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Ruth Colker

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# ANTI-SUBORDINATION ABOVE ALL: A DISABILITY PERSPECTIVE

*Ruth Colker\**

## INTRODUCTION

The field of disability discrimination is undertheorized; it conflates “separate” and “unequal.” Theories of justice typically do not consider the example of disability,<sup>1</sup> or if they do, they proceed from a

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\* Heck Faust Memorial Chair in Constitutional Law, Michael E. Moritz College of Law, The Ohio State University. I would like to thank former Moritz librarian Sara Sampson, as well as current Moritz librarian Katherine Hall for their excellent bibliographical and research assistance. I would also like to thank Moritz law students John Billington, Catherine Woltering, and Pamela Bridgeport for their excellent research assistance. I would also like to thank the Moritz faculty for their many helpful suggestions at my summer brownbag workshop on July 26, 2006, and particularly thank Marc Spindelman for his many helpful suggestions. I would like to thank The Ohio State University for my “Distinguished Scholar” award which helped fund my team of research assistants. I would also like to thank Martha Nussbaum for her invitation to speak about disability theory at the University of Chicago Law & Philosophy Workshop in Fall 2006; that invitation sparked the development of this Article. Finally, I would like to thank the Workshop participants for their engagement with me on this topic.

1 John Rawls’s theory of justice, for example, presumes that society consists of “free and equal persons . . . who can play the role of fully cooperating members.” JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 24 (Erwin Kelly ed., 2001). Further, “we must add to these concepts those used to formulate the powers of reason, inference, and judgment.” *Id.* As Martha Nussbaum points out, Rawls excludes individuals with disabilities from consideration when designing basic political principles. MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* 111 (2006). Similarly, Ravi Malhotra argues that Rawls’s theory suffers from several problems which make it difficult to apply to the disability area. See Ravi A. Malhotra, *Justice as Fairness in Accommodating Workers with Disabilities and Critical Theory: The Limitations of a Rawlsian Framework for Empowering People with Disabilities in Canada*, in *CRITICAL DISABILITY THEORY* 70, 74–83 (Dianne Pothier & Richard Devlin eds., 2006). Norman Daniels applies Rawls’s theory of justice to the disability arena by finding a justification for reasonable accommodations so that we can keep “people with disabilities functioning as close to normally as possi-

pure “integrationist” perspective.<sup>2</sup> Although an integrationist perspective played an important historical and structural role in helping to close some horrendous disability-only institutions, it fails to recognize that the government may need to retain some disability-only services and institutions for those who need or want them while

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ble.” Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA*, in MENTAL DISORDER, WORK DISABILITY AND THE LAW 281, 287 (Richard J. Bonnie & John Monahan eds., 1997). Daniels’s work expands the group of individuals with disabilities who can take advantage of Rawls’s original position but also presupposes an integrationist perspective in measuring equality. Daniels makes a passing reference to the illegitimacy of “Jim Crow or other caste-enforcing laws,” saying they “should be given no moral weight in arguments about social policy.” NORMAN DANIELS, JUST HEALTH CARE 124 (1985). That argument is consistent with my anti-subordination perspective but does not address the integration/segregation dichotomy of this Article.

Douglas Rae mentions individuals with disabilities in passing as part of his “need-based person-regarding” equality theory, but the examples are degrading. See DOUGLAS RAE, EQUALITIES 99 (1981). He says, for example,

Perhaps *no* service could make a crippled child as happy as her healthy friends, but her special needs may nonetheless require special services equal to and different from those of her playmates. Even if a mentally retarded boy will never derive the same utility from schooling that his bright brothers derive from it, schooling equally suited to his needs should still be provided (even if it is more costly than ordinary schooling).

*Id.*

2 For an excellent overview of disability theory, see David Wasserman, *Philosophical Issues in the Definition and Social Response to Disability*, in HANDBOOK OF DISABILITY STUDIES 219 (Gary L. Albrecht et al. eds., 2001). William and Susan Stainback are typical of researchers who justify integrated (or what is often called “inclusive”) education for all children with disabilities. Susan Stainback & William Stainback, *Inclusive Schooling*, in SUPPORT NETWORKS FOR INCLUSIVE SCHOOLING 6–7 (William Stainback & Susan Stainback eds., 1990). They argue: “When a single person, who has not broken any laws, is excluded from the mainstream of school and community life, all of society becomes vulnerable.” *Id.* at 7. This last argument is a conversation stopper because it makes the act of separation evil in itself and requires no justification for integration. In this Article, however, I will argue that it is too simplistic to equate separation and harm; such a claim must be made on a more individualized basis. For similar arguments, see Harold Hongju Koh & Lawrence O. Gostin, *Introduction to THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES* 1, 5 (Stanley S. Herr et al. eds., 2003) (presenting a collection of papers arguing that the core elements of an international civil rights standard on disability should include “such rights as *access* to tools for exercising individual agency; *participation* and *inclusion* in critical decisions that affect the disabled person’s life and future; and freedom for disabled individuals proactively to exercise their rights, both personally and through agents”); ANITA SILVERS ET AL., DISABILITY, DIFFERENCE, DISCRIMINATION 5 (1998) (presenting arguments for the full social participation of individuals with disabilities in society). An exception to this trend is the work of Carlos Ball which proceeds from a communitarian perspective. See Carlos A. Ball, *Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law*, 66 OHIO ST. L.J. 105 (2005).

protecting others from coercively being required to accept such services or being placed in such institutions. An absolutist integrationist perspective disserves the disability community by supporting an inappropriately high threshold for the development and retention of disability-only services and institutions. An anti-subordination perspective<sup>3</sup> should replace it.

An important figure in the development of the integrationist approach was Jacobus tenBroek who in a 1966 article calling for tort reform argued for individuals with disabilities to have “the right to live in the world.”<sup>4</sup> tenBroek penned his passionate plea for “integration-

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3 Twenty years ago, I argued for an anti-subordination perspective for analyzing sex- or race-based claims of discrimination. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–08 (1986) (“Under the anti-subordination perspective, it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole. This approach seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities. From an anti-subordination perspective, both facially differentiating and facially neutral policies are invidious only if they perpetuate racial or sexual hierarchy.”). In that article, I did not consider the example of individuals with disabilities. This Article seeks to apply that framework to individuals with disabilities.

For a thoughtful article that seeks to apply an anti-subordination perspective to the law of disability discrimination, see Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397 (2000) (connecting the concept of disability-based subordination to “stigma,” which he thinks best explains how subordination operates in the lives of individuals with disabilities). Bagenstos considers the concept of subordination to help define the class covered by disability or civil rights legislation and does not address the integration and remedy issue which is central to this Article.

4 See Jacobus tenBroek, *The Right To Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 917 (1966). tenBroek declares that “integrationism,” which he describes as “a policy entitling the disabled to full participation in the life of the community and encouraging and enabling them to do so,” should guide the decisions of legislatures and courts. *Id.* at 843. tenBroek’s passionate argument for integrationism is necessary, in part, because of the failure of basic political principles to include individuals with disabilities. In tenBroek’s words:

However much the courts may instruct juries that the reasonably prudent man is an idealized mortal, possessing human, not superhuman virtues, but no human or subhuman weaknesses or depravities; however often they may repeat that he is an abstraction not to be confused with any identifiable individual, and especially not with a judge or a juror; and however much they may emphasize that he acts in the light of all of the circumstances and that he is physically disabled when the plaintiff is, the jurors are almost entirely able-bodied (blind people are excluded from jury service), and the judge has sound if somewhat aging limbs, fair enough eyesight, and, according to counsel, can hear everything but a good argument. The abstraction they conceive is unavoidably in their image and, in any event, will be applied

ism" at a time when individuals with disabilities were excluded from juries, had few educational opportunities, were disenfranchised, were often housed in inhumane warehouses and had little "right to live in the world."<sup>5</sup> Separation was synonymous with inequality.

Although tenBroek is primarily remembered in the disability field for his integrationist perspective,<sup>6</sup> he also recognized the importance of values other than integrationism. At the end of his path-breaking torts article, he noted that the disability community wanted the

same right to privacy that others do; not only the right to rent a home or an apartment, public or private housing, but the right to live in it; the right to determine their living arrangements, the conduct of their lives; the right to select their mates, raise their families, and receive due protection in the safe and secure exercise of these rights.<sup>7</sup>

"The right to live in the world consists in part of the right to live out of it."<sup>8</sup> He argued for integrationism at a time when forced segregation was the dominant social existence for most individuals with disabilities, but he also recognized the positive role that separation by choice can have in the lives of individuals with disabilities.

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through the filter of their experiences and make-up. Standing on good feet and legs, erect through the strength of taut muscles, peering through eyes approaching or receding from 20/20 visual acuity, the judge or juror, or their personified image, provide the blind, the deaf, the lame, and the otherwise physically disabled with a standard of reasonableness and prudence in the light of all of their circumstances, including some often quite erroneous imaginings about the nature of the particular disability.

*Id.* at 917.

5 *Id.* Another key early figure in fashioning the integrationist approach was Stanley Herr. He argued many of the early cases which sought to provide access to the public school system for children with mental disabilities. See, e.g., *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (requiring that public schools in the District of Columbia cease denying retarded children a "regular public school assignment"). His work is often credited as being a precursor to the standards found in the Education for All Handicapped Children Act of 1975, § 612(5)(B), Pub. L. No. 94-142, 89 Stat. 773, 781 (codified as amended at 20 U.S.C. § 1412(a)(5)(A) (2000)) (requiring children with disabilities to be taught in the regular classroom wherever possible).

6 Jacobus tenBroek was also a noted Fourteenth Amendment scholar. See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

7 tenBroek, *supra* note 4, at 918.

8 *Id.*

Since 1966, at the urging of disability advocates, the law of disability discrimination has developed under the integrationist rubric<sup>9</sup> with insufficient attention to how separateness can have positive benefits. It has conflated inequality and separation by borrowing the race mantra that “[s]eparate . . . [is] inherently unequal.”<sup>10</sup> Hence, special education is considered intrinsically degrading and is disfavored as the mechanism for delivering educational services to children with disabilities.<sup>11</sup> Disability-based institutionalization is considered an inhumane way to deliver health care services.<sup>12</sup> Segregated voting practices for individuals with disabilities are considered to be a denial of basic citizenship rights.<sup>13</sup>

From a historical perspective, the connection between separation and inequality makes sense. Special education was a “dead end” academically that did not seek to prepare children for higher education or well paying careers.<sup>14</sup> Disability institutionalization was a way to hide and degrade individuals with disabilities rather than provide them with treatment.<sup>15</sup> Segregation served to suppress voting behavior by individuals with disabilities in at least two ways: (1) by requiring them to use absentee ballots rather than vote at regular polling places and (2) by disenfranchising them based on their residency at a state facility for mental retardation or insanity.<sup>16</sup> Together, these segregating practices contributed to the subordination of individuals with disabilities in society.

Modern disability legal policy developed as a response to these historical practices of invidious segregation. Federal education law dictated that children with disabilities “to the maximum extent appro-

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9 Mark Weber describes the Americans with Disabilities Act as “a classic integrationist measure.” Mark C. Weber, *Home and Community-Based Services*, Olmstead, and *Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 279 (2004).

10 *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). See generally RICHARD KLUGER, *SIMPLE JUSTICE* (rev. & expanded ed. 2004) (tracing the evolution of the *Brown* strategy from a case by case demonstration of inequality stemming from segregation to a critique of segregation itself).

11 See *infra* notes 61–72 and accompanying text.

12 See *infra* Part II.A.

13 See *infra* Part III.B.

14 See *infra* Part I.A.

15 See *infra* notes 97–101 and accompanying text.

16 See *infra* Part III.A. Today, we would not use the terms “mental retardation” or “insanity.” Instead, we refer to categories such as intellectual and developmental disabilities. This Article, however, uses these terms as they reflect the language of the legislatures and courts who have considered these issues.

priate” should be educated “with children who are not disabled.”<sup>17</sup> The Supreme Court interpreted federal antidiscrimination law to require states to seek to provide living assistance to individuals with severe disabilities in a home rather than disability-only institution.<sup>18</sup> Federal voting law required each state to have at least one accessible machine in each polling place by 2006 so that individuals with disabilities could vote independently and privately with the rest of the public.<sup>19</sup>

Although each of these policies can be justified historically as a necessary structural remedy to protect against invidious discrimination, they also reflect an unsophisticated connection between separation and inequality. Separation need not result in inequality if it is accompanied by adequate services and positive recognition; it need not be the equivalent of invidious segregation. Hence, today, some parents are *seeking* to have their children labeled as “learning disabled” to obtain special education resources.<sup>20</sup> Other parents are *criticizing* state attempts to close disability-only institutions because they believe those institutions may be the most appropriate place for their children to receive needed health care services.<sup>21</sup> Some voting rights advocates are encouraging states to develop mechanisms so that *all voters* can vote in the privacy of their homes rather than consider voting to be a public act of citizenship where accessible polling places would be required.<sup>22</sup> An anti-subordination theory of equality could recognize the validity of these claims as well as the continued possibility of invidious segregation. Anti-subordination<sup>23</sup> rather than integration should be the measure of equality.

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17 Individuals with Disabilities Education Improvement Act of 2004, § 101, 20 U.S.C. § 1412(a)(5)(A) (Supp. IV 2004). For further discussion, see *infra* Part I.B.

18 *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999). For further discussion, see *infra* notes 156–65 and accompanying text.

19 Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (Supp. IV 2004). For further discussion, see *infra* Part III.B.

20 See *infra* text accompanying notes 256–60.

21 See *infra* Part IV.B.

22 See *infra* Part IV.C.

23 This Article does not seek to provide a universalistic definition of “anti-subordination” that can be applied to all claims of inequality by groups in society. Rather, this Article presumes that under any definition of subordination, individuals with disabilities qualify as having experienced subordination by the dominant power structure in society. As Parts I.A, II.A, and III.A will recount, individuals with disabilities have been coercively institutionalized, denied an opportunity to receive an education, and denied the right to vote. They are among the poorest members of society with an estimated unemployment rate of eighty percent. Whether we define subordination on the basis of economic inequality, stigma, or a basic denial of the right to participate in political institutions, individuals with disabilities would meet those criteria.

This Article will examine the connection between separation and inequality in the disability context with special emphasis on how the racial civil rights movement influenced the development of disability theory and practice. Part I will discuss special education, Part II will discuss health care institutionalization and Part III will discuss voting. It will demonstrate that governmental entities created and funded disability-only educational and health care institutions in the late eighteenth century, in part, out of a humane desire to provide assistance to individuals with severe disabilities. Nonetheless, these institutions became severely overcrowded, underfunded and inhumane by the middle of the nineteenth century as public attitudes towards individuals with disabilities became more negative. The disenfranchisement of individuals with disabilities was connected to the increasingly negative attitude towards individuals with disabilities that emerged as compulsory public education and an emphasis on literacy increased during the early nineteenth century. The disability rights movement arose in response to these deplorable conditions with the argument that separation is inherently unequal. The borrowing of the *Brown v. Board of Education*<sup>24</sup> formulation of equality<sup>25</sup> made sense because of the historical connection between invidious race and disability segregation. Disability segregation was a mechanism to degrade disfavored groups in society including individuals with disabilities, immigrants and racial minorities. Part IV will conclude that policy makers need to develop an approach that recognizes the history of overt disability-

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Others can seek to develop universalistic criteria for determining which groups in society have faced subordination and are therefore entitled to protective legal measures to redress their history of subordination. See generally NUSSBAUM, *supra* note 1, at 111–19 (2006) (criticizing Rawls for excluding the disabled from playing any role in his social contract theory); JOHN RAWLS, *A THEORY OF JUSTICE* 65–73 (rev. ed. 1999) (proposing principles of justice to benefit the least well-off members of society); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* 10 (1985) (arguing that the characteristics of goods are independent of the characteristics—“able-bodied or crippled”—of their owner); Ronald Dworkin, *What is Equality?*, 10 *PHIL. & PUB. AFF.* 283, 296–99 (1981) (discussing the response to disability in the insurance industry).

24 347 U.S. 483 (1954).

25 In *Brown*, the Supreme Court held that “[s]eparate educational facilities are inherently unequal.” The Court then followed the *Brown* decision with a series of summary opinions which extended its holding beyond the context of education. See, e.g., *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (public bathhouses and beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (municipal golf course); *Gayle v. Browder*, 352 U.S. 903 (1956) (city buses); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (municipal parks and golf courses). The Court offered no explanation for these decisions but, implicitly, it extended the concept that separate “educational” facilities are inherently unequal to the concept that any separate facility or service is inherently unequal.

based discrimination through invidious segregation while also leaving room for modern approaches to the delivery of separate services and maintenance of some disability-only institutions for individuals with disabilities that are not premised on an intention to demean and degrade. The concept that “separate is inherently unequal” has outlived its usefulness in the disability context.

Moving beyond the mantra “separate is inherently unequal” is challenging because a tension exists between using broad structural remedies to eliminate degrading disability-only services and institutions while also retaining effective disability-only services and institutions for those who need or desire them. States do not want to retain expensive disability-only institutions if they are going to be underpopulated.<sup>26</sup> It is hard to strike a balance between a state’s fiscal concerns—which may result in coercive overpopulation and overuse of disability-only institutions and services—and the needs of some individuals for such institutions and services.

In trying to resolve this tension, history can offer some important lessons. States initially offered no services for individuals with disabilities and, during times of fiscal austerity, tried to eliminate the few special programs and institutions that existed for individuals with disabilities. The movement towards integration on the part of the states was motivated, in part, by a desire to save money rather than a desire to improve the lives of individuals with disabilities.<sup>27</sup> Support

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26 On a per person basis, it is considered less expensive to educate children in mainstream classrooms or provide health care services to people in community settings than to maintain disability-only institutions. If *some* people need disability-only institutions, then states are faced with high fixed costs to retain those institutions. Hence, the integrationist perspective puts pressure on the states to close all disability-only institutions, leaving no safety net for those who need or desire such institutions. See *infra* note 63 and accompanying text.

27 Even today, arguments for integration (or community placement) often contain subtle suggestions that integration would be cheaper for the state than institutionalization. See, e.g., JAMES W. CONROY ET AL., CTR. FOR OUTCOME ANALYSIS, INITIAL OUTCOMES OF COMMUNITY PLACEMENT FOR THE PEOPLE WHO MOVED FROM THE STOCKLEY CENTER 47–48 (2003), available at <http://www.dhss.delaware.gov/dhss/ddd/files/conroyrep.pdf> (“In practically all prior studies, including more than 200 ‘independent assessments’ of Medicaid Waivers, community costs have been found to be lower than public institutional costs, even for the same or comparable people. . . . Only through proper tracking of costs will the State be aware of the money that could possibly be saved, and spent more wisely, in the community. This kind of evidence will become crucial for development of public policy, as the pressures for full implementation of Olmstead mandates increase.”); Michael J. Head & James W. Conroy, *Outcomes of Self-Determination in Michigan: Quality and Costs*, in COSTS AND OUTCOMES OF COMMUNITY SERVICES FOR PEOPLE WITH INTELLECTUAL DISABILITIES 219, 232–34 (Roger J. Stancliffe & K. Charlie Lakin eds., 2005) (concluding that public costs do not

for integration has not always accompanied support for genuine equality as measured by the principle of anti-subordination. Disability rights advocates need to recognize that integration is not inherently beneficial, as separation is not inherently degrading. They need to support disability-only services and institutions that are available to those who need or desire them<sup>28</sup> while also creating safeguards to prevent some people from being inappropriately coerced into entering disability-only institutions, particularly residential institutions, for the sole purpose of making them financially viable for others. If tenBroek were alive today, he might be willing to measure progress towards equality through the principle of anti-subordination rather than integration.<sup>29</sup>

## I. SPECIAL EDUCATION

### A. History

Until the nineteenth century, most individuals with disabilities received no education whatsoever, because they were feared and

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increase when service recipients obtain control over resources and move towards community placements).

