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Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled

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ABROAD IN THE LAND: LEGAL STRATEGIES TO EFFECTUATE THE RIGHTS OF THE PHYSICALLY DISABLED

“Movement, we are told, is a law of animal life. As to man, in any event, nothing could be more essential to personality, social existence, economic opportunity—in short, to individual well-being and integration into the life of the community—than the physical capacity, the public approval, and the legal right to to be abroad in the land.”

The past decade has witnessed a growing public awareness of the rights of many disadvantaged and previously ignored groups in society. Essentially unnoticed, however, are the problems of the physically disabled. Discrimination against the handicapped exists in many forms. For instance, entire school systems flagrantly violate state law by excluding handicapped children; planners design public buildings which are inaccessible to the physically disabled; and employers, fearful of higher insurance costs, refuse to hire them. While the ensuing economic costs are serious, the human costs, in terms of the suffering and wasted lives, are even more distressing.

1 Jacobus tenBroek, The Right to Live in the World: The Disabled in the Law of Torts, 54 CALIF. L. REV. 841 (1966) (Professor tenBroek himself was blind).

2 The total number of physically handicapped individuals in the United States is not readily ascertainable. One authority recently placed the number at 11.7 million. See Hearings on H.R. 8395 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 265 (1972) [hereinafter cited as Handicapped Hearings—Senate]. The difficulty in obtaining accurate and meaningful statistics is attributable to the inability of statisticians to measure the effect of a defined handicap on the capacity of the handicapped to function normally in society. For example, the epileptic may not be handicapped in his capacity to use public transportation; however, he is severely limited in his ability to secure and maintain employment. See M. Gandy, Notes on Employment Problems and Epilepsy Patients, Jan. 4, 1971 (available from Epilepsy Foundation of America). Similarly, an individual with a spinal cord injury may be able to obtain employment but incapable of utilizing public transportation in order to seek and maintain employment. See Handicapped Hearings—Senate 1006. Numerical statistics must be evaluated in terms of the resultant effect of a specific disability on participation in normal activity. See generally U.S. Social Security Admin., Dep’t of Health, Educ., & Welfare, SOCIAL SECURITY SURVEY OF THE DISABLED: 1966 (Rpt. No. 10, 1970); U.S. Dep’t of Health, Educ., & Welfare, CHRONIC CONDITIONS AND LIMITATIONS OF ACTIVITY AND MOBILITY (National Health Survey Series 10, No. 61, 1971); U.S. HEALTH SERVICES & MENTAL HEALTH Admin., Dep’t of Health, Educ., & Welfare, USE OF SPECIAL AIDS, (National Health Survey Series 10, No. 78, Public Health Service Pub. No. (HSM) 73-1504).

3 See 118 CONG. REC. 1258 (1972) (remarks of Representative Vanik).


5 See M. Gandy, supra note 2, at 8.
While a number of laws have been enacted which affect the handicapped it is only recently that the handicapped themselves vocally have asserted their right to equal treatment. Proposed amendments to Title VI and Title VII of the Civil Rights Act of 1964 would have prohibited discrimination against the handicapped in federal programs and in private employment. Although there was strong support for these bills among the handicapped, no action was taken. A similar provision to prohibit discrimination in federal programs was included in the Rehabilitation Act of 1972 which was passed by Congress but subsequently vetoed by the President.

In view of this limited legislative action, the handicapped may be forced to resort to the courts in order to vindicate their rights. To do

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Several states have gone further than the federal government in securing the rights of the disabled. The Illinois constitution guarantees the physically and mentally handicapped the fullest possible participation in the social and economic life of the state. ILL. CONST. art. I, § 19. Other states have anti-discrimination laws protecting handicapped persons seeking employment in private industry. See IOWA CODE ANN. § 601A.7 (Supp. 1972); Wis. Stat. § 111.31 (1969). In addition, many state constitutions provide for education as a basic right. See E. WEINTRAUB, A. ABESON AND D. BRADDOCK, STATE LAWS ON EDUCATION OF HANDICAPPED CHILDREN; ISSUES AND RECOMMENDATIONS 11 (1971). But see id.; at 11-12, 17 (some state constitutions permit omission from mandatory attendance laws of children with certain handicaps); notes 14-16 infra and accompanying text. A number of state statutes provide that publicly funded buildings must be accessible to handicapped persons, and some statutes include publicly used-privately owned buildings as well. See COMMITTEE ON BARRIER FREE DESIGN, THE PRESIDENT'S COMMITTEE ON EMPLOYMENT OF THE HANDICAPPED, A SURVEY OF STATE LEGISLATION TO REMOVE ARCHITECTURAL BARRIERS. See also note 59 infra.


so, they must develop new legal strategies by using existing theories in previously unexplored ways. This Note will consider the development of such strategies in the areas of education, physical access and employment.

