

10. The Uses of Courts and of Lawyers

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The Setting

We are living and working, happily, in an era in which assumptions about the nature of persons called "retarded"—and a wide variety of other persons called black, women, poor, elderly, Asian—are changing. Assumptions about human nature are not easily uncovered, let alone changed, because they can be deeply taken for granted. Once we stumble into awareness, however, we face an opportunity (maybe a short-lived opportunity) to render a new understanding, itself taken for granted. Erving Goffman writes: "During periods of marked social change, when individuals acquire rights or lose them, attention is directed to properties of individuals which will soon become defined as simply human."¹

Changing assumptions, and changing facts as well,² invariably give rise to claims of right. And, inevitably, claims of right will implicate the law. We are after all, or we are struggling to become, a constitutional society. Notions of "person," and changing notions of who are persons and who are not, and who are not in what particulars, will, therefore, be expressed formally in the fabric of our laws and those notions more or less imposed by the laws.³ And if the law is implicated, so are the courts. For the courts are entrusted with the generation of claims of right and with their authoritative adjudication. To be sure, these functions are not confined to the courts alone. Claims of right may be validated by negotiation and by legislation and, still more informally, by widespread practice and custom. But the courts have a special place in working out the claims of rights of persons subject to prejudice, which may distort the workings of negotiation and legislation and which may have corrupted custom entirely.⁴

"Independence and self-confidence, the feeling of creativity . . . , lives of high spirits rather than hushed, suffocating silence," the Supreme Court wrote in *Papachristou v. City of Jacksonville*,⁵ is the promise of the Constitution of the United States to its citizens. The question is: how can we use the courts, the law, and lawyers, and how can

we organize ourselves in their use most quickly and surely to generalize new notions of rights of retarded persons—and indeed of all persons who are different—and do so not only in symbolic terms but also in reality?

The Uses of the Courts

The question is: of what uses are the courts in declaring rights, in fashioning and enforcing remedies, and in securing change itself? The answer is more complex than sometimes appears: Courts may establish rights, remedies, and change directly, and especially often will they define and declare rights, but their most important use is instrumental. The courts' declarations, and the forum they provide, affect the balance of forces in other political arenas to secure remedy and change. As one commentator puts it, "The declaration of rights is ordinarily a prelude to a political struggle."⁶ The courts are not a magically different instrument of change; like each of the other instruments there are tasks and times to which they are especially well fitted. But in no case will singleminded use of the courts be effective. The use of litigation along with lobbying and bargaining promises to be effective. Our task is to use the courts not only for their own yield, but also for their effect in other arenas.

The litany of rights declared in recent litigation by retarded citizens is familiar. The right to appropriate education. The right to treatment. The right to due process. The right to a minimum wage. The right to employment. The right of access to public transportation. The right to reside in the community. The right to services in the community. In sum, the right to be different and to have that difference accommodated.

Those declarations reflect the beginnings of the application to retarded citizens of basic constitutional notions. Taking Plato's ideal Commonwealth as his counterpoint, Mr. Justice McReynolds, writing for the Supreme Court in *Meyer v. Nebraska*,⁷ expressed them as follows:

"For the welfare of his Ideal Commonwealth, Plato suggested a law which would provide: 'That the wives of our guardians are to be common, and no parent is to know his own child, nor any child his parent . . . The proper officers will take the offspring of the good parents to the pen or fold, and . . . will deposit them with certain nurses . . . but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

"Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution."

In *Meyer v. Nebraska*,⁸ and elsewhere in the fabric of American constitutional law, five norms are clear. First, liberty. Citizens are to be freed from stereotyping. Not only is the state not to poach upon citizens but the state is to protect them in pursuit and realization of their capacities. Second, equality. "Inferior"—"superior" distinctions are disfavored. It is not that unequally situated persons are to be treated equally. Justice Frankfurter said that would be a travesty of equality.⁹ Rather, citizens, each of them, are to be accorded a functional equality, and none of them are to be set apart. Which is to suggest the third norm, integration. Or what retardation professionals have come to call "normalization." Integration, not to deny difference, but to create or to allow, to protect, space for difference within society. Indeed, integration to celebrate difference. Hence, the fourth and fifth of the constitutional norms: Individuation in the state's address of its citizens. And the reservation to each citizen of choice about who he is and who he shall become.

This is not the place to parse these norms doctrinally, nor is it the place to weigh precisely the uncertainties in their application in any particular case in any particular court at any particular times.¹⁰ Suffice it to say, it is constitutional values we seek. As constitutional values they are, almost by definition, also values widely held in the society at large.

The question then is what functions may the courts serve in giving flesh to the word¹¹ and fulfillment to the promise these norms embody.

The uses of the courts and of litigation are at least four. One, to secure the authoritative declaration of rights, to change or to refine the rules which formally govern conduct. Two, to create new forums and to structure new relationships wherein declared rights may be enforced and where new rights may be declared. Three, to bring forcefully to the attention of legislators, executives, bureaucrats and other public and private decision-makers and to the attention of the citizenry at large, certain facts or authoritative characterizations which have not had great visibility or salience before. And four, like each of the other modes of petitioning the government for redress of grievances, litigation may be used by a citizen to express hi(r)self, to tell others who (s)he is, or to redefine hi(r) notion of hi(r)self or the notions others have of hi(r).

To Change the Rules

The right to education cases will illustrate.¹² The rules were changed in at least five ways. By court order, the new rules were: first, zero-reject education, the inclusion of all children, no matter how handicapped, in free public education. Second, education appropriate to each child's needs and capacities. Third, (an initial step toward an operational definition of the standard of "appropriate" education) written, individually prescribed plans for the education of each handicapped child. Fourth, the delivery of education in as integrated a setting as possible (a strong presumption that mainstreaming is the appropriate education). Fifth, the opportunity for a full hearing on the appropriateness question before assignment to special education, and thereafter before any change in educational assignment and periodically (annually, most often) in the course of the child's schooling.

To Create New Forums

Apart from the courts' usual power of enforcement (contempt is the chief formal power), the right to education cases established several new forums—some temporary and some permanent—and otherwise restructured the relationships among the parties (and non-parties as well). They provided new formal (and informal) mechanisms to give further operational definition to the children's newly declared rights, and to enforce them and perhaps to create new rights. Four such new structures have arisen from these cases.

First, a due process hearing is now available to each child to determine whether hi(r) educational assignment is appropriate. Typically, the hearing is to be held by the Secretary of Education (or hearing examiners designated by and acting for hi(r)). The child is entitled to access to all school records before the hearing, to an independent evaluation of hi(r) educational needs and capacities and the appropriateness of hi(r) educational program, to representation at the hearing by an Association for Retarded Citizens advocate, a lawyer, or any other person of hi(r) choosing, to the opportunity to present evidence and to cross-examine school district witnesses. Thus, for the child and hi(r) parents—if the resources and skills necessary to manage the hearings are adequately distributed and accessible to them—the hearings may provide the means to secure in fact the appropriate, integrated education the courts have declared is legally their right.¹³ In addition to restructuring the relationship between parent/child and the school district, the due process hearings may alter relationships within the education bureaucracy. For example, the power of teachers and psychologist as against administrators, local and state, may change, given the opportunity the teacher now has in the due process hearing to present at the highest level of the state education bureaucracy hi(r) best professional judgment of what is required to provide the appropriate education for a particular child and the opportunity to make claims for recourses necessary to deliver that education.

Second, under aegis of court orders, state and local task forces (one for each county or intermediate unit) are forming. Each is composed of Association for Retarded Citizens and other handicapped organization representatives, the school districts, and the county mental retardation agency, and empowered to oversee the planning for and the implementation of the courts' declarations.

In one state (Pennsylvania), at least, these task forces have been made permanent by state regulation. The very existence of these task forces, to say nothing of the possibility of a network of links and strategies among Association for Retarded Citizens advocates on each county task force and on the state task force, may alter the balance of forces bearing on educational policy and the delivery of education. The relationship between Association for Retarded Citizens and the other parties in the task force may be further defined and detailed formally in the direction of a

duty "to bargain in good faith."¹⁴ It may take on the formal characteristics of the statutorily required Developmental Disabilities Councils,¹⁵ or Title I parent groups,¹⁶ or of any of the range of relationships defined in the Housing Acts for urban renewal, housing code enforcement, and community development.¹⁷

The right to treatment cases—notably *Wyatt v. Stickney*¹⁸—create Human Right Committees, sharply defined neither as forums for hearings nor as forums for collective bargaining, but which hold prospect to become either or both.

The appointment of Masters to oversee the implementation of court orders in the right to education cases as in desegregation and corporate reorganization cases may provide for the short life of the Masters' term a new forum in which relationship between the parties are altered. And, of course, during the litigation itself, the very dependency of the litigation may change the power relationship among the parties and yield bargaining on quite different terms.

To Focus Attention

In addition to creating new rules and new forums, litigation and the courts may be used to bring fact hitherto invisible to the attention of legislatures, executives, bureaucrats, and other private and public decision-makers and of the public at large, and otherwise to change their understanding of the matters at issue and the people who have put them at issue.

It is true that "rights are declared as absolutes, but they ripple out into the world in an exceedingly contingent fashion."¹⁹ It is true, as a consequence of this and of the analysis offered here, that a court's declaration of rights is only one event in a political struggle. But that does not mean that the declaration of rights exhausts the uses of the courts. Chief Justice Warren wrote:

"Whenever the Congress discerns some defect in our society, within its constitutional limits it may reach out for solution. If it cannot achieve consensus on . . . a complete solution, it may compromise for a half or a quarter loaf or even postpone its action . . . When the Court determines the relevant facts, it must apply the legal principles applicable to them. The judge is not justified in parceling out a portion of the rights established by a statute or the Constitution . . . The judicial process, therefore, might well be described as 'the process of principle,' as distinguished from 'the art of the possible.'"²⁰

But the court, nonetheless, may have significant effect in the arena of compromise and on the limits of the possible. The judges' function, Alexander Bickel argued, is to call attention to constitutional values, to demonstrate the evils present in some "political" compromises, to move the other political processes "off the dime," and thus to alter the vector of political bargaining.²¹

Attention may be secured just by being in court, even short of the courts' authoritative findings. When plaintiffs file in any case of public interest, they can expect to be featured, as cases presenting the claim of retarded citizens invariably are, in the printed media. When authorities like Gunnar Dybwad and Ignacy Goldberg come to court to testify to the fact that all retarded children are educable, the electronic media will broadcast those facts from the courthouse steps. When the courts enter authoritative findings on the educability and employability of all, they are broadcast and the interrelations between the courts and the other political processes—and the opportunity of using all the processes—become clear.

Consider Section 503 of the Rehabilitation Act of 1973. Undoubtedly, apart from the right to education and the right to treatment cases (or better put, in conjunction with them), this is the recent development with the most revolutionary potential for the quality of life of handicapped citizens. Section 503, the first legislatively enacted affirmative action requirement for employment of handicapped persons in the country's history, requires that virtually every government contractor (any with a contract larger than \$2500) "shall take affirmative action to employ and advance in employment qualified handicapped individuals."²² This requirement must mean not only nondiscrimination and affirmative efforts to hire the handicapped, but the fitting of work settings and job tasks to the handicapped. As the Supreme Court wrote in *Griggs v. Duke Power Company*,²³ invoking Aesop to construe a statue which imposes only the duty of nondiscrimination in employment (a lesser duty than the Section 503 duty of affirmative action):

"Congress has now provided that tests and criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has—to resort again to the

fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminating in operation."²⁴

R. W. Conley estimated (a conservative estimate probably, made before the affirmative action requirement was adopted) that at least 400,000 of the 690,000 retarded adults, currently idle or institutionalized, could be employed.²⁵ Section 503—if it is implemented and made real, in fact—provides a necessary and perhaps even the sufficient condition for deinstitutionalization and realizing for each handicapped person a normalized, autonomous life in the community.

The adoption of Section 503, as every Congressional speech preceding it shows, was influenced by *King-Smith v. Aaron*,²⁶ a decision of the United States Court of Appeals for the Third Circuit, holding that a school district could not deny employment to a blind teacher, by a host of unreported cases,^{26a} and by the finding of the courts in the right to education, right to treatment, and minimum wage cases. Litigation and the court findings and orders, and the consciousness created by them, and the public sentiment and the energy of organizations of the handicapped mobilized by them had some place in the complex and open-textured forces focused by Washington lobbyists for these organizations, by members around the country, and by friendly Congressmen to yield Section 503. It would take a political science of much greater sophistication than we have to calculate exactly how significant a place: it is enough to understand that the words and actions of the courts had a place in the kit bag of the Congressional lobbyists.

Similar interrelationships (and similar product in rules change) may be observed between the right to education cases and the Acts requiring zero-reject education and due process adopted by more than 24 state legislatures, the progress of U.S. Senate Bill No. 6, requiring the same and providing federal funding of 75 percent of the excess cost of special education, and the adoption by Congress in August 1974 of Amendments to the Education of the Handicapped Act which required that the states give priority to zero-reject education in the expenditure of federal funds and establish due process hearings, and which significantly increased authorization of federal funding for education for the handicapped.²⁷

Thus far we have noted only the lateral use of the courts to affect other rule-formulating instrumentalities. But the courts by focusing attention have a vertical effect as well on the implementation of the very rights they declare. Shortly after the Pennsylvania findings and orders, the majority leader of one house of the legislature said: "I wish we'd done that." Such sentiments, loosened by the court and nursed by the Association for Retarded Citizens and a new public consciousness, yielded, at Governor Milton Shapp's request, a \$25 million increase in the state contribution to special education to implement the newly declared rights.