28 Some parents have argued that the integration movement threatens the special education programs that have benefited their children. See, e.g., Margaret N. Carr, *A Mother's Thoughts on Inclusion*, in *THE ILLUSION OF FULL INCLUSION* 263, 265–57 (James M. Kauffman & Daniel P. Hallahan eds., 1995).

29 To be clear, I am *not* suggesting that we should develop an anti-integration perspective. Integration is frequently a useful remedy for individuals with disabilities who face claims of discrimination. For example, children with vision or mobility impairments have historically been excluded from the regular classroom. See *infra* Part I.A. In most cases, there is no justification for such exclusion. They should be educated with typically developing children. But we do not need an integration presumption to attain that result because there are few, if any, arguments for why these children would not do better in a mainstream rather than special education classroom. By contrast, the evidence with respect to children with cognitive and mental impairments is more mixed. I argue that we can only determine the most appropriate classroom configuration for those children on an individual basis, taking into account their specific needs and abilities. An integration presumption inappropriately tips the balance towards a mainstream classroom for such children. I simply suggest that we should be more agnostic about the correct remedy as we examine the information available for any specific child. I discuss the available empirical data for children with cognitive and mental impairments in a prior article, and do not repeat those arguments in this Article. See Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 825–35 (2006). In this Article, I simply attempt to expose the widespread use of the integration presumption and how it causes parents, policymakers, and courts to reach conclusions that might not be supported by the evidence of what practices are most likely to redress a history of subordinating practices.

shunned by society.<sup>30</sup> Thomas Hopkins Gallaudet was among the earliest American reformers to argue for the education of individuals who are deaf. He helped found the Connecticut Asylum for the Education and Instruction of Deaf and Dumb Persons in Hartford, Connecticut in 1817.<sup>31</sup> Samuel Gridley Howe played a similar role in Massachusetts, helping to found the Massachusetts Asylum for the Blind in 1832 and the Massachusetts Asylum for Idiotic and Feeble-Minded Youth in 1848.<sup>32</sup> Howe argued that such institutions should be considered part of the public school system.<sup>33</sup> Both Gallaudet and Howe had to overcome enormous barriers even to suggest that individuals with disabilities should be educated.<sup>34</sup> These schools were residential facilities which did not seek to educate children who used wheelchairs, who were not toilet-trained or who were considered uneducable.<sup>35</sup> Thus, they served a small subsection of the disability community.

Gallaudet and Howe had humanitarian reasons for seeking to create separate residential facilities for individuals who were deaf, blind or mentally disabled. By the early 1900s, however, such institutions became much more problematic. Attitudes towards disability became more negative “with the disabled facing near as much ostracism, contempt, and misunderstanding as ever.”<sup>36</sup>

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30 ROBERT L. OSGOOD, *THE HISTORY OF INCLUSION IN THE UNITED STATES* 18 (2005) (“patterns of response grounded in fear, suspicion, contempt, and cruelty”). One of the earliest cases affirming this principle is *Watson v. City of Cambridge*, 32 N.E. 864, 864–65 (Mass. 1893) (permitting exclusion of a child who is “weak in mind” from public schools). That principle was approved as recently as 1958. See *Dep’t of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958) (finding no right to public education for the “feeble minded”).

31 See SCOTT B. SIGMON, *RADICAL ANALYSIS OF SPECIAL EDUCATION* 21 (1987).

32 *Id.* at 23.

33 OSGOOD, *supra* note 30, at 21.

34 See generally *id.* at 21 (indicating that educational institutions for the disabled came “into being amid intense scrutiny and skepticism on the part of the public”).

35 SIGMON, *supra* note 31, at 22.

36 OSGOOD, *supra* note 30, at 22. A case from 1919 reflects this ostracism. *State ex rel. Beattie v. Bd. of Educ.*, 172 N.W. 153 (Wis. 1919). Merritt Beattie, who was paralyzed at birth, was educated in the public schools until the fifth grade. The record indicates that he was “normal mentally” and “kept pace with the other pupils.” *Id.* at 153. Nonetheless, after a visit to the school by a representative of the state department of public instruction, he was excluded from the regular public schools. The school district’s rationale for the exclusion was that

[H]is physical condition and ailment produces a depressing and nauseating effect upon the teachers and school children; that by reason of his physical condition he takes up an undue portion of the teacher’s time and attention,

In addition to separate residential facilities for children with hearing, sight or intellectual disabilities, states also began to experience children with disabilities in nonresidential public school classrooms beginning in the late 1800s.<sup>37</sup> They began to develop segregated education classrooms at this time. The development of special education classrooms must be understood in relationship to the development of compulsory education<sup>38</sup> and hostility to immigrants.<sup>39</sup>

The compulsory education movement increased class size in regular public school classes and put pressure on the public school system to discard the undesirables (which included the disabled and immigrants) by dumping them into special education classrooms. Large public schools began to exist in urban areas in the United States in the early 1800s. These classes often had eighty or ninety students. In the second half of the century, schools instituted grade placement where students were assigned according to their chronological age but differed dramatically with respect to background, interests, skills, abilities, and preparation.<sup>40</sup> Faced with broad discrepancies among students in the classroom, teachers began to request "segregated settings for children who were different, uncooperative, or unsuccessful in school."<sup>41</sup> School districts developed generic ungraded classes for these children which were "dumping grounds."<sup>42</sup> The primary population for these generic ungraded classes was immigrants, although the developing interest in intelligence testing also gave rise to the classification of many of these immigrants as in the "moron" range of intelligence.<sup>43</sup> Thus, educational segregation was a mechanism to remove undesirables from the regular classroom rather than offer them high quality education.

Meanwhile, school districts also began to open some day schools for subcategories of individuals with disabilities—primarily students who were deaf or mentally retarded.<sup>44</sup> By 1932, 75,000 children with

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distracts the attention of other pupils, and interferes generally with the discipline and progress of the school.

*Id.*

37 SIGMON, *supra* note 31, at 22.

38 Compulsory education laws were enacted in each state between 1852 and 1918.

*See id.* at 20.

39 *Id.*

40 OSOOD, *supra* note 30, at 22-25.

41 *Id.* at 24.

42 *Id.*

43 *Id.* at 25.

44 SIGMON, *supra* note 31, at 21.

mental retardation were being educated in special classes. Ironically, the category of mental retardation received little attention until compulsory education raised the literacy rate; children who had trouble learning to read then became more apparent.<sup>45</sup> The rise of the mental retardation category put pressure on the need to create a formal identification process. Students classified as mentally retarded were typically male immigrants of all races.<sup>46</sup>

Justifications for segregation of these various populations in the late nineteenth and early twentieth centuries into separate schools in urban school districts were: (1) that separate schools benefited "normal" students by removing disruptive elements and (2) that segregated settings benefited children with disabilities because they would be surrounded by "mutual understanding, helpfulness and sympathy."<sup>47</sup> Special schools arose from a mixture of bureaucratic interest in controlling the classroom and a humanitarian interest in developing appropriate educational programs for children with a wide variety of disabilities.<sup>48</sup> Special schools were largely an urban phenomenon; rural school districts with one room schoolhouses typically sought to exclude or expel children who were problematic.<sup>49</sup>

The movement towards special classes in public day schools or separate disability-only institutions, however, declined from 1930 to 1940 due to financial pressures.<sup>50</sup> Children with mental retardation returned to the regular classrooms where little learning took place. Parents pushed for the resurrection of special classes after World War II and were pleased with the return to that educational alternative.<sup>51</sup> By 1948, more than 439,000 children were educated in special settings; those numbers increased by forty-seven percent between 1948 and 1953.<sup>52</sup> Although separation was the primary method of educating children with disabilities, some parents and practitioners began expressing concern about separation in the 1940s and 1950s. As early as 1945, the International Council for Exceptional Children held a panel entitled "Segregation versus Non-Segregation of Exceptional

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45 *Id.* Similarly, a focus on "intelligence" has been historically a mechanism to limit the franchise. See *Dunn v. Blumstein*, 405 U.S. 330, 356 (1972) ("[T]he criterion of 'intelligent' voting is an elusive one, and susceptible of abuse.").

46 OSGOOD, *supra* note 30, at 26-27.

47 *Id.* at 28 (quoting J.E. WALLACE WALLIN, *THE EDUCATION OF HANDICAPPED CHILDREN* 94-97 (1924)).

48 *Id.* at 31.

49 *Id.* at 32-33.

50 *Id.* at 37-38.

51 See SIGMON, *supra* note 31, at 22.

52 OSGOOD, *supra* note 30, at 42.

Children.”<sup>53</sup> Efficacy studies were conducted to determine which educational configuration made the most sense for children with mild mental retardation.<sup>54</sup> The dominant view continued to support segregation. Studies suggested that disabled children suffered rejection and isolation in mainstream classrooms. “Such rejection, it was thought, underscored the judgment that physical proximity did not necessarily lead to true integration, nor did a primarily separate setting condemn an exceptional child to permanent isolation.”<sup>55</sup> Arthur S. Hill, education director of United Cerebral Palsy and an associate editor of the journal *Exceptional Children*, criticized the pursuit of integration as the “pursuit of a ‘cliché’ for its own sake.”<sup>56</sup> His sharp critique of integration responded to an emerging mainstreaming movement.

In addition to separate schooling for children with disabilities, more residential institutions began to emerge during the 1950s. In fact, seventy-five percent of the residential institutions that served individuals with disabilities that existed in 1970 had been built since 1950.<sup>57</sup> These institutions varied widely with respect to how much education occurred within their walls. “[T]he wide range of ages and severity of disabilities made provision of formal schooling problematic, and the educational functions of each became clouded by the institutions’ multiple roles as school, hospital, penal institution, and warehouse.”<sup>58</sup> Although this construction boom was supposed to alleviate serious overcrowding problems, those problems persisted in the 1970s.<sup>59</sup>

Until 1967, state and federal legislation did not focus on placing children with disabilities in the regular classroom.<sup>60</sup> The focus was on creating universal and compulsory educational opportunities for children with disabilities. Disability advocates considered integration to be a less expensive and less satisfactory option than special schools or classrooms.

In the 1960s and 1970s, educators began to publish articles questioning the effectiveness of self-contained schools and special educa-

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53 *Id.* at 44.

54 *Id.* at 47.

55 *Id.* at 51.

56 *Id.* at 53.

57 *Id.* at 54–55.

58 *Id.* at 55.

59 *Id.*

60 SIGMON, *supra* note 31, at 24.

tion classes.<sup>61</sup> Their work laid the foundation for the concept of "least restrictive alternative"—that children should be educated in the most integrated setting possible.<sup>62</sup> The proponents of integration presented evidence that special schools and separate classrooms did not necessarily achieve better outcomes than regular classrooms with appropriate support. Further, as one proponent of integration has noted:

[N]ot all of those jumping on the mainstreaming bandwagon are doing so for solely egalitarian reasons. The total per capita annual expenditure is considerably less for a nonclassified student, and in this sense, mainstreaming saves money. So in this political era of fiscal austerity, the concept of mainstreaming is welcomed by many.<sup>63</sup>

The disability rights movement, in some sense, became strange bedfellows with school districts that sought a less expensive way to educate children with disabilities. Motivations other than anti-subordination spurred some school districts to adopt integration for children with disabilities.

The racial civil rights movement also influenced the disability movement towards integration. Educators began to argue that there were parallels between the treatment of African-Americans and individuals with disabilities, and that integration was necessary to eliminate negative stereotypes.<sup>64</sup> Increased attention to disability, especially mental retardation, arose during John F. Kennedy's presidency, particularly because of his personal family experience with

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61 *Id.* at 27-28; see also OSGOOD, *supra* note 30, at 78-84 (discussing critiques of special education).

62 See *Welsch v. Likins*, 550 F.2d 1122, 1125 (8th Cir. 1977) (at the time, the concept was referred to as "least restrictive environment").

63 SIGMON, *supra* note 31, at 32. In fact, one of the most well known critiques of the effectiveness of special education identified monetary concerns as one problem with special education. G. Orville Johnson argued:

It is indeed paradoxical that mentally handicapped children having teachers especially trained, having more money (per capita) spent on their education, and being enrolled in classes with fewer children and a program designed to provide for their unique needs, should be accomplishing the objectives of their education at the same or at a lower level than similar mentally handicapped children who have not had these advantages and have been forced to remain in the regular grades.

OSGOOD, *supra* note 30, at 80 (quoting Orville Johnson, *Special Education for the Mentally Handicapped—A Paradox*, 29 EXCEPTIONAL CHILD. 62, 65-66 (1962)).

64 OSGOOD, *supra* note 30, at 60-61.

mental retardation.<sup>65</sup> Federal funding became available to the states to support special education.

Further, disability advocates began to identify the horrific nature of many of the residential institutions for school-age children with disabilities. The number of children enrolled in such institutions rose from 40,000 in 1958 to 127,000 in 1966.<sup>66</sup> Investigations during the 1960s revealed that many of these institutions were deplorable and offered little or no education to children.<sup>67</sup> The "normalization" or deinstitutionalization movement sought to move these individuals out of disability-only institutions.<sup>68</sup>

Although the movement toward normalization and deinstitutionalization reached its initial impetus on behalf of individuals who were mentally retarded and who lived in institutional settings, it soon spread to concerns about other categories of disability and to children who received special education outside of the residential institutional setting. In the 1970s, the prevailing view, even among those who ardently argued for integration of children with mild mental retardation, was that children with severe disabilities should be educated in nonresidential special education programs.<sup>69</sup> The National Association for Retarded Citizens supported a continuum approach under which nonresidential separate education would play an important role.<sup>70</sup> Nonetheless, the continuum approach took a backseat to a presumption that children should be educated in the most integrated environment possible. Lloyd Dunn's article on the benefits of integrated education for children with mild mental retardation<sup>71</sup> was used to support an integration presumption for all children with disabilities, although Dunn himself supported special education for children with more severe disabilities.<sup>72</sup>

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65 *Id.* at 64–66 (noting that Kennedy's sister Rosemary was identified as mentally retarded).

66 *Id.* at 67.

67 *Id.*

68 "[T]he normalization principle means making available to all mentally retarded people patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society." *Id.* at 94 (quoting Doug Fuchs & Lynne Fuchs, *Evaluation of the Adaptive Learning Environments Model*, 55 *EXCEPTIONAL CHILD*. 155 (1988)).

69 *Id.* at 96–97.

70 *Id.* at 98.

71 See Lloyd Dunn, *Special Education for the Mildly Retarded: Is Much of It Justifiable?*, 35 *EXCEPTIONAL CHILD*. 5 (1968).

72 *Id.* at 6 ("We are not arguing that we do away with our special education programs for the moderately and severely retarded, for other types of more handicapped children, or for the multiply handicapped. The emphasis is on doing something bet-

This brief history of special education reflects that it went through many stages of development. Initially, children with disabilities were excluded entirely from the school system. Then, humanitarian reformers supported the creation of residential institutions for subcategories of individuals with disabilities. These humanitarian impulses were soon co-opted by those who wanted to separate out the "undesirables," including immigrants as well as individuals with disabilities. These institutions became dumping grounds or warehouses for society's outcasts. During a period of fiscal austerity in the 1930s, some children with mental retardation were returned to the regular classroom with negative results. Parents then pushed for the development of well funded disability institutions in the 1950s as the United States recovered financially. Parallel to the development of disability-only institutions was the development of special education classes. This mode of education for children with disabilities was popular until the 1970s when the separate nature of these programs was called into question. The legal discourse soon moved to an integration presumption even though many educators, in fact, called for a continuum of programs and services for individuals with disabilities.

Advocates for children with disabilities have been able to find many examples of abuse during this period. Many disability-only institutions were substandard warehouses. Many special classrooms for individuals with disabilities did not do an effective job. Nonetheless, children with disabilities who were integrated into the regular classroom did not always fare well due to negative attitudes and inadequate support. Every alternative has been problematic. As we will see in the next subpart, success in the education area has been measured by the extent to which children are educated in the most integrated setting possible rather than by whether they have received the most effective education possible.

### B. *Legal Developments*

The law of special education and race discrimination in education have been closely connected, strengthening the tendency for the disability rights movement to focus on the "separate is inherently une-

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ter for slow learning children who live in slum conditions, although much of what is said should also have relevance for those children who are labeling [sic] emotionally disturbed, perceptually impaired, brain injured, and learning disordered. Furthermore, the emphasis of the article is on children, in that no attempt is made to suggest an adequate high school environment for adolescents still functioning as slow learners."). For further discussion, see OSGOOD, *supra* note 30, at 80-84, 96-98; Colker, *supra* note 29, at 825-35.

qual” argument. This is particularly true for students who are labeled as “mentally retarded” and placed in special education rather than the regular classroom. In 1967, Judge Skelly Wright authored an opinion for the United States District Court for the District of Columbia in which he concluded that ability tracking was a mechanism to maintain de facto segregation after de jure segregation was ended in D.C. public schools.<sup>73</sup> He concluded that the tracking system was “tainted” by race discrimination because “of all the possible forms of ability grouping, the one that won acceptance in the District was the one that—with the exception of completely separate schools—involves the greatest amount of physical separation by grouping students in wholly distinct, homogeneous curriculum levels.”<sup>74</sup> Throughout the opinion, Judge Wright refers to “retarded” students who are assigned to the lowest tracking level so that they can be placed with a curriculum that they can understand.<sup>75</sup> This track was called “special academic” and was for students who had “emotionally disturbed behavior, an IQ of 75 or below, and substandard performance on achievement tests.”<sup>76</sup> Originally, placement in this track was mandatory for qualifying students; over time, it became possible only with parental consent. Judge Wright was very critical of the implementation of this tracking system. He found that the methodology used to place children in the lowest track was culturally biased and that assignments in early grades tended to be permanent and offered students no opportunity to take classes outside of their track. Further, the special academic track was supposed to offer students remedial education, yet he found that little remedial education was available in that track. Hence, the effect of being subjectively placed in the lowest track was to consign poor and African-American students to a low-skill vocational track.<sup>77</sup> His hundred page opinion was a ringing indictment of the relationship between ability tracking and racial segregation.<sup>78</sup>

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73 *Hobson v. Hansen*, 269 F. Supp. 401, 513 (D.D.C. 1967).

74 *Id.* at 443.

75 *See, e.g., id.* at 444.

76 *Id.* at 448.

77 *Id.* at 512–13.