**Education**

Sixty percent of the estimated seven million handicapped children in the United States are denied the special educational assistance they need for full equality of opportunity. The bases for this discrimination lie in constitutional provisions, statutes and court decisions of the various states. Two recent district court opinions, however, recognized the right of the handicapped to participate equally in public education. A consent decree issued in *Pennsylvania Association For Retarded Children v. Pennsylvania* required the state to provide free access to public education and training for all mentally retarded children. The court in *Mills v. Board of Education* stated that the education right extended to the physically handicapped as well as to the mentally retarded. The *Mills* court held that the denial of a publicly supported education for the handicapped in the District of Columbia, where public education was available to all others, violated the due process clause of the fifth amendment. The same rationale may be applicable to the states through the equal protection clause of the fourteenth amendment.

13 Id.
14 See DEL. Const. art. 10, § 1; N.M. Const. art. 12, § 5. Both the New Mexico and Delaware constitutions permit omission of the mentally and physically handicapped from the state's compulsory school attendance provisions.
16 The Wisconsin Supreme Court held that a board of education may deprive a physically handicapped child of his right to a public school education. See State ex rel. Beattee v. Board of Educ., 169 Wis. 231, 234-35, 172 N.W. 153, 155 (1919). However, in 1967 the Wisconsin Attorney General, while reaffirming the right of local school authorities to exclude a student, stated that other means for a free, public education must be provided. See F. WINTERBAUER, A. ABBSON AND D. BRADDOCK, supra note 6, at 12. Thousands of handicapped children still are excluded from Wisconsin public schools. See 118 CONG. REC. E561 (1972) (remarks of Representative Vanik).
18 Id. at 1259.
20 Id. at 878.
21 Id. at 875.
22 The fifth amendment, which contains a due process clause, is applicable to the District of Columbia, while the fourteenth amendment, which contains both a due process clause and equal protection clause, applies only to the states. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Though both concepts stem from the American ideal...
The Supreme Court has applied two tests for judging whether a state's justification defeats an equal protection challenge. Under the more lenient rational basis test, a state's classification is unconstitutional only if based on grounds totally irrelevant to the state's objective. However, when fundamental interests or suspect classifications are involved, the Court scrutinizes discriminatory laws more carefully and requires the state to demonstrate an interest sufficiently compelling to overcome a presumption of invalidity.

Discrimination against the handicapped may be a suspect classification. The courts have found suspect classifications when the particular group involved is saddled with such disabilities, subjected to a history of such purposeful discrimination, or relegated to a position of such political weakness as to require special protection. The stigma of inferiority usually attached to such a classification has been the major determining factor in designating classifications as suspect. Handicapped groups historically have been politically weak and fragmented.

of fairness, they are not mutually exclusive. While the equal protection clause is a more explicit safeguard against prohibited unfairness than the due process clause, every interest found to be fundamental and protected under due process probably is fundamental under the equal protection clause as well. See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1130 (1969). Thus the Mills court's rationale based on the due process clause in the District of Columbia is sound precedent for application of the equal protection clause to the states.

23 See, e.g., Reed v. Reed, 404 U.S. 71, 75-76 (1971); Morey v. Doud, 354 U.S. 457, 463-64 (1937); Lindsey v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); see notes 129-130 infra and accompanying text.


29 See Handicapped Hearings—Senate 564-67.
and handicapped persons have been stigmatized by society with a badge of inferiority. The handicapped condition, often congenital and unalterable, has been analogized to racial classifications which almost always compel the strict standard of review. Classification of the handicapped, involving a politically weak group with a congenital or unalterable trait, similarly should undergo the strictest scrutiny by the courts.