And it was the action of the Congress in adopting the August 1974 Amendments to the Education of the Handicapped Act that finally made clear to the Department of Health, Education, and Welfare that the Bureau for Education of the Handicapped has the power and the duty to write (and enforce, one hopes they will realize) regulations. The process of consultation with organizations of the handicapped and professionals and the schools has begun. The domino theory, if you will, of implementation. The question remains whether the regulations will have operational definitions and cutting edges to assist in securing the declared rights in fact.

To Announce One's Dignity

The fourth use to which litigation and the courts may be put is to assert oneself, to declare one's own notion of who one is and what one is due, and to change the notions others have (and sometimes one's own notions) of who one is. Participating in a struggle, and recognizing and having it recognized that it is right and good to assert oneself, confirms one's identity and one's confidence in oneself. That in itself is a value, and it is a value, legions of reports indicate, realized by most people in most struggles, and especially in struggles for what is seen as justice, as redress of just grievances. If the use of the courts, or of the due process hearings, or of state and local task forces, like the use of other modes of petition, had only that effect and only on the immediate participants, that use would be significant. But the effect extends well beyond the immediate participants.

Consider blacks and white. After the decision in *Brown v. Board of Education*, the civil rights movement took on still a new life. The recognition and respect for blacks as persons, asserted by those many who litigated *Brown* and those many more who for 50 years prepared, inter alia, to

litigate *Brown*, acknowledged by the court, and broadcast by its opinion and the attention thus focused, brought many blacks (who had been coerced by the many times they were told they were inferior to believe they were inferior) to a new respect for themselves and to freedom. And many whites, laboring under the similar debilitating belief that they were superior, came not only to a new respect for blacks, but to a new, less precarious, respect for themselves.

The retarded and the handicapped, their parents, their siblings, their friends, and professionals to whom the retarded are clients have struggled similarly. Subject to the same judgment that we are inferior, many of us came to believe it. Struggling in the name of justice, asserting ourselves, our sense of ourselves changed. Assertions legitimated by the courts, they are broadcast to others who did not participate directly. And their notions change. And thus freed, the likelihood that one will participate in reducing to reality the declaration of one's rights—and the rights of others—increases. A necessary condition of participation in the political arena is some threshold of self-respect, of felt competency, of deservingness to be politically effective.²⁸

Kay Gorham speaks of "climbing out of the personal struggle and into the still bigger battles," of "Mrs. Naders popping up all over, where formelry there were timid souls."²⁹ Dorothy Dean's *Closer Look*,³⁰ published by the National Information Center for the Handicapped, speaks in terms of rights and coalitions: "It's okay to be different," says one headline. Advertisements for Association for Retarded Citizens, United Cerebral Palsy and Easter Seals no longer speak to sympathy but to rights; themes of charity and grace have given way to themes of justice. The most significant number of the out-of-school children found in Pennsylvania came in not because they were traced in school records but in response to publicly broadcast invitations to "come and claim the rights of your child." The courts and litigation can be and have been so used.

The Comeuppance

But for all this, rights have not become real. There have been few efforts to measure what has happened in the lives of handicapped citizens and what has not³¹—and that is one of our problems. We are left, therefore, with our impressions; and to this observer, the impressions are inescapable.

The institutions stand and have not altered for many, probably for most. Zoning battles are not posed, let alone won; community residences are still at Stage I on the drawing boards; and even if they were built or found, we have not the systems to assure they do not become New York's nursing homes.³² In some places children are in school, but it is no more appropriate schooling than it has ever been. Hearings are mooted; educational strategies have been tested and found productive, but they have not been widely shared and certainly not distributed to those who must teach. Section 503 exists, but virtually no one knows of it—even those whose profession is developing jobs for the handicapped. For very few handicapped persons, if any indeed, has it yet yielded a job. Even the first steps have not been taken; no one has analyzed the skills required by the contractors' job tasks as they are presently defined, let alone formulated a job conversion table so that in each area of the country there may be a choice of jobs available to fit the skills of each handicapped person.

Symbolic victories—change in the rules—we have had. The problem is that symbolic victories may satisfy and divert us from real victories. We know the courts can be used, as can so much else, to make rules real. But despite the celebration of the last few years, little (except perhaps the change most directly a product of symbolic victories, the increasing sense of self-respect) has happened on the street. Widespread declarations of rights have provided a moment for innovation for the rights to take hold. When the task is—as it is here—to alter deep-seated patterns of behavior which have long since taken on a life of their own in large and complex bureaucracies largely out of control even of those who people them, moments of leverage are rare and hardly expendable. What can be done to seize the moment and to secure the translation of rights into reality?

Before turning to a modest proposal to that end, consider the uses of lawyers. The analysis will be familiar, for the uses of lawyers track the uses of the courts.

The Uses of Lawyers

Questions of using lawyers most effectively resolve to three: (1) What functions shall they be directed to discharge? (2) how shall we organize ourselves in our relationships with lawyers to direct their work? and (3) how can we pay (or change) the costs of using them?

In a paper of productive insight, entitled *Why the "Haves" Come Out Ahead: Speculations on the Settings and Limits of Legal Change*,³³ Marc Galanter distinguishes two classes of litigants: "one-shotters" and "repeat-players." One-shotters resort to the courts only occasionally. They include both parties in custody disputes, divorces, ordinary neighborhood civil suits, commitment proceedings, and ordinary inheritance disputes. They are usually the plaintiffs in suits by welfare recipients against agencies, auto dealers against manufacturers, residents against zoning boards, accident victims against insurance companies, tenants against landlords, and consumers against creditors. The defendants in those suits are usually repeat-players. Repeat-players also include the plaintiffs in suits by prosecutors against amateur accuseds, finance companies against debtors, condemnor (highways, e.g.) against property owners, landlords against tenants, and I.R.S. against taxpayers. And in cases between unions and companies, movie distributors and censorship agencies, purchasers and suppliers, regulatory agencies and firms in regulated industries, both parties are usually repeat-players. Repeat-players, as the examples suggest, engage in large numbers of similar suits over time.

Whether one is a one-shotter or a repeat-player affects the immediate outcome of any given lawsuit. And even more, whether one is a repeat-player or a one-shotter determines whether one can use litigation to effect long-term real gain.

As to the first, Galanter suggests the advantages that repeat-players bring any piece of litigation: having done it before, repeat-players have advance intelligence: they are able to structure the next suit and to build a record in anticipation of it. It is the repeat-player, for example, who writes the form contract. Repeat-players develop expertise, employ specialists, enjoy economies of scale and low start-up costs for any particular case. They have opportunities to develop helpful, informal relationships with those who people the courts. The repeat-player must establish and maintain credibility as a combatant and has an obvious interest in maintaining hi(r) "bargaining reputations" to establish commitment to hi(r) bargaining position. (S)he can say, "I must have xyz or I can't settle" and be believed.

With no bargaining position to be maintained, the one-shotter has more difficulty in convincingly committing hi(r)self to a particular demand and hence has less bargaining strength. Repeat-players

can play the odds: The more important the matter at stake in a particular case is for the one-shotter, the more likely (s)he is to choose a strategy which seeks to minimize hi(r) maximum loss. The stakes in any particular case are smaller for the repeat-player; they can adopt strategies calculated to maximize their gains over a long series of cases and thus can take the risk of a big loss in any particular case. Repeat-players can play for favorable changes in the rules as well as immediate tangible gains. Since repeat-players are in the game to stay, it pays them to spend resources to get favorable rules. A repeat-player can afford the risk of losing in any given rule-change case because (s)he'll be back and hi(r) accumulated expertise will enable hi(r) to present the rules case persuasively.³⁴

The position of the one-shotter, if it is social change (s)he is after, is more stark. Galanter writes:

"Our analysis suggests that change at the level of rules is not likely in itself to (bring) redistributive outcomes. Rule change in itself is likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels.

"In a setting of overloaded institutional facilities, inadequate, costly legal services, and unorganized parties, beneficiaries may lack the resources to secure implementation; a repeat-player opponent may restructure the transaction to escape the thrust of the new rule. . . .

"The system has a capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages.

"With their relative insulation from retaliation by antagonistic interests, courts may more easily propound new rules which depart from prevailing power relations. But such rules require even greater inputs of other resources to secure effective implementation. And courts have less capacity than other rule-makers to create institutional facilities and reallocate resources to secure the implementation of the new rules. Litigation then is unlikely to shape decisively the distribution of power in society. It may serve to secure or solidify symbolic commitments. It is vital tactically in securing temporary advantage or protection, providing leverage for organization and articulation of interests and conferring (or withholding) the mantle of legitimacy . . ."³⁵

Despite the explosion of litigation, despite the attention at national conventions of handicapped organizations to the law and the courts, despite the host of professional meetings on the subject, despite the creation of a National Center for Law and the Handicapped and the American Bar Association's Special Commission on the Mentally Disabled, our use of the courts and lawyers and the law remains episodic. We are, by-and-large, one-shotters. If we are to make maximum use of the law, we must reconstitute ourselves as repeat-players:

"Coherent groups . . . have the ability to act in a coordinate fashion, play long-run strategies, benefit from high-grade legal services and so on. An organized group is not only better able to secure favorable rule change (in courts and elsewhere) but it is better able to see that good rules are implemented. It can expend resources on surveillance, monitoring, threats and litigation that would be uneconomic for a one-shotter."³⁶

In 1934, a potential repeat-player went to the Washington law firm of Covington & Burling with a one-shot problem. With the advice of that firm, they transformed themselves into a repeat-player and to this day they have maintained the full advantage of that status. The Air Transport Association presented a "three-bit problem"—the loss of certain government mail contracts to other airlines in a freewheeling competitive situation. Instead of addressing the problem one-shot, the Association and their lawyers worked four years on a host of fronts to secure a Congressional bill creating the Civil Aeronautics Board and forbidding anyone to engage in air transportation except with a CAB certification of "public convenience and necessity." The members of the Air Transport Association, alone, were certified in 1938 and competitors have since found it difficult to enter this market.³⁷

The history of Welfare Rights Organizations over the last decade is the story of the efforts of welfare recipients to become repeat-players and to reap the advantages thereof. Where they have in fact become repeat-players, change has been marked. In Philadelphia, for example, Welfare Rights Organizations negotiated a recognition agreement with the State Department of Public Welfare granting them bargaining rights with the county director, access (and a desk) in each of the 12 Philadelphia District Offices, and the right to represent applicants and recipients in informal relations and in appeal hearings. No one made a

claim without an advocate member of the Welfare Rights Organization being present and available to advise and assist and appeal, if necessary. In a year and a half the rate of rejection of new applications for public assistance was brought down from nearly 50 percent to 25 percent. The record of change from welfare lawyering is mixed (and subject still to debate), but, to the extent that lawyers worked for organizations of recipients and the organizations functioned as repeat-players, significant change was secured.³⁸

The classic case of the organization for social change becoming a repeat-player is the National Association for the Advancement of Colored People which, from its beginnings in 1909, included among its strategies the use of the courts and lawyers.³⁹

The trick, then, is not the one-shot use of lawyers but their systematic use. Many state Associations for Retarded Citizens have a lawyer full-time on their staff. Valuable as that is, one lawyer can attend to little more than one arena (in California, lobbying; in Pennsylvania, the due process hearings) and more likely only to a part of that one arena. One lawyer cannot ring all the legal bells or even plot the legal score; certainly, (s)he cannot respond to the range of possibilities and directions presented by the members of the state organization. Volunteer lawyers, no matter what their skill otherwise or their good will, cannot, without more, build the expertise or the informal relationships or integrate strategies across cases or follow the cases with monitoring, cajoling, threats, or still another case. One-shot lawyers, who are paid, suffer all of the disadvantages of the one-shotter and the cost is prohibitive. One-shots, who are not paid, cost less but remain one-shots—unless, of course, they are among the many legal services and public-interest lawyers who have carried most of the freight in recent litigation. But even at that, these lawyers remain less well integrated with the handicapped organizations than systematic use of them would require.

Thus, if the best use of the courts to secure social change is their use to mobilize political forces to establish the rights of the handicapped in fact, the curious but clear corollary is that we must mobilize to best use lawyers.

A Proposal

City by city, region by region, state by state.
Associations for Retarded Citizens join in coalition

with other organizations of handicapped persons to create in each city or county and in each state Centers on Law and the Handicapped. With three to eight lawyers at their direction, the coalition of organizations would become repeat-players and could pursue the full use of the law; integrated short and long-term strategies, in the courts and in other arenas, follow through.

Cost inhibits the use of lawyers and of courts. But coalition can make it go. Full-time staff lawyers are available for work which concerns social change at considerably less dollar cost than lawyers in the ordinary open market even at a discounted fee.⁴⁰ An optimum three-lawyer office can be staffed for about \$80,000.⁴¹ The cost then to an eight-organization coalition will be \$10,000 per organization per year; to a four-organization coalition, \$20,000 annually.

But the benefits of coalition and of staff lawyers are not merely the dollar economies; coalition offers economies of function and of impact in the uses of the law as well. The members of the several organizations of the handicapped share, after all, a common social situation and similar experience. Their needs and wishes will, in significant degree, be similar. The fabric of the law intersects with the experience of each in similar ways. Cases will be stronger; opportunities and problems susceptible of legal address are more effectively and efficiently addressed together. Zoning and building regulations, which inhibit or prevent the development of residential facilities in the community, and supplemental security income regulations, which delay or exclude handicapped persons, will affect persons with different handicaps in the same way. What will resolve the problems of some persons will resolve them for almost all. What will open access to public transportation and to community services (from education to recreation), what will assure the quality of residential services to some, will for others too. Redesign of job tasks and job settings to open employment to handicapped persons will be secured most surely and most efficiently if it is sought with all the handicapped in mind. Often the gaps and the blocks to realizing the rights of the range of handicapped persons will have their origins in the same mistakes in writing or interpreting state and federal statutes and regulations, in judging competence, in designing programs, or in just plain oversight. Often the remedies required, as well as the targets, will be the same.