78 Similar litigation was brought in Georgia, but the court did not find that the disproportionate placement of African-American children in the educable mentally retarded category violated federal law. *See* Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1412–13 (11th Cir. 1985). Similarly, in more recent litigation, a Georgia district court found that ability tracking, even though it resulted in racially disparate results, did not violate federal law or the Constitution. *See* Thomas County Branch of the NAACP v. City of Thomasville Sch. Dist., 299 F. Supp. 2d 1340, 1358–59 (M.D. Ga. 2004), *aff'd in part, rev'd in part sub nom.* Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325 (11th Cir. 2005). On appeal, however,

Subsequent litigation in D.C. focused on the failure of the public schools to provide any education to a subclass of children with disabilities—those with mental or cognitive impairments.<sup>79</sup> Some of these children were never allowed to enroll in the public school system; others were suspended or expelled after they enrolled. Each of the named plaintiffs was African-American.<sup>80</sup> Hence, disability status and race were commingled, as with the lawsuit challenging tracking.<sup>81</sup>

Lawsuits in other states challenged both exclusion and tracking. One of the earliest lawsuits challenging exclusion was brought in Pennsylvania.<sup>82</sup> The lawsuit was brought by the parents of thirteen children with mental retardation, alleging that they were excluded from the educational system. Under Pennsylvania law, children could be excluded from the state's compulsory education law if they were deemed "uneducable and untrainable" or had not attained a mental age of five years.<sup>83</sup> The case resulted in a consent decree under which the state agreed to provide all mentally retarded children with a free public education.<sup>84</sup> The parents wanted their children to receive a free public education; some of these parents had paid for their children to attend a private residential school during the pendency of the litigation. The focus of this litigation was ending the practice of exclusion rather than creating integrated education within the regular classroom<sup>85</sup> yet the consent decree included the presumption that "placement in a regular public school class is preferable to placement in a special public school class."<sup>86</sup>

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the Eleventh Circuit reversed, finding that the district court had failed to determine whether the placements were "based on present results of past segregation." *Holton*, 425 F.3d at 1346.

79 See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874 (D.D.C. 1972).

80 *Id.* at 870.

81 From a social science perspective, Lloyd Dunn's important critique of special education also recognized the relationship between race and special education tracking. See Dunn, *supra* note 71, at 6 ("In my best judgment, about 60 to 80 percent of the pupils taught by these teachers are children from low status backgrounds . . . . This expensive proliferation of self contained special schools and classes raises serious educational and civil rights issues which must be squarely faced. It is my thesis that we must stop labeling these deprived children as mentally retarded. Furthermore, we must stop segregating them by placing them into our allegedly special programs.")

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

83 *Id.* at 282-83.

84 *Id.* at 288.

85 *Id.* at 297 ("Plaintiffs do not challenge the separation of special classes for retarded children from regular classes or the proper assignment of retarded children to special classes.")

86 *Id.* at 307.

Similar lawsuits were brought elsewhere. Unlike the Pennsylvania case, these cases also alleged racial bias in the placement of children in the mentally retarded category.<sup>87</sup> In 1971, six African-American children in California filed suit challenging as unconstitutional the use of standardized intelligence tests for the placement of children in classes for the “educable mentally retarded.”<sup>88</sup> Although their case began as one brought under the Constitution, it soon expanded to include allegations of violations of race-based and disability-based federal statutes.<sup>89</sup>

As in the earlier D.C. litigation, the case provided strong evidence of how the separate, special education program was used to remove African-Americans from the regular classroom through the mentally retarded label. There were three categories of children in this school system: typical children, the “educable mentally retarded” and the “trainable mentally retarded.”<sup>90</sup> African-Americans were statistically overrepresented in the “educable mentally retarded” category but not in the “trainable mentally retarded” category. If genetic or socio-economic factors caused African-Americans, in general, to have lower IQ scores than whites, then one would have expected African-Americans

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87 Overrepresentation of African-Americans in special education continues today. See generally Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms To Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005) (arguing that the Individuals with Disabilities Education Improvement Act of 2004 is a necessary, though not sufficient, step in addressing the overrepresentation of African-Americans in special education programs); Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407 (2001) (advocating a combination of Title VI and disability law to combat overrepresentation of African-Americans in special education programs).

88 *Larry P. v. Riles*, 343 F. Supp. 1306, 1307 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974); see also *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd in part, rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (expanding claims in earlier litigation and reaching a decision on the merits in favor of Larry P.). Similar litigation was brought in Chicago. *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831, 833 (N.D. Ill. 1980). This litigation was unsuccessful; disagreeing with the result in *Larry P.*, 495 F. Supp. 926, the court concluded that the tests were not culturally biased and did not discriminate against African-American children. *Hannon*, 506 F. Supp. at 882.

89 See *Larry P.*, 495 F. Supp. at 978–79. The intervening Supreme Court decision in *Washington v. Davis*, 426 U.S. 229, 239 (1976), in which the Court concluded that disparate impact alone did not demonstrate a constitutional violation, put pressure on statutory approaches to disparate impact arguments in the special education context. Ultimately, the *Larry P.* court concluded that federal law, but not the Fourteenth Amendment, was violated by the disproportionate enrollment of African-American children in classes for the “educable mentally retarded.” See *Larry P.*, 793 F.2d at 984.

90 See CAL. EDUC. CODE § 56515 (West 1978) (repealed 1980).

to be disproportionately represented in *both* of the below average IQ categories.<sup>91</sup> Instead, the evidence strongly suggested that the educable mentally retarded category was used to take African-Americans out of the regular classroom. The separate classrooms for the educable mentally retarded were described as “dead-end” classes which did *not* try to teach these children the regular curriculum or prepare them to re-enter mainstream classes.<sup>92</sup>

These cases brought attention to two problems: (1) the misidentification of some children as mentally retarded and (2) the inadequate education made available to those who were identified as mentally retarded. Initially, the courts focused on the first problem. Schools that had a racial disparity in placement in the classes for children with mental retardation were required to devise a remedial plan to equalize placements.<sup>93</sup> So long as the appropriate racial balance existed, California could maintain its system of “dead-end” classes for children with mental retardation.

This misidentification focus continues today.<sup>94</sup> Schools are required to keep program data by race, ethnicity and limited English proficiency status, gender, and disability categories<sup>95</sup> so that the government, as well as plaintiffs, can ascertain whether certain groups are disproportionately represented in certain disability categories or certain types of education programs. The assumption underlying this misidentification problem is that special education programs are inferior programs where children should not be educated unless they are genuinely mentally retarded. Separation is equated with invidious segregation. The concept that “separate is inherently unequal” has passed back and forth between disability and race-based civil rights cases because of the historical connection between special education and racial segregation in the mental retardation context.<sup>96</sup>

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91 See *Larry P.*, 793 F.2d at 976.

92 *Id.* at 980.

93 *Id.* at 984.

94 For a recent case involving this issue, see *Lee v. Butler County Board of Education*, No. CIV.A.70-T-3099-N, 2000 WL 33680483, at \*3 (M.D. Ala. Aug. 30, 2000) (continuing to monitor overrepresentation of African-American children in the mental retardation and emotional disturbance categories and underrepresentation in the specific learning disabilities and gifted and talented special education classifications).

95 20 U.S.C. § 1418 (Supp. IV 2004).

96 There is far less litigation under the IDEA involving other disability categories on the integration issue, although the IDEA covers all children with a disability that affects their ability to learn. The integration/segregation issue mostly arises in the context of children with mental retardation or emotional impairments including autism. Neither schools nor parents will typically disagree about whether a child with a mobility impairment or visual impairment should be educated outside the regular

## II. HEALTH CARE INSTITUTIONALIZATION

### A. History

Although disability-only institutions for the mentally ill were horrific by the 1950s, their origins were more benign. In the late eighteenth and early nineteenth centuries, some disability rights advocates were pleased to persuade lawmakers to allocate funds for the construction of public psychiatric hospitals.<sup>97</sup> They considered these institutions to be a better option than the streets, almshouses, or jails.<sup>98</sup> But others sought to create these institutions as a way to confine and reform a “defective” population. “The physical design of the asylum was shaped by the portrayal of lunacy as inconvenient at best, and contagious at worst.”<sup>99</sup>

Until 1880, some of these institutions emphasized humane care and were not overcrowded. Between 1880 and 1955, however, the psychiatric population grew thirteenfold. “Hospitals that had originally been built as humane asylums had become on the best of days merely human warehouses. On the difficult days, they became much worse than that.”<sup>100</sup> These institutions began to emphasize incarceration rather than treatment. The philosophy underlying these institutions also became more racist. “By the late nineteenth century, the educational optimism of the founding era succumbed to racial and ethnic mythology, spearheaded by a nativistic fear of the ‘menace of the feebleminded’ and a professional turn to eugenic control.”<sup>101</sup>

Conscientious objectors who had been assigned to work in public hospitals in the 1940s brought the deplorable conditions of these institutions to the public’s attention.<sup>102</sup> A grand jury was convened in Cleveland in 1944 to investigate the conditions at Cleveland State Hospital and reported that it was “shocked beyond words that a so-called civilized society would allow fellow human beings to be mistreated as

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classroom. Children with hearing impairments raise separate issues which will be discussed in Part IV.A.3.

97 See generally E. FULLER TORREY, *OUT OF THE SHADOWS* 81–90 (1997) (describing the difficulties the mentally ill have faced securing adequate treatment in the United States).

98 See *id.* at 81.

99 JOHN G. RICHARDSON, *COMMON, DELINQUENT, AND SPECIAL* 30 (1999).

100 TORREY, *supra* note 97, at 82.

101 RICHARDSON, *supra* note 99, at 33.

102 See TORREY, *supra* note 97, at 82. The 1946 publication of *The Snake Pit* and its 1948 movie version (starring Olivia DeHaviland) stunned many people into learning about the inhumanness and coerciveness of lunatic asylums. See MARY JANE WARD, *THE SNAKE PIT* (1946).

they are at the Cleveland State Hospital.”<sup>103</sup> This kind of evidence spurred the creation of the deinstitutionalization movement. Consequently, the number of patients at Cleveland State Hospital declined from 2200 in 1944 to 140 in 1994.<sup>104</sup>

But deinstitutionalization has not been an overwhelming success. A 1994 report by a Cleveland newspaper found that many mentally ill people were living within the prison system rather than in state mental hospitals—there was an “explosion in the number of mentally ill inmates” because of “repetitive incarceration of nonviolent offenders on scant mental health services in the home counties.”<sup>105</sup> Rather than ending institutionalization, the deinstitutionalization movement resulted in many people being housed in jails rather than state mental institutions. One study found that forty percent of the patients in state hospitals cannot be cared for in the community irrespective of the range of services offered.<sup>106</sup> Nonetheless, public psychiatric hospitals have deinstitutionalized ninety-two percent of their patients. Some strong proponents of the deinstitutionalization movement acknowledge that disability rights advocates have gone too far in expounding deinstitutionalization as the remedy.<sup>107</sup>

Nonetheless, the deinstitutionalization movement did benefit many individuals who had been living in state mental institutions. A study of individuals discharged from a Rhode Island state hospital into well-structured community settings found that “94 percent expressed a preference for life in the community” even though fifty-five percent of people in the study required rehospitalization at least once.<sup>108</sup> A Delaware study which followed the results of individuals moved from an institution for the developmentally disabled into the community noted that the movement of people with developmental disabilities from institution to community has been generally more successful than the movement from institution to community for people with mental illness.<sup>109</sup> The challenge, as described in a 1989 report by the National Institute of Mental Health, is to find the “‘appropriate balance between liberty and paternalism that will maximize individual

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103 TORREY, *supra* note 97, at 83 (quoting ALEX SAREYAN, *THE TURNING POINT* 67 (1994)).

104 *Id.* at 85.

105 *Id.*

106 *Id.* at 87.

107 *See id.* at 86–87.

108 *Id.* at 85.

109 CONROY ET AL., *supra* note 27, at 5–6.

and societal rights to physical safety and well-being.’”<sup>110</sup> An integrationist perspective has measured success on the basis of integration rather than safety and well-being.

Authors who chronicle the deinstitutionalization movement frequently only describe it from an integrationist perspective. For example, David Braddock and Susan Parish provide an excellent description of the deinstitutionalization movement in the *Handbook of Disability Studies*.<sup>111</sup> Yet, they conclude that that movement has not been a complete success because approximately forty-six percent of the funds allocated for disability services and long-term care support individuals in segregated settings.<sup>112</sup> Further, they are critical of the fact that sixty-one percent of students with intellectual disabilities were served in segregated settings in 1996.<sup>113</sup> Similarly, they report the sharp decline in the number of deaf and blind children being educated in residential or special schools.<sup>114</sup> But nowhere do they provide data as to whether individuals receiving services in *modern* disability-only institutions are worse off than individuals receiving services in more integrated settings.<sup>115</sup> An integrationist perspective has shaped research methodology, thereby precluding researchers from asking whether the integration movement has sufficiently protected individuals’ well-being and safety.

### B. Legal Developments

The health care and education desegregation stories have many parallels. In each context, the courts developed case law requiring individuals to be in the most integrated setting possible, as a response to litigation about the horrific nature of disability-only institutions. But, as E. Fuller Torrey has argued, “deinstitutionalization has been a psychiatric *Titanic*” for a “substantial minority. . . . [t]he ‘least restrictive setting’ frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.”<sup>116</sup>

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110 TORREY, *supra* note 97, at 87 (quoting C. Attkisson et al., *Clinical Services Research*, 8 SCHIZOPHRENIA BULL. 561, 605 (1992)).

111 David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, in HANDBOOK OF DISABILITY STUDIES, *supra* note 2, at 11, 45–51.

112 *Id.* at 51.

113 *Id.*

114 *Id.* at 48.

115 They cite one study from England in which women self-reported that education in special schools was detrimental to their growth and independence. *Id.*

116 TORREY, *supra* note 97, at 11.

Ironically, one of the early legal opinions that formed the basis for the deinstitutionalization movement foresaw the problems that might arise under this movement. In *Lake v. Cameron*,<sup>117</sup> the United States Court of Appeals for the District of Columbia Circuit granted habeas corpus relief to plaintiff Catherine Lake, who appeared to suffer from dementia, to determine if an alternative existed to her forced confinement at Saint Elizabeths Hospital.<sup>118</sup> Writing for the majority in an en banc panel, Judge Bazelon remanded the case to the district court for an inquiry into "other alternative courses of treatment"<sup>119</sup> for the plaintiff, such as whether she could be required

to carry an identification card on her person so that the police or others would take her home if she should wander, or whether she should be required to accept public health nursing care, community mental health and day care services, foster care, home health aide services, or whether available welfare payments might finance adequate private care.<sup>120</sup>

In dissent, three judges argued that that kind of inquiry was beyond a court's remedial authority in a habeas corpus proceeding and that a court can merely order her release from the state institution. They then argued that "it would be a piece of unmitigated folly to turn this appellant loose on the streets with or without an identity tag."<sup>121</sup> Nonetheless, Torrey argues that there were 2.2 million Americans with untreated severe mental illnesses in 1995, with 150,000 of them being "homeless, living on the streets or in public shelters" and 159,000 being incarcerated "mostly for crimes committed because they were not being treated."<sup>122</sup>

The challenge for courts in these cases was that the option of keeping people in these institutions was unfathomable. For example, in *Wyatt v. Stickney*,<sup>123</sup> the district court describes the conditions in an Alabama state mental institution six months after defendants were

117 364 F.2d 657 (D.C. Cir. 1966).

118 *Id.* at 661.

119 *Id.*

120 *Id.*

121 *Id.* at 664 (Burger, Danaher & Tamm, JJ., dissenting).

122 TORREY, *supra* note 97, at 3. Interestingly, one of the early institutionalization cases involved the relationship between the prison system and state mental hospitals. At age eighteen, Charles Rouse was acquitted by reason of insanity of the misdemeanor charge of carrying a weapon without a license. Five years later, he brought a successful habeas corpus action in which he argued that he had never consented to the insanity defense and should be released from the state mental hospital. He prevailed on this argument. *Rouse v. Cameron*, 387 F.2d 241, 245 (D.C. Cir. 1967).

123 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd in part, rev'd in part*, 503 F.2d 1305 (5th Cir. 1974).

required to institute improvements, and those conditions were unquestionably inhumane. The plaintiffs were housed in unsanitary, dangerous living conditions where fifty cents per day was spent on their food, and virtually no medical treatment was offered to the patients.<sup>124</sup> On appeal, Judge Wisdom recounts the conditions in graphic terms. "The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients; testimony established that four Partlow residents died due to understaffing, lack of supervision, and brutality."<sup>125</sup>

One of the four died after a garden hose had been inserted in his rectum for five minutes by a working patient who was cleaning him; one died when a fellow patient hosed him with scalding water; another died when soapy water was forced into his mouth; and a fourth died from a self-administered overdose of drugs which had been inadequately secured.<sup>126</sup>

The most challenging issue in the *Wyatt* litigation was the appropriate remedy. Unlike the *Lake* case, the plaintiffs did not seek relief under habeas corpus—the right to be released from the facility. Instead, they sought to require the state to establish a "constitutionally acceptable minimum treatment program."<sup>127</sup> The state's obligation to provide that basic level of service apparently stemmed from the fact that "the state has involuntarily confined" the plaintiffs in mental hospitals.<sup>128</sup> Governor Wallace argued that compliance with the court order would "entail the expenditure annually of a sum equal to sixty per cent of the state budget excluding school financing, and a capital improvements outlay of \$75,000,000."<sup>129</sup> It is not hard to predict from the budget forecasts in this litigation that the state would choose deinstitutionalization as a means of avoiding such significant expenditures of money. The number of patients in Alabama in public mental hospitals declined from 7197 in December 1955 to 1649 in December 1994.<sup>130</sup> The deinstitutionalization movement could claim victory given the horrific nature of the state institutions in the early 1970s.<sup>131</sup>

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124 *Id.* at 1343.

125 *Wyatt*, 503 F.2d at 1311.

126 *Id.* at 1311 n.6.

127 *Id.* at 1316.

128 *Id.* at 1315.

129 *Id.* at 1317.

130 TORREY, *supra* note 97, at 207.

131 These problems were not limited to Alabama. In *Lessard v. Schmidt*, 349 F. Supp. 1078, 1089–90 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974) (per curiam), the court discusses the high mortality rate and poor conditions at mental institutions in Wisconsin.

But how many of those thousands of people were getting adequate treatment and living conditions?

One impetus for the deinstitutionalization movement was that many people were unnecessarily institutionalized. For example, an Illinois statute "allowed married women and infants to be committed on the request of a husband or guardian."<sup>132</sup> These loose commitment standards resulted in 679,000 persons being confined in mental institutions in 1963 as contrasted with 250,000 persons who were involuntarily incarcerated.<sup>133</sup> The legal response to this evidence of unnecessary institutionalization was to craft a rigorous institutionalization standard which focused on whether the state has "a compelling interest in emergency detention of persons who threaten violence to themselves or others for the purpose of protecting society and the individual."<sup>134</sup> The Supreme Court hastened this development when it held in 1975 that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."<sup>135</sup>

The problem of relief was complicated in these cases and caused some courts to hesitate in providing the release of all individuals held in state institutions. In 1973, for example, Judge Judd concluded that the conditions at Willowbrook State School for the Mentally Retarded were inhumane.