The alternative method to invoke the application of the compelling state interest test is to recognize education as a fundamental interest. The Supreme Court, however, in San Antonio Independent School District v. Rodriguez, sustained Texas’ use of the property tax as the means for financing public education, while holding that education is not a fundamental interest. The Court, nevertheless, left open a door to a constitutional attack on unequal educational opportunity when this inequality consists of an absolute denial of education. Such an absolute denial of education is what confronts many handicapped chil-

30 Kriege1, Uncle Tom and Tiny Tim: Some Reflections on the Cripple as Negro, 38 AMERICAN SCHOLAR 412 (1969). But see Developments in the Law, supra note 22, at 1127 (stigma of inferiority does not attach to certain physical disabilities as it does to recognized suspect classifications).

31 Kriegel, supra note 30, at 416.


35 Id. at 4417.

36 Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic and minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 4418.
Hence the holding of *Mills v. Board of Education*, that the right to a free, publicly supported education extends to all handicapped children, should not be placed in jeopardy by the *Rodriguez* decision. In situations where there is no absolute denial of education to the handicapped, but merely the allegation that the education provided by the state is inadequate, the *Rodriguez* decision will limit plaintiff's attempts to obtain the strict scrutiny of suspect classification analysis.

If successful in establishing the handicapped condition as a suspect classification, traditional arguments offered as justifications by the state probably would not pass the compelling interest test. While a state might argue that prohibitive costs compel such classification, the Supreme Court has stated previously that constitutional rights cannot be denied merely because their protection will necessitate the expenditure of public funds. Similarly administrative inconvenience is not a compelling interest justifying the exclusion of the physically disabled. School systems which discriminate against or totally exclude handicapped children then would have to provide the equal educational opportunities to which all children are entitled.

**Physical Access**

**Transportation**

The two major barriers to complete utilization of transportation facilities by the physically handicapped are architectural design and legal recognition of the rights of the handicapped. Architectural impediments are particularly acute for individuals confined to wheelchairs who are often unable to enter buses, trains, planes, or transportation terminals. Since these physical obstacles can be eliminated effectively by modern technology and proper planning, the only remaining barrier to sufficient mobility is the lack of legal principles implementing the right to fully use such facilities. Even where that right clearly is

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37 See notes 13-16 supra and accompanying text.
39 348 F. Supp. at 875.
42 See F. WEINTRAUB, A. ABSEN, AND D. BRADDOCK, supra note 6, at 40-46.
44 Id. at 15-16. For example, California's Bay Area Rapid Transit System was designed to be totally accessible to disabled persons. Id.
45 Some attempts have been and are being made. The Civil Aeronautics Board has notified air carriers of its intention to exercise rule-making authority with regard to the transportation of physically disabled persons. See 36 Fed. Reg. 20,309 (1971).
established by legislation, some officials have failed to initiate effective action. Thus, the courts again may be called upon to provide relief where legislation is either non-existent or not fully implemented by public officials.

The Supreme Court has developed the principle that the right to interstate travel and the right to use the instrumentalities of interstate commerce are fundamental under the Constitution. In Shapiro v. Thompson, the Court declared that statutes requiring residence as a prerequisite for the receipt of welfare benefits infringe upon the constitutional right to travel by inhibiting movement from one state to another. The Court reasoned that residency requirements create two move is in reaction to present dissatisfaction with a 1962 industry agreement. See CAB Agreement No. 16614 (Dec. 31, 1962). See generally Medical Criteria for Passenger Flying, Archives of Environmental Health, Feb., 1961. The new rules have not been promulgated.

The Interstate Commerce Commission has not regulated the transportation of handicapped persons via rail or interstate bus. See Handicapped Hearings—Senate 515. However, the National Railroad Passenger Corporation (AMTRACk) has provided barrier-free construction in new equipment and facilities and renovation of old equipment and facilities where practical and feasible. National Railroad Passenger Corp. Executive Memorandum No. 72-4 (Mar. 15, 1972).

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Washington, D.C., subway officials refused to approve installation of elevators in the local system, as mandated by Congress, until ordered by the court to do so. See Washington Urban League, Inc. v. Washington Metropolitan Area Transit Authority, Inc., Civil No. 776-72 (D.D.C., June 29, 1973). The suit focused on the need for further appropriating legislation rather than individual rights.

Whereas both Guest and Shapiro only involved the right to travel interstate, lower courts have found a fundamental right to travel intrastate. See King v. New Rochelle Municipