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# PROBLEMS OF ENFORCING THE RIGHTS OF THE MENTALLY RETARDED

*Human rights in our society are not guaranteed or protected by good will alone. The fabric of our society, even many of its customs, is dictated, controlled, or modified by law. The mentally retarded, in spite of pious protestations of good will, are still too often regarded as a sub-specie of Homo sapiens. It is inherent in our ethic, and latterly, of our jurisprudence, that the weaker need and must receive society's protection. Their "rights," their human rights, if you will, depend, therefore, not on their own strength, but how society translate government, the agencies of government, and the people who are entrusted with the task of implementing, or making effective this protection, express this protection through legislation, administration and custom.*[1]

Until recently, "good will" has, in fact, been the only protection that the mentally retarded could rely upon to secure their rights. Since the political process depends on power both in terms of votes and in terms of organized pressure groups, it is not surprising that legislation protecting the rights of the mentally retarded has been inadequate or nonexistent.[2] Since the executive branch operates from much the same power base as the legislative branch, it too has been ineffective in securing the rights of the mentally retarded. By contrast, the judiciary is not necessarily responsive to the popularity of an issue or the power of the group whose rights are being infringed. Rather, it is the duty of the courts to accord these rights the full measure of legal protection, whoever the complaining party may be.

Fulfilling this obligation, several United States District Courts and one state court[3] have given legal recognition to the rights of the mentally retarded in the areas of adequate habilitation[4] and of education. In so doing, they have placed

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1 Address by Joseph T. Weingold, American Association on Mental Deficiency regional meeting, in Grossinger, New York, Oct., 1971.

2 The main reason that the mentally retarded are ineffective as a voting power bloc is that in many states they are not allowed to vote. *See, e.g.,* MO. ANN. STAT. § 111.060 (1966), which states in part: "No idiot, no insane person . . . shall be entitled to vote at any election under the laws of this state."

The main reason that the mentally retarded are ineffective as a pressure group is best summed up by Dr. Morton Birnbaum: "There are many . . . patients who are just sitting around the hospitals doing nothing. They are not complaining loudly, they are not writing letters to newspapers, to their legislators or to their governor . . . ." *Hearings on the Constitutional Rights of the Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, United States Senate,* 91st Congress in Washington, D.C., on November 11, 1969, at 64.

For a thorough analysis of the reasons behind public, legislative, and executive inaction in the area of treatment and care of mentally ill, see Note, *The Right to Treatment: Judicial Realism—Judicial Initiative,* 10 DUQ. L. REV. 609 (1972).

3 Mills v. Bd. of Educ. of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Renelli v. Dept. of Mental Hygiene, 169 N.Y.L.J. No. 17, § 2 at S18, col. 6 (Jan. 24, 1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *appeal docketed,* No. 72-2634, 5th Cir., argument heard Dec. 6, 1972.

4 Habilitation has been defined as:

> . . . the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency. Habilitation includes but is not limited to

upon the state the duty to provide funds and services which require the expenditure of funds. In each case the state has not contested the fact that the mentally retarded have such legal rights, but rather has expressed its inability to comply with the court's financing order due to lack of available funds.[5] Each court, on the other hand, has made it clear that noncompliance with its order cannot be defended or excused on the basis of lack of available funds or resources.[6] The ensuing dilemma has been stated as follows:

> Such an order, although given within the court's substantive authority, will have no effect if the Court does not possess the power to impose financial obligations upon a party to enforce compliance with the judicial order.[7]

This note will examine the basis for recognizing the legal rights of the mentally retarded and the commensurate problems which arise from judicial intervention, in the form of a financing order, in a traditionally legislative area. Particular emphasis will be placed on the difficulty presented under the eleventh amendment in suing state agencies and officers, the problem of compelling a state legislature to appropriate funds, and the problem faced by a court in enforcing a financing order.

## I. Decisional Law Giving Legal Recognition to the Rights of the Retarded

### A. *Right to Education*

The right of the mentally retarded to a free, publicly supported education was first enunciated in *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania,*[8] a class action brought on behalf of mentally retarded children, residents of Pennsylvania, who were being denied access to a free program of public education and training. The plaintiffs sought to enjoin the defendants from applying certain Pennsylvania statutes[9] which postponed or denied to the plaintiffs a free education. No decision was reached on the merits because a consent agreement was entered. Basically, the agreement provided that

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programs of formal, structured education and treatment.
Wyatt v. Stickney, 344 F. Supp. 387, 395 (M.D. Ala. 1972).

5 *See* cases cited note 3 *supra.*

6 *Id.*

7 Note, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy,* 59 GEO. L.J. 393 (1970).

8 334 F. Supp. 1257 (E.D. Pa. 1971).

9 The statutes in question were:
(1) PA. STAT. ANN. tit. 24, Purden (1962) § 13-1304 (Cum. Supp. 1972), which permitted admission to public school to be postponed for an indefinite period for any child who had not attained the mental age of five years.
(2) PA. STAT. ANN. tit. 24, § 13-1326 (1962), which defined compulsory school-age attendance as eight to seventeen and which was used in practice to postpone admissions of retarded children until eight or to eliminate them from public schools at seventeen.
(3) PA. STAT. ANN. tit. 24, § 13-1330 (Cum. Supp. 1972), which appeared to permit that any child be excused from compulsory school attendance if a psychologist found that child unable to profit from an education.
(4) PA. STAT. ANN. tit. 24, § 13-1375 (Cum. Supp. 1972), which relieved the State Board of Education from any obligation to provide an education for a child certified as uneducable and untrainable by the public school psychologist.

all children could benefit from an education, that Pennsylvania had undertaken to provide a free public education to all its children, including its exceptional children, and that the Commonwealth had an obligation to place each mentally retarded child in a free public program of education appropriate to the child's ability. Subsequently, the agreement was amended when certain local school districts and intermediate units expressed fear that there would be grave financial burdens placed upon them as a result of the consent agreement.[10] In discussing this aspect of the agreement, the court stated:

> Financially, the burden of implementing this settlement falls primarily upon the Commonwealth, not the local districts or intermediate units. Dr. Ohrtman testified that the excess instruction cost required to educate a retarded child will be paid for by the Commonwealth. . . . Moreover, the Commonwealth will pay intermediate units, in advance, funds necessary to hire extra personnel such as secretaries and psychologists necessary to implement this settlement.[11]

The leading case on the right to education is *Mills v. Board of Education of the District of Columbia*.[12] This was a class action brought in the United States District Court for the District of Columbia on behalf of all school-age residents of Washington, D.C., who had been, or might be deprived of a publicly supported education. Mentally retarded children were among the seven named plaintiffs, who sought to enjoin the defendants from denying to the plaintiffs and the class they represented a publicly supported education. In its answer the defendants stated that it was impossible to grant the relief requested unless Congress appropriated or the defendants diverted millions of dollars already appropriated to other educational services. The defendants contended that to do so would violate a congressional mandate and in addition would be inequitable to children not in the plaintiffs' class.[13] Judge Waddy, however, granted summary judgment for the plaintiffs. He stated:

> The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these "exceptional" children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.... [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia

10 Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).
11 *Id.* at 301-02.
12 348 F. Supp. 866 (D.D.C. 1972).
13 *Id.* at 875.

> Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[14]

The court was reluctant to cast itself in the role of administrator in implementing its judgment, but cautioned the defendants that inaction or delay on their part would result in the appointment of a special master to implement the judgment under the court's direction. To this end the court retained jurisdiction.[15]

### B. *Right to Adequate Habilitation*

The recognition of the constitutional right of the mentally retarded to receive adequate habilitation was the result of litigation which originally pertained to the right to treatment of the mentally ill in Alabama. The initial suit, *Wyatt v. Stickney,*[16] was brought on behalf of patients who had been involuntarily civilly committed to Bryce Hospital.[17] The complaint alleged that the treatment plans were inadequate.[18] The court held:

> When patients are so committed (involuntarily) for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. . . . Adequate and effective treatment is constitutionally required . . . .[19]

While evidence indicated that a lack of operating funds was the main reason for inadequate treatment, the court found this insufficient to justify denial of the right to treatment. The defendants were given ninety days in which to formulate a specific plan for providing adequate treatment for patients at Bryce and to define the mission and function of the hospital. Failure to comply, the court warned, would result in the appointment by the court of a panel of experts to formulate adequate standards.[20]

A second *Wyatt*[21] decision resulted when the defendants failed to formulate the minimum standards required of them by the first decision. The court held that although available financing to satisfy those standards had not yet been provided by the Alabama legislature, the defendants should have at least formulated the necessary standards. However, the court declined to make provision for the formation of a panel of experts because it determined that the defendants had not acted in bad faith. Rather the court set a date for a hearing to permit

14 *Id.* at 876.
15 *Id.* at 883.
16 325 F. Supp. 781 (M.D. Ala. 1971).
17 Bryce Hospital is a state hospital for the mentally ill. The evidence indicated that there were 1000 mentally retarded patients at Bryce as well as 1500-1600 geriatric patients and 2600-2700 mentally ill patients. *Id.* at 782, 784.
18 *Id.* at 785.
19 *Id.* at 784.
20 *Id.* at 785.
21 Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971).

the parties and *amici*[22] time to formulate standards which would "meet medical and constitutional requirements."[23]

In the third *Wyatt*[24] decision the class of plaintiffs was expanded to include those mentally retarded who were residents of another state hospital, which allegedly was being operated in a constitutionally impermissible manner with the result that the residents were being denied the right to adequate habilitation. Judge Johnson discussed the previous *Wyatt* decisions and stated:

> In the context of the right to appropriate care for people civilly confined to public mental institutions, no viable distinction can be made between the mentally ill and the mentally retarded. Because the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation.[25]

In discussing the problem of lack of funds, the court stated: "[D]efendants must realize that the prompt institution of minimum standards to ensure the provision of essential care and training for Alabama's mental retardates is mandatory and that no default can be justified by a want of operating funds."[26]

The defendants did not contest the rights of the plaintiffs to adequate habilitation, but rather voiced a concern for the fiscal integrity of the state.[27] Realizing that the key issue would be financing, the plaintiffs moved for permission to join certain state officials as necessary parties for complete relief.[28] Initially the plaintiffs sought an injunction against the expenditure of state funds on nonessentials until sufficient funds had been accumulated to satisfy the requirements of the judgment.[29] In addition, the plaintiffs asked the court to order the sale of a portion of the defendant Mental Health Board's landholdings and other assets and to enjoin the Board from the construction of any physical facilities. The court, however, reserved ruling on the plaintiffs' motions, echoing a long-standing policy of judicial deference to state officials charged by law with specific responsibilities.[30] Judge Johnson noted that the responsibility for adequate funding rested with the state legislature and that, while past legislatures had been derelict in their duty to provide adequate funds for the habilitation of the mentally retarded, the present legislature should be afforded an opportunity to rectify that wrong. He concluded:

> To shrink from its constitutional obligation at this critical juncture would be to sanction the inhumane conditions which plague the mentally retarded of Alabama. The gravity and immediacy of the situation cannot be over-

22 The *amici* included: the United States of America, the American Ortho-Psychiatric Association, the American Psychological Association, and the American Civil Liberties Union. *Id.* at 1343 n.2.
23 *Id.* at 1344.
24 Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972).
25 *Id.* at 390.
26 *Id.* at 392.
27 *Id.*
28 Plaintiffs filed the motion on September 1, 1971, and renewed it on March 15, 1972. *Id.* at 389-90 n.3.
29 *Id.*
30 *Id.* at 393.