Testimony of ten parents, plus affidavits of others, showed failure to protect the physical safety of their children, and deterioration rather than improvement after they were placed in Willowbrook School. The loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds were typical of the testimony.<sup>136</sup>

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132 See *id.* at 1086 (describing the situation in Illinois). The court's order in *Lessard* was vacated on appeal. See *Lessard*, 414 U.S. at 477 (vacating the order of the lower court as insufficiently specific and presenting an inadequate foundation for review).

133 *Lessard*, 349 F. Supp. at 1090.

134 *Id.* at 1091; cf. *Boddie v. Connecticut*, 401 U.S. 371, 377-79 (1971) (describing the fundamental right of procedural due process guaranteed by the Fourteenth Amendment and the standard the state must meet to infringe upon it).

135 *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). The Court claimed that it did not decide "whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." *Id.* at 573.

136 *N.Y. State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973).

Nonetheless, the court concluded that it could not “in fairness direct that any of the residents be released before they have been habilitated so far as possible. . . . Nor can the court direct the closing of Willowbrook. . . . ‘The State has no realistic option open to it to discontinue its mental hospitals and training schools forthwith.’”<sup>137</sup>

The concept of “least restrictive alternative” developed during this litigation in the 1970s. In *Welsch v. Likins*,<sup>138</sup> a case involving the institutionalization of individuals with mental retardation, the district court held as a matter of law “that retarded persons are constitutionally entitled to the benefit of the least restrictive environment consistent with their needs and conditions.”<sup>139</sup> The plaintiffs in *Welsch*, like the plaintiffs in the Willowbrook litigation, did not seek to be released immediately from state institutions. Instead, they sought meaningful habilitation so that they could learn to live more independently. The *Welsch* court, however, was more explicit in recognizing a goal of living in a less “restrictive environment” than the rigid institutionalization offered by the state facility.<sup>140</sup> Two years later, in adopting the “least restrictive alternative approach,” the Third Circuit in the *Halderman v. Pennhurst State School and Hospital*<sup>141</sup> litigation noted that it did not include “a shutdown of all institutions.”<sup>142</sup> In fact, it overturned the district court’s “blanket prohibition against institutionalization” as inconsistent with the concept of least restrictive alternative because it would preclude “institutionalization of patients for whom life in an institution has been found to be the least restrictive environment in which they can survive.”<sup>143</sup>

Today, the situation has become more complicated as people complain that it is too difficult to get treatment for mentally ill family or friends. Torrey begins his book by describing the story of a man

137 *Id.* at 768 (quoting *Employees of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 452 F.2d 820, 827 (8th Cir. 1971), *aff’d*, 411 U.S. 279 (1973)). For a follow-up on the Willowbrook litigation, see DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS* (2005). The Rothman book is written from a pure integration perspective; it assumes that every resident of Willowbrook should ultimately attain a community placement.

138 550 F.2d 1122 (8th Cir. 1977).

139 *Id.* at 1125 (describing the district court opinion).

140 *Id.*; *see id.* at 1132.

141 612 F.2d 84 (3rd Cir. 1979), *rev’d*, 451 U.S. 1 (1981).

142 *Id.* at 114. The court quoted the sponsor of the relevant Pennsylvania legislation, who had said: “The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it.” *Id.* at 114–15 (quoting 1966 PA. LEGIS. J., 3d Spec. Secc., No. 33, 76 (Sept. 27, 1966) (remarks of Senator Peacham)).

143 *Id.* at 115.

whom he calls Thomas McGuire.<sup>144</sup> When McGuire suffered chest pains and shortness of breath, he was readily admitted to the hospital and treated for his heart problem. He also benefited from a follow-up program to reduce his cholesterol. But when he went to the emergency room because of suicidal symptoms, he was released from the emergency room without being given any medication because the senior psychiatrist found "there were no issues of danger to self [or] others."<sup>145</sup> Nonetheless, his wife found him hanging from a rope in their basement a few hours after discharge.

McGuire's situation is not a direct result of the deinstitutionalization movement. He was not released from an institution as a result of that movement. But he could not be involuntarily admitted to a hospital, upon his wife's request, without meeting a high standard of potential danger to himself or others. The senior psychiatrist in the hospital's waiting room was not able to correctly assess that McGuire was in imminent danger of committing suicide. Had the legal standard been lower, McGuire may have received treatment and, in the short term, avoided suicide.

McGuire's case poses an odd equality problem. The standard for admission for his physical condition (risk of heart attack) was lower than for his mental condition (risk of suicide). But his case also presents the legacy of concerns about the quality of institutionalization, and whether psychiatric wards or hospitals offer care that is below what we consider basic to human dignity. Torrey reports that McGuire lived in a state that had closed over eighty percent of its public psychiatric beds and had a long history of promoting "mental health" issues; his wife had sought treatment for her husband "in a prestigious university hospital in a city reputed to be a regional medical Mecca."<sup>146</sup>

The problem here is one that we will see in the educational context as well—the move towards structural reforms (deinstitutionalization) comes at the price of consideration of what is best for the individual patient. By closing most public psychiatric beds and creating a very high standard for institutionalization, certain important structural reforms were achieved. Moreover, the evidence suggests that most individuals do benefit from deinstitutionalization.<sup>147</sup> At the

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144 TORREY, *supra* note 97, at 2.

145 *Id.*

146 *Id.* at 3.

147 See generally S. KIM ET AL., RESEARCH & TRAINING CTR. ON CMTY. LIVING, UNIV. OF MINN., POLICY RESEARCH BRIEF—BEHAVIORAL OUTCOMES OF DEINSTITUTIONALIZATION FOR PEOPLE WITH INTELLECTUAL DISABILITIES: A REVIEW OF STUDIES CONDUCTED BETWEEN 1980 AND 1999, at 1 (1999), available at <http://ici.umn.edu/products/prb/>

individual level, however, there is no safety net for the McGuires of our society. As one proponent of deinstitutionalization has noted: “[T]he problem that has proved most vexing—the treatment of the new generation that has grown up since deinstitutionalization—was almost totally unforeseen by the advocates of deinstitutionalization.”<sup>148</sup> Torrey estimates there are 2.2 million Americans with untreated severe mental illnesses and that 150,000 of them are homeless and 159,000 are incarcerated in jails and prisons.<sup>149</sup> Torrey argues that “even one Thomas McGuire is too many; hundreds of thousands are a disgrace.”<sup>150</sup> Yet, our legal system has remained relatively unchanged since Torrey described McGuire’s case in 1997. Deinstitutionalization has continued to move forward, state laws for involuntary commitment have gone unchanged, and our health insurance crisis (for nearly everyone) remains unchanged. The integrationist perspective is so strong that it is difficult to put cases like McGuire’s on center stage to achieve law reform.

The pre-1990 cases were usually decided on the basis of a combination of state law and federal constitutional right. Since the passage of the Americans with Disabilities Act of 1990 (ADA),<sup>151</sup> many of these cases have been litigated under federal law. The federal courts have been seeking to find a balance between integration and appropriate services in interpreting modern federal antidiscrimination law. Although they have struck the balance on the side of integration, they have recognized that separate services may play a proper role in the delivery of health care for individuals with disabilities.

Under Section 504 and Title II of the ADA, Congress has not clearly imposed an integration requirement. Nonetheless, both the enforcement agencies and the courts have interpreted the nondiscrimination rule imposed by ADA Title II<sup>152</sup> and Section 504 of the

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101/101.pdf (reporting the results of a review of thirty-eight studies of deinstitutionalizing people with mental disabilities).

148 H. Richard Lamb, *Deinstitutionalization at the Beginning of the New Millennium*, in DEINSTITUTIONALIZATION 3, 4 (H. Richard Lamb & Linda E. Weinberger eds., 2001).

149 TORREY, *supra* note 97, at 3. Similarly, Steven Raphael concludes that deinstitutionalization of state and county mental hospitals has resulted in an increase of between 48,000 to 148,000 inmates in state prisons in 1996. See Steven Raphael, *The Deinstitutionalization of the Mentally Ill and Growth in the U.S. Prison Population: 1971 to 1996*, at 12 (Sept. 2000), <http://socrates.berkeley.edu/~raphael/raphael2000.pdf>.

150 TORREY, *supra* note 97, at 11.

151 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2000)).

152 ADA Title II provides: “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from

Rehabilitation Act<sup>153</sup> to include an integration requirement. Regulations promulgated to interpret Section 504 of the Rehabilitation Act require recipients of federal funds to “administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.”<sup>154</sup> Similarly, the regulations promulgated to enforce ADA Title II state that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.”<sup>155</sup>

In *Olmstead v. L.C. ex rel. Zimring*,<sup>156</sup> the Supreme Court was faced with the question of whether the nondiscrimination rule found in ADA Title II mandated that the plaintiffs live in the most integrated setting possible which, in this case, would be at home rather than in an institutionalized setting. The Court concluded that this requirement is imposed by ADA Title II’s nondiscrimination language and offered these two justifications for that conclusion:

First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.<sup>157</sup>

Nonetheless, in *Olmstead*, the Court was careful to limit its holding to cases involving individuals with disabilities who live in institutional settings and prefer to live in the community.<sup>158</sup> It expressly did not

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participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

153 Section 504 provides: “No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Rehabilitation Act of 1973 § 504, Pub. L. No. 93-112, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a) (2000)).

154 28 C.F.R. § 41.51(d) (2006).

155 28 C.F.R. § 35.130(d) (2006).

156 527 U.S. 581 (1999).

157 *Id.* at 600–01 (citations omitted).

158 The court required states to provide community-based services and support for individuals with disabilities when (1) the state’s treatment professionals determine that community placement is appropriate for the individual, (2) the individual does not oppose treatment in the community, and (3) the placement can be reasonably accommodated, taking into account the state’s available resources and the needs of others with disabilities. *Id.* at 596–602.

determine the validity of the general pro-integration regulations, cited above.<sup>159</sup>

In dissent, Justice Thomas disputes this expansive interpretation of the word "discriminate" under ADA Title II. He argues that Congress could have specifically outlawed unnecessary segregation in the provision of public services under ADA Title II if it had so desired, since it used such language elsewhere in the ADA under Title I.<sup>160</sup> Yet Congress chose not to use such specific language.

Although Thomas disagrees with the majority's statutory interpretation of ADA Title II, he does not disagree with the majority's normative assertions about the deleterious effects of institutional isolation. He characterizes the majority's assertions on this point as "unremarkable,"<sup>161</sup> by which I assume he means "obvious." The fact that such a position could be normatively justified, however, does not mean that Congress intended to impose that requirement on the states. Returning to the statutory language and its proximate causation requirement, he therefore concludes that it is wrong to interpret the statute to preclude "[c]ontinued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement."<sup>162</sup>

Implicit in Thomas's response to the majority is the sense that one cannot dispute the normative claim underlying a pro-integration argument. His hesitation is similar to the hesitation found in the special education context. Researchers are cautious even to ask the question of whether the most integrated setting is presumptively the most appropriate for children with disabilities. Underlying this hesitation is the sense that integration *must* be a highly desirable moral imperative.

Nonetheless, even the majority seems to understand that the argument for integration must have some nuances. Hence, Justice Ginsburg's opinion for the Court observes that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."<sup>163</sup> Justice Kennedy's concurrence (which was joined by Justice Breyer) is mindful of the fact that deinstitutionalization is not the right answer for everyone with severe mental illness and observes that it would be "tragic" if the *Olmstead* decision scared states into provid-

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159 *Id.* at 592.

160 *Id.* at 622 (Thomas, J., dissenting).

161 *Id.* at 625.

162 *Id.* at 626.

163 *Id.* at 601 (majority opinion).

ing services for individuals with disabilities in "settings with too little assistance and supervision."<sup>164</sup>

Carlos Ball justifies the Ginsburg and Kennedy approaches from a communitarian perspective. He defends the district court result in *Williams v. Wasserman*,<sup>165</sup> in which the court held that the state did not violate ADA Title II by retaining some state institutions so that it would have viable options for those who could not benefit from community settings.<sup>166</sup> The *Williams* litigation reflects how hard it is to create structural remedies by closing many disability-only institutions while still maintaining sufficient disability-only institutions to provide a safety net for those who need such institutions.

The plaintiffs in the *Williams* litigation suffered significant harm during the course of their institutionalization. Ms. Lentz received the drug Thorazine for seventeen years and thereby developed tardive dyskinesia; the evidence suggested that she should not have been administered the drug for this entire time period.<sup>167</sup> She was also "assaulted after stealing belongings from other patients."<sup>168</sup> Mr. Polard may have received inappropriate treatment with neuroleptics and benzodiazepines for his seizure disorders.<sup>169</sup> Ms. Kemble and Ms. Jackson engaged in self-destructive behavior which might have been avoided with more effective supervision.<sup>170</sup> The plaintiffs were also subjected to physical restraints. Six of the plaintiffs were subjected to two- or four-point restraints at times during their tenures in the state hospitals. Two plaintiffs were restrained using a geri-chair and posey bed to prevent them from harming themselves. Nearly all the plaintiffs faced seclusion from time to time "as a form of behavior modification."<sup>171</sup> The most inappropriate use of restraints related to Ms. Lentz. She was placed in mitten or wrist restraints between 1986 and 1988 to control her compulsive stealing but the restraints were "discontinued more than six years before this lawsuit was filed."<sup>172</sup>

Despite these myriad of problems, the court declined to find statutory or constitutional violations in this case. Medication was administered based on sound medical advice. The use of restraints was for patient safety and did not deviate from accepted medical standards.

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164 *Id.* at 610 (Kennedy, J., concurring).

165 164 F. Supp. 2d 591, 636-38 (D. Md. 2001).

166 *See* Ball, *supra* note 2, at 161-64.

167 *Williams*, 164 F. Supp. 2d at 616.

168 *Id.* at 618.

169 *Id.* at 616-17.

170 *Id.* at 618-19.

171 *Id.* at 620.

172 *Id.*

They "were used as necessary to calm or protect the patients or other residents."<sup>173</sup>

The court also emphasized the aspect of *Olmstead* that permitted it to consider the effect on other individuals with disabilities if the plaintiffs were accorded their desired remedy. The court found that Maryland's pace of attaining deinstitutionalization was appropriate because a faster pace might be costly and jeopardize the well-being of those who needed institutionalized care.<sup>174</sup> Carlos Ball describes this approach as "communitarian" rather than integrationist because it considers the impact on others in devising a remedy.<sup>175</sup>

Ball's justification, however, is problematic because it does not explain why individuals with mild disabilities should have to bear the burden of finding financial resources to assist those with severe disabilities who need to live in residential institutions. Why is their liberty less valuable than the liberty of any other individuals in society? While it may be true from a communitarian perspective that *everyone* in society should bear the financial burden of funding humane institutions for individuals with severe disabilities, it seems inappropriate for those with mild disabilities to sacrifice their liberty interest of living in the community so that others can live in institutions. An anti-subordination perspective would impose those costs on the entire society rather than balance one group of individuals with disabilities against another group.<sup>176</sup> It would also closely track the well-being of all groups of individuals with disabilities to see if they are benefiting from the remedies imposed by the courts.

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173 *Id.* at 622.

174 *Id.* at 638.

175 Ball, *supra* note 2, at 162-64.

176 Admittedly, there are subtle issues in these kinds of contexts that cannot be readily resolved by an anti-subordination perspective. An anti-subordination perspective tells us that we should devote economic and social resources to remedying a group's history of subordination. Individuals with health care needs that make it difficult for them to live independently are one group that qualifies for such resources from an anti-subordination perspective. Nonetheless, the individuals within that class may have competing claims for resources within a limited economic pot. Assuming society has devoted sufficient economic resources to remedying that historic problem, we still need to establish how to allocate those resources. An anti-subordination perspective is not particularly helpful at resolving those competing claims. It merely establishes that we cannot expect those with disabilities to bear the most extreme sacrifices that are necessary to remedy this historical problem. Keeping some individuals with more mild disabilities *institutionalized* as a way to ensure that sufficient resources are devoted to those with more severe disabilities therefore seems inappropriate from an anti-subordination perspective. It is not appropriate to expect those with mild disabilities to bear the primary burden of ensuring that those with severe disabilities have adequate and appropriate housing.

The hesitation to impose immediate integration in the *Williams* litigation, however, cannot necessarily be attributed to the court's questioning of the pure integration perspective. Instead, it could be attributed to the court's interest in avoiding a political backlash from imposing integration too quickly.<sup>177</sup>

The deinstitutionalization case law is muddled. States have been given the opportunity to move through their waiting lists at a "reasonable pace," sacrificing the liberty interests of those who are mildly disabled and could live in the community so that the state can afford to maintain its disability-only institutions for those with more severe disabilities. Further, success is measured by the rate of deinstitutionalization rather than by the quality of life for those who are deinstitutionalized. Even if states are allowed to proceed toward integration at a "reasonable pace," they should be required to account for the quality of life of both those who are institutionalized and those who are placed in community settings under an anti-subordination perspective. An exclusive focus on integration creates an insufficient safety net for the plaintiffs who are supposedly assisted by the courts' decisions.

### III. VOTING

#### A. History

The disenfranchisement of individuals with disabilities was the result of two different kinds of mechanisms. For individuals with intellectual or developmental disabilities, disenfranchisement occurred as the result of explicit denial of the vote. For individuals with various physical disabilities, disenfranchisement occurred as the result of unconscious barriers, such as the need to see or walk, that impeded access to the polling place or ballot itself.

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177 See Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People": The Disability Rights Cases*, 104 COLUM. L. REV. 49, 58 (2004) (noting that such cases reflect a "recognition of the limited capacity of courts to shoulder the burden of significant social change on their own"). Nonetheless, some commentators have praised *Olmstead* and its progeny as providing important safeguards for individuals with disabilities. See Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After Olmstead v. L.C.*, 24 HARV. J.L. & PUB. POL'Y 695, 721-22 (2001) (arguing that "unchecked deinstitutionalization" could put "people into communities where they are unable to cope, and where they lack the structured environment and monitoring of an institution").

## 1. Intellectual and Developmental Disabilities

The story of the disenfranchisement of individuals with intellectual or developmental disabilities is connected to the history of institutionalization, recounted above.<sup>178</sup> As states began to develop special schools and asylums for subcategories of individuals with disabilities, they also began to create constitutional and statutory rules that excluded the "idiot and insane" from voting.<sup>179</sup>

Vermont and Maine were the first two states to exclude individuals from voting based on intellectual or developmental disabilities. Vermont's Constitution of 1793 required voters to have "quiet and peaceable behaviour."<sup>180</sup> Maine's Constitution of 1819 excluded "persons under guardianship" from voting.<sup>181</sup> The explicit disenfranchisement of those who are "idiot[s]" or "insane" began in 1831 in Delaware<sup>182</sup> and soon spread to Rhode Island,<sup>183</sup> New Jersey,<sup>184</sup> Iowa,<sup>185</sup> Wisconsin,<sup>186</sup> California,<sup>187</sup> Ohio,<sup>188</sup> Maryland,<sup>189</sup> Minne-

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178 See *supra* Parts I.A, II.A. It is also connected to the disqualification of individuals with various mental disabilities from entering a contract of marriage. See, e.g., *Inhabitants of St. George v. City of Biddeford*, 76 Me. 593, 598-99 (1885) (upholding lower court decision to void marriage on the grounds that the man did not have sufficient mental capacity to enable him to undertake the responsibilities of marriage).