The benefits of coalition extend, however, beyond the direct uses of the courts and other legal forums. The indirect uses of the courts to marshal forces in other political arenas are advanced by coalition. Coalition can seize the opportunity for authoritative pronouncements of the courts to stir the confidence of more people to seek more deeply, more widely, and more skillfully the realization of rights in fact. It can do this by using the burgeoning handbook of strategy to place at the fingertips of handicapped persons and their parents and advocates clear and precise understanding of the rules and of how to use them to thread particular problems,⁴² by training lay advocates for hearings and for work on local task forces, by mobilizing strength in the legislature and elsewhere. Vestigial rivalries among handicapped groups may be muted in a common pursuit of rights, and the common strength of the handicapped may be increased.⁴³

Services received from lawyers should be of a different and better quality when lawyers work full time at the direction of a coalition of organizations. Committed full time to the pursuit of the rights of the handicapped, and informed, guided and directed by the citizens most knowing of the problems, of the relationship between the problems, and of the sought-after resolutions, lawyers may probe more deeply, more widely, and focus more on target. The sometimes intricate and obscure set of federal, state and local statutes and regulations, which so largely determine for good or ill the quality of life of handicapped persons, may be searched and parsed systematically to discover what claims, yet unfound, lie there. The possibilities of invention in the common law of tort, contract, and property may be explored and exploited. And follow-through (in all of its dimensions) may be addressed.

Given a local Center on Law and the Handicapped, volunteer lawyers can now be used effectively. The core lawyers can share expertise in handicapped law, provide the strategic connections between cases and coordinate follow-through.⁴⁴ One-shot lawyers, paid and not paid, may now be used more effectively; indeed, given a local Center on Law and the Handicapped, more refined judgments can be made on marshaling non-Center lawyers especially expert in particular matters for particular cases or parts of cases. And as the award of attorneys fees to prevailing (or even failing) plaintiffs in cases for the handicapped becomes more common,⁴⁵ and as prepaid insurance-type legal service plans for union

members and other groups are established more widely,⁴⁶ the role of local Centers in sharing expertise and coordinating strategies will become the more important, the use of lawyers the more widespread, and all the more effective in securing change.⁴⁷

Local, regional and statewide Centers on Law and the Handicapped might begin in a number of ways. They might spring full-blown in coalition from the several organizations of the handicapped. One or a few such organizations might start the Centers, recruit additional organizations and resources to the coalition later; thence expanding the scale and the scope of the Centers. In some communities, where bar associations have significant financial resources, Centers might be launched with contributions from the bar. In those communities where state and federally funded Regional Centers, or Mental Retardation Centers, or Developmental Disability Centers, or University Affiliated Facilities exist (and they are existent in various forms and under various names in virtually every local community in the country), they might contribute start-up resources. Indeed, where state and federally sponsored Mental Retardation Centers, however named, evince an interest in themselves asserting the rights of their handicapped clients against others, they might become long-term members of the coalition and partners in the Centers on Law and the Handicapped. Over the long term, the increasing resources of the organizations who are members of the coalition, an improving public consciousness, and increasing attorney's fees awards from the courts, should render the local Centers stable institutions, a taken-for-granted part of the expanding effort of handicapped citizens to effectively claim their rights.

Roles for Professionals in the Bureaucracy

The uses of litigation and the courts present new role opportunities for mental retardation (and other handicap) professionals who practice in the bureaucracies: as plaintiffs and as defendants.

The Plaintiff's Role

Wyatt v. Stickney, the Alabama right to treatment case (it will surprise many to know), was begun not by the residents or relatives or the Association for Retarded Citizens, but by employees of the institution. In the face of a cut in the Alabama cigarette tax, the state fired 93 professional, sub-

professional and intern employees of a state hospital. The terminated employees took to federal court to contest the firings, asserting, *inter alia*, that residents of the institution would not receive adequate treatment. As the case developed, its focus changed and the claim became: even with the employees reinstated, Alabama's institutions do not provide adequate treatment. The rest is history, albeit current history.⁴⁸

Professionals in the bureaucracy have the right to assert the rights of their clients, even to assert the rights of their clients against the bureaucracy in which they work. Indeed, professionals in the bureaucracy may well have a duty—a legal as well as professional duty—to assert the rights of their clients.

The Right To Assert the Rights of Clients

On January 13, 1973, at 6:30 in the morning, Benny Parrish, a public assistance case worker in Oakland, California, was instructed to join "Operation Bedcheck," a search of the houses of public assistance recipients—"especially the beds, closets, bathrooms, and other places of concealment," to determine if there was a man in the house and, hence, whether assistance could be terminated. He refused, asserting that such searches were illegal. He was fired for insubordination. The County Civil Service Commission upheld his firing. But the California Supreme Court, in a unanimous opinion, held that Benny Parrish was protected in his right to assert the rights of his clients and ordered him reinstated.⁴⁹

On the evening of July 27, 1976, Ocania Chalk, a public assistance case worker in York County, Pennsylvania, attended a meeting of public assistance recipients, a group called the Public Assistance Committee. There, he criticized the personnel and policies of the York County Assistance Office. He urged recipients to "get on case workers' backs and demand their rights;" he stated that some case workers failed to accord recipients dignity and to inform them of their rights of appeal; and, quoting Frederick Douglass, he exhorted recipients to "agitate, agitate, agitate." He was suspended from his job without pay for "having caused embarrassment and unfavorable publicity to the department." The State Civil Service Commission upheld his suspension. But the Pennsylvania Supreme Court, generally more conservative than California's, reversed, holding Ocania Chalk's remarks protected by the First Amendment. "As a member

of that governmental institution (York County Assistance Office)," The Court found, "he had a unique, and valuable, perspective, from which to view it." The benefit of that perspective could not be denied to his clients or to the public.⁵⁰

From 1966 through 1969, Father Joseph Donahue,⁵¹ Chaplain of Manteno State Hospital in Illinois ("a gigantic institution operating on a skimpy budget," as the court put it), engaged in a campaign of public criticism of the institution. He wrote in a union newspaper column; he addressed the State Federation of Labor and made other public speeches; he wrote letters to the governor and to the editor of the local newspaper; and he published a paid advertisement in that paper. He complained, *inter alia*, of insufficient employees, unqualified employees, inadequate care, and in the paid advertisement criticized the Director of the Mental Health Department and the Superintendent of the Hospital. In 1969, he was fired. He sued in federal court for reinstatement. He won and was awarded back pay, punitive damages and attorney's fees.

There is a very significant space in the bureaucracy within which the professional is protected in asserting the rights of hi(r) clients, even against the bureaucracy itself. Thus, e.g., a Regional Mental Retardation Center psychologist whose child-client has been denied schooling may assert hi(r) right to schooling against the school district, perhaps into court. And a teacher may assert in a due process hearing hi(r) professional views of the appropriate educational program for hi(r) client even if the district's official view is to the contrary. Indeed, the bureaucratized professional may have a duty to do so.

The Duty To Assert the Rights of Clients

Donaldson v. O'Connor,⁵² the Florida right to treatment case holding two physicians personally liable in damages for failure to treat a state hospital resident, suggest, though it does not reach, the question of whether a bureaucratized professional does not have a duty to assert the rights of hi(r) clients. The defense of the physicians to the claim of liability was that they did "the best they could given the stark limitations on the resources available to them." If the court had found the defense true, the next issue would have been whether the doctors would have had to show a good faith effort to secure sufficient resources in order to escape liability.

A Pennsylvania case suggests the answer is yes. The superintendent of a state hospital was fired for dereliction of duty. It was alleged, *inter alia*, that residents were maintained in unsanitary cages. His defense was lack of funds, understaffing and overcrowding. On a finding that the superintendent had made inadequate protest of inadequate resources, the State Civil Service Commission upheld his firing.⁵³

The duty of the bureaucratized professional may arise both from hi(r) status as a professional and from hi(r) status as a statutory fiduciary. As a professional, by definition, (s)he is possessed of some special knowledge and, by definition and by the Codes of Professional Responsibility of virtually all professions, (s)he is bound to use that knowledge to serve hi(r) client.⁵⁴ As to fiduciary duties derived from statutes, consider two common statutory provisions; one, Section 1501 of California's Community Care Facilities Licensing Act:

"It is the intent of the state to develop policies and programs designed to . . . (2) assure that all people who require them are provided with the appropriate range of social rehabilitative, habilitative and treatment services including residential and non-residential program tailored to their needs;"⁵⁵ Another, Section 4201 of Pennsylvania's Mental Health-Mental Retardation Act:

"The Department shall have the power, and its duty shall be: (1) to assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them."

Such provisions must impose a duty upon the bureaucratized professional: a duty owed, if not to client, then at least to the state. If resources are inadequate to deliver on these statutory injunctions, the least that can be expected of the bureaucratized professional is that (s)he holler about it, inside and outside the bureaucracy.

The Defendant's Role

At least two very different styles of response have arisen in bureaucrats across the country to litigation against them. Some take lawsuit litigation personally, becoming very defensive. Others recognize the uses of litigation and, in effect, welcome it. They see that litigation is targeted at objectives which they, as professionals, share and that it will provide them with additional leverage toward their objectives. (The right to education

cases, for example, spring directly from the Council for Exceptional Children's Policy Statement of 1971; and the right to treatment cases spring from the Accreditation Standards of the Joint Commission on Accreditation of Hospitals.)

The bureaucrat's response is important to the pace at which a suit will proceed. And hi(r) response and attitude is crucially important to the pace and the thoroughness of implementation. The first (defensive) response may have its roots in mistaken notions about the nature of litigation or in styles of personal involvement and notions of change and truth which may themselves be profession-rooted or, at least, occupation-rooted.

If the source of the defensive response of bureaucratized professional is mistaken notions about litigation, these professionals are hardly alone in the mistaking. Virtually every civil procedure casebook presently in use in the law schools of this country contains a ritual recital "on litigation as the last resort in the resolution of disputes, short of violence." Such a recital, and defensive feelings, may have made sense in the Middle Ages when a trial was by fire: whoever survived the hot coals in better shape was right and won. It makes no sense now.⁵⁶ Litigation, as the analysis offered here indicates, is fundamentally like every other method of resolving disputes or of petitioning the government for redress of grievances; each of the methods has in some degree its own peculiar costs and benefits.

As a descriptive matter, the analysis indicates, litigation is hardly the last of anything; most often, for repeat-players anyway, it is merely a beginning. And if "litigation is the last resort" means that one will or should try every other means of resolving a dispute before turning to litigation, that obviously depends upon the circumstances: upon the relative accessibility (and the costs of access) of other methods; upon which method is most susceptible to the sorts (and the size) of resources one can put behind hi(r) claim; and upon a host of other contingencies. For those to whom, because of prejudice, "the political processes ordinarily to be relied on" are effectively closed—in short, for those who are different—litigation may be the first resort.⁵⁷

Suits against governments for injunctions are not personal unless one chooses to make them so. They are addressed to changing things as they are and have no function in allocating blame. If blame is involved at all, it is systemic, not

personal—except in the cases where systemic failure is indeed personal or is personally caused or personally abetted. The same is not true, of course, for personal actions for damages, though the modern view of damage actions regards even them as mechanisms for the allocation of costs, without tones of blame or fault.⁵⁸

Contrasting styles of response among bureaucratized professionals, in some instances, may be caused (or accentuated) by differing notions of how change comes. The bureaucrat, classically, believes that proper change comes (if it is to come at all) hierarchically. Some professionals may join the bureaucracy because they so believe; others, whose notions were different or inchoate when they were selected, may have since been socialized by bureaucracy to that belief; truth is found and proper change comes dialectically in the contest of thesis and counterthesis. It will be of little comfort to say to the bureaucrat schooled in hierarchy: have faith, join the contest, bring to bear your best information and your best opinion—justice will out. Lawyers, after all, have been schooled in the dialectic, to joy in expression and assertion, to take the outcome without personal involvement (not necessarily to accept the outcome, for in another forum another result may be obtained), and to leave the courtroom with their arms thrown around the shoulders of opposing counsel. But that may be all that can be said to professionalized bureaucrats to remove the sting.

There are, of course, hard cases in which the bureaucratized professional will have a position opposed to the particular position of particular handicapped plaintiffs (and also there are easy cases in which the professional in the bureaucracy must, for one reason or another, taken an opposed position), in which case (s)he must join the contest and bring to bear hi(r) best information and hi(r) best opinion. But in those cases, once the verdict is in, implementation (or not) can proceed without cavil.

Functions for Professionals in Research

Litigation and the orders of the courts have been built upon the findings of mental retardation (and other handicap) professionals in research. The same questions raised about the uses of law and of the courts must be raised about professional research. Can research evoke only hortatory changes in the rules, undergird only symbolic

victories? Can research effectively address implementation? As before, any answer that relies only on the description of what has happened must be grim. To date, research has not produced or packaged findings which are sufficiently systematic, precise, or coherent to support change in fact.

But the productivity of research like the uses of the law) need not be confined to symbol and exhortation. Research can contribute to the implementation of the rights of the handicapped just as the courts can, and even more directly. Indeed, the rights of handicapped persons cannot be made real in fact unless research is focused upon implementation.