> emphasized. At stake is the very preservation of human life and dignity. Consequently, a prompt response from the State Legislature, as well as from the Mental Health Board and other responsible state officials, is imperative.
>
> In the event, though, that the Legislature fails to satisfy its well-defined constitutional obligation and the Mental Health Board, because of lack of funding or any other legally insufficient reason, fails to implement fully the standards herein ordered, it will be necessary for the Court to take affirmative steps, including appointing a master, to ensure that proper funding is realized and that adequate habilitation is available for the mentally retarded of Alabama.[31]

The most recent decision in the area of the right to habilitation, *Renelli v. Department of Mental Hygiene*,[32] involved a resident of Willowbrook State School in New York. In the twelve years that the plaintiff had resided at Willowbrook, she had received only custodial care. Justice Titone of the Supreme Court of Richmond County held that the state had an obligation "imposed upon it by both the Constitution and the [New York] Mental Hygiene Law"[33] to provide the plaintiff with adequate treatment, care, education and training. Justice Titone concluded:

> The Court is aware that this would be quite costly, but if the State of New York is going to undertake the responsibility for the care and treatment of these patients, then the job must be done right. Nothing less can be acceptable. As noted above, the legislature did enact a new Mental Hygiene Law and many laudatory provisions were put on the books, but without money and personnel conditions will not improve.
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> . . . .
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> [T]he State has been derelict in the duties imposed upon it by both the Constitution and the Mental Hygiene Law, and the Court has the jurisdiction and the power to see to it that the State meets its obligations.[34]

## II. Problems of Judicial Enforcement of Financing Orders

Since the type of order issued by the courts in the foregoing cases requires either the expenditure of available funds in a particular manner or, more probably, the appropriation of additional funds, the courts have had to intervene in matters which have been traditionally reserved to the legislative branch. A threshold problem has been the establishment of a basis for such judicial intervention.

### A. *Basis of Judicial Intervention*

While the court in the third *Wyatt* decision acknowledged the long-standing

31 *Id.* at 394.
32 169 N.Y.L.J. No. 17, § 2 at S18, col. 6 (Jan. 24, 1973).
33 *Id.* col. 8. In support of his conclusion that the mentally retarded have a constitutional right to treatment, Justice Titone cited the first *Wyatt* decision.
34 *Id.* cols. 7-8.

policy of judicial deference in matters traditionally reserved to the legislative branch, it noted that it would take affirmative steps if the legislature and the Board of Mental Health failed in their constitutional obligation to provide for the rights of the mentally retarded to adequate habilitation.[35] Such intermeddling by the judiciary into traditionally legislative enclaves when the legislature has failed to fulfill its constitutional obligation is supported by several Supreme Court decisions in the desegregation area.

In *Watson v. City of Memphis*[36] the plaintiffs sought immediate desegregation of municipal parks and other city owned and operated facilities. The defendants argued that desegregation would result in the closing of a number of facilities since the present park budget would not adequately provide the added services which would be necessary. While nothing appeared in the record to indicate that the added services were in fact necessary, Justice Goldberg stated that it was "obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."[37]

Having established that constitutional rights cannot be denied on the basis of unavailability of adequate funds, the next step was taken by the Supreme Court in *Griffin v. County School Board of Prince Edward County*.[38] There the plaintiffs sought to enjoin the county school board from refusing to operate a public school system even though the county had been authorized by the state legislature to raise the necessary funds by levy. Justice Black stated:

> [T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia.[39]

The district court had held that Prince Edward County officials could not close its schools to avoid the law and warned that it would consider an order to reopen the schools if not opened by the beginning of the school year.[40] On this point Justice Black commented:

> That day has long passed, and the schools are still closed. On remand, therefore, the court may find it necessary to consider further such an order. An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them.[41]

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35 344 F. Supp. at 394.
36 373 U.S. 526 (1963).
37 *Id.* at 537; *accord,* Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Goldberg v. Kelly, 397 U.S. 254, 266 (1970); United States v. School Dist. 151 of Cook County, Ill., 301 F. Supp. 210, 232 (N.D. Ill. 1969), *modified,* 432 F.2d 1147 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); Hosier v. Evans, 314 F. Supp. 316, 320 (D. V.I. 1970); Long v. Robinson, 316 F. Supp. 22, 29 (D. Md. 1970), *aff'd,* 436 F.2d 1116 (4th Cir. 1971).
38 377 U.S. 218 (1964).
39 *Id.* at 233.
40 *Id.*
41 *Id.* at 233-34. Justice Black gave no support for his conclusion as to the validity of the use of a financing order. For a discussion of the support for the existence and exercise of

*Griffin* establishes that at least one basis for judicial intervention by means of a financing order is the protection of constitutional rights. Since the mentally retarded have a constitutional right to habilitation and education, they may be protected by the judiciary by means of a financing order. Notwithstanding this fact, several problems may still occur in determining against whom such an order may issue.

### B. *Issuance of a Financing Order—the Problem of Sovereign Immunity*

Where a suit to enforce the rights of the mentally retarded is directed against a county or lower political subdivision, the judiciary may issue a financing order. The main difficulty in directing such an order to a county is that the county may not be able to provide adequate relief. If the county has authority to levy more than it is currently levying, then the judiciary can, according to *Griffin,* issue an order requiring the county to levy to the maximum rate authorized for that purpose.[42] But, where the county is already taxing at the maximum rate, the court is without authority to raise that maximum.[43] From a realistic standpoint, a judgment against a county school board or department of mental health may only be effective to make the county unit expend the funds which it has to comply with the minimum constitutional requirements of the right to education and the right to habilitation.

This being the case, it may be necessary either to join additional parties to a suit which has already been initiated, or to include in the original complaint as defendants those state officials who have the power to provide full relief to the retarded whose rights have been infringed.[44] The problem with joining such

judicial financing orders, *see* Note, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy,* 59 GEO. L.J. 393 (1970).