179 See generally Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 439 (2000) ("States use terms such as 'idiot,' 'insane,' 'lunatic,' 'mental incompetent,' 'mentally incapacitated,' 'unsound mind,' and 'not quiet and peaceable' to characterize persons who will not be allowed to vote.").

180 VT. CONST. of 1793, ch. II, § 21, reprinted in 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3762, 3768 (Francis Newton Thorpe ed., 1909) [hereinafter LAWS OF THE STATES].

181 ME. CONST. of 1819, art. II, § 1, reprinted in 3 LAWS OF THE STATES, *supra* note 180, at 1646, 1649.

182 DEL. CONST. of 1831, art. IV, § 1, reprinted in 1 LAWS OF THE STATES, *supra* note 180, at 582, 589.

183 R.I. CONST. of 1842, art. II, § 4 ("[No] lunatic, person *non compos mentis*, [or] person under guardianship . . . shall be permitted to be registered or to vote."), reprinted in 6 LAWS OF THE STATES, *supra* note 180, at 3222, 3226.

184 N.J. CONST. of 1844, art. II, para. 1, reprinted in 5 LAWS OF THE STATES, *supra* note 180, at 2599, 2601.

185 IOWA CONST. of 1846, art. II, § 5, reprinted in 2 LAWS OF THE STATES, *supra* note 180, at 1123, 1125.

186 WIS. CONST. of 1848, art. III, § 2, reprinted in 7 LAWS OF THE STATES, *supra* note 180, at 4077, 4080.

187 CAL. CONST. of 1849, art. II, § 5, reprinted in 1 LAWS OF THE STATES, *supra* note 180, at 391, 393.

sota,<sup>190</sup> and Oregon.<sup>191</sup> Other states achieved similar results in this period without direct reference to idiots or the insane.<sup>192</sup> Initially, most of the states that excluded idiots or the insane were northern states, but many of the southern states created such exclusions between 1860 and 1880 when they wrote new state constitutions following the Civil War.<sup>193</sup>

As with the special education and institutionalization movements, this development can be traced to evolving views of individuals with disabilities. The initial disenfranchisement movement excluded “‘persons under guardianship’” and favored those “‘of a quiet and peaceable behavior.’”<sup>194</sup> The guardianship reference could be thought of as a reference to dependency rather than as a moral statement about one’s worth as a citizen. The evolving references to idiots or the insane, however, reflected “intellectual and moral incompetency due to disability, not dependency.”<sup>195</sup> In addition, the disenfranchisement of individuals with intellectual or developmental disabilities is parallel to the disenfranchisement of African-Americans. As with the special education movement, a disability-specific term may have achieved disability, class-based, and racial discrimination.<sup>196</sup> As property classifications began to develop for voting, idiots and the insane were excluded from voting, in part, because they were perceived to be financially dependent (as well as deviant).<sup>197</sup> Further, the focus on cognitive aptitude was a relatively recent phenomenon

188 OHIO CONST. of 1851, art. V, § 6, *reprinted in* 5 LAWS OF THE STATES, *supra* note 180, at 2913, 2924.

189 MD. CONST. of 1851, art. I, § 5 (“[N]o person under guardianship as a lunatic, or as a person *non compos mentis*, shall be entitled to vote.”), *reprinted in* 3 LAWS OF THE STATES, *supra* note 180, at 1712, 1718.

190 MINN. CONST. of 1857, art. VII, § 2, *reprinted in* 4 LAWS OF THE STATES, *supra* note 180, at 1991, 2007.

191 OR. CONST. of 1857, art. II, § 3, *reprinted in* 5 LAWS OF THE STATES, *supra* note 180, at 2998, 3001.

192 Massachusetts excluded “persons under guardianship.” MASS. CONST. of 1780, amend. art. III (1821), *reprinted in* 3 LAWS OF THE STATES, *supra* note 180, at 1888, 1912. Louisiana excluded any “person under interdiction.” LA. CONST. of 1845, tit. II, art. 12, *reprinted in* 3 LAWS OF THE STATES, *supra* note 180, at 1392, 1394.

193 See Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 489–90 (2001).

194 *Id.* at 489 n.42 (quoting ME. CONST. of 1819, art. II, § 1; VT. CONST. of 1793, ch. II, § 21).

195 *Id.* at 490.

196 I have not seen any data on this connection but it is interesting to note that the disability disenfranchisement category was created in the southern states at the same time as Jim Crow laws and other vehicles of racial segregation.

197 Schriener & Ochs, *supra* note 193, at 507.

because "intellectual impairments did not have the economic significance that they would later acquire when work became more individualized and routinized."<sup>198</sup>

The exclusion of individuals from voting on the basis of a cognitive or emotional impairment continues today.<sup>199</sup>

Only ten states permit citizens to vote irrespective of mental disability. Twenty-six states proscribe voting by persons labeled idiotic, insane or non compos mentis . . . . Twenty-four states and the District of Columbia disenfranchise persons adjudicated incompetent or placed under guardianship . . . . Four states disqualify from voting persons committed to mental institutions . . . , but other laws in three of those states provide that commitment alone does not justify disenfranchisement.<sup>200</sup>

Today, states are sometimes required to make more individualized assessments of voter qualifications rather than assume that all the idiots or the insane are unqualified to vote. Nonetheless, informal barriers still persist even in those states to such persons being able to vote. One of the biggest challenges is for individuals who reside in institutional settings. They rarely have private transportation and are dependent on others to vote. If transportation is provided for them to travel to the polling place, will they feel comfortable voting independently and privately in accordance with their own political beliefs?

The institutional segregation of individuals with intellectual or developmental disabilities has also been a mechanism to screen them for exclusion. For example, one of the important voting rights cases for individuals with such disabilities involved a group of twenty-eight residents of a state facility (the New Lisbon State School) who traveled by bus to the clerk's office in Burlington County to register to vote on October 3, 1974.<sup>201</sup> The clerk refused to register them to vote, making that determination based on their residence.<sup>202</sup> The trial court judge concluded that they were excluded from voting not because of

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198 *Id.* at 506.

199 For an excellent recent survey of voting rights law as it applies to individuals with intellectual and developmental disabilities, see Kay Schriener & Lisa Ochs, "No Right is More Precious": Voting Rights and People with Intellectual and Developmental Disabilities, *POL'Y RES. BRIEF*, May 2000, at 1, 7-15, available at <http://ici.umn.edu/products/prb/111/111.pdf>.

200 Note, *Mental Disability and the Right To Vote*, 88 *YALE L.J.* 1644, 1645-47 (1979) (footnotes omitted).

201 See *Carroll v. Cobb*, 354 A.2d 355, 356-57 (N.J. Super. Ct. App. Div. 1976).

202 Barbara Armstrong, *The Mentally Disabled and the Right To Vote*, 27 *HOSP. & COMMUNITY PSYCHIATRY* 577, 578 (1976). Similarly, in a case from Massachusetts, *Boyd v. Board of Registrars of Voters*, 334 N.E.2d 629 (Mass. 1975), residents of Belchertown State School who were "adjudicated incompetent or placed by the court under guard-

“their idiocy or their insanity” but because they were “confined to such a school.”<sup>203</sup>

Their transportation needs can also serve as a method to identify them for disenfranchisement. For example, Karl Peters took twenty-five trainees at a local workshop for individuals with mental retardation by bus to register to vote, in part, so that they could vote in favor of building “a new mental retardation facility and workshop” on the next primary ballot.<sup>204</sup> Had these individuals not arrived together by bus, they would probably not have been singled out for unfavorable treatment. Residential segregation can therefore be tied to disenfranchisement because it creates an easy method to identify disabled individuals, and then deny the franchise.

## 2. Physical Impairments

In general, two different kinds of barriers impede voting by people with disabilities—access to the polling place itself or access to the ballot. A 2001 report by the General Accounting Office found that twenty-eight percent of polling places had “potential impediments” and did not provide curbside voting in the 2000 presidential election.<sup>205</sup> Barriers can include inaccessible parking, architectural barriers such as curbs, narrow doorways, poor signage, and stairs. In addition, eighty-four percent of polling places had at least one barrier that could have impeded individuals with disabilities from voting.<sup>206</sup>

Even if voters can enter the polling place, they have historically not been able to vote privately and independently if they have a visual impairment or an impairment that affects their ability to use the regular ballot. Voters with visual impairments cannot read the text of the ballot, voters with hand or arm impairments cannot operate voting equipment, and many individuals who use wheelchairs cannot access the machines from their chairs.<sup>207</sup> The National Organization on Disability reported in 2001 that fewer than ten percent of polling places

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ianship” were not allowed to register to vote because of their residence in a state facility. *Armstrong, supra*, at 579.

203 *Carroll*, 354 A.2d at 357.

204 *Armstrong, supra* note 202, at 580–81.

205 U.S. GEN. ACCOUNTING OFFICE, *VOTERS WITH DISABILITIES 7* (2001), available at <http://www.gao.gov/new.items/d02107.pdf>.

206 *Id.* at 26.

207 See Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 *STAN. L. & POL'Y REV.* 353, 357 (2003).

used audio output that would allow visually impaired voters to vote privately and independently.<sup>208</sup>

Voters with visual impairments have historically found that polling places offered *no* opportunity for them to vote privately and independently.<sup>209</sup> Voters with visual impairments need to request assistance from others to cast their ballots and often do not feel confident that their actual intentions were recorded.<sup>210</sup>

In theory, voters with mobility or visual impairments are offered the opportunity to vote with the general public. In practice, however, it can be very difficult for them to vote. Thus, there are both *de jure* and *de facto* voting barriers that limit the rights of individuals with disabilities. Disenfranchisement is a way of precluding people from full participation in society as equal citizens.

### B. Legal Developments

One of the earliest known cases involving the voting rights of individuals with disabilities occurred in 1878 when E.E. Clark sought to contest an election which he had lost by sixteen votes.<sup>211</sup> He contested the votes of five individuals who were allegedly mentally defective or “idiots.” (For some reason, the plaintiff appears to know how various individuals voted;<sup>212</sup> the ballot does not appear to have been entirely secret.) The court ruled against the plaintiff with respect to these votes, finding the evidence insufficient to establish them as incompetent to vote.<sup>213</sup> These individuals lived as regular members of the community, holding jobs.<sup>214</sup> Nonetheless, some professionals were willing to characterize them as “idiots” who were not competent to vote.<sup>215</sup> Similarly, the Arkansas Supreme Court ruled that the lower

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208 National Organization on Disability, ALERT: Most Voting Systems Are Inaccessible for People with Disabilities (Aug. 2, 2001), <http://www.nod.org> (type “voting systems” into search field; then follow hyperlink for article title).

209 Both the General Accounting Office report and a separate report by the League of Women Voters found no voting equipment adapted to blind voters as recently as the 2000 presidential election. See Waterstone, *supra* note 207, at 357.

210 See Michael Waterstone, *Civil Rights and the Administration of Elections—Toward Secret Ballots and Polling Place Access*, 8 J. GENDER RACE & JUST. 101, 105 (2004) (“When people with disabilities did vote in polling places, they were often directed to do so in ways that compromised the secrecy and independence of their ballots.”).

211 *Clark v. Robinson*, 88 Ill. 498, 500 (1878).

212 *Id.* at 501 (stating they voted for the appellee).

213 *Id.* at 502–03 (finding individuals had “peculiarities and eccentricities indicative of mental deficiency to some extent” but not sufficient to be deemed incompetent to vote).

214 *Id.* at 502.

215 *Id.*

court was correct to rule that Elzy Thorn was not an "idiot or insane" for the purposes of determining whether an election was valid.<sup>216</sup> In those early cases, the plaintiff tried to use the voter's disability status as a mechanism to void an entire election; that strategy was not viewed favorably by the courts even if they were not willing to open up the general problem of the disenfranchisement of individuals with disabilities.<sup>217</sup> The courts' decisions in these cases, however, can best be understood as reflecting hesitancy to invalidate elections, not reflecting an interest in protecting the rights of voters with disabilities. When voters tried to invalidate elections on the ground that some individuals were disenfranchised, the results were equally unsuccessful.<sup>218</sup>

In the 1970s, voters with disabilities started to bring direct challenges concerning the inaccessibility of polling places under the Equal Protection Clause. These lawsuits were largely unsuccessful because courts found that the availability of an absentee ballot was sufficient access to voting.<sup>219</sup> Courts rejected arguments that this alternative was unacceptable because it required advanced planning.<sup>220</sup> Segregation of voting was therefore condoned in the 1970s even though judges were able to imagine other alternatives which would have allowed voters with disabilities to make last-minute decisions and vote at regular polling places.<sup>221</sup>

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216 *Youngblood v. Thorn*, 224 S.W. 962, 963 (Ark. 1920).

217 *See also* *Ruffo v. Margolis*, 401 N.Y.S.2d 900, 902-03 (N.Y. App. Div. 1978) (rejecting attempt to invalidate election because some residents of a mental institution were permitted to vote by absentee ballot).

218 *See* *Whalen v. Heimann*, 373 F. Supp. 353, 357 (D. Conn. 1974) (refusing to invalidate election on grounds that absentee ballots were not available to those who were unable to appear at polling places for health or business reasons).

219 *See, e.g.*, *Selph v. Council of L.A.*, 390 F. Supp. 58, 61 (C.D. Cal. 1975).

220 *Id.* ("This approach can be seen as a rational alternative to the legitimate state purpose of minimizing the high cost and substantial administrative effort involved in providing more than 3800 accessible polling places.").

221 *Id.* at 62. Similarly, judges were reluctant to second-guess legislative judgments about how to treat voters with visual impairments. Tennessee, for example, amended its state statute that related to voting by individuals with visual impairments, to limit them to choosing a select group of relatives or election officials to assist them with marking a ballot rather than allowing them to continue to use "any reputable person of the voter's selection." *Smith v. Dunn*, 381 F. Supp. 822, 824 (M.D. Tenn. 1974) (quoting TENN. CODE ANN. § 2-1226 (repealed 1973)). Voters unsuccessfully argued that they should not have to reveal their voting decision to persons not of their own choice if they could not bring in a relative for assistance. *Id.* The court permitted this change in policy despite recognizing that although "the court may find the former provision preferable, . . . regulation of the election process is, within constitutional boundaries hereinafter explored, a purely legislative function." *Id.*

Individuals with disabilities also sought to challenge policies which precluded individuals from voting because they resided at a state school for mental retardation. In this instance, residential segregation made it easy to identify a category of individuals who could then be disenfranchised. Courts had varying responses to these cases. Sometimes, they concluded that residence at a state school should not be a *per se* disqualification from voting;<sup>222</sup> other times, they concluded it could be.<sup>223</sup> Irrespective of the legal outcome, these cases reflect an attempt by the government to connect segregation to subordination by denying the franchise to these individuals who lived in segregated housing arrangements.

The lack of concern for voters with disabilities as recently as the mid-1970s is graphically illustrated by some language from Judge Newman's opinion in *Whalen v. Heimann*.<sup>224</sup> Judge Newman was considering the allegation that an election should be invalidated because of Connecticut's requirement that all voting take place in person at the polls without the availability of absentee balloting. He said:

Is there anything in the Constitution that prohibits a state from requiring that voting be done by physical attendance at the polls? Surely this is not an arbitrary or unreasonable requirement such as would violate the due process or equal protection clauses. A physically incapacitated voter has no more basis to challenge a voting requirement of personal appearance than a blind voter can complain that the ballot is not printed in braille.<sup>(\*)</sup> Nor is it the province of courts to weigh the relative ease or difficulty with which the state could accommodate its voting procedures to meet the needs of various handicapped voters. These are policy questions to be resolved by legislators.

[\*] Though the Constitution does not require special arrangements to facilitate voting by the physically handicapped, legislatures of course have ample discretion to enact remedial measures for this purpose. *See, e.g.*, [CONN. GEN. STAT. ANN. § 9-297 (West 2002)].<sup>225</sup>

Judge Newman's comments are striking because they reflect the disconnection between segregation and subordination. The problem in the disability context is the disenfranchisement of individuals with disabilities. Some states achieved that disenfranchisement by insisting that voters with disabilities use absentee ballots because they did not

222 *See, e.g.*, *Boyd v. Bd. of Registrars of Voters*, 334 N.E.2d 629, 630 (Mass. 1975); *Carroll v. Cobb*, 354 A.2d 355, 359 (N.J. Super. Ct. App. Div. 1975).

223 *See, e.g.*, *Town of Lafayette v. City of Chippewa Falls*, 235 N.W.2d 435, 443 (Wis. 1975).

224 373 F. Supp. 353 (D. Conn. 1974).

225 *Id.* at 357 & n.6.

want to bear the expense of making polling places accessible. Other states achieved that disenfranchisement by creating the unrealistic requirement that everyone would vote at polling places even though they knew that some voters with disabilities could not vote at existing polling places. The no-absentee ballot rule could be seen as a rule mandating integration, but in practice, it created disenfranchisement for some voters. Under the low-level rational basis review available at the time, even voters with visual impairments had no recourse to insist that they be provided with a ballot that they could actually use.<sup>226</sup>

Until recently, voters with disabilities also had little recourse under federal statutory law.<sup>227</sup> Despite the enactment of the Voting Accessibility for the Elderly and Handicapped Act,<sup>228</sup> section 504 of the Rehabilitation Act of 1973,<sup>229</sup> and Title II of the ADA,<sup>230</sup> the United States Department of Justice has concluded "that Braille ballots are not required for blind voters, assistance of another person of the voter's choice is equivalent, and that curbside voting complies with the ADA's access requirements and does not constitute discriminatory treatment."<sup>231</sup> A district court has chosen to require a secret

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226 Interestingly, in one of the few successful equal protection challenges to voting practices, a court used a reverse discrimination theory to conclude that it was unconstitutional for a state to allow blind and physically disabled voters to receive assistance in marking their ballot but not to extend that assistance to illiterate voters. See *Garza v. Smith*, 320 F. Supp. 131, 136-37 (W.D. Tex. 1970), *vacated*, 401 U.S. 1006 (1971). In the context of a voting rights challenge by illiterate voters, the court used heightened scrutiny even though other judges had only used rational basis scrutiny in cases involving voters with disabilities. *Id.* at 137 (requiring "compelling state interest" justification). Other courts have rejected this equal protection argument. See, e.g., *State ex rel. Melvin v. Sweeney*, 94 N.E.2d 785, 790 (Ohio 1950) ("The granting to voters handicapped by 'physical infirmities' of aid in marking their ballots, although such privilege is not extended to others, is, in the opinion of this court, not unconstitutional legislation.").

227 Plaintiffs sometimes prevailed under state law. See, e.g., *Carroll*, 354 A.2d at 359 (holding that it is improper under state law to deny individuals the right to register to vote merely because they live at a state school for the "mentally retarded").

228 Pub. L. No. 98-435, 98 Stat. 1678 (codified at 42 U.S.C. § 1973ee (2000)).

229 Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-706 (2000)) (prohibiting disability discrimination by entities receiving federal financial assistance).

230 Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (2000)) (finding that discrimination on the basis of disability persists "in such critical areas as voting").