First, the grim descriptive facts of the present and a suggestion for their remediation. Second, a few suggestions for priority on the agenda of research for implementation and impact. Third, a comment on the relationship between research, the law and change in fact.

Packaging

With perfect fidelity to research findings, expert professionals can testify that all handicapped children can learn. But in the 36 states now under legislative or court injunction to provide an appropriate program to all handicapped children, many teachers do not know how to teach them. Experts know that for every sort and combination of handicapping condition, somewhere in this wide land, educational strategies and techniques have been invented, tested and found productive. For all our investment in curriculum development, learning materials, teacher training and continued training, many teachers do not know what to do or where or how to find out what to do. And for good reason. What is known is neither collated nor indexed nor is there a distribution system to equip teachers and children to realize the opportunity which is theirs.

No matter cries out more urgently for address than the design, development and production of schemes for ordering and distributing present knowledge. Research in packaging research, and its use immediately!

The Laboratory Around Us

Some 36 states are now committed to experiment in the right to appropriate education: some 12 states are committed, by legislative or court injunction, to experiment in the right to treatment. The largest single laboratory in social change

(excepting only racial desegregation in the aftermath of *Brown*) and the largest single laboratory ever to retest and to confirm or to alter previous findings on the development of retarded persons, on learning, theory and techniques, on theories and techniques of habilitation and rehabilitation, and so on, is thus available at our fingertips. Astonishingly, the laboratory is empty.

The hunger for fuller and more exact knowledge of the processes and techniques of change is acute. How is the productivity of committees on human rights or of masters or of local and state task forces (in terms of rights in fact) affected by differing composition of the task forces? By differing formal and actual definition of their powers and duties? By differing skills, attitudes and experience of members? By ad hoc training, or its absence, in the uses of task forces? By differing training? By differing schedules of meeting and differing mechanisms of structuring agendas? By differential location of the task force in the organizational hierarchy? By differing relations of each of its members to the constituency of each member? By whether task force meetings are private or public? By differing task force access to records and personnel of the school district or the institution? By differential sanctions (informal and formal) available to the task forces?

How is the productivity of due process hearings (in terms of rights in fact) affected by where they are located in the hierarchy (at the top with the Secretary of Education, for example, or in tiers across the system); by the professional identity of the hearing officers; by the screening mechanisms and the criteria used in their selection; by the formal aspects of the hearing itself; by the representation of hearing complainants variously by lawyers, by Association for Retarded Citizens advocates and by others; by the training and preparation of the advocates; by differing role perceptions of teachers and administrators, defendants in the hearings; by the nature, skill and type of independent evaluations of program available to complaining parents or children and of the personnel who conduct the evaluations; by the bureaucratic, professional, consumer and policultural cultures in which the hearing mechanisms operate? What effect do differential hearing processes have on ordinary, day-to-day behaviors and decisions (not themselves the subject of hearings) in the classroom and in the bureaucracy? What effect do varying techniques of individual prescription have on educational

outcomes; what are the necessary conditions (in terms of training, socialization, skills and attitudes) of productivity (in terms of educational outcomes) of prescriptive techniques; is the participation of the student, the parent, the resident in the design of the prescription among those necessary conditions; in what ways is that condition most effectively fulfilled? What effect do differential handbooks used by handicapped persons and their advocates in differing ways, with differing training of the users, have in changing the behavior and decisions of the schools and the other institutions?

If what we suppose about the effects of litigation and declarations of rights on self-perceptions, self-confidence and felt-dignity, and, thus, on losing the energy of people for political action is true, what are the necessary and sufficient conditions of such effects and how do they vary among people in differing social situations? If it is true that authoritative injunctions by courts and legislatures to educate every handicapped person liberates great creative energy in the teacher (after the initial fright has passed or been mastered), how long does this creative energy last? Is there a critical period after which, if the teacher does not get assistance and reinforcement, his creative energy dissipates? What are the necessary and sufficient conditions of supplying that reinforcement? And, indeed, are there, as a general matter, critical periods after any declaration of rights after which, if the necessary and sufficient conditions of implementation are not supplied, the opportunity passes?

What are the differential consequences of differing formulations of declarations of rights by courts and by legislatures? What differences in the structure of remedies result in what differences in the realization of rights? What styles of Associations for Retarded Citizens, of lawyers, of other professionals most effectively conduce to change? What are the necessary conditions of those styles and the necessary conditions of change in fact?

Even the casual observer could multiply the questions with profit. Their answers will have an immediate place in the redesign of strategies for change, in altering the mechanisms we use to seek change. Varying mechanisms and varying strategies are in use now more intensively in more places than ever before. Participant observation, multivariate analysis, the host of more or less precise and thorough techniques of modern research—and just plain taking a good, hard, careful look at what is happening and what is

not—can be used to gather and sort and analyze the very rich data in the great wealth of events occurring across the country. The findings will be rich. They will refine our theories of social change and they can increase our wisdom in seeking it.⁵⁹

Similar questions can be formed for research in developmental and learning theories. In very many places, people are trying out what we think we know about development and learning. And since in many places, others don't know what we think we know, they may be trying things we don't know. Whichever way, the very number of the new tries provides an unparalleled opportunity to validate and refine and perhaps to renew our understanding.

Section 503

If Section 503 of the Rehabilitation Act of 1973 can be made an engine of deinstitutionalization, securing to handicapped persons a life of liberty, relative autonomy and choice, in an integrated setting, it will only be made so if the necessary research is forthcoming. To translate the declared statutory duty of government contractors to hire and advance handicapped persons in employment into regulations that will bind and litigation that will make a difference, certain things must be done.

On the legal side, it must be recognized that affirmative action requires the government contractor not only not to discriminate, and affirmatively to reach out to recruit and hire, but also to redefine job tasks and job settings to fit the handicapped to the extent necessary to provide employment to all handicapped persons.⁶⁰ To give that duty operational—and enforceable—meaning, research must tell us what the "extent necessary" is.

That requires the development of a typology (or several alternative typologies) of competence and their distribution and incidence among all the handicapped. The typology of competences may be constructed from a systematic collation of occupations in which handicapped persons (of all the various capacities) have engaged. Two additional kinds of typologies are required. First, a typology (or several alternative typologies) of required job competences for job tasks in job settings as they are defined and as they exist now among government contractors. The typology of competence required may be constructed from an analysis of job tasks in job settings presently existing among, say the 500 largest and most

constant government contractors. Then, using a conversion formula derived from experience in redesigning job tasks and job settings to fit the handicapped, a third typology (or set of typologies) may be constructed to display, with particularity, the converted (and unconverted) job tasks which must exist in altered (and unaltered) settings among government contractors in each area of the country if each handicapped person is to have, say, three jobs which fit hi(r) competence available for choice.

Minimum Quantitative Standards for Community Services

Recall the California and Pennsylvania statutory injunctions recited above. Pennsylvania, for illustration, provided: "The Department(s) power and its duty shall be to assure the availability of adequate mental retardation services for all persons who need them." Similarly phrased provisions dot the education, welfare, housing and recreation statutes of virtually all of the states.

The problem is these are declarations—the right to "adequate mental retardation services," for example—without operational definition. When the crunch comes and the inquiry is whether such rights are real, it is often discovered that resources have not been made available and the declaration is violated—waiting lists abound, needs are snubbed, claims are mooted, some lives are laid waste (often imposing a greater cost on the government later).⁶¹

Two strategies may serve to address the problem of operational definition. One, the strategy of the right to education cases is to consign the definition of a phrase like "a program of education and training appropriate to the capacities of each child" to hearings and the administrative process, and to structure that process so that the only question for decision is the appropriateness, educationally, of the student's program. Considerations of resources are, in the education cases, excluded (in the formal, legal sense at least) from the hearings and from the judgment about appropriateness. The cases are explicit that cost and the purported scarcity of resources are no defense to the failure to provide each child hi(r) due. The integrity of judgments about educational appropriateness is protected (in the formal sense) by the availability of judicial review of the hearing to assure procedural regularity (impartiality of the decision-maker, notice, the opportunity for an independent evaluation of the student and hi(r) educational program, the opportunity to be

represented by a person of one's choosing to present evidence, the opportunity to cross-examine, and the requirement that decisions be made solely on the basis of the evidence presented at the hearing) and to assure that the judgment is not so far wrong as to be patently arbitrary and irrational. The strategy of the structured, individualized hearing is proper when, in an area like education, there is much uncertainty about input-output relationships and the best one can seek is a fully informed shot at bringing the best professional opinion to bear on the finding of appropriateness. To be sure, the hearing, and the findings themselves, will be structured by the allocation of the burden of proof, by presumptions like the one imposed by the courts in favor of the most integrated setting, and by rudimentary minimum quantitative standards (like student-teacher ratios) which have long since characterized special education.⁶²

The institutional right to treatment cases illustrate the other strategy. The genius of *Wyatt v. Stickney* is its adoption of minimum quantitative standards to give content to the duty of the court found in the Constitution to provide "adequate treatment" to all involuntarily committed resident. For 10 years before *Wyatt*, right to treatment litigation wrestled with the problem of what might constitute adequate treatment. As with education, but even more so, there was great conflict of opinion about what might constitute adequate treatment for any given person. And, in many instances, perhaps most, the courts would be incompetent to resolve the conflict. The conundrum was solved in *Wyatt* (formally at least) by avoiding the question of adequacy of treatment in any given instance, by adopting minimum quantitative standards and requiring individualized treatment plans and leaving the rest to process. The court adopted the Accreditation Standards of the Joint Commission on Accreditation of Hospitals which, in turn, were the product of extensive work by research and practicing professionals.

Guarantees of "adequate services" in the community may be taken a step toward realization in the same way. Research and the formulation of minimum quantitative standards might proceed from analysis of incidence of various handicaps, admixing the best prevailing professional judgment about minimum services necessary to a full and relatively autonomous life in the community, to minimum quantitative standards, varying by community size, of the generic programs required, and minimum staff skills and ratio.

With these standards in hand, litigation may proceed to give operational definition to guarantees, like Pennsylvania's, of services in the community. A similarly phrased provision in the federal Social Security Act provides that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." Again and again, the Supreme Court has held that this provision means that if one is eligible, then aid must be furnished.⁶³ The difference is that both "eligibility" and "Aid to Families with Dependent Children" are given operational definition by the Act itself and in federal and state regulations under the Act. Neither "services" nor "persons who need them" are defined in or under the Pennsylvania Act. Minimum quantitative standards, however, would, as in *Wyatt*, keep the courts out of the business of defining who needs what services, but put them in the business of policing palpable, measured standards.

Discussion of minimum quantitative standards raises certain questions about strategy in the use of the courts and about the wisdom, or place, of securing detailed statements of standards in the law. The very genius of *Wyatt* is its danger. It is now painfully clear that the institutional right to treatment cases contain the risk of reifying the institution.⁶⁴ A priori one might have thought that a minimum standards order would cause the institutions to tumble; that the cost of maintaining the institutions to standards would have proven prohibitive to the state; that the state would, therefore, choose alternative, less costly settings for treatment. That possibility still inheres. The data is not yet in. And the ultimate outcome is still subject to influence and control by partisans of deinstitutionalization (if we mobilize ourselves effectively). But when the court issues an emergency order directing the employment of 300 additional resident care workers and those workers are hired,⁶⁵ that, without more, props up the political case by at least 300 additional citizen-constituents-of-legislators-and-governors who have a stake in maintaining the institution. The perception of the risk of reifying the institutions suggests that court strategy in the institutional cases might better be focused on the "least restrictive alternative" aspects of the case:⁶⁶ seeking to secure operational definition of the duty to provide treatment in the least restrictive setting (perhaps, indeed, minimum quantitative standards for treatment in the community, and a timetable for moving institutional residents to adequate.

small facilities in the community). Indeed, it should be noted that the Fifth Circuit Court of Appeals, in its decision affirming *Wyatt v. Stickney*, recognized that the minimum standards had entered the case below by stipulation of all the parties, expressly declined to reach a decision as to whether those standards are constitutionally minimum requirements and, still more important, expressly declined to decide whether a federal court may prescribe standards at all "as distinguished from enjoining the operation of such institutions while constitutional rights are being violated."⁶⁷ (Emphasis deleted)

In any case, the contribution of the *Stickney* standards to reifying the institutions can at best only be marginal; the political forces and the inertia which protect the continued existence of the institutions are altered hardly a jot or tittle by adding another few hundred employees. It is those facts of political life that make so pressing the need for minimum quantitative standards for services in the community. Parents in some significant number oppose deinstitutionalization for a host of reasons: a most important one being that there is no assurance that services will be available in the community—nor even, it sometimes appears, a fighting chance that they will be.⁶⁸ Employees of institutions—and a politically salient number they are: 14,000 in California in 1975, for example, and 17,000 in Pennsylvania—similarly have no assurances, either that they will have jobs after deinstitutionalization nor, to the some significant number of employees who may have such concerns, that their professional responsibility to their clients will be discharged in the community. The formulation, and authoritative promulgation, of minimum quantitative community standards would be a step toward such assurances. They would provide a focus, a rallying measure; something to holler articulately about and against which to measure progress toward right in the community in fact; something enforceable.

Minimum quantitative community standards, just as minimum quantitative institutional standards, raise another question: apart from reifying the institutions (or the community), there is a danger of reifying the standards themselves. On the one hand, the conscientious researcher and citizen, and the activist, know that quantitative standards formulated today will be no good the day after tomorrow. There will be new research, new modes of service, new lifestyles, new economies, new professions even, a changing incidence of

handicapping conditions, and new senses of what is the minimum—on the basis of which quantified minimum standards should also change. On the other hand, we have seen the uses of operating definitions, of cutting edges: to measure whether the handicapped are getting what they are entitled to; more easily to prove and to enforce their entitlements (starkly easier than with words like "adequate"). A battle once won and a measure established in fact, then—until battle needs be joined again—the measure need not be defended (and the defense probably lost) day by day.