42 377 U.S. at 233.

43 In United States v. County of Clark, 95 U.S. 769, 773 (1877), Justice Strong stated: "It need not be said that no court will by *mandamus* compel county officers of a state to do what they are not authorized to do by the laws of the state." *Accord,* Weaver v. City of Ogden City, 111 F. 323, 326 (C.C.D. Utah 1901.)

44 In the third *Wyatt* case, the plaintiffs filed a motion to join various state officials as defendants. Included among the list of those whom the plaintiffs wished to join were the members of the state legislature, the state treasurer and state comptroller. Judge Johnson reserved ruling on the motion in order to give the state board of mental health and the state legislature time to act on their own accord. But, he warned:

> If the Legislature does not act promptly to appropriate the necessary funding for mental health, the Court will be compelled to grant plaintiffs' motion to add various state officials and agencies as additional parties to this litigation and to utilize other avenues of fund raising.

344 F. Supp. at 394 n.14.

In Bradley v. School Bd. of City of Richmond, Virginia, 51 F.R.D. 139 (E.D. Va. 1970), the defendants, members of the city school board, moved to join several additional parties such as the state board of education and the state superintendent of public instruction, where it was *uncontested* that the relief sought could not be provided by the defendants and that in all likelihood a denial of the joinder motion would lead to repetitious litigation and delay in granting plaintiffs their relief. The joinder motion was opposed by the proposed parties to be joined. The court, however, granted the joinder motion. It recognized that funding was between the city and its residents but stated that joinder of state officials is

> . . . by no means inconsistent with the existence of a duty on the part of officials with broader powers to exercise such powers to afford different or additional relief from what the Court has found to be state imposed segregation.

*Id.* at 141. The court also recognized that:

> In a state where the law formerly compelled racial segregation, this duty includes

state officials is that they may raise the defense of sovereign immunity if the state has not consented to the suit.[45]

The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the amendment does not on its face bar suits brought by a citizen against his own state, it has been construed to bar such suits.[46] In order to circumvent the harsh results which strict adherence to the sovereign immunity doctrine produces, the courts in certain instances have developed legal fictions to allow suits by citizens against state officials to enjoin them from enforcing an unconstitutional state statute.

Whether state officials may successfully claim sovereign immunity has in the past hinged on the form of relief sought to secure the rights infringed. Since the nature of right to education and the right to habilitation are different, they will be treated separately.

### 1. Right to Education

What specific additional defendants are necessary to provide the constitutionally mandated relief is a function of (1) the structure of the state government in relation to the operation of those services which have been carried out in a constitutionally deficient manner and (2) the nature of the right infringed. The power of the state in the area of education is vested in a state department of education, which is responsible for allocating funds between special and

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that of taking affirmative steps to dismantle the dual system. In such instances the constitutional obligation toward the individual school children is a shared one.

*Id.* at 142 (citations omitted).

45 *See, e.g.*, Clark v. Barnard, 108 U.S. 436 (1883).

This problem is not presented in suits against counties, since, as Justice Black stated in *Griffin*, "[i]t has long been established that actions against a county can be maintained in United States courts in order to vindicate federally guaranteed rights." 377 U.S. at 233.

46 Article III, § 2 of the United States Constitution sets out the subject matter that is within the federal judicial power. No mention is made in this article concerning the judicial power in suits between a state and its own citizens. Presumably under this article a suit could be brought by a citizen of the defendant state in cases which arose under federal law. The eleventh amendment is a limitation on *judicial power* of article III. As such it does not refer to suits against a state by citizens of that state. However, in Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court extended the limitation on the judicial power imposed by the eleventh amendment to include suits against a state by citizens of that state:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue in their own state in federal courts, whilst the idea of suits by citizens of other states, or of foreign states was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

*Id.* at 15. For a thorough discussion of the eleventh amendment, *see* Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 Hous. L. Rev. 1 (1967).

regular educational facilities. In general, the nature of the right of the mentally retarded to education is based on the equal protection clause of the fourteenth amendment. The Supreme Court, in *Brown v. Board of Education*,[47] held that where a state has undertaken to provide an education to its residents, it must provide it equally to all.[48] Thus, the nature of the right to education requires that whatever funds a state chooses to allocate for education, it must allocate such funds in such a manner that an equal educational opportunity is provided for all. Any relief sought in enforcing these rights would be prohibitory in nature, by seeking to prevent those state officials responsible from allocating funds in a manner which deprives the mentally retarded of their right to an equal educational opportunity. That these state officials can be joined in such an action seeking this type of relief without incurring the sovereign immunity problem is well grounded in both the older cases involving suits against state officials and in the more recent desegregation cases.

In the leading case, *Ex parte Young*,[49] the Attorney General of Minnesota was held in contempt for violating a federal court order enjoining him from enforcing a state statute. In the contempt proceeding, he collaterally attacked the prior judgment on the grounds that the suit from which the injunction had issued was, in reality, a suit against the state and therefore barred by the eleventh amendment. The Supreme Court found that the lower court had jurisdiction to grant the injunction:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[50]

Thus, a suit may be brought against a state official to obtain prohibitory relief which would stop him from enforcing an unconstitutional law. Such a suit

47 347 U.S. 483 (1954).
48 *Id.* at 493.
49 209 U.S. 123 (1908).
50 *Id.* at 159-60. This decision has been followed in numerous cases. *See, e.g.*, Georgia R. Co. v. Redwine, 342 U.S. 299 (1952), where the petitioners sued to enjoin collection of taxes in a manner which would impair the obligation of contract between the taxpayer and the state, contrary to article I, § 10 of the Constitution. Georgia, by means of a constitutional amendment, had attempted to repudiate certain tax exemptions which the state had granted the plaintiff company in its charter of incorporation. The Supreme Court held that a suit to enjoin unconstitutional action by a state officer was not a suit against the state barred by the eleventh amendment. In effect, the plaintiffs were given specific performance of their contract even though the relief granted was prohibitory in nature.

would not be barred by the eleventh amendment as a suit against the state. Failure by the state official to comply with the injunction will lead to a contempt charge.