231 Waterstone, *supra* note 207, at 361 (citing Letter from Stewart B. Oneglia, Chief, Coordination & Review Section, Civil Rights Div., Dep't of Justice (Aug. 25, 1993), available at <http://www.usdoj.gov/crt/foia/lofc018.txt>; Letter from Stewart B. Oneglia, Chief, Coordination & Review Section, Civil Rights Div., Dep't of Justice (Sept. 10, 1993), available at <http://www.usdoj.gov/crt/foia/lofc021.txt>; Letter from

ballot for visually impaired voters despite the Department of Justice position,<sup>232</sup> but that is an unusual outcome under the ADA.<sup>233</sup> Nonetheless, some of the guardianship restrictions have been found to violate federal statutory or constitutional law.<sup>234</sup>

The lack of success of many of these lawsuits under the ADA, coupled with reports about inaccessible voting in the 2000 presidential election, caused Congress to enact the Help America Vote Act of 2002 (HAVA).<sup>235</sup> States are provided with grants to upgrade voting machines, ensure that polling places are accessible, and meet general standards for voting technology. Certain minimum standards are established by the Act; nonvisual access to equipment for voters with visual impairments, and polling place accessibility for voters with mobility impairments.<sup>236</sup> Enforcement, however, is weak, with states merely having to submit applications for approval by the Secretary of Health and Human Services to be eligible for payments.<sup>237</sup> States did submit these plans by March 2004, although "the plans were often vague and lacked any detailed descriptions of the type of actual standards that would be used to ensure accessibility."<sup>238</sup>

The focus of the disability provisions of HAVA is on gaining access to public polling places and allowing visually impaired voters to vote privately and independently.<sup>239</sup> States are able to self-certify compliance and voters with disabilities are not able to bring private causes of action against the state for enforcement.<sup>240</sup> The Attorney General

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Stewart B. Oneglia, Chief, Coordination & Review Section, Civil Rights Div., Dep't of Justice (Sept. 30, 1993), available at <http://www.usdoj.gov/crt/foia/lofc023.txt>.

232 See *Lighthourn v. County of El Paso*, 904 F. Supp. 1429, 1433-34 (W.D. Tex. 1995), *rev'd*, 118 F.3d 421 (5th Cir. 1997).

233 See, e.g., *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1127-30 (C.D. Cal. 2004) (ruling against plaintiffs with visual impairments who sought to vote independently and privately); *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001) (refusing to determine competency for plaintiffs with mental illness); *Nelson v. Miller*, 950 F. Supp. 201, 204 (W.D. Mich. 1996), *aff'd on other grounds*, 170 F.3d 641 (6th Cir. 1999) (finding that Congress did not intend "to elevate a blind voter's privacy in casting a ballot to a protected right under the ADA or RA").

234 See, e.g., *New York ex rel. Spitzer v. County of Del.*, 82 F. Supp. 2d 12, 16-18 (N.D.N.Y. 2000); *DiPietra v. City of Philadelphia*, 666 A.2d 1132, 1134-36 (Pa. Commw. Ct. 1995), *aff'd*, 673 A.2d 905 (Pa. 1996).

235 Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15545 (Supp. III 2003)).

236 42 U.S.C. § 15421(b).

237 *Id.* § 15423.

238 Christina J. Weis, *Why the Help America Vote Act Fails To Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 445 (2005).

239 See 42 U.S.C. § 15481(a)(3).

240 See *id.* §§ 15511-15512.

is expected to achieve national compliance—an impossible task with each state establishing its own guidelines.<sup>241</sup> Hence, disability rights advocates call for a uniform set of national standards that can be enforced by the disability community through a private right of action.<sup>242</sup> These national standards are premised on the notion that integration is the measure of success. The focus on integration, however, may have caused us to lose sight of the underlying goal of voting rights—increasing voter participation by individuals with disabilities. Despite various federal reforms, voting participation by individuals with disabilities has barely improved;<sup>243</sup> if we measured success by increasing participation rather than by integration, further remedies may become evident.<sup>244</sup>

#### IV. ALTERNATIVES TO PURE INTEGRATIONISM

##### A. *Special Education Alternatives*

Evidence from three different education contexts can show how separate programming for individuals with disabilities can be considered superior rather than invidious: (1) education for children with learning disabilities, (2) private schools for children with various cognitive or emotional impairments, and (3) deaf-only educational environments. This evidence suggests that it is wrong to conflate separate with unequal.

##### 1. Learning Disabled Category

Early critiques of the special education system demonstrated that African-Americans were overrepresented in the “educable mentally retarded” category and shunted into dead-end educational programs. In 1997, Mark Kelman and Gillian Lester made the controversial argument that white upper-class children are now overrepresented in the “learning disabled” category and receive expensive low-stigma

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241 See *id.* § 15511.

242 See Weis, *supra* note 238, at 456.

243 See *infra* Part IV.C.

244 An additional problem, which is beyond the scope of this Article, is the problem of voting fraud by individuals who purport to vote on behalf of individuals with disabilities when those individuals are not able to cast independent and private ballots. See generally Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345, 1348 (2004) (“Further study is needed to determine whether there are ways of reducing the risk of fraud or coercion while fully protecting the voting rights of disabled but capable individuals.”).

resources that are not made available to racial minorities.<sup>245</sup> They distinguish between self-contained special education classrooms and part-time resource rooms for providing services to children with disabilities.<sup>246</sup> They argue that self-contained special education classrooms are disproportionately used for low-income racial minorities and are both inadequate and stigmatizing, and that resource rooms are comparatively effective and nonstigmatizing.<sup>247</sup>

Kelman and Lester's work proceeds from two controversial premises: (1) that the "learning disabled" (LD) category is a questionable "soft" disability category with less stigma than the "educable mentally retarded" (EMR) category and (2) that resource rooms and in-class supplementary services are less stigmatizing than self-contained special education classrooms.<sup>248</sup> The word "stigma" appears throughout the book, but it is not clear how they decide what categories and settings are "stigmatizing." Is LD less stigmatizing because it is a predominantly white disability category or because it is an inherently less stigmatizing label? Are resource rooms less stigmatizing because they are disproportionately populated by upper middle-class white boys or because they are inherently less stigmatizing?

The data on disability classification is more complicated than described by Kelman and Lester. The United States Department of Education publishes data by race and disability that document who is served under the Individuals with Disabilities Education Act (IDEA).<sup>249</sup> As provided below, the most recent data are for the 2000–2001 academic year and do not include New York.

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245 See MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 79–80 (1997).

246 *Id.* at 75.

247 *Id.*

248 *Id.* at 16, 75.

249 Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400–1482).

TABLE 1. PERCENTAGE OF STUDENTS AGES SIX THROUGH TWENTY-ONE SERVED UNDER IDEA BY DISABILITY AND RACE/ETHNICITY (2000–2001 ACADEMIC YEAR)<sup>250</sup>

Disability	American Indian/ Alaska Native	Asian/ Pacific Islander	Black (non-Hispanic)	Hispanic	White (non-Hispanic)	All students served
Specific Learning Disabilities	56.3	43.2	45.2	60.3	48.9	50.0
Speech or language Impairments	17.1	25.2	15.1	17.3	20.8	18.9
Mental Retardation	8.5	10.1	18.9	8.6	9.3	10.6
Emotional Disturbance	7.5	5.3	10.7	4.5	8.0	8.2
Multiple Disabilities	2.5	2.3	1.9	1.8	1.8	2.1
Hearing Impairments	1.1	2.9	1.0	1.5	1.2	1.2
Orthopedic Impairments	0.8	2.0	0.9	1.4	1.4	1.3
Other Health Impairments	4.1	3.9	3.7	2.8	5.9	5.1
Visual Impairments	0.4	0.8	0.4	0.5	0.5	0.4
Autism	0.6	3.4	1.2	0.9	1.4	1.4
Deaf-blindness	0.0	0.0	0.0	0.0	0.0	0.0
Traumatic Brain Injury	0.3	0.3	0.2	0.2	0.3	0.3
Developmental Delay	0.7	0.6	0.7	0.2	0.6	0.5
All Disabilities	100.0	100.0	100.0	100.0	100.0	100.0

These data suggest that the connection between race or ethnicity and disability category is complex. While it is true that African-Americans are overrepresented in the mental retardation category and underrepresented in the learning disability category, the same pattern is not evident for other minority groups. American Indian/Alaska Natives are overrepresented in the learning disability category and underrepresented in the mental retardation category. And contrary to Kelman and Lester's assertions,<sup>251</sup> whites are *not* overrepresented

250 U.S. DEP'T OF EDUC., TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, at II-22 tbl.II-5 (2002), available at <http://www.ed.gov/about/reports/annual/osep/2002/index.html> (follow hyperlink under Section II).

251 KELMAN & LESTER, *supra* note 245, at 76.

in the learning disability category. The two groups that are overrepresented in this category are American Indian/Alaska Natives and Hispanics. Asian/Pacific Islanders are underrepresented in the learning disability category, overrepresented in the speech or language impairment category and overrepresented in the autism category. The speech or language numbers could be explained by second-language issues, but neither the learning disability nor autism categorizations have an obvious explanation.

The Department of Education data do not indicate where the students received their services—regular classroom, resource room, or self-contained special education classroom. Kelman and Lester assume that children who are diagnosed with learning disabilities are more likely to receive services in a more integrated setting than children who are diagnosed with mental retardation.<sup>252</sup> Moreover, they assume that the learning disability diagnosis is less stigmatizing than the mental retardation label.<sup>253</sup> If so, then the children least stigmatized by disability labeling would be Hispanic children, not whites. Possibly, Hispanic children are less stigmatized by disability labeling, but more likely, the connection that Kelman and Lester perceived between disability and stigma was really a racial stigma connection, not a disability stigma connection.

Kelman and Lester's work proceeds from the "separate is inherently unequal" premise. They assume that self-contained special education classrooms are stigmatizing, "dead-end" classes.<sup>254</sup> They assume that part-time resource rooms or intervention in the regular classroom—which are more integrated alternatives—are less stigmatizing. Although their work includes a very careful empirical account of much disability literature, they make their assumptions about stigma without investigating the literature on stigma as it relates to disability educational practices. Studies of children with cognitive or mental disabilities report that the children often prefer pull-out programs and special education classrooms because they find them to be "no more embarrassing and stigmatizing than in-class services."<sup>255</sup>

Kelman and Lester's "separate is inherently unequal" perspective is also contradicted by their own findings. They report that upper-class white parents are seeking to have their children labeled as "learning disabled" so that they can receive the protections of the IDEA and

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252 *Id.* at 74.

253 *Id.* at 30.

254 *Id.* at 68.

255 Joseph R. Jenkins & Amy Heinen, *Students' Preferences for Service Delivery: Pull-Out, In-Class, or Integrated Models*, 55 *EXCEPTIONAL CHILD*. 516, 520 (1989). For further discussion, see Colker, *supra* note 29, at 833-34.

the resources available to children identified as disabled.<sup>256</sup> They argue that one of these important services is "resource rooms," which they describe in glowing terms and contrast with self-contained special education classrooms which they describe as dead ends.<sup>257</sup> The special education classrooms are supposedly "dead ends" because they are self-contained disability classrooms whereas the resource rooms are for part-time use.<sup>258</sup> But they are both "separate" educational programs devised entirely for children with disabilities. One complication in understanding Kelman and Lester's argument is that they seem to conflate supplementary in-class services with resource rooms.<sup>259</sup> They talk about children who are "seen" by resource specialists as if that is the same as children who are "seen" in resource rooms themselves.<sup>260</sup> Yet, children can be seen by resource specialists in the regular classroom in a fully integrated setting; whereas, resource rooms are typically only for children with disabilities and therefore look a lot like the self-contained special education classrooms which they criticize.

Certainly, the special education classrooms which are populated predominantly by poor African-American boys are likely to be inferior educational alternatives. But Kelman and Lester also report that one upper-class New York school district experimented with creating resource room services for any student who wanted to use them.<sup>261</sup> They had to abandon this experiment because of excess demands on expensive resource room services.<sup>262</sup> The resource rooms then returned to disability-only environments but they were apparently highly desirable environments.<sup>263</sup> If resource rooms—a separate type of educational environment—can be considered so desirable, one must wonder if special education classrooms could also become so desirable.<sup>264</sup>

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256 KELMAN & LESTER, *supra* note 245, at 75, 92.

257 *Id.* at 75.

258 *Id.*

259 *See id.* at 76.

260 *Id.* at 77.

261 *Id.* at 86.

262 *Id.*

263 *Id.*

264 For example, when my son was in preschool, he attended a special education classroom called the "Teddy Bear" room. Each day, a few children from regular classrooms spent about an hour in his class to act as typically developing role models. Children in the regular classrooms were not forced to attend; they were allowed to volunteer. Nearly all the children in the regular classrooms did volunteer because they enjoyed attending the special education classroom. No one called the special education classroom a classroom for children with disabilities. It was simply the

Kelman and Lester's description of the resources made available to upper-class students with learning disabilities shows how separate can be superior rather than unequal.<sup>265</sup> Like gifted pull-out services, which are often popular despite the "separate" educational element, special education resource rooms can be popular despite the "separate" educational element.

Unfortunately, many "dead-end" self-contained special education classrooms still do exist that are populated primarily by African-American male students. The federal government should collect data on the educational progress of African-American students within special education settings. Self-contained special education classrooms should not be the new ghetto and disability resource rooms should not be the new Taj Mahal. Instead, all children with disabilities should have a claim to an appropriate configuration of resources. The emphasis on the degree of integration, however, may deter a focus on quality of services. Self-contained special education classrooms may be dead ends, but that may be due to the limited educational resources devoted to those classrooms rather than due to their segregated nature.

Daniel Losen and Kevin Welner connect race with the quality of services provided to children with disabilities. They note that "white students are overrepresented among students with disabilities seeking accommodations for the SAT, whereas minority students with disabilities are grossly underrepresented among this same group."<sup>266</sup> They argue that these statistics reflect the "racially differential use of special

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"Teddy Bear" room. In fact, my son did not learn until he was nine that he had ever attended a classroom for children with disabilities. Older children may be more aware of such distinctions, but Kelman and Lester seem to assume an inherent stigmatization and inferiority that need not exist.

265 Their work also reflects the challenges of applying an anti-subordination model to the education context. Their work is premised on an anti-subordination model because they are trying to demonstrate how one group of children with disabilities—middle or upper class children with learning disabilities—are treated more favorably than another group of children with disabilities—poor or minority children with mental retardation. See KELMAN & LESTER, *supra* note 245, at 68. They even go so far as to question whether the first category is even a subordinated group because they question the disability label for these children and suggest that their parents have co-opted the disability label as a way to make a claim for additional resources for their already-privileged children. *Id.* I would agree with them that we should not use an anti-subordination perspective to benefit those who are, at most, mildly disabled at the expense of those who are both more disabled and face subordination through race and class. But I do not accept their premise that the learning disabled category is a "soft" and less stigmatizing category than the mental retardation category. I suggest that they have confounded race and disability to make those arguments.

266 Losen & Welner, *supra* note 87, at 419.

education: the use by schools to isolate difficult minority children versus the use by white parents to gain additional resources and advantages for their children.”<sup>267</sup> Race and class, rather than the disability label, may be producing differential outcomes. Federal law should be seeking to ensure that all children with disabilities have the opportunity to seek the appropriate configuration of resources, irrespective of their race or class.<sup>268</sup>

The overall problem in this area is that integration rather than quality of education is considered the measure of success. Researchers need to develop reliable measures of progress for children with disabilities so that we can have an accurate indication of whether various special education classrooms or institutions are achieving appropriate progress for children with disabilities.<sup>269</sup>

## 2. Private Schools for Children with Disabilities

Most of the discussion of the invidious nature of disability-only educational institutions has focused on public disability-only schools when parents have wanted their children not to attend those schools.<sup>270</sup> From those cases, it has been easy to conclude that sepa-

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<sup>267</sup> *Id.*

<sup>268</sup> This problem is, of course, compounded by general inequities in our society in educational opportunities on the basis of race or class. The disability label, however, should not be used to further widen those inequities. It is hard to imagine that we can equalize the resources available to children with disabilities so long as widespread educational inequities exist for children in our society on the basis of race and class.

<sup>269</sup> One of the best studies of special education results that I found was conducted by Beth Harry and Janette Klingner. They were able to document the overrepresentation of minority children in special education while also noting that some children achieved positive results in special education environments. Rather than globally dismiss or accept special education, they tried to note what factors made special education successful for poor minority children. See BETH HARRY & JANETTE KLINGNER, WHY ARE SO MANY MINORITY STUDENTS IN SPECIAL EDUCATION? 159–72 (2006).

<sup>270</sup> One general problem in discussing this area of the law is that the stories are told from the perspective of the parents and the school districts. In the K–12 context, the IDEA grants the cause of action to the parents, not the child. And, of course, parents are socialized by society to have particular views about disability. Therefore, it is naïve to assume that parents are always making arguments in the best interest of their child with a disability. Even if children had a greater voice in the litigation in this area, we would have to question whether they are in a good position to assess what configuration of educational resources is most appropriate for them. This Article cannot begin to resolve such problems of what we might call “false consciousness” or “false standpoint.” Such problems exist in all areas of the law in which we purport to grant choices to individuals. Nonetheless, it is compounded in the disability area where we expect others to make judgments on behalf of individuals with disabilities as to their needs, desires, and capabilities.

rate is unequal. But there is another line of cases which suggests a different result—cases involving parents who want the state to reimburse them for the cost of sending their children to private disability-only schools when the public schools were not able to provide them with an adequate education for their children. The poor quality of the public school offerings has forced these parents to pursue other options. Interestingly, the private schools they explore tend to be disability-only. As with the evidence from the learning disability field, these cases suggest that separate need not necessarily carry the invidious segregation stigma. If school districts are incapable of developing high quality disability-only institutions, then possibly the case law should be more flexible in having the state pay for children to attend private disability-only institutions. Although the tuition for these schools may seem high, the tuition may still be less than what it would cost the public school district to create such an institution within its own school district.

One of the major cases concerning parents seeking to have their children attend private schools culminated in a 1985 Supreme Court decision in *School Committee of Burlington v. Department of Education*.<sup>271</sup> The case is known for setting the standards with respect to reimbursement if a parent rejects the school district's proposed individualized education plan (IEP) and sends a child to a private school. Most of the case law on this case involves procedural issues about reimbursement, but hidden in the case is an example of a parent preferring a private disability-only school over the more integrated option put forward by the school district.

John Doe's father began this litigation when he objected to the school district's proposed placement for his son who was entering fourth grade.<sup>272</sup> The town proposed that John Doe attend Pine Glen School, a public school that provided both regular and special education.<sup>273</sup> Mr. Doe preferred the Carroll School, a disability-only private school for children with learning disabilities.<sup>274</sup> Although the case

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271 471 U.S. 359 (1985).

272 *Town of Burlington v. Dep't of Educ.*, 655 F.2d 428, 429 (1st Cir. 1981), *aff'd sub nom. Sch. Comm. of Burlington*, 471 U.S. 359. Although the son is called "John Doe" in the early litigation, he appears to proceed under his own name in later litigation. *See Sch. Comm. of Burlington*, 471 U.S. at 361 (referring to the child as Michael Panico and the father as Robert Panico).