Thus, we need minimum quantitative community standards, but we do not want to be stuck with them when they are outdated. Should we then create them? This dilemma is a false dilemma. It is resolved by classic administrative law doctrines. Certain standards—those of a high level of abstraction, like "adequate services . . . for all who need them," which set the purpose, the tone and the direction—should be promulgated by the legislature or by the judiciary. Other standards—the concrete particularized minimum quantitative standards for services in the community, for example, should be promulgated in regulations by the executive or administrative. By hypothesis, regulations are more easily changed than statutes or judge-made law. (In any particular case, and ours may be one, the reverse may be true. It may be easier to change Congressional enactments than to change HEW regulations, for example. In the states, the effort to secure minimum quantitative standards from the executive in regulations may be prejudiced by intrinsic conflicts between the executive function in budget-making and its function in achieving purposes and directions set, abstractly, by the legislature. In any given case, the place we will choose to seek the promulgation of minimum quantitative standards will depend on the vector of the forces which bear on the respective places and upon our access and strength with them respectively.)

On the classic view (and it is a correct view generally), if standards become reified in regulations, and stale and no longer responsive to the legislative purpose and direction, resort may be had to judicial review to void the stale regulations and to start the process of writing new ones. As the Supreme Court said long ago in another context:⁶⁹ "The constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those fact have ceased to exist."

By the same token, regulations promulgated to effectuate legislative purpose and to discharge legislative direction may have done so once but when the facts have changed may have ceased to do so.

Minimum quantitative community standards raise still one more question: the question of reifying labels. And this question may constitute a true dilemma. After all, there presently do not exist now for the general run of citizens general rights to minimum services necessary to life in the community, general rights to a minimum income, for example, or to a job, or to housing, or to health care.⁷⁰ (Though for certain special services—such as education—such rights may exist for the generality of citizens.)⁷¹ But some such services do exist specially for handicapped citizens (and all of this paper is part of the wide effort to render them services of right). Therefore, whenever any handicapped person consumes such services, (s)he marks hi(r)self special and in some sense “submits” to labelling. The dilemma is not resolved by saying that, if such services were delivered by generic service agencies, labelling of the handicapped would not occur since (among other reasons), for many services, there exist no generic agencies (just as there exist no general rights to certain services). The dilemma will, of course, be resolved truly if and when general rights to services are recognized (and here, of course, is where the wider coalition comes in).⁷² For now, it may be said that any minimum quantitative standards for community services to handicapped persons will reify the labelling process.

When there is no gain at all from getting services which carry a label, the dilemma dissolves. This is what the *Dinacase*, *Larry P.*, and the rest of the misclassification cases are in part about.⁷³ There the question in part is the assignment of mildly retarded students to special, EMR classes. Since research is persuasive that there is no educational benefit to be gained by mildly retarded students from special classes,⁷⁴ it would clearly be irrational to submit to the label such classes bring. (Note that even when we go to full integration of the mildly retarded into regular classes, labelling may still creep back in, for most mainstreaming plans contemplate some special “resource room” or “resource teacher” attention. Labelling will be dismissed significantly, but will linger until every student, handicapped or not, receives special, individualized attention in regular schooling; in other words, until all regular schooling becomes

“special.”) When there is no gain in return for the service, resolution is easy.

The hard cases arise when there is clear gain from the service and clear detriment from the accompanying label, and when the questions of service gain or label detriment are uncertain and problematic. Consider, for example, Section 503. Should the mildly handicapped adult be blanketed into the group covered by government contractors’ duty to employ and to advance in employment? Yes, because probably with the aid of Section 503, the mildly handicapped person can secure more remunerative and constant employment. No, because no matter how well his particular job is integrated into the work setting and no matter what prophylactic devices are invoked to secrete the records, probably word will go out that he is “here on quota,” “our house dummy.” Put this way, the question begins to look like a question of who shall decide whether the gain of Section 503 service outbalances the cost of the label. Perhaps, therefore, the regulations implementing Section 503 should extend coverage to the mildly handicapped, and simply leave it to each mildly handicapped person to weigh the gain and the cost and to choose. If the dilemma is to be resolved by each mildly handicapped person, what of the moderately handicapped person, the severely and profoundly handicapped person?

As suggested twice, just above and throughout by the attention to coalition, this dilemma may be obviated only by creating integrated space for difference to thrive, by altering the meaning of “difference,” and by generalizing the perception of individual differences. A strategy of rights and of services has particular salience to these tasks. The sought-for outcome is that each citizen (handicapped and not handicapped) is recognized and respected as different (not as more different than in fact (s)he is, for that would be stereotyping, nor as less different than (s)he is, for that would be denial.) “Difference” is purged of the invidious because difference is universal and celebrated. And that’s what the First Amendment, and the Constitution, are all about.

Surveying the Opinions and Attitudes of Handicapped Persons

For years we have surveyed, in a host of clever ways, the opinions and attitudes of the public, parts of the public, legislators, opinion-makers, parents, siblings, friends, associates, teachers, would-be teachers, employers, would-be employers, just about everyone we could think of.

toward the handicapped. We have not, however, sought assiduously to determine the opinions and attitudes of handicapped persons themselves. By and large, we have not consulted them at all. Yet, their opinions are crucial on any number of questions central to the struggle for change. There are, of course, exceptional pieces like Edgerton's conversations with "feebleminded women" about their feelings and opinions after their sterilization.⁷⁵

More extensive and intensive surveying will require most creative uses and perhaps adaptations of methodology. The retarded, for example, are different after all and engage little in hypothetical thinking.⁷⁶ The usual structure of survey instruments ("If I could have A, B, C, or etc., I would want Q") may not do. In addition to whatever methods of direct search of opinion and attitude, research may proceed by structuring choice and attitude-expressing situations. Such research will, like any research, be susceptible to the dangers of manipulation and the control effect and to risks of error in interpretation. But we may learn not only a great deal about the preferences of handicapped persons themselves but also much that is urgent for us to learn about how to consult the handicapped.

Identity and Roles of Clients and Lawyers

The preceding analysis suggests three separate observations about clients and lawyers, which after all may not be separate but central to the uses of lawyers. One observation is on clients, another on lawyers, and a third on the intermediate fate of both.

Identity of Clients

Standard legal doctrine about parties in litigation requires that a court may not come to a binding decision unless all "indispensable parties" have had an opportunity to appear before the court and to be heard. Indispensable parties, the Supreme Court said in 1854, are:

"Persons who not only have an interest in the controversy, but an interest such that a final decree (determining the entire controversy and adjusting all the rights involved in it) cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."⁷⁷

Handicapped persons themselves, therefore, would appear to be indispensable parties in any controversy where the rights of handicapped persons are being asserted.

Mr. Justice Douglas, dissenting in part in the recent successful challenge by the Amish to compulsory high school attendance, made a similar point. (To the reader, the invocation of the following words of Douglas may seem to betoken the common stereotypic pattern identifying handicapped persons with children. That, of course, is not the intent; rather the assertion is, what is said of Amish children by Douglas may be said, *mutatis mutandis*, of handicapped persons, whether children or adults, and universally, of all persons.)

"I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone . . .

"These children are 'persons' within the meaning of the Bill of Rights. We have held so over and over again . . .

"On this important and vital matter of education, I think the children should be entitled to be heard. While parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views . . . It is the student's judgment . . . that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of (persons) to be masters of their own destiny."^{77a}

These themes are expressed in the order of the court in *Horacek v. Exon* (the right to treatment in the community case) appointing on its own motion a guardian to represent retarded persons in the litigation because the interests of retarded may be different from the interests of the parents.⁷⁸ The recent cases holding the "voluntary" commitment of handicapped children to institutions by their parents is unconstitutional without a hearing and representation of the children reflect that concern.⁷⁹

As a general matter (apart from the cultural fact that in the courts virtually no one represents hi(r)self, virtually everyone is represented by a lawyer),⁸⁰ substituting one representative (the guardian) who may or may not perceive the retarded person's interest as the retarded person himself perceives his interest for a representative (the parent) who may have conflicting interests but

who may also be more likely to perceive the retarded person's interest as the retarded persons perceives it is a problematic gain. (Except, of course, from the perspective of the lawyer's conviction that the more interests, or perceived interests, contending, the greater the likelihood of truth and justice.) In either case, we may be no closer to securing the expression of the retarded person.

The point is not limited to expression in litigation, but extends also to expressions to guide and direct other lawyering functions. And still more generally and even more important, it extends to expression to guide the full campaign for rights. A recently founded organization of young, physically handicapped persons, Disabled in Action, may express different sentiments and objectives than an organization with a different mix of handicapped and nonhandicapped membership. In England, Scandinavia, and a few places here, Associations for Retarded Persons are beginning to take shape, which may or may not express more faithfully the desires and opinions of the retarded themselves.⁶¹ Undoubtedly they will, if indeed they are associations of the retarded themselves (this is the very subtle and complex problem of manipulation to which we shall return below).

The point is that among the organizations in coalition for purposes of using lawyers and the courts (and otherwise) should be organizations of the retarded and the handicapped themselves. If lawyers can do best what they can do only with the close participation of their clients (another matter to which we shall return below), then retarded and handicapped persons themselves, and their organizations, must be among the lawyers' clients. Thus, it is important that organizations of the retarded begin and grow. And therein lies a host of sensitive and most important questions, some of which have been raised above in the discussion of research.

In the general context of seeking the opinions of the retarded and in seeking to assist in organizing, a crucial question is: how shall situations of consultation with the retarded be structured? That is a question which Ann Shearer discusses carefully in her chapter in this volume. In the subclass of those interactions which is the retarded person's relationship as client with hi(r) lawyer, the most sensitive and important question is the question of manipulation. That question is not uniquely present here, though it may be present here in unique form. The problem of

manipulation is endemic to all lawyering and indeed to relationships of all professionals; for, by definition, "profession" means special knowledge. And special knowledge invariably presents the opportunity to control events and other persons by use of that special knowledge. Most such control we accept as benign—a teacher keeping a classroom of children orderly (though not too orderly) and at creative work; a doctor causing a person to ingest strange pink pills four times a day; a purchaser's lawyer drafting a contract which determines many of the decisions of the production manager of a plant for the next four years—but even in these benign activities the question of manipulation is implicit. Ultimately, the problem of manipulation will be removed from professional relationships with others only when that special knowledge is no longer special but fully distributed and shared in our society. The problem is diminished to the extent that special knowledge is in fact shared with the other persons. (That is the point, so seldom realized, of the homily which is so often recited by and to professionals: "Lay out the alternatives to your client, and their consequences, and (s)he will decide," though everyone also knows that what alternatives one chooses to lay out, and how, can determine the decision.) That—the extent to which special knowledge is shared in fact with the other—is also the basis of our comfort with the lawyer and for our comfort (or none) with the doctor and with the teacher. (We assume that the production manager had equal access to special knowledge and, indeed, that if relevant special knowledge was intentionally withheld from him, the contract will be void for fraud.)

But the problem is deeper even than professional "special knowledge," though it is compounded by it. In any human interaction, the exchange of meaning is of the essence.⁶² And hence, there is always the opportunity and the necessity to interpret, and the opportunity to interpret not only for oneself but for the other, to persuade the other that your interpretations are really hi(r) interpretations (or beliefs or desires), and hence, to manipulate. There are no automatic rules or sanctions to eliminate manipulation. There are only skills (including observation of self) and exhortations. For professionals in relationships with clients, there are the exhortations and skills of "professional responsibility," exhortations reinforced by the probable truth that function (having what one is doing work) most often reinforces responsibility: if you have not shared

special knowledge but have relied on manipulation, what you are seeking to do (or get, or be), you will probably not accomplish (or get or become).

So the question which exists in every human relationship, exists for lawyers and other professionals in their professional-client relationship with retarded persons. It is perhaps even more emphatic in relationships with retarded persons, for they are different, after all, and a part of the difference may be that they are more susceptible to manipulation. There is no magic to purge the question; it must be dealt with each day.

Roles for Clients and/or Lawyers

The analysis offered above in this paper suggests that the uses of lawyers are not merely court-oriented, and that even when their uses are court-oriented, they are not that alone, for the discharge of the lawyer's functions in court may (and must) have effect in other places as well. A lawyer, therefore, must—if he is to be effective in using the courts and, more generally, the law to contribute to the realization of the rights of his clients—include in his repertoire of roles both the directly court-oriented roles:

fact-gatherer and fact-researcher
law-knower and researcher
theory creator and adaptor
pleader
trier of facts
arguer of "the law"
designer of remedies
draftsman
negotiator
counselor

and indirectly court-oriented and otherwise oriented roles:

investigator
muck raker
social scientist
avid reader of the daily press, government reports, and professional-consumer journals
writer
publicist
dramatist
negotiator
special pleader
consultant
hard and soft sell artist
lobbyist
strategist
large-scale organization analyst
organizer and reorganizer

bureaucrat
teacher
counselor

Indeed, the second set of roles is implicit in the first and they are just as necessary to securing an order from the courts, and enforcing it, as they are to securing orders and product from the legislature and the bureaucracy and otherwise to structuring public and private orders so as to enhance the position of the lawyer's clients. (And both sets of roles must be assumed by everyone—lawyer, client, professional, parent, and handicapped person—who would participate effectively in social change.) Without the will and the ability to take on these roles, or find someone who will, the lawyer cannot function effectively.