Like recent desegregation cases, actions to enforce the rights of the mentally retarded have been brought under the civil rights statutes.[51] The desegregation cases have uniformly granted injunctive relief as necessary to enforce the rights of those deprived of educational opportunity by school segregation.[52] The desegregation cases clearly indicate that the sovereign immunity doctrine will not bar suits against state officials such as a superintendent of public instruction.[53] Thus, those state officials responsible for allocating funds to special and regular educational facilities can be enjoined from allocating such funds in a manner which deprives the mentally retarded of their right to equal protection in education. This will require the splitting of those funds which have been appropriated to them by the state legislature in a manner consistent with the equal protection requirements of the fourteenth amendment. While this may somewhat improve the educational services which the mentally retarded are now provided, the educational services available to other students will be commensurately diminished. Although the reallocation of funds would then comply with the equal protection requirements of the fourteenth amendment, no meaningful purpose would be served, since slightly increased educational services for the mentally retarded will probably not help them to attain the standard of self-sufficiency or care of which they are capable.

The only source capable of providing adequate funds without affecting existing educational facilities is the state legislature. However, a financing order issued directly to a state legislature would be inappropriate[54] since a state is not bound to provide public education to its residents. The Constitution merely

51 Relief in these cases has generally been sought under 28 U.S.C. § 1343(3) (1970) (jurisdiction), 42 U.S.C. § 1983 (1970) (private citizen may bring the civil action for deprivation of rights) and 28 U.S.C. § 2201 (declaratory judgment).

52 *See, e.g.*, McNeese v. Bd. of Educ. for Community Unit School Dist. 187, Cahokia, Ill., 373 U.S. 668 (1963); Oliver v. Kalamazoo Bd. of Educ., 346 F. Supp. 766 (W.D. Mich. 1972).

53 *See, e.g.*, Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971). In *Bradley* the defendants included the Governor of Michigan, the Attorney General of Michigan, the State Board of Education and the Superintendent of Public Instruction. In its conclusions of law the court found:

> 11. Under the Constitution of the United States and the constitution and laws of the State of Michigan, the responsibility for providing educational opportunity to all children on constitutional terms is ultimately that of the state.
>
> 12. That a state's form of government may delegate the power of daily administration of public schools to officials with less than state-wide jurisdiction does not dispel the obligation of those who have broader control to use the authority they have consistently with the constitution. In such instances the constitutional obligation toward the individual school children is a shared one.
>
> * * *
>
> 17. Where a pattern of violation of constitutional rights is established the affirmative obligation under the Fourteenth Amendment is imposed on not only individual school districts, but upon State defendants in this case.

*Id.* at 593, 594 (citations omitted); *accord,* Bradley v. School Bd. of City of Richmond, Virginia, 51 F.R.D. 139 (E.D. Va. 1970).

54 It has been said, at least in the right to education area, that the eleventh amendment "will undoubtedly bar relief in the federal courts where plaintiffs specifically seek an injunction requiring a state legislature to appropriate additional moneys." Parker v. Mandel, 344 F. Supp. 1068, 1072 (D. Md. 1972) (dictum).

requires that, once a state decides to provide such education, it must provide the opportunity equally to all citizens.[55] If the state legislature determines not to appropriate additional funds to the educational facilities of its state, it cannot be constitutionally required to do so. All that is required is that all appropriated funds be allocated in a manner that will accord an equal educational opportunity for all. While this is true, the practical result of issuing a financing order against the state department of education will be to "compel" the state legislature by public pressure to appropriate added funds to return the regular educational facilities to their former status, while providing equal educational opportunities for the mentally retarded.

Although prohibitory relief against a state board of education may necessarily lead to some affirmative action by the state in the form of additional appropriation of funds, it has been held that such a suit is not an action against the state barred by the eleventh amendment.[56] Thus, while it is clear that in the educational area a direct financing order against a state legislature is inappropriate due to the nature of the right involved, a financing order directed against the state department of education could indirectly compel the state legislature to achieve the desired result of providing appropriate educational opportunity for the mentally retarded.

### 2. Right to Adequate Habilitation

There are several ways to characterize the rights of the institutionalized mentally retarded to adequate habilitation.[57] For example, in the third *Wyatt* case the court stated:

> [P]eople involuntarily committed through noncriminal procedures to institutions for the mentally retarded have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society. That this position is in accord with the applicable legal principles is clear beyond cavil. . . . In the context of the right to appropriate care for people civilly confined to public mental institutions, no viable distinction can be made between the mentally ill and the mentally retarded. Because the only constitutional justification for civilly committing a mental retardate, therefore, is habilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation.[58]

The constitutional right to habilitation can be based upon several constitutional provisions. First of all, the fourteenth amendment states that no person can be deprived of liberty without due process of law. Those who are involuntarily[59] civilly committed may have been denied procedural safeguards which

55 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

56 Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Henry v. Betit, 323 F. Supp. 418 (D. Alas. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). For a discussion of this case, *see* text accompanying notes 83-85 *infra*.

57 For a general discussion of the civil rights of the mentally retarded, *see* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 Notre Dame Lawyer 133 (1972).

58 344 F. Supp. at 390.

59 It is questionable whether the institutionalized mentally retarded can be said to have

guarantee certain constitutional protections. Where the state has institutionalized the mentally retarded for their own benefit, or for the benefit of society, fundamental fairness requires that such person receive not merely custodial care, but rather adequate habilitation affording him an opportunity to return to society.[60] Failure to provide adequate habilitation would transform the institution into a facility closely paralleling a "penitentiary, where one could be held indefinitely for no convicted offense"[61] and would constitute a denial of due process.