273 *Town of Burlington*, 655 F.2d at 429.

274 *Id.*; *see* The Carroll School, [http://www2.retrieve.com/carrollschool/upload/scs\\_images/the\\_carroll\\_school\\_home.html](http://www2.retrieve.com/carrollschool/upload/scs_images/the_carroll_school_home.html) (follow "About Us" hyperlink) (last visited Mar. 26, 2007) ("Carroll is a thriving community where children come together in an environment that values their differences and remediates their learning difficulties.").

involved extensive litigation, the reported decisions do not provide many facts about Doe's situation. One appellate decision reports that the Carroll School cost a total of \$6466 a year, of which the state would reimburse to a maximum of \$2795.<sup>275</sup>

The *Burlington* case reflects how a school system may not have sufficient disability-only programming for a particular child, necessitating a private placement. The child, whom the Supreme Court calls "Michael Panico," began to experience difficulties in the public school in first grade.<sup>276</sup> In third grade, the public school developed an IEP that included some individual tutoring, plus individual and group counseling.<sup>277</sup> When those services did not help Michael, the school district proposed placing Michael in a highly structured class of six children with special academic and social needs at another public school.<sup>278</sup> Michael's father objected to this placement, believing Michael needed to be educated at Carroll School, a state-approved private school for children with learning disabilities.<sup>279</sup> It appears that part of the dispute with the school district involved whether Michael's problems were primarily social or neurological.<sup>280</sup> In the school district's proposed placement, Michael's "reading skills would have been lower than those of five of the six students and he would have been one of the older students in the class."<sup>281</sup> The class also exceeded the maximum thirty-six months chronological age span in the classroom considered appropriate for Michael, and had a shorter school day than the Carroll School.<sup>282</sup>

In Michael's case, the school district had available a disability-only program for children with social and emotional difficulties but did not have available a disability-only program for children with learning disabilities. Both the school district and Michael's parents agreed that Michael should not be educated in the regular classroom, even with assistance, but needed some kind of special education. At the time of the dispute, the Carroll School placement would apparently cost

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275 *Town of Burlington*, 655 F.2d at 432 n.7. According to the school's website, tuition in 2006–2007 was \$32,200 for the winter program. See *The Carroll School*, *supra* note 274 (follow "About Us" hyperlink; then follow "Most frequently asked questions about the Carroll School" hyperlink).

276 *Sch. Comm. of Burlington*, 471 U.S. at 361.

277 *Id.*

278 *Id.* at 362.

279 *Id.*

280 *See id.*

281 *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 789 (1st Cir. 1984), *aff'd sub nom. Sch. Comm. of Burlington*, 471 U.S. 359.

282 *Id.* at 789–90.

\$6486 and the school district was only willing to reimburse \$2795.<sup>283</sup> From an efficiency perspective, it made sense for the school district to reimburse the private school for Michael's education rather than try to replicate their school in the public setting. The case also revealed how it was important for disability-only options to be available because a regular classroom, with assistance, had not benefited Michael.

A similar fact pattern existed for the other leading Supreme Court case on parental reimbursement for private schooling.<sup>284</sup> Shannon Carter was classified as learning disabled in ninth grade.<sup>285</sup> The school district proposed keeping Shannon in regular classes except for three periods of individualized instruction per week.<sup>286</sup> Her parents wanted to place her at Trident Academy, a private school specializing in educating children with disabilities.<sup>287</sup> Shannon made significant progress at Trident; her reading comprehension rose three grade levels in her three years at the school.<sup>288</sup>

Shannon's case, like Michael's case, appears to involve a school system with inadequate disability-only alternatives. The school system proposed a program placing Shannon in a regular classroom for three periods per week of individualized instruction.<sup>289</sup> The stated goals for her progress constituted approximately four months of progress on a yearly basis.<sup>290</sup> The school district had originally proposed placing Shannon in a resource room, but the parents objected because the other students in that room had very different types of disabilities.<sup>291</sup> When the parents insisted on specialized assistance by a learning disability expert, the school responded with its three periods per week proposal.<sup>292</sup> By contrast, when Shannon attended a private school for children with learning disabilities, she was able to make more than three years' progress in reading comprehension in three years.<sup>293</sup>

The school district and Shannon's parents initially agreed that Shannon needed disability-only services to make adequate progress, but the school district did not have a disability-only program for chil-

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283 *Town of Burlington v. Dep't of Educ.*, 655 F.2d 428, 432 n.7 (1st Cir. 1981), *aff'd sub nom. Sch. Comm. of Burlington*, 471 U.S. 359.

284 *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 10-11 (1993).

285 *Id.* at 10.

286 *Id.*

287 *Id.*

288 *Id.* at 11.

289 *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 159 (4th Cir. 1991), *aff'd*, 510 U.S. 7.

290 *Id.*

291 *Id.* at 158-59.

292 *Id.* at 159.

293 *Id.*

dren with learning disabilities. By attending a private disability-only school, Shannon was able to have her educational needs met without the school district investing in a new institutional arrangement.

Most of the attention under the IDEA has been on the issue of whether children are being educated in the most integrated setting possible. For many children, the best educational outcomes may occur in those settings. But for children like Michael and Shannon, the empirical literature suggests that disability-only settings targeted to the different learning style of children with learning disabilities are more likely to be effective.<sup>294</sup> Under the existing case law, parents have an exceedingly high burden of proof to have the school district pay for their children to attend such institutions.

A private school placement can occur under two scenarios under the IDEA. First, the school district and parent can voluntarily agree that a private school is the appropriate placement for a child.<sup>295</sup> In that case, the statute provides that such schooling shall occur at "no cost" to the parents.<sup>296</sup> Second, the parents can unilaterally choose to place their child in a private school and seek reimbursement for that education from the school district. The parent is only entitled to reimbursement "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment."<sup>297</sup> Shannon's and Michael's cases proceeded under that legal standard. Their parents were able to obtain reimbursement because the programs suggested by the school district were found not to constitute an "appropriate" education. Both children had made little progress in their existing public school program, the proposed program by the school district was unlikely to change those results, and the private school programs worked well for them.

The standards for an "appropriate" education, however, are very low. The Supreme Court in *Board of Education v. Rowley*<sup>298</sup> made it clear that maximizing each child's potential "was further than Congress intended to go."<sup>299</sup> Adequate yearly progress is sufficient under this standard, rather than evidence that the child with a disability has

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294 See Colker, *supra* note 29, at 825-35 (surveying empirical research).

295 See 20 U.S.C. § 1412(a)(10)(B)(i) (Supp. IV 2004).

296 *Id.*

297 *Id.* § 1412(a)(10)(C)(ii).

298 458 U.S. 176 (1982).

299 *Id.* at 199.

attained progress fully "commensurate with the opportunity provided to nonhandicapped children."<sup>300</sup>

One can understand that courts are reluctant to impose the cost of private education on public school systems. Hence, parents have a high burden of proof to attain reimbursement when they unilaterally choose a private school option for their children.

The issue of cost, however, is a complicated one. In the *Burlington* case, the private school was not much more expensive than what the school district was ordinarily prepared to pay for special education schooling. Further, no one even considered in either case what it would cost for the school district to create a comparable educational opportunity for these children. If these children needed an effective disability-only educational setting to make adequate academic progress, it would have been very expensive for the school district to create a publicly funded program for the small number of children likely to need such a program. It made more sense financially for the school district to pay the cost of educating one child at a private facility that already existed. In the private facility, the school district is spreading out the fixed overhead costs with parents or other school districts.

Another background assumption that may be operating in these cases is that children should be in an integrated public school setting rather than a private disability-only setting. If the private school were the only way for these children to attain an integrated setting, the case law might not be so stringent. But courts seem skeptical of the value of these private schools because they are only for children with disabilities. The courts are proceeding from an integration bias.

Yet, the evidence in these cases indicates that the parents are very desirous of having their children educated in these private schools. Despite the high burden of proof for reimbursement, parents are willing to advance the costs of attending these schools in the hope that they will be reimbursed later. The parents have abandoned the integration presumption at a high personal and financial cost.

It is hard to see what structural policies are furthered by the rigid integration perspective that courts bring to the discussion of schools reimbursing children for attendance at private disability-only schools. If the private school reimbursement were substantially more expensive than public school alternatives, one might see a structural argument that school districts should not divert money to these private

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300 *Id.* at 200. The Supreme Court in *Rowley* rejected this more rigorous standard, which had been applied by the lower court. Compare *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980) with *Rowley*, 458 U.S. at 192.

schools rather than spend this money on the education of other children with disabilities. But marginal cost issues are not even a part of the discussion in these cases. The private school option may not have been more expensive than providing appropriate support in an integrated public school classroom.

The private school option furthers the principle of anti-subordination by giving courts the option of finding a segregated placement for some disabled children while not forcing the state to finance its own disability-only institution. In the health care context, we saw courts express concern about public institutions being insufficiently populated to be cost effective. A private sector option can make it possible for some students to receive segregated services without the state bearing the cost of building and maintaining a disability-only institution. Hence, private segregated options for some children can help serve the availability of public integrated options for others.

A common criticism of segregation is that segregation is often equated with stigma. But these cases reveal how segregation need not be more stigmatizing than integration. In the *Burlington* case, for example, the parents seemed to be concerned that Michael would be stigmatized by being placed in a classroom with younger children who had disabilities very different from Michael's. They thought he would benefit from being in a classroom with children of the same age and similar disability. Possibly, the fact that the private school was at a different location also provided Michael with more privacy as he sought to improve his academic skills. Stigma is a vague concept, but private segregated options may help reduce stigma in some cases. Private school, in general, seems to be a valued alternative in our society. By allowing more children with disabilities to take advantage of private schooling, we may alleviate rather than increase stigma.

The private school option is not a panacea. Many children live in areas where no private school alternatives exist. Also, few parents can afford to pursue private education unilaterally in the hope that they may be reimbursed later by the school district. If the standards for private education were relaxed, however, then more parents could secure private schooling as part of the initial IEP rather than have to seek reimbursement for tuition dollars later. The current system only allows parents with the most financial resources to risk having to pay for the entire schooling themselves while they await the results of litigation. From an equality and diversity perspective, the stringent standards make little sense. They provide a range of options to middle-class parents but make it hard for poorer parents to secure nonstigmatizing and effective options for their children. If progress were measured by educational gain rather than integration, courts might be

more willing to require school districts to offer private segregated options to poor and minority children with disabilities.

### 3. Deaf Culture Educational Movement

Separate organizing by individuals with disabilities played a crucial role in the development of modern strategies for the delivery of services to individuals with disabilities. An important point in the development of the disability-based civil rights movement was the empowerment of individuals with disabilities to advocate on their own behalf and, in some cases, to resist a complete integrationist perspective.

Individuals with hearing impairments have been in the forefront of this movement through the "Deaf Culture" movement.<sup>301</sup> They resisted the movement to push them toward lip reading rather than sign language. They also insisted on the creation and maintenance of institutions like Gallaudet University that only educated individuals with hearing impairments. They also resisted the cochlear implant movement, arguing that deafness did not necessarily have to be "cured."<sup>302</sup>

The Deaf Culture movement had a profound impact on the development of policy under the ADA. Deaf culture advocates successfully argued to Congress that they should not be required to seek to alleviate their deafness while also receiving special services to alleviate the effects of their deafness.<sup>303</sup> Bonnie Tucker argues that the "yearly cost of educating one child in a residential school for the deaf is \$35,780 and educating one child in a self-contained class for the deaf is \$9689, compared to only \$3383 to educate the same child in a

301 See, e.g., CLAIRE RAMSEY, DEAF CHILDREN IN PUBLIC SCHOOLS 3–5 (1997); Harlan Lane & Michael Grodin, *Ethical Issues in Cochlear Implant Surgery: An Exploration into Disease, Disability, and the Best Interests of the Child*, 7 KENNEDY INST. ETHICS J. 231, 233–35 (1997); Harlan Lane, *Ethnicity, Ethics, and the Deaf-World*, 10 J. DEAF STUD. & DEAF EDUC. 291, 291–95 (2005); Claire Ramsey, *Ethics and Culture in the Deaf Community Response to Cochlear Implants*, 21 SEMINARS IN HEARING 75, 75–76 (2000) [hereinafter Ramsey, *Ethics*]; Claire Ramsey & Carol Padden, *Natives and Newcomers: Gaining Access to Literacy in a Classroom for Deaf Children*, 29 ANTHROPOLOGY & EDUC. Q. 5, 6–7 (1998); Claire Ramsey, *What Does Culture Have To Do with the Education of Students Who Are Deaf or Hard of Hearing?*, in LITERACY AND DEAF PEOPLE 47, 52–55 (Brenda Jo Brueggemann ed., 2004) [hereinafter Ramsey, *Culture*]; Robert Sparrow, *Defending Deaf Culture: The Case of Cochlear Implants*, 13 J. POL. PHIL. 135, 139–43 (2005).

302 See Lane & Grodin, *supra* note 301, at 244–46.

303 Bonnie Poitras Tucker, *The ADA and Deaf Culture: Contrasting Precepts, Conflicting Results*, 549 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 33 (1997).

regular classroom.”<sup>304</sup> In 1995, Congress allocated nearly \$24.8 million for various schools for the deaf in the District of Columbia.<sup>305</sup> Based on these and other cost estimates, Tucker argues that deaf people, who choose to remain deaf despite available cures, should not be eligible for state financial assistance to accommodate their deafness.<sup>306</sup> Tucker argues: “Deaf people cannot have it both ways. Deaf people cannot claim to be disabled for purposes of demanding accommodations under laws such as the ADA, yet claim that deafness is not a disability and thus efforts to cure deafness should cease. The two precepts are not reconcilable.”<sup>307</sup>

Tucker’s argument is a strong integrationist perspective—society should not be expected to subsidize segregating practices by individuals with disabilities. Her primary argument is financial and shows how financial concerns, rather than egalitarian concerns, can cause integrationist arguments. She acknowledges that “[f]rom a purely altruistic perspective, it might be ideal if Deaf culturists could choose to be deaf and at the same time require society to pay the costs of that choice.”<sup>308</sup> Economic realism, however, causes her to conclude that Deaf Culturists must balance their individual needs with societal concerns about expense.

Members of the Deaf Culture community disagree sharply with Tucker because they place a high value on the acquisition of American Sign Language (ASL) as the primary mode of communication for deaf children.<sup>309</sup> Segregated schools and classrooms are not an end in themselves. They are a mechanism for deaf children to learn ASL. They dispute the evidence that cochlear implants are successful for young children and argue that ASL is the best option for these children.<sup>310</sup>

Many deaf children, however, face a very difficult situation. They are born to hearing parents who do not speak ASL. During the critical young years when most children learn language, they may be exposed to no natural language—they cannot hear their parents, yet

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304 *Id.* (citing Jean L. Johnson et al., *Implementing a Statewide System of Services for Infants and Toddlers with Hearing Disabilities*, 14 SEMINARS IN HEARING 117 (1993)).

305 *Id.* at 33–34.

306 *Id.* at 35.

307 *Id.* at 36.

308 *Id.*

309 *See, e.g., Ramsey, Culture, supra* note 301, at 56.

310 “Rather than improving the child’s linguistic situation, implant surgery may prolong the period of time that the deaf child, who is already atypical from a developmental linguistic point of view, lives without access to a language.” Ramsey, *Ethics, supra* note 301, at 78; *see Lane, supra* note 301, at 295–302; Sparrow, *supra* note 301, at 140–52.

they are also not exposed to ASL at home. They may need an intensive segregated deaf environment in order to develop appropriate language skills.<sup>311</sup> Even assuming that Tucker's statistics are accurate about the cost of educating them in a deaf-only environment, that environment may present them with the only realistic option of developing sufficient linguistic skills to be productive members of society. Tucker offers statistics about short-term costs, overlooking the evidence about comparative long-term results.<sup>312</sup>

No easy resolution exists in the dispute between Tucker and the Deaf Culture community. Deaf Culture activists argue that Tucker's position is disrespectful of their basic right of self-determination.<sup>313</sup> They argue that we would never ask an African-American to undergo surgery to make his life "easier" by becoming white or ask a woman to undergo surgery to make her life "easier" by becoming a man.<sup>314</sup> Analogizing to arguments by black social workers that black children should preferentially be raised in black households, they argue that deaf children should be educated in households that value Deaf Culture.<sup>315</sup>

Unfortunately, Deaf Culturists have no answer to Tucker's economic arguments. If children who are born deaf could begin to hear by taking one inexpensive pill that caused no negative side effects, would they still insist that society should subsidize the cost of deafness? Could an argument for taking such a pill be made in a way that is respectful of Deaf Culture? From an anti-subordination perspective, the important question would be whether the argument for taking the pill was premised in a degrading view about disability. At present, that possibility is only theoretical. Deaf Culture advocates argue that society has exaggerated the benefits of cochlear implants out of disrespect for the Deaf Culture movement.<sup>316</sup> An anti-subordination perspective would counsel us to be aware of such potential exaggerations given the anti-disability history of our society.<sup>317</sup>

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311 See Ramsey & Padden, *supra* note 301, at 11–13.

312 "The long-term outcomes of implants are not well-understood. Documentation of the primary hoped-for benefit to prelingually deaf children—acquisition of spoken language—is difficult to find in published research." Ramsey, *Ethics*, *supra* note 301, at 85.

313 Tucker herself is deaf but does not subscribe to the tenets of the Deaf Culture movement. See Tucker, *supra* note 303, at 34–36.

314 See Neil Levy, *Reconsidering Cochlear Implants: The Lessons of Martha's Vineyard*, 16 *BIOETHICS* 134, 137–41 (2002).

315 Lane & Grodin, *supra* note 301, at 232–35.

316 See, e.g., Ramsey, *Ethics*, *supra* note 301, at 84.

317 We also should be mindful that individuals within the Deaf Culture movement have also been socialized by society. That socialization could be causing them to exaggerate.

Claire Ramsey offers a respectful framework to consider difficult issues like cochlear implants and ASL instruction for deaf children. She says:

Those of us who work to educate deaf children see them as whole human beings. From this point of view, speech ability and amplified ability to perceive sound are not our dominant goals for deaf children. We know that rich linguistic and intellectual lives do not depend on detection of sound. Like the deaf community, many teachers question the linguistic, social, mental health, and psychological consequences of implants in prelingually deaf children. It is essential that we devote thoughtful, rigorous reflection to the risks and benefits of cochlear implants for prelingually deaf children and that, at the same time, we give respectful attention to the ethical concerns of the deaf community and those who study the linguistic and social implications of early childhood deafness because they are concerned about the quality of a deaf child's entire lifespan.<sup>318</sup>

Ramsey seeks to develop policy that will consider the long-term impact on the child while also valuing the social network in which the child might live. Her approach leaves open the possibility that cochlear implants might be considered the best option for some children, with education in the mainstream classroom, while also respecting the option of a focus on ASL in an intensive deaf-only classroom. That range of possibilities is evident from an anti-subordination perspective that does not presuppose the benefits of integration.