This is not the place to explore whether and to what extent and why the law schools produce such lawyers. Some lawyers have those skills and the will, and some do not. And, of course, some lawyers who say they do, do not; some who do not say, do. The important thing is, that in staffing their Centers on Law and the Handicapped, the coalition of organizations should seek to hire those lawyers who do and not to hire (or fire) those lawyers who do not.⁸³

One set of roles was left out of the listing above; it is the set of roles for clients and roles for lawyers which define the relationship between them. Put shortly and in the gross, the client's role is to be assertive and the lawyer's role is to be responsive. Roles such as initiator, listener, idea man (or woman), prober, insister, and so on, will be shared, sometimes weighted on one side and—from issue to issue, from matter to matter, from function to function, from struggle to struggle—sometimes weighed on the other, but the gestalt of the relationship will show clearly that decision-making is the role of the client.

This is as it should be, both because professional canons say it shall be so—Ethical Consideration 7-7 of the Lawyers' Code of Professional Responsibility, for example, provides: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and if made within the framework of the law, such decisions are binding on his lawyer"—and still more important because experience in the relationship over history (memorialized sometimes in such places as Codes of Professional

Responsibility) instructs that it works best this way. It works best this way not only internally, for the relationship between client and lawyer itself, but also, and quite as important, externally, to discharge the functions assigned in the society to the professional—in the instance at hand, the uses of lawyers, the courts and the law to achieve social change and justice.

A recent study by Douglas Rosenthal, *Lawyer and Client: Who's in Charge?*,⁸⁴ confirms again that this is so, even in the kinds of disputes frequently and widely regarded as "traditionally" the province of the lawyer alone. (Though the tradition is, and long has been, to the contrary.) Rosenthal takes a close look at the preparation and trial of personal injury cases in which parties are seeking to ~~use~~ the courts directly for change and finds that the "results" in those cases are "better" in a measure common to both clients and lawyers (namely dollars) when lawyer and client have shared in the development and management of the case and client decision-making has predominated.

The same differential productivity may be expected to hold in cases which seek to use the courts indirectly as well as directly for change. In such cases the second set of roles and the skills implicit in them are involved. And in these roles, lawyers, while they may sometimes be especially skillful, have no (not even a formal) monopoly. The skills necessary to this set of roles are more widely shared in the society; and clients, particularly organizational clients, will have them in significant measure. Further, since such cases in part involve diagnosing and affecting political processes other than the courts (albeit through the courts as well as otherwise), the lawyer in his solitary state (and, indeed, anyone else alone) can usually not do the job. Thus, there is even greater reason to suppose that the results will be better in these cases when there is a close relationship between lawyer and client, client decision-making predominating.

"... They Just Fade Away"

While lawyers tend not to be retiring people, the implications of what has been said is that the use of lawyers and the courts will tend to fade as their contribution to the mobilization of forces toward change has been milked for all it's worth.

Once rights are fully realized and secured, lawyers will surely disappear, but that is the millenium. The tendency is, nonetheless, implicit in the proper role for lawyers vis-a-vis clients. It is implicit in the transmission by

professionals—lawyers, in this instance—of whatever special knowledge or skills they possess to their clients, to the point that they are widely shared. It is implicit in the processes of social change themselves and in the analysis of the uses of the courts offered here. Once resources are so mobilized that organizations of handicapped persons may bargain to a satisfactory conclusion with those people and institutions and bureaucracies which affect the quality of their lives, the uses of the courts and of lawyers will have been largely exhausted and the handicapped may rely entirely on the ordinary political processes to protect their rights. There would remain for lawyers and the courts only those matters that are assigned for decision to the courts exclusively and not to other political processes (commitments, perhaps, if "commitment" could still exist at all; criminal prosecutions; the probate of estates and so on), and occasional sporadic contests with other repeat-players with whom contacts are occasional and sporadic and with whom, therefore, a satisfactory "private" bargaining process has not been established.

Thus, for illustration of the promise of things to come, the relative demise of welfare litigation in recent years may be a mark not of the failure of the use of lawyers and of the courts by welfare recipients to advance their rights, as it has been widely described,⁸⁵ but a mark of its success. After a rush of victories in the courts in the mid-1960s, the courts turned sour, decided a few cases badly and announced some rules which discouraged further suit. But by that time, it may be that forces were so well mobilized at the behest of welfare recipients that they would in any case have turned from the courts. This may well have been the case in Philadelphia; it was decidedly not in other parts of the country. A further, but less reliable, measure would be the increase in the proportion of those eligible for public assistance who are receiving it and an increase in the ratio between the level of public assistance income and the level required for a "minimum but adequate" income as calculated by the Bureau of Labor Statistics. On both measures, Welfare Rights Organizations are succeeding and the uses of lawyers and the courts (even including the losing cases) have, undoubtedly, had their place, but they have not yet succeeded and evidence is that all of their forces have not yet been mobilized. So it is with the handicapped too.

For now, in the pursuit of the rights of the handicapped, we must mobilize ourselves to use

the courts and the law, and other means. As Frederick Douglass and Ocania Chalk said, "agitate, agitate, agitate." As Joe Hill said, "organize, organize, organize." Here we add, "litigate, implement, research, litigate, litigate" until we are fully mobilized, the balance of forces is changed, those who, like legislatures, say things, do them, and handicapped citizens are well on their way to rights in fact.

References

1. E. Goffman, *Strategic Interaction*, 3 (University of Pennsylvania Press, 1969).
2. Settled assumptions about retarded persons are challenged not only by essential ideas of humanism but also by the very significant change in the decades since the Second World War in the "fact," i.e., our understanding of the possibilities, and of the ways and means to realize them, for a full life for the retarded. See, e.g., Roos, "Trends and Issues in Special Education for the Mentally Retarded," 5 *Education and Training of the Mentally Retarded*, 51 (1970); Yates, *Behavior Therapy*, 324 (1970). Generally on the new technology and on criteria for judgment about who shall receive its benefits (and the detriments), see Shapiro, "Who Merits Merit? Problems in Distributive Justice and Utility Posed by the New Biology," 48 *Southern California L. Rev.* 318 (1974).
- As to the relationship between changing facts and the law and the courts, consider the opinion of the United States Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938): "The constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . that those facts have ceased to exist."
3. Consider the constitutional career of black persons, from "three-fifths of a person" (Art. I, Sec. 2, U.S. Const. (1787)), to property *Dred Scott v. Sandford*, 60 U.S. 393 (1856) to freedman (Art. XIII, U.S. Const. (1865)), to "equal" but separate (*Plessy v. Ferguson*, 163 U.S. 537 (1896)), to equal and integrated (*Brown v. Board of Education*, 347 U.S. 483 (1954)). The careers of women, the elderly, the poor, and the handicapped, are marked by similar traces in the law. See Gilhool, "The Rights of Citizens Who are Different to Services in the Community," Chapter 7 in Kindred, Cohen, Penrod & Shaffer, *Mentally Retarded Citizens and the Law*, (The Free Press, 1976). See also Stone, "Should Trees Have Standing?", 45 *Southern California L. Rev.* 450 (1972).
4. As later Chief Justice Stone wrote for the Court in *United States v. Carolene Products Co.* 304 U.S. 144, 152-53 n.4 (1938): "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." See Lusk, "Minority Rights and the Public Interest," 52 *Yale L.J.* 1 (1942).
5. 405 U.S. 156, 164 (1972).
6. S. Scheingold, *The Politics of Rights*, 123 (Yale University Press, 1974). More exactly, declarations of rights are a part of (and sometimes a prelude to) political struggle. See also Gilhool, "The Uses of Litigation: The Right of Retarded Children to a Free Public Education," 50 *Peabody J. of Educ.* 123 (1973); J. Lippman and I. Goldberg, *Right to Education: An Anatomy of the Pennsylvania Case and Its Implications for Children*, 46 (1973).
7. 262 U.S. 390, 401-02 (1923).
8. *Ibid.*
9. *Dennis v. United States*, 339 U.S. 162, 184 (1950).
10. The best and fullest collection of essays reviewing developing legal doctrine as it seeks to make benefit of these norms available to retarded citizens in every area of their lives is Kindred, Cohen, Penrod & Shaffer, *Mentally Retarded Citizens and the Law*, (The Free Press, 1976) (the proceedings of the 1973 Ohio State Conference, sponsored by the President's Committee on Mental Retardation).
11. The phrase is most recently borrowed from Dellinger, "Of Rights and Remedies: The Constitution as sword," 85 *Harv. L. Rev.* 1532, 1534, (1972).
12. The illustration is more fully worked out, and the legal arguments upon which the claims of zero-reject education and due process rest, are reported, *inter alia*, in Dimond, "The Constitutional Right to Education: The Quiet Revolution," 24 *Hastings L.J.* 1087 (1973); "Education: An Inalienable Right,"

39 Exceptional Children 597 (1973); Gilhool, "The Rights of Citizens Who are Different to Services in the Community," Chapter 7 in Kindred, Cohen, Penrod & Shaffer, *Mentally Retarded Citizens and the Law*, (The Free Press, 1976); and Note, "Equal Protection and Intelligence," 26 Stanford L. Rev. 647 (1974).

The magnitude of exclusions from schooling was first publicly estimated in the Report of the Massachusetts Task Force on Children Out of School, *The Way We Go to School*, (Beacon Press, 1970). Estimates for the country as a whole have now been carefully compiled and analyzed by the Children's Defense Fund, Washington, D.C. in its Report, *Children Out of School in America* (1974).

13. For two excellent discussions of the uses and functions of the due process hearing, see Dimond, "The Constitutional Right to Education: The Quiet Revolution," 24 Hastings L.J. 1087 (1973) and Kirp, Buss & Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 California L. Rev. 40 (1974). The latter assesses in preliminary fashion, the impact of the *PARC*, 343 F. Supp. 279 (E.D. Pa. 1972), *Mills*, 348 F. Supp. 866 (D.D.C. 1972), and *Diana*, and *Larry P.*, 343 F. Supp. 1306 (N.D. Cal. 1972) cases. A later report, Kuriloff, True, Kirp & Buss, "Legal Reform and Educational Change: 1 The Pennsylvania Case," 41 Exceptional Children 35 (1974) updates some of the qualitative measures of impact (e.g., by this time 16 months after the final order in *PARC*, 13,000 previously out-of-school retarded children had been admitted to public schooling). Further reports on this impact assessment project will be forthcoming.

The possibilities for the use of such hearings may be seen by looking to the impact of similar hearing mechanisms in similar areas, such as public assistance and public housing. See, e.g., Lempert, "Evictions from Public Housing: Effects of Independent Review," 35 American Sociological Rev. 852-60 (Oct. 1970). C.F., Dauer & Gilhool, "The Economics of Constitutionalized Repossession," 47 So. Cal. L. Rev. 116, 138-150 (1973).

In Philadelphia, for example, the selective use of the Social Security Act hearing mechanisms by the Philadelphia Welfare Rights Organization, coupled with "collective bargaining" between PWRO and the County Director of Public Assistance pursuant to a "recognition" agreement, and intensive representation of complainants by PWRO in informal negotiations short of the hearing (see the discussion of local task forces in the text) resulted in a drop in the rate of rejections of applications for public assistance from nearly 50 percent to 25 percent in a year and a half. See Gilhool, "The Uses of Litigation," 2 Leadership Series in Special Education, 167 (U. of Minn. 1973). Questions of appropriateness of education undoubtedly will present opportunities and problems in some degree different from those presented by eligibility decisions for public assistance; but that and similar experience may be nonetheless instructive.

14. Compare *Area Wide Council v. Romney*, 456 F.2d 811 and 469 F.2d 1326 (3d Cir. 1972), holding that the requirement of "maximum feasible participation" in the Model Cities Act requires "good faith bargaining" with low-income residents of the area, a duty whose content is drawn by analogy from the National Labor Relations Act.
15. 42 U.S.C.A., sec. 2674.
16. 20 U.S.C.A., sec. 1231d.
17. These range all the way from the right to speak (but not necessarily to be listened to or heeded) in a public forum at planning stages of urban renewal projects to a right of veto on certain issues accorded Project Area Committees in Neighborhood Renewal Programs. For the tale of one recognition agreement and collective bargaining model, built on a requirement of tenant participation as a condition of funds for public housing modernization, see "Public Housing: Tenant's Role," 28 J. of Housing 413 (1971).
18. *Wyatt v. Stickney*, 344 F. Supp. 387, 392 (M.D. Ala. 1972), affirmed sub. nom., *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).
19. Schiengold, *The Politics of Right*, 123 (Yale Univ. Press, 1974).
20. Warren, "The Notre Dame Law School Civil Rights Lectures," 46 Notre Dame Lawyer 14, 16-17 (1972).

21. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, esp. Chapter 6 (1962).

For an intriguing discussion of a, perhaps, contrasting "activist," patience-exhausted possibility (that a court may order Alabama to sell off the land surrounding its institutions to finance treatment for its residents), see *Wyatt v. Aderhold*, 503 F.2d 1305, 1316-19 (5th Cir. 1974).

22. 29 U.S.C.A., sec. 793 (Supp. 1974).

23. 401 U.S. 424, 431 (1971).

24. For a full discussion of Section 503, see the forthcoming Note, "Affirmative Action in Hiring Handicapped Persons," 48 Southern California L. Rev. (1976); Weiss, "Equal Employment Opportunity and the Disabled," 10 Col. J. of Law & Social Problems, 457 (1974).

25. Conley, *The Economics of Mental Retardation*, 336 (Johns Hopkins Univ. Press, 1974). Indeed Conley's estimate was avowedly conservative, see pp. 332-53.

26. *King-Smith v. Aaron*, 455 F.2d 378 (3d Cir. 1972).

26a. The cases are unreported in the law reports because they were favorably settled before court decision, but they have been extensively reported in the popular media and the media of organizations of the handicapped.

27. The Council for Exceptional Children, Arlington, Virginia, maintains a continuing summary of such acts of legislatures and of the courts.

28. See, e.g., Dahl, *Who Governs?* (Yale Univ. Press, 1961); and Lane, *Political Life* (Yale Univ. Press, 1964).

29. Kay Gorham, "The Parent's Perspective on the Law," paper delivered at the National Conference on the Mentally Retarded Citizen and the Law sponsored by the President's Committee on Mental Retardation, May 3-5, 1973, Columbus, Ohio.

30. *Closer Look*, Winter, 1975. (Box 1492, Washington, D.C. 20013).

31. S. R. Gelman, "Periodic Review of Mentally Retarded Residents," 19 Social Work 726 (1974) and Kirp, Buss & Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 California L. Rev. 40 (1974) are almost alone in looking carefully at the impact of recent developments. Kirp, et al., is discussed at

Footnote 13. Gelman assesses the impact of annual or periodic review of residents of state institutions and concludes "the reform legislation has done little to alter the institutional power base—power remains concentrated at points other than local communities. New legislation without a firm administrative base, without adequate funds for staffing and support systems needed for implementation, without the necessary planning and coordination, and without effective links to other service systems, cannot go far toward changing our present institutional system."

32. See the New York Times series on nursing homes for the elderly, October, 7, 8, and 10, 1975, and reports of the continuing investigation thereafter.

33. Galanter's paper, Working Paper No. 7, in the Yale Law School Program in Law and Modernization (1972), is published at 9 Law & Society Rev. (1974).

Galanter's distinction between "repeat-players" and "one-shotters" has deep roots in sociological thought. Similar distinctions, to different purposes but quite as fruitful, have been invoked by Leff, "Injury, Ignorance and Spite—The Dynamics of Coercive Collection," 80 Yale L.J. 1, 19-26 (1970) (distinguishing the "consumer as creditor" from the "professional as creditor" to analyze the dynamics of the American collection system) and MacNeil, "The Many Futures of Contracts," 47 So. Cal. L. Rev. 691, 737-744 (1974) (distinguishing "transactional" interactions from "relational" interactions to analyze problems of choice and contract).

34. Galanter, *supra*, pp. 6-7.

This analysis explains the great difficulties in getting any justice at all (or at best random justice), let alone the seeming impossibility of getting favorable rules changes in criminal or juvenile prosecutions against handicapped persons, and in commitment proceedings. See, e.g., Cohen, "The Function of the Attorney and The Commitment of the Mentally Ill," 44 Texas L. Rev. 424 (1966). A great deal of fine doctrinal work has been done in these "defensive" areas; e.g., Allen, *First & Weihofen, Mental Impairment and Legal Incompetency* (Prentice-Hall, 1968); Brakel & Rock, *The Mentally Disabled and the Law* (U. of Chicago Press, 1971); but not

much can be effectively done for individual parties who find themselves in these suits until and unless we are able to handle their defenses systematically as repeat-players would, to lend to them, as it were, the benefits of repeat-player-hood, and to translate their defensive posture into an offensive one.

35. Galanter, *supra* at pp. 35-36. Schiengold's analysis, *The Politics of Rights* (Yale Univ. Press, 1974), is not dissimilar. Schiengold, however, misses the possibility of the repeat-player. His analysis is partially flawed by a too simple conception of the relationship of organizations to litigation.
36. Galanter, *supra*, at p. 30.
37. Goulden, *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms*, 32-37 (Weybright & Talley, 1971). On the consequences—ill—of this most effective use of the law, see Levine, "Is Regulation Necessary? California Air Transportation and National Regulatory Policy," 74 *Yale L.J.* 1417 (1965).
38. Empirical work on the impact of WRO's and their lawyers is scarce, but the story may be garnered from Sparer, "The Right to Welfare," in Dorsen (ed.), *The Rights of Americans* (Pantheon, 1971); Cloward & Piven, *Regulating the Poor* (Pantheon, 1971).

Generally on the impact of poverty lawyering, see Johnson, *Justice and Reform*, esp. Chapter 8 (Russell Sage, 1974). The Philadelphia experience is discussed in Gilhool, "The Uses of Litigation," 2 *Leadership Series in Special Education*, 167 (U. of Minn., 1973).

- 39 The story is told, among other places, in Greenberg, "Litigation for Social Change: Methods, Limits and Role in Democracy," 29 *The Record of the Assoc. of the Bar of the City of New York* (April 1974). For a systematic look see Vose, "Litigation as a Form of Pressure Group Activity," 319 *Annals of the Am. Academy of Polit. & Soc. Sci.*, 20 (1958); Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (U. of California Press, 1967). C.F. Comment, "Private Attorneys General: Group Action in the Fight for Civil Liberties," 58 *Yale L.J.* 574 (1949).
40. For social change work a lawyer fresh out of law school can be hired for about \$11,000; a

lawyer of four to six years experience, for about \$21,000; and a lawyer of ten years experience, for about \$27,000. Those figures obtain in major metropolitan areas, and may be less in some other areas of the country. Thus, staff lawyers can be engaged at about the same price as other retardation professionals.

41. The "optimum," for a three-lawyer office, will include one senior, one mid-level, and one beginning lawyer.
42. A prototypical rights handbook is Biklen, "Let Our Children Go: An Organizing Manual for Advocates and Parents," (Human Policy Press, Syracuse Univ., 1974). *Closer Look* (see its Winter 1975 issue), is collecting handbooks produced across the country and making them available to all who ask for them. The handbook strategy was widely and well used by Welfare Rights Organizations. See the papers cited above at Footnote 38.
43. Indeed, the coalition might productively extend to other citizens who are different—to the elderly, who share with the handicapped common problems of access to transportation, and control of the quality of nursing homes (which problems arise from the same sources and respond to similar remedies); and to the poor, who share common problems of access to income, to employment, and to health care; and to blacks and the elderly and women, who share the common opportunity to be different and the common problem of rearranging services and power so that each may be what (s)he chooses to be.
44. Developments in the use of volunteer lawyers, and in illustrations of effective and ineffective ways and means of using them, are reported periodically in the *Pro Bono Report*, published by the American Bar Association's section on Individual Rights and Responsibilities.
45. On the award of attorneys fees by the courts, see, e.g., *Newmann v. Piggie Park Enterprises*, 390 U.S. 400 (1968); and *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). The cases on attorneys fees are collected and analyzed in M. F. Derfner, "Attorneys Fees in Pro Bono Publico Cases: A Compilation of Federal Court Cases", available (for \$7.00) from the Lawyers' Committee for Civil Rights Under Law, Washington, D.C.

A recent decision has introduced some uncertainty into the law of attorneys fees. The Supreme Court recently held that federal courts are not authorized to award attorneys fees to a plaintiff winning an injunctive action merely on the "private attorney general" theory. *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612 (1975). But the Court explicitly recognized many situations in which attorneys fees may be awarded: where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons; where the winning party has preserved or recovered a fund or property on behalf of others in addition to hi(r)self; or where, as in antitrust and civil rights cases, Congress has provided by statute for such fees. (95 S. Ct. at 1622-23). Furthermore, the ruling will presumably not prevent the parties to an action from agreeing to a standard for award of fees as part of a larger settlement, which agreement would then be enforceable in court (see, e.g., *Arenson v. Chicago Mercantile Exchange*, 372 F. Supp. 1349 (N.D. Ill. 1974)). And, of course, the decision does not affect the award of fees in the state courts.

46. Under a wide variety of sponsorship, there have recently been established an equally wide variety of group legal services plans, analogous to health insurance, to make legal services available to middle-income persons at a low cost. The most interesting and the most hopeful of these plans are under the sponsorship of labor unions, which in coalition with bar and consumer groups have recently secured an amendment to the Taft-Hartley Act permitting collective bargaining for legal services benefits, as now there is bargaining for health and retirement benefits. While few of these plans have yet made provision for social change litigation, many unions have long since been very active on behalf of the handicapped, whether relatives of members or not. One may hope, therefore, that group legal services plans will make lawyers available to secure the rights of the handicapped. Developments in group legal services are reported periodically in *Group Legal Review*, published by the National Consumer Center for Legal Services, Washington, D.C. Developments in legal services for middle income persons, for the

poor, in public interest and in the structure of the legal professions generally are reported periodically in *Trends in Legal Services*, published commercially by Editorial Services, Washington, D.C.

47. The instrumentalities responsible for most of the litigation on behalf of the handicapped to this date—Legal Services Programs for the poor, formerly funded through the Office of Economic Opportunity, and funded now by a recently created federal corporation, the National Legal Services Corporation—remain in trouble. The prospects of Legal Services Programs will be determined by the members of the new Corporation's Board and by the regulations they write. The Corporation bill passed by the House provided that special emphasis be given to representation of the handicapped; that provision was deleted by the Senate, though the Conference Report, but not the Act, contains a similar emphasis. Developments in legal services for the poor are reported periodically in *The NLADA Briefcase*, published by the National Legal Aid and Defender Association, Washington, D.C., and in the *National Clearinghouse Review*, a reporter system for poverty lawyers, published by the National Clearinghouse for Legal Services, Northwestern University School of Law, Chicago, Illinois.

The second instrumentality significantly responsible for the litigation on behalf of the handicapped to date is the network of "public interest law firms" which dots the country. Typically, these are foundation-funded law firms, sometimes associated with the Lawyers Committee for Civil Rights Under Law and the NAACP Legal Defense Fund. Developments in this part of the profession may be followed through the newly created Center for the Advancement of Public Interest Law, Washington, D.C. The special tax status of these firms, a status which Centers on Law and the Handicapped would share, is discussed in B. Heineman, Jr. In Pursuit of the Public Interest, 84 Yale L.J. 182, 198 (1974), and Hearings on Tax Exemptions for Charitable Organizations Affecting Poverty Programs, Subcommittee on Employment, Manpower and Poverty of Senate Committee on Labor and Public Welfare, 91st Congress, 2d Session (November 16 and 17, 1975).

48. The tale of the employees is told in *Wyatt v. Aderholt*, 503 F.2d 1305, 1307-09, affirming *Wyatt v. Stickney*, 344 F. Supp. 390 (M.D. Ala., 1972).
49. *Parrish v. Civil Service Commission*, 66 Cal. 2d 260, 425 P.2d 223 (1967).
50. *Chalk Appeal*, 441 Pa. 376 (1971).
51. *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973).
52. 493 F.2d 507, 518 and 527 (5th Cir. 1974). This case is now pending in the United States Supreme Court.
53. *McClelland Appeal*, Pa. Civil Service Commission No. 1423 (October 25, 1973) reversed on other grounds sub. nom., *McClelland v. Civil Service Commission* 322 A.2d 133 (Pa. Cmwlth, 1974).
54. The definition is from Webster's New International Dictionary 1713 (1923; professional canons of ethics are reviewed in D. Rosenthal, *Lawyers and Clients: Who's in Charge?* (Russell Sage 1974); and the nature of professions is analyzed in T. Parson, *Professions*, Internat'l Encyclopedia of Social Science.
55. The California provision may be found at 15 Cal. Health & Safety Code, sec. 1501 (1974); the Pennsylvania provision, at Pa. Stat. Ann., Tit. 50, sec. 4201 (1969). Similar provisions dot state codes on education, welfare, housing and recreation.
56. E.g., Louisell & Hazard, *Pleading and Procedure*, 196 (Foundation Press, 3d Ed., 1973).
57. The quoted phrases are from later Chief Justice Stone writing for the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 152-53, n. 4 (1938). His text is set out in full at Footnote 4, *supra*.
It is Hazard's failure, in "Social Justice Through Civil Justice," 36 U. Chicago L. Rev. 699 (1969), to take account of the possibility of repeat-players (his model for litigation is basically a one-shot private party against another one-shot private party), of the uses of litigation for mobilization and for the influence of court declarations in other political arenas, and of the contingent costs and advantages of the use of a particular method of petition (or dispute resolution, or dispute creation) rather than another depending upon one's social situation that accounts for his grim, and erroneous, conclusions about the uses of litigation to secure redistribution. To be sure, Hazard sometimes switches to a model of litigation as one-shot private party against repeat-player private party, but even then the other two omissions vitiate his analysis. Further, Hazard's definition of distributive justice is considerably narrower than Aristotle's. For Aristotle, distributive justice was concerned with "distributions of honour or money or other things that fall to be divided among those who have a share in the constitution." Ch. 2, Bk. V., *Nicomachean Ethics*. For Hazard, it is merely "allocation of community resources," *Ibid.*, 704.
58. See, e.g., G. Calibresi, *The Costs of Accidents* (Yale Univ. Press, 1970); R. Keeton, *Legal Cause in the Law of Torts* (Ohio State, 1963).
59. For suggestive bibliographies on the design and execution of impact studies, see Wasby, *The Impact of the United States Supreme Court*, 283-291 (Dorsey Press, 1970) and T. Becker, *The Impact of Supreme Court Decisions: Empirical Studies* (Oxford Univ. Press, 1969).
Footnote 30, *supra*, cites two excellent studies by Gelman & Kirp and Buss & Kuriloff, among the few concerned with the rights of the handicapped.
60. The Southern California L. Rev. Note parsing Section 503 and suggesting standards for its enforcement is cited at Footnote 24, *supra*.
61. See Conley, *The Economics of Mental Retardation* *passim* (Johns Hopkins Univ. Press, 1974).
62. The best explication of this strategy and the assumptions which undergird it is Dimond, "The Constitutional Right to Education: The Quiet Revolution," 24 *Hastings L. J.* 1087 (1973).
63. The Social Security Act provision is at Title 42 U.S.C., sec. 602(a)(10) (Adopted in 1950). The cases are *King v. Smith*, 392 U.S. 309, 333 (1968); *Townsend v. Swenk*, 404 U.S. 282, 285-86 (1971); *Carleson v. Remillard*, 406 U.S. 598, 600 (1972).
64. See, e.g., Burt, "Beyond the Right to Treatment," in Kindred, Cohen, Penrod & Shaffer, *Mentally Retarded Citizens and the Law* (The Free Press, 1976).
65. Order of March 2, 1973.
66. *Wyatt v. Stickney*, did declare, "Residents shall have a right to the least restrictive conditions necessary to achieve the purposes of habilitation," and that the institution might implement the "principle