Involuntary commitment can also be characterized as violating the eighth amendment's ban on cruel and unusual punishment. It could be argued that conditions present at institutions for the mentally retarded (*i.e.*, lack of adequate medical care, lack of adequate health standards, overcrowding and likelihood of injury from other violent patients or from employees) are cruel and unusual punishment.[62] To institutionalize the mentally retarded for treatment and not provide it is in reality punishment for the status of being retarded and punishment for status has been held to be impermissible by the Supreme Court.[63]

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been voluntarily placed in the institution. First, the mentally retarded cannot consent to his own institutionalization. Second, the substituted consent of the parent may not be legally effective. Institutionalization should be for the benefit of the child. Yet, a parent's substituted consent may well not be in the child's best interest. Parents may be influenced by economic, physical or emotional strain which such child has placed upon them. It may well be in the child's best interest to remain with the family and in the community. Where the interest of the child and the parent is potentially in conflict, the courts are loath to allow parents to consent for the child. *See, e.g.*, Frazier v. Levi, 440 S.W.2d 393 (Tex. App. 1969). In this context even though the parent has "voluntarily" consented to the institutionalization, the child may be said to have been involuntarily institutionalized.

60 Generally, the due process argument has been framed more narrowly. In many states the commitment statutes are couched in terms of commitment for treatment and care. Therefore, if a person is deprived of his liberty under the guise that it is for treatment, not to provide such treatment is a denial of due process.

61 Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *quoting* Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960).

62 Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). The eighth amendment ban on cruel and unusual punishment has been applied where punishment has been administered to those civilly confined to a state training school. Lollis v. New York State Dept. of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971).

63 In Robinson v. California, 370 U.S. 660 (1962) the Supreme Court stated that conviction of a drug addict for his mere status was cruel and unusual punishment. The Court stated:

> [W]e deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not be has been guilty of any antisocial behavior there.
>
> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought of to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

*Id.* at 666.

If the Supreme Court has said that to criminally punish someone for "status" is cruel and unusual, can it be any less cruel and unusual punishment to civilly confine the mentally retarded without such habilitation which might enable them to return to society? Such confinement without adequate habilitation would transform the institution into a penitentiary. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

A final characterization involves a threefold consideration of the equal protection clause. First, if one accepts the argument that the involuntarily civilly committed are constitutionally entitled to adequate habilitation, then those who have been "voluntarily"[64] committed, whether in the same state institution or another state institution, are entitled to the same standard of care. Second, if the state does set up minimum protective standards for *private* institutions for the mentally retarded, then equal protection would require that the standards in state institutions be equal. Third, as in the right to education area, once the state has undertaken to provide funds to state and privately owned facilities for the treatment and care of persons in hospitals and homes for the aged, it must provide a sufficient share of the funds to institutions for the habilitation of the mentally retarded to enable them to provide a standard of treatment and care equal to that of other institutions.

In enforcing the constitutional rights of the mentally retarded to adequate habilitation, an initial order to the state board of mental health may not bring about adequate relief if the board has already allocated all of the funds appropriated to it by the legislature for that purpose. If other state officials, such as a state treasurer and comptroller, are joined in the action, they might be enjoined from spending state funds for nonessential items until enough money is available to provide for the constitutional rights of the mentally retarded. But, this is unlikely because of the difficulty in determining what is a nonessential and who would make that determination. In addition, the surplus funds made available might still be insufficient. If all of the available funds will not adequately afford the institutionalized retarded their constitutional rights, then the legislature's failure to appropriate adequate funds would in itself constitute a deprivation of the constitutional right to adequate habilitation because the nature of the right to habilitation requires a minimum expenditure in order to maintain a minimum constitutional standard of habilitation. As a result, it may be necessary to join the members of the state legislature in order to assure that full relief is granted.[65] In such a suit, however, the relief sought might require some affirmative action on the part of the state legislature, unlike purely prohibitory relief. It is necessary, therefore, to determine whether such an action would constitute a suit against the state in violation of the eleventh amendment.

In *Lucas v. Forty-Fourth General Assembly of Colorado*,[66] an apportion-

64 *See* note 59 *supra*.

65 If all available funds will not afford the institutionalized retarded their constitutional rights, then release might afford a proper remedy. Rouse v. Cameron, 373 F.2d 451, 458-59 (D.C. Cir. 1966). If such releases were to take place on a massive scale public opinion would likely cause the legislature to appropriate additional funds to provide adequate treatment for those who should remain institutionalized. It is unlikely, however, that releases would take place on other than an individual basis. Note, *Guaranteeing Treatment for the Committed Mental Patient: The Troubled Enforcement of an Elusive Remedy*, 32 MD. L. REV. 42, 55-58 (1972).

While release may be available only to an individual patient, its real value lies in the publicity which it would generate. This might well serve as an impetus for a legislature to appropriate funds. For example, since conditions in Alabama's mental hospitals were brought to the attention of the public, the Alabama legislature voluntarily made a 38% increase in appropriations to the Mental Health Board. Basic Rights of the Mentally Handicapped, Mental Health Law Project 18 (1973).