### B. Institutionalization Lessons

Attempts to close state institutions entirely may offer insight into how states can go too far in the deinstitutionalization movement. New Hampshire is well known for being the first state to provide services for individuals with developmental disabilities without any use of institutional care.<sup>319</sup> It went from having 1200 individuals in residential institutions in 1970 to zero individuals in such programs by 1991.<sup>320</sup> The legal action that helped spur this development did not, in fact, insist upon the closure of all state disability-only institutions. The goal was to have fewer than 400 individuals in such institutions, a number

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gerate the benefits of their own position. Nonetheless, on balance, I think that problem is unlikely because the dominant social position supports integration rather than segregation.

318 Ramsey, *Ethics*, *supra* note 301, at 85.

319 See Donald Shumway, *Closing Laconia*, in *DEINSTITUTIONALIZATION AND COMMUNITY LIVING* 19, 19 (Jim Mansell & Kent Ericsson eds., 1996).

320 *Id.* at 19–20.

that was thought to be appropriate.<sup>321</sup> But when only thirty individuals remained at the only state facility, “the high overhead for the single facility dictated that it ultimately be closed”<sup>322</sup> even though the family members of those individuals had previously objected to community alternatives for those people. No new admissions were made to the state facility in its last five years of existence.<sup>323</sup> The state reported “very high satisfaction levels” by the families and individuals affected by deinstitutionalization, including the thirty “hold out” families.<sup>324</sup>

No critical inquiry is suggested as to whether this complete deinstitutionalization has been a problem for some individuals.<sup>325</sup> The author of the New Hampshire study reports that one ongoing challenge is to “[f]ight hard to keep people from having to return, once placed.”<sup>326</sup> Because the only residential setting has been closed, one must ask—where would they return if community placement fails?

Most of the 1200 New Hampshire citizens who left institutional care probably fared much better in the community settings that became available to them. The increased infusion of funds into programs for these individuals virtually guaranteed some improvement. But this reallocation of funds may be problematic for those who are unlikely to benefit from community settings. Rather than coercing individuals to remain in disability-only institutions so that they have sufficient population to survive, we may be coercing individuals to enter community-based settings so that we can close disability-only institutions. Coercion in either direction is inappropriate.

One deinstitutionalization complication is that the population that was released from state institutions after living there for a long period is not the same as the population that has never lived in an institutional setting. Richard Lamb notes that “[p]ersons who have been hospitalized for long periods have been institutionalized to passivity.”<sup>327</sup> When they are placed in community settings they “tend to stay where they are placed and to accept treatment.”<sup>328</sup> But what he calls the “new generation of severely mentally ill persons” does not

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321 *Id.* at 21.

322 *Id.* at 22.

323 *Id.*

324 *Id.* at 25.

325 Similarly, another author describes the New Hampshire experience as nearly perfect. See JULIE ANN RACINO, POLICY, PROGRAM EVALUATION, AND RESEARCH IN DISABILITY 53–71 (1999).

326 Shumway, *supra* note 319, at 27–28.

327 Lamb, *supra* note 148, at 4.

328 *Id.*

have this culture of passivity and finds it difficult to fare well in community settings.<sup>329</sup> Lamb does not argue for returning the mentally ill to “the back wards of state hospitals,” but he does argue that we need to be realistic in some cases and promote a “restricted lifestyle” for some people who are severely mentally ill that will help them enjoy the liberty of staying in the community.<sup>330</sup> He also supports the relaxation of involuntary commitment laws so that states can order outpatient civil commitment rather than commitment to a state mental hospital.<sup>331</sup> Finally, he supports the appointment of a conservator for individuals who cannot care for themselves without supervision. The conservator “has the authority to place the conservatee in any setting . . . and to require that he or she participate in psychiatric treatment and take medications in order to remedy or prevent the recurrence of severe disability.”<sup>332</sup> Lamb’s suggestions are inconsistent with a full deinstitutionalization approach but may offer more realistic and effective support for individuals with severe disabilities.

Some states have followed Lamb’s suggestions, whereas others continue to have a very narrow standard for mandatory treatment. The District of Columbia, for example, only permits mandatory treatment when a person is a danger to self or others.<sup>333</sup> By contrast, Minnesota has developed a sophisticated set of statutes which distinguishes between mandatory inpatient and outpatient treatment and tries to provide both assistance and due process safeguards. In order to receive mandatory *inpatient* treatment, an individual must demonstrate a clear danger to others or the likelihood of physical harm to self or others as demonstrated by:

1. failure to obtain necessary food, clothing, shelter, or medical care as a result of impairment, or
2. inability to obtain necessary food, clothing, shelter or medical care and likely to suffer substantial harm, significant psychiatric deterioration or debilitation, or serious illness, or
3. a recent attempt or threat to harm self or others, or

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329 *Id.* at 4–5.

330 *Id.* at 7.

331 *Id.* at 9.

332 *Id.*

333 D.C. CODE ANN. § 21-545(b) (LexisNexis Supp. 2005); *see also* MD. CODE ANN., HEALTH—GEN. § 10-632(e)(2) (LexisNexis 2005); MASS. GEN. LAWS ch. 123, §§ 1, 8 (2004); NEV. REV. STAT. § 433A.310(1) (2005); N.J. STAT. ANN. 30:4-27:10 (West 1997); R.I. GEN. LAWS § 40.1-5-8(j), 40.1-5-2(7)(i) (2006); TENN. CODE ANN. § 33-6-501 (2001) (narrow standards for mandatory treatment). For an excellent overview of state laws, *see* TREATMENT ADVOCACY CTR., STATE STANDARDS FOR ASSISTED TREATMENT (2004), <http://www.psychlaws.org/legalresources/statestandardschart.pdf>.

4. a recent volitional conduct involving significant damage to property.<sup>334</sup>

In addition, an individual can obtain mandatory *outpatient* treatment if one of those four factors is present and there is evidence that:

1. manifestations interfere with ability to care for self and, when competent, the individual would choose substantially similar treatment, or
2. the individual has at least two court-ordered hospitalizations in past three years, exhibits symptoms or behaviors that are substantially similar to those precipitating one or more of those hospitalizations, and the individual is reasonably expected to deteriorate to inpatient standard unless treated.<sup>335</sup>

These factors are premised on an anti-subordination rather than integrationist perspective because they measure equality on the basis of the quality of an individual's life rather than on integration. These standards may not be perfect and the disability rights community may disagree on their exact formulation. But they place the focus in the right place—trying to provide a sufficient safety net so that individuals with disabilities can live in dignity, whether the setting is community or institution.

### C. Voting Alternatives

Individuals with cognitive and emotional impairments and individuals with physical impairments face explicit and subtle barriers to voting. The legal approach has been to remove those barriers so that individuals with disabilities can vote alongside others in public polling places. The legal approach has been governed by the integrationist premise that everyone should vote at a public polling place as a basic act of citizenship.

But what if we abandoned the integration premise and, instead, asked how we could best achieve independent and private voting for individuals with disabilities? Under an anti-subordination approach, we might think about how to bring the polling place to the person rather than how to get the person to the polling place.

The example of individuals who live in nursing homes reflects this problem. Federal voting law has focused on making it possible for individuals with physical or visual impairments to vote in public pol-

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334 MINN. STAT. § 253B.09(1) (2006).

335 *Id.* § 253 B.02(13)(a), (17), 253 B.065(5)(b). Some other states have similar standards. See, e.g., MONT. CODE ANN. §§ 53-21-126(1), 53-21-127(7) (2005); OR. REV. STAT. § 426.005(1)(d) (2005).

ling places. Success is measured by how many polling places have become accessible and whether technology permits blind voters to vote privately and independently. Meanwhile, voting participation rates by individuals with disabilities have barely changed.<sup>336</sup>

One problem is the assumption that integrated public voting is the best solution to the problem of the disenfranchisement of individuals with disabilities. Individuals typically live in nursing homes because they do not have the physical strength or ability to live independently. Many people who live in nursing homes find basic daily activities to be exhausting because they suffer from conditions which involve chronic pain. Accessible voting equipment may make it *possible* for them to vote at a public polling place. Nonetheless, the effort of public voting may also exhaust them so that they have to choose, for example, between voting and a visit with a relative the next day.<sup>337</sup> If we bring voting technology to the nursing home rather than expect the residents of the nursing home to travel to the polling place, we might see a significant increase in voting participation rates by some individuals with disabilities.<sup>338</sup> Their bus ride from the nursing home can also no longer be the basis for identifying them as disabled and excluded from voting.

Not all individuals with disabilities, of course, live in nursing homes. Nonetheless, problems with “getting to polling places” was one of the most common problems cited by individuals with disabilities who have not voted in recent elections.<sup>339</sup> We could explore ways for individuals with disabilities to vote in the privacy of their homes on Election Day through telephone or electronic voting so that they would not have to “get” to the polling place. The disability rights community has appropriately criticized attempts to make individuals

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336 Unfortunately, little data exist on disability turnout over time. The available data suggest that turnout rates among individuals with disabilities are fourteen to twenty-one percent below that of the nondisabled population and that recent changes in federal law have not changed those numbers. See Lisa Schur et al., *Enabling Democracy: Disability and Voter Turnout*, 55 POL. RES. Q. 167, 171 (2002).

337 I thank my colleague, Deborah Merritt, for helping me see this point.

338 Further, we might also improve the integrity of their vote. Encouraging the use of absentee balloting may facilitate others to vote on behalf of individuals with disabilities. If voting became possible at the nursing home itself, through private and confidential voting equipment, more individuals with disabilities may be able to cast the ballot of their choice. For discussion of the problems associated with absentee voting for individuals with disabilities, see Karlawish et al., *supra* note 244, at 1347–48.

339 Researchers have found that “getting to polling place” is one of the most common accessibility problems noted by individuals with disabilities who did not vote in recent elections. See Schur et al., *supra* note 336, at 177 (finding 8.8% of the individuals with disabilities in their sample reporting this problem).

with disabilities vote by absentee ballot in advance of elections. Absentee balloting requires additional proactive steps by voters, and forces them to make up their minds before the last crucial days of the election campaign. Some states, however, have devised telephone and computer methods of voting on Election Day that are no more cumbersome than traveling to public polling places. For individuals who suffer from various physical impairments, those methods of voting may even be more convenient than public voting at polling places.

### CONCLUSION

We should not assume that the most integrated environment is always the preferable policy in the disability context. Before moving from a segregated to integrated method of delivery of programs or services, we should ask whether there is evidence to support the integrated method over the segregated method.

An example of how such cautiousness might be helpful involves the Special Olympics movement. This program was created in 1962 to provide athletic opportunities for individuals with developmental disabilities.<sup>340</sup> It is a classic “segregated” model for delivery of services because the participants compete on teams with others who are also developmentally disabled.<sup>341</sup> In 2000, a broad survey was completed to attain feedback on the success of the program.<sup>342</sup> Participants, their families, and coaches reported high levels of satisfaction with the program.<sup>343</sup> Meanwhile, the Special Olympics had also created a “Unified Sports” program under which disabled and nondisabled individuals could compete together as “partners” in athletic events in furtherance of the “full inclusion” ideal. Disabled participants were supposed to be given a choice of participating in the traditional or integrated program. A 2001 report of that integrated program found that participants were generally very happy with it but that some participants complained that nondisabled partners dominated the activities, and that individuals with disabilities were not given the choice whether to participate in the unified, rather than traditional, Special Olympics programming.<sup>344</sup>

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340 See GARY N. SIPERSTEIN ET AL., A COMPREHENSIVE NATIONAL STUDY OF SPECIAL OLYMPICS PROGRAMS IN THE UNITED STATES 2 (2006), available at [http://www.specialolympics.ca/SOC/ref\\_r\\_1.pdf](http://www.specialolympics.ca/SOC/ref_r_1.pdf).

341 *Id.* at 8–9.

342 *Id.* at 2.

343 *Id.* at 9–14.

344 CTR. FOR SOC. DEV. & EDUC., UNIV. OF MASS. & DEP’T OF SPECIAL EDUC., UNIV. OF UTAH, NATIONAL EVALUATION OF THE SPECIAL OLYMPICS UNIFIED SPORTS PROGRAM 19, 20, 22 (2001), available at <http://www.specialolympics.org> (follow “Initiatives”

These two programs create a choice for the Special Olympics movement. Should it put more emphasis on the Unified Sports program approach so that individuals with disabilities are likely to compete alongside individuals without disabilities? Or should the Unified Sports program approach simply be one choice among many for individuals with disabilities? An anti-subordination approach suggests that the unified approach is not inherently superior but is merely one possible approach among many and should have to be justified in its own right to receive support.<sup>345</sup> It is consistent with the anti-subordination model that the Unified Sports program, along with the traditional program, is being rigorously examined. So long as the reports of both programs demonstrate positive results, neither should be abandoned for the sake of an integration (or segregation) principle.

One special challenge in the disability area that is reflected by the Special Olympics/Unified Sports controversy is the use of the “disability” category. Under the traditional model, only individuals who meet certain criteria involving developmental disability may participate.<sup>346</sup> In our highly competitive society, in which great emphasis is placed on sports at an early age, the restrictive definition of disability leaves many children who may be mildly disabled, or merely uncoordinated, with few, if any, athletic opportunities because they do not qualify for the Special Olympics. This same problem exists elsewhere in society as only individuals with disabilities are legally entitled to seek accommodations under the ADA. Individuals with physical or mental impairments that do not rise to the legal level of “disability” cannot take advantage of that statutory obligation.<sup>347</sup>

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hyperlink; then follow “Research” hyperlink; then follow “Impact of Special Olympics Programming” hyperlink; then follow “National Evaluation of the Special Olympics Unified Sports Program” hyperlink; then follow “Adobe PDF” hyperlink) (finding 53% of coaches and 43% of family members reporting problems with partner dominance; 29% of families indicating that they did not have a choice regarding unified versus traditional participation in the Special Olympics).

345 For a social construction perspective on this issue, see Mary Ann Devine, *Inclusive Leisure Services and Research: A Consideration of the Use of Social Construction Theory*, 24 J. LEISURABILITY 1, 3, 5 (1997), available at <http://www.lin.ca/resource/lin/html/Vol24/v24n2a2.htm> (suggesting that the Special Olympics may impede inclusion in leisure services for people with mild developmental disabilities).

346 See SPECIAL OLYMPICS OFFICIAL GENERAL RULES § 6.01(d) (2004), available at <http://www.specialolympics.org> (follow “About Us” hyperlink; then follow “Special Olympics General Rules” hyperlink; then follow “General Rules (Adobe PDF document, 724K)” hyperlink) (defining the term “mental retardation”).

347 See 42 U.S.C. § 12102(2) (2000) (defining the term “disability” as it is used throughout the ADA).

The issue of whether policy makers should use a restrictive definition of disability is beyond the scope of this Article. But the restrictive definition puts pressure on the integration/segregation issue. It raises the broader question of what we mean by "integration." Currently, the Special Olympics model, for example, is segregated on the basis of whether an individual is developmentally disabled. The Unified Sports model, by contrast, is integrated with the participants either qualifying as "developmentally disabled" or as "nondisabled partners." But what if the "nondisabled partners" were themselves individuals with physical or mental impairments that did not meet the restrictive definition of "disability" used in the Unified Sports model? Then, the Unified Sports model could become a mechanism for individuals with developmental disabilities along with individuals who have trouble participating in traditional sports programs to gain athletic opportunities. Would that model be considered an "integrated" model or a "segregated" model? That model—whether we call it integrated or segregated—might be the most beneficial because it could meet the needs of individuals with developmental disabilities as well as the needs of individuals who have few athletic opportunities in our competitive society. It also might lessen the problem of "nondisabled partner domination" if the partner is not a typically athletic individual. The integration/segregation dichotomy may cause us not to consider that intermediate option.

The Special Olympics/Unified Sports program is not the only place where a more flexible understanding of the term "integration" might achieve positive benefits. In the educational context, for example, we might seek to integrate individuals who qualify as "disabled" with other individuals who would benefit from more attention and smaller class size but who do not meet the restrictive definition of "disabled." Psychologists, for example, use the term "autism spectrum disorder" to describe individuals who have autism-related impairments.<sup>348</sup> They recognize that autism exists along a spectrum, yet our legal definitions insist on individuals either having "autism" or otherwise being "nondisabled." An anti-subordination model could suggest that we might modify a traditional special education classroom for individuals who meet the legal definition of "autism" by making the classroom available to other students who have sensory/social impairments along the autism spectrum but who do not meet the legal definition of "disability." Some might call this approach segregation; others might call it integration. From an anti-subordination

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<sup>348</sup> See Abigail Sullivan Moore, *Students on the Spectrum*, N.Y. TIMES, Nov. 4, 2006, at 28.

perspective, however, we would simply ask whether it meets the needs of as many students as possible. Is it effective?<sup>349</sup>

One problem with the anti-subordination approach, one might argue, is that it does not give sufficient attention to the benefits of integration to the nondisabled community. Some might argue that children without disabilities benefit from being exposed to children with disabilities from a young age. The proliferation of special education classrooms in which they do not have contact with such children unless they share a similar impairment might result in more stereotypes (from lack of exposure) of individuals with disabilities. This factor, however, can be part of the anti-subordination model, but it would have to be reframed. The issue would not be whether the nondisabled community benefits from early exposure to individuals with disabilities. The issue would be whether individuals with disabilities benefit from the nondisabled community having early exposure to individuals with disabilities. From an anti-subordination perspective, the issue is not the benefits to the nondisabled community; instead, the issue is the benefit to the historically subordinated group—individuals with disabilities.

Nonetheless, we should not forget that segregation can be problematic. Parents are continuing to bring cases on behalf of their children complaining about the low quality of disability-only education that school districts are seeking to impose on their children. Guardians are continuing to represent individuals with disabilities to oppose their placement in segregated and inhumane disability-only institutions. And people with disabilities continue to object that they are disenfranchised due to the inaccessibility of polling places. Invidious segregating practices continue today. And integration is often the correct response to these practices.

The field of disability studies needs a theory of equality that goes beyond the mantra "separate is inherently unequal." This theory needs to take into account that some guardians are frustrated at the lack of disability-only institutions available to some people with profound disabilities who cannot safely live in the community. It needs to consider that some parents desire their children to have a disability label to secure a space in private disability-only institutions. It needs to respect the request for disability-only educational settings for children with hearing impairments so that they can get a strong foundation in American Sign Language. Finally, it needs to adjust to

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349 Some researchers argue that the empirical evidence does not support an integration presumption for children with autism. See, e.g., Bernard Rimland, *Inclusive Education: Right for Some*, 7 *AUTISM RES. REV. INT'L* 3 (1993).

the possibility that public voting will be considered inconvenient and antiquated as voting in the privacy of one's home becomes more feasible.

The mantra "separate is inherently unequal" needs to be replaced with the slogan "invidious segregation is inherently unequal." Unfortunately, this is not a catchy slogan that can spur another *Brown v. Board of Education*. Catchy slogans may facilitate fundraising and even achieve some needed structural reforms. But they may also miscalibrate the balance between equality and justice. The challenge for the disability rights movement is to construct a theory of equality that can safeguard against invidious segregation while promoting new practices that can protect those who need or desire separate disability-only programming or institutions. Rather than celebrate the closing of the last disability-only institution in a state, we should ask what is happening to those in the disability community who need or want such institutions. The measure of equality should be anti-subordination rather than integration for individuals with disabilities.