- ... that each resident may live as normally as possible." "Every attempt" was to be made to move residents from large structured, isolated living units as far as possible toward autonomous living in the community. 344 F. Supp. 373, 396 (Minimum Constitutional Standards 2, 3c).
67. *Wyatt v. Aderholt*, 503 F.2d 1305, 1316-17 (5th Cir. 1974).
 68. In four years residents (net) in California's hospitals for the developmentally disabled were released. Annual institutional expenditures by the state were reduced by \$42 million, but at the end of that four years, annual expenditures for mental health services in the community had increased by only \$4 million. The Governor's Budget, Health and Welfare Supplement 1974-75. To be sure, many of the residents released were undoubtedly not mentally ill at all, see B. Ennis & T. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 California L. Rev. 693 (1974), and the figures above do not reflect services delivered in the community but accounted in the budget in generic program expenditures.
- For an excellent account of California's ill-managed institution-closing program (an account not nearly so grim as popular expectation has it), see the Report of the Senate Select Committee on Proposed Phaseout of State Hospital Services, Sen. Alfred E. Alquist, Chairman (Paul O'Rourke, consultant) (1974).
69. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938).
 70. For the arguments made—but not yet authoritatively adopted—for such general rights, see F. Michelman, "Supreme Court, 1968 Term. Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969), and F. Michelman, "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice," 121 U. Pa. L. Rev. 962 (1973).
- For a discussion of the relevant cases, especially *Dandridge v. Williams*, 397 U.S. 471, 480-81 (1970) and *Jefferson v. Hackney*, 406 U.S. 535, 540-41 and N.S. (1972) (income) and *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (housing), and their reservation of the question of general rights, see Gilhool, "The Rights of Citizens Who are Different to Services in the Community," at Footnote 29 therein, Chapter 7, in Kindred, Cohen, Penrod & Shaffer, *Mentally Retarded Citizens and the Law* (Free Press, 1976).
71. E.G., *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36-37 (1973) (dictum: "Some identifiable quantum" of education may be constitutionally guaranteed to all). See Dimond & Reed, "Rodriguez and Retarded Children," 2 J. of Law & Education 476 (1973). For a general typology of services elaborating claims of rights, see Gilhool, "The Rights of Citizens Who are Different to Services in the Community," at Section II, Chapter 7 in Kindred, Cohen, Penrod & Shaffer, *Mentally Retarded Citizens and the Law* (Free Press, 1976).
 72. See this paper, *supra*, at Footnote 43.
 73. The *Larry P.* case is reported at 343 F. Supp. 1306 (N.D. Cal. 1972); *Diana* is unreported. The misclassification cases are discussed in Kirp, Buss & Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 Cal. L. Rev. 40, 96-112 (1974) and in Kirp, "Schools as Sorters: The Constitutional and Policy Implications of Student Classification," 121 U. Pa. L. Rev. 705 (1973).
 74. See, e.g., N. Hobbs, *The Futures of Children*, (Jossey-Basse, 1974).
 75. Reported, among other places, in R. Edgerton, *The Cloak of Competence* (U. of Cal. Press, 1967).
 76. See Ann Shearer's chapter herein. And see, e.g., W. B. Stephens, "The Development of Reasoning, Moral Judgment and Moral Conduct in Retardates and Normals. Phase II. Final Report." Cooperative Project # RD 2382P (Temple Univ., 1972).
 77. *Shields v. Barrow*, 58 U.S. 130, 139 (1854).
 - 77a. *Wisconsin v. Yoder*, 406 U.S. 205, 241, 243, 244-5 (1972). Generally, see Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child*, Chapter 5 (MacMillan, 1973).
 78. *Horacek v. Exon*, 357 F. Supp. 71, 74 (D. Neb. 1973).
 79. *Saville v. Treadway* (M.D. Tenn., Civil Action No. 6969, March 8, 1974) (unpublished opinion); *Bartley v. Cremins* (E.D. Pa., Civil Action No. 72-2272, July 24, 1975). Generally, see Ellis, "Volunteering Children: Parental Commitment of Minors to Mental Institutions," 62 Cal. L. Rev. 840 (1974); and Ferleger, "Loosing the Chains: In-Hospital Civil Liberties of Mental

Patients," 13 Santa Clara Lawyer 367 (1973).

80. It is a cultural artifact, not a legal one (though it may arise from the legal subculture). Persons are guaranteed the right, by and large, by the law to represent themselves in court. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) and *Faretta v. California*, 43 L.W. 5004 (U.S., 6/30/75).

And compare, Wexler, "Practicing Law for Poor People," 79 Yale L.J. 1049 (1970). The court in *Horacek* was constrained by one legal provision, Rule 17(c) of the Federal Rules of Civil Procedure, concerned with inputs of "incompetent" persons:

"Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If the . . . person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a . . . person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the . . . person."

Parents typically serve as "next friends" of any party children.

81. See Ann Shearer's chapter, "The Handicapped Person," herein. Note that the Human Rights Committee appointed in *Wyatt v. Stickney*, 344 F. Supp. 373, 376, 386 (M.D. Ala. 1972) included one mildly retarded resident of the institution. And consider that the jury studies establish that one in a group of twelve is not a sufficient critical mass to expect that that one will express hi(r)self or stand by hi(r) opinions to the contrary. Kalven & Zeisler, *The American Jury*, 463 (Little, Brown & Co., 1966).

82. In the exploding literature on the central places of the exchange of meaning and on reading meaning, and communicating it, the works of E. Goffman, e.g., *The Presentation of Self in Everyday Life* (Doubleday, 1959); *Encounters* (Bobbs-Merrill, 1961); *Strategic Interaction* (U. of Pa. Press, 1969); *Relations in Public* (Basic Books, 1971); are among the most trenchant.

83. That lawyering in "the grand manner" has traditionally encompassed the full set of roles (though not always for the good) is

evidenced in the stretch of reports from L. Brandeis, "The Opportunity in the Law," 39 American L. Rev. 555, 559 (1905), through J. C. Goulden, *The Superlawyers: The Small and Powerful World of the Great Washington Law Firms* (Weybright & Talley, 1971).

Among the excellent ruminations on role, see E. and J. Cahan, "Power to the People or the Profession?," 79 Yale L.J. 1005 (1970); A. Platt and R. Freedman, "Limits of Advocacy," 115 U. Pa. L. Rev. 1156 (1968); note, "The New Public Interest Lawyers," 79 Yale 1069 (1970); A. Matthews and J. Weiss, "What Can Be Done: A Neighborhood Lawyer's Credo," 47 B.U.L. Rev. 231 (1967); S. Wexler, "Practicing Law for Poor People," 79 Yale L.J. 1049 (1970); and E. Sparer, "The Right to Welfare," in N. Dorsen, *The Rights of Americans*, (Pantheon, 1971).

84. D. E. Rosenthal, *Lawyer and Client: Who's in Charge?* (Russell Sage, 1974).

85. See, e.g., S. Krislov, "The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process," 58 Minn. L. Rev. 211 (1973). And see Sparer, "The Right to Welfare," in N. Dorsen (ed.), *The Rights of Americans*, (Pantheon, 1971).

Biography

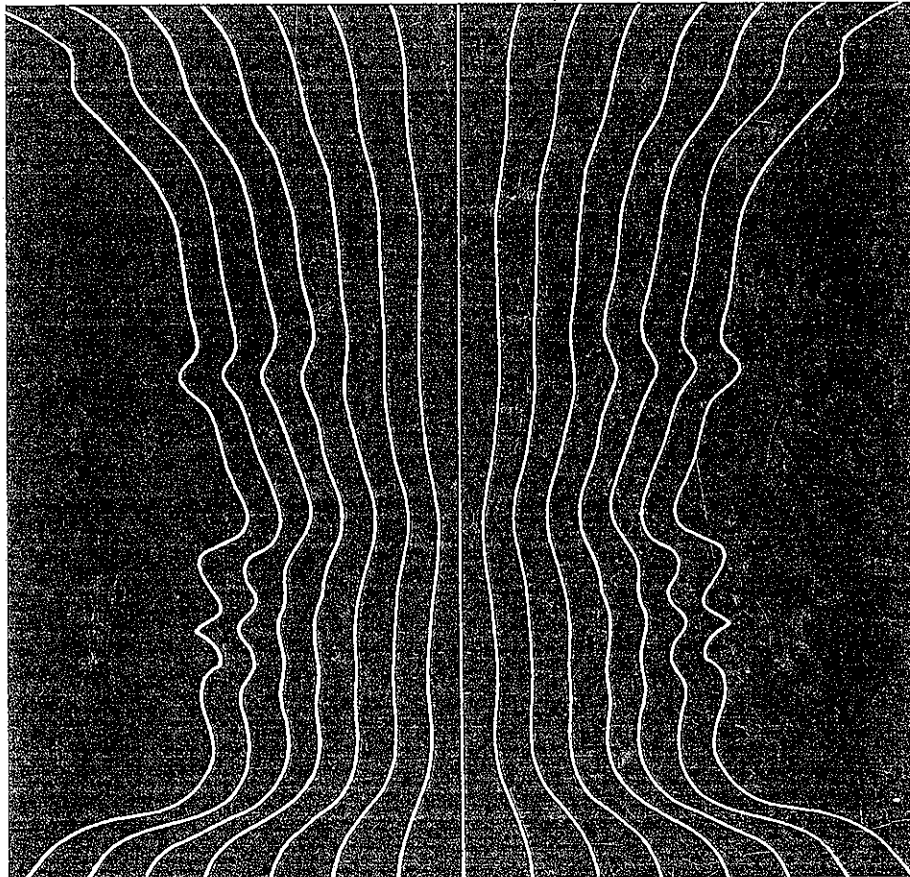
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Mr. Gilhool practiced law with Dilworth, Paxson, Kalish, Levy and Coleman in Philadelphia and as consumer advocate and director of law reform at Community Legal Services, Inc. in Philadelphia. In the latter capacity, he represented the Philadelphia Welfare Rights Organization, the Residents Advisory Board of Philadelphia (a public housing tenants organization) and argued the Public Assistance Residence Requirement Case (*Shapiro v. Thompson*, 394 U.S. 612 (1969)) in the United States Supreme Court. He was founding co-director of the Legal Services Training Program.

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Revised Edition

President's Committee on Mental Retardation Washington, D.C. 20201 1976



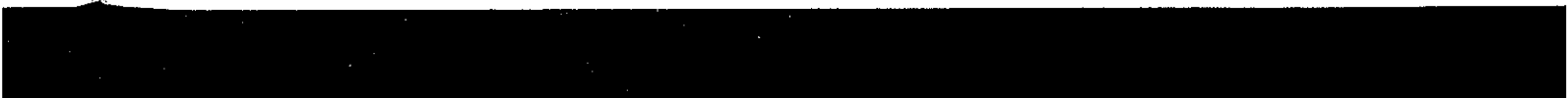
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Changing Patterns in Residential Services for the Mentally Retarded

Revised Edition

Edited by
Robert B. Kugel
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Kansas City, Kansas
and
Ann Shearer
London, England

President's Committee on Mental Retardation
Washington, D.C. 20201
1976



Preface

Considerable progress has been made in residential services for the mentally retarded since the President's Committee on Mental Retardation, in 1969, published the first *Changing Patterns in Residential Services for the Mentally Retarded*. No single report so profoundly affected thinking in the field of mental retardation as did this monograph. The internationally known authors presented challenging new service concepts, that spread rapidly. Over 20,000 copies of the 1969 monograph have been distributed throughout the world. Several countries translated it into their own language, and the President's Committee still answers requests for information and copies.

Change has been so rapid that we need once again to examine our situation, the new challenges and the emerging service models. The Federal Government has focused attention on this major issue and States have developed deinstitutionalization plans which emphasize new alternatives in community service programs. This has further developed reform within our public institutions by reducing their size and providing means for evaluation and placement of their residents in a less restrictive environment.

Normalization, a term popularized by the 1969 report, has been a guiding principle for planners in establishing standards of services.

The President's Committee on Mental Retardation is indebted to Dr. Robert B. Kugel and Ann Shearer, the editors of this new edition, and the contributing authors. Retaining the values of the original monograph while adding much important new material, they have provided the imaginative, people-related thinking which must underly improvements in services to the Nation's millions of mentally retarded persons.

In spite of progress made since the first edition, we still have a number of institutions in the United States which are overcrowded, understaffed and poorly financed. And there remain many gaps in quantity and quality of community-based services. But with the emerging Federal, State and local programs we hope that by the end of this decade many of these problems will be on the way to solution. The President's Committee on Mental Retardation is dedicated to that end, and presents these papers not as the official position of the PCMR but as views of the authors that can contribute to further beneficial change in the pattern of residential services.


Executive Director, PCMR.

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