66 377 U.S. 713 (1964).

ment action seeking prohibitory relief was successfully maintained against members of the state legislature of Colorado. In the original suit, a three-judge district court held that the defendants were not immune from suit:

> Nor is there any merit in the contention of the Attorney General that the suit is against the State. The action is against state officers. It seeks injunctive relief against violation of the federal constitution, and thus sovereign immunity is not an issue.[67]

The court stressed that the General Assembly of Colorado had repeatedly refused to apportion itself as mandated by the state constitution and that it was unlikely that it would ever apportion itself.[68] Final adjudication was, however, postponed because there was an impending election at which two proposals for apportionment were to be submitted to the voters. After the election the case was again tried[69] and, on appeal, the Supreme Court granted declaratory relief against enforcement of the amended apportionment plan, noting that:

> Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature.[70]

While suit against members of state legislatures will not be barred by the doctrine of sovereign immunity in many cases, at least where the relief sought is prohibitory in nature, a problem may arise where an order is sought to provide funds or services which require the expenditure of funds. For example, in *Smith v. Reeves*,[71] railroad receivers sued the treasurer of California to recover taxes assessed against and paid by the railroad. A California statute authorized suit if the tax had been illegally exacted. If the plaintiffs had been successful the state comptroller would have been directed to draw a warrant on state funds for its payment.[72] The Supreme Court held that the suit was in reality a suit against the state because the state would have to pay the judgment.[73] In another case, *Great Northern Life Insurance Company v. Read, Insurance Commissioner*,[74] the plaintiff, a foreign insurance company, was compelled by a state statute to pay a tax. The plaintiff paid the tax under protest and sued in United States District Court for a refund from the state tax commissioner. The Supreme Court stated that the right of the plaintiff to maintain an action was dependent on whether the suit was against the individual or the state.[75] If it was against the state the court would have to inquire whether the state had consented to be

67 Lisco v. McNichols, 208 F. Supp. 471, 476 (D. Colo. 1962).
68 *Id.*
69 Lisco v. Love, 219 F. Supp. 922 (D. Colo. 1963).
70 377 U.S. at 736.
71 178 U.S. 436 (1900).
72 *Id.* at 438.
73 *Id.* at 438-39.
74 322 U.S. 47 (1944).
75 *Id.* at 49.

sued.[76] In holding that the action against the commissioner was in reality an action against the state, the Supreme Court stated:

> This ruling that a state could not be controlled by courts in the performance of its political duties through suits has been consistently followed. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the constitution.[77]

Thus, in these early cases, the Supreme Court has held that an action was really an action against the state where a judgment for the plaintiff would have required the state to take some affirmative official action. At least one reason for this judicial reluctance to entertain suits to require affirmative action is the problem of fashioning an appropriate remedy.

A more modern decision, *Williams v. Dandridge*,[78] lends support to this position. In *Williams*, an action was brought to declare invalid and enjoin enforcement of a maximum grant to families on welfare under the Aid to Families with Dependent Children (AFDC) program established by the Social Security Act. The problem was that the Governor and the state legislature of Maryland had failed to appropriate sufficient funds for Maryland's share of the cost of AFDC. In determining that the maximum grant was inconsistent with the Social Security Act and violative of equal protection, the court stated:

> We do not hold that Maryland must appropriate additional funds to support its participation in the program of AFDC; we reiterate our previous holding that the Eleventh Amendment deprives courts of the United States from jurisdiction to grant such relief.
>
> We hold only that if Maryland has appropriated insufficient funds to meet the total need under AFDC, as measured by the standards for determining need that Maryland has prescribed, Maryland may not, consistent with the Social Security Act or the equal protection clause, correct the imbalance by application of the maximum grant regulation. No other proposed solution to this problem is before us, and we express no other opinion.[79]

The courts have justified judicial self-restraint in this type of situation by the need for the state to be free to carry on its policies *within constitutional limits*.[80] The dictum in *Williams* no doubt is correct in light of the nature of

76 *Id.*

77 *Id.* at 51 (citations omitted).

78 297 F. Supp. 450 (D. Md. 1968), *rev'd on other grounds*, 397 U.S. 471 (1970), *reh. denied*, 398 U.S. 914 (1970); *accord*, Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969) (dictum); Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972) (dictum).

79 297 F. Supp. at 459.

80 Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944); *accord*, Rosado v. Wyman, 397 U.S. 397 (1970), where the plaintiffs sought declaratory and injunctive relief against the State Department of Social Services, contending that a New York statute had impermissibly lowered the welfare standards in violation of the Social Security Act. An equal protection question had been rendered moot because the state had, prior to trial, amended its statute to conform. The Supreme Court rejected an argument by defendants that it was without power to review state welfare provisions or to prohibit use of federal funds by a state. The Court said that the state could either appropriate more funds or be cut off. In so holding, the Court stated: "New York is, of course, in no way prohibited from using only state funds ac-

the right sought to be protected there. The state's participation in AFDC was voluntary and each state was free to set its own standard as to the amount of funds which it wished to devote to the program. Any state which wanted to receive federal funds had to obtain approval of its plan from the Department of Health, Education and Welfare. Since it was not constitutionally required that there be a minimum standard, as there is in the right to habilitation area, the court could not order added appropriations. All that was required, as in the right to education area, was that such programs be administered in accordance with the equal protection clause. Thus, an order to a legislature to appropriate additional funds in the welfare area would be as inappropriate as it was in the area of the right to education. In welfare, as in education, compliance with constitutional provisions involves only an equitable allocation of whatever funds the state legislature has appropriated.

However, in the area of the rights of the mentally retarded there is a minimum constitutional right to adequate habilitation. If adequate funds have not been appropriated, then the constitutional rights of the mentally retarded are being violated. If the legislature has not appropriated enough funds or given the proper authorities the means to appropriate adequate funds, then legislative inaction is the source of the violation and the courts should not hesitate to allow suits against the members of a state legislature which seek positive state action in the form of appropriation of added funds or release of surplus funds. Actions have been held barred by the eleventh amendment where the remedy sought against the state official would require the state to take affirmative action.[81] In doing so, the Supreme Court has stressed that the states must be free from judicial compulsion in carrying out their policies *within constitutional limits*.[82] In carrying out their policies in the area of habilitation of the mentally retarded, the states have not been acting within the limits of the Constitution. Therefore, the court should allow an individual to seek an order requiring a state officer to act affirmatively when failure to act violates the constitutional rights of the plaintiff.

In *Holt v. Sarver*,[83] prisoners in Arkansas state prisons sought a declaration that the state practices, acts, and policies in the prison system violated due process and equal protection and constituted cruel and unusual punishment. The petitioners contended that prisoners had a right not to be imprisoned without meaningful rehabilitation programs, to be free from cruel and unusual punishment, to be free from arbitrary and capricious denial of rehabilitation programs and to be fed, housed and clothed so as not to be subjected to loss of health or life. The Arkansas Attorney General moved for a dismissal on the ground that the case was nothing more than an effort to coerce the Arkansas legislature into appropriating more money for the system and that the court was without jurisdiction. In denying this motion, the court gave recognition to the fact that

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cording to whatever plan it chooses, providing it violates no provision of the Constitution." *Id.* at 420.

81 Smith v. Reeves, 178 U.S. 436 (1900); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

82 *See* note 80 *supra*.

83 309 F. Supp. 362 (E.D. Ark. 1969), *aff'd* 442 F.2d 304 (8th Cir. 1971).

in a sense the real respondents were not only those formally before the court but included the Governor, the members of the state legislature and, ultimately, the people of the state.[84] The court recognized that revamping the prison system would require an added expenditure of money but stated that where the lives, safety and health of human beings were at stake such expenditure was essential:

> It is obvious that money will be required to meet the constitutional deficiencies of the institution, and there is no reason to believe that, subject to the overall financial needs and requirements of the State, the Legislature will be unwilling to appropriate necessary funds.
>
> . . . .
>
> Let there be no mistake in this matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.[85]

Similarly, if a state is going to operate an institution for the mentally retarded, it must operate it in a manner consistent with the Constitution. If the ultimate burden rests upon the state legislature to appropriate such funds, a suit should be entertained to order the legislature to appropriate the additional funds, to release surplus funds, or to do whatever is necessary to bring these institutions within the constitutionally required minimum standards. The basic problem with the issuance of this type of order lies in the enforcement problems which the court may encounter in the event the state legislature refuses to appropriate the necessary funds.

### C. *The Problems of Enforcement of a Financing Order Issued to a State Legislature*

If in order to guarantee the right of habilitation to the mentally retarded, it is necessary to sue the state legislature, the court would be faced with the problem of enforcement of its order should the legislature fail to comply. A writ of mandamus would be one method which the court might use to enforce its decree. The question of mandamus depends upon the specific act to be enforced and not the character of the office of the person against whom it is directed.[86] The general rule is that the court will not issue such a writ to compel a state legislature to exercise its legislative function or to perform duties involving the exercise of discretion.[87] Therefore, it apparently follows that mere ministerial duties of legislative officers, not involving the exercise of any discretion or of any legislative function, may be enforced by the courts by a writ of mandamus.[88]

84 *Id.* at 365.
85 *Id.* at 383, 385.
86 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).
87 Clough v. Curtis, 134 U.S. 361 (1890).
88 State v. Osburn, 347 Mo. 469, 147 S.W.2d 1065 (1941).

Thus, the characterization of the act to be performed by the legislature is critical.

When there is a valid judgment against a state legislature ordering it to provide the institutionalized mentally retarded with constitutionally adequate habilitation, then a writ of mandamus could be appropriate if the act is characterized as ministerial in nature. In *Virginia v. West Virginia,*[89] the petitioner argued that when a state is subject to a binding judgment, a subsequent order to enforce compliance with that judgment imposes on the state legislature a mere ministerial duty.[90] The Court ordered the legislature of West Virginia to fulfill its prior obligation. Although the Court postponed the fashioning of a remedy, it warned that it was within the judicial power to enforce its judgment by mandamus if necessary. If the court were to issue a writ of mandamus to a state legislature it would probably not direct that funds be appropriated, but rather it would order the body to correct the constitutionally deficient standards. The legislature would then have the option to appropriate additional funds, to release funds from another area or to utilize some other method to correct the deficiency.

A major problem with mandamus as a remedy, or in fact with any suit directed against a state legislature, is that failure to comply with the writ or order might result in contempt proceedings. Since contempt proceedings may be successfully brought against the governor of a state,[91] it is logical that such a sanction may also be imposed upon the legislative branch. But this raises numerous questions yet to be answered. Should all of the legislators be held in contempt or should only those who were unwilling to comply with the court's order be held in contempt? Would the court merely fine the legislators or would it go as far as imprisonment? It is problems of this nature which make a suit against a state legislature, although appropriate, unlikely in reality. This would leave it to the power of public opinion to influence the legislature to provide for the constitutional rights of the mentally retarded.

## III. Conclusion

> Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.[92]

The constitutional rights of the mentally retarded to education and adequate habilitation have been denied them in the past. The nature of the right to education is such that a suit to enforce it should be directed against those state officials directly responsible for allocating funds in a manner which will give all an equal educational opportunity. This will require a reallocation of funds, the practical result of which will be a diminution of services provided to the regular education program. Consequently, it is predictable that under these circumstances the public will "compel" the legislature to appropriate additional funds

89 246 U.S. 565 (1918).
90 *Id.* at 582-83 (Argument for Petitioner).
91 Meredith v. Fair, 313 F.2d 532 (5th Cir. 1962), *cert. denied sub nom.* Mississippi v. Meredith, 372 U.S. 916 (1963).
92 Cohens v. Virginia, 19 U.S. (6 Wheaton) 264, 404 (1821).

to return the regular educational facilities to their former status, while providing equal educational opportunities for the mentally retarded.

In the area of habilitation, the nature of the right is such that a suit against a state legislature may be the only method by which the institutionalized mentally retarded can secure their rights. Although such suits should be maintainable, the judiciary is reluctant to entertain them because of the enforcement problems. But the court may not have to face the enforcement problems. Once the public's attention is focused on the substandard conditions prevailing in many mental institutions, it is likely that pressure will be exerted against the legislatures to cure such conditions and to accord the mentally retarded their rights under the Constitution.

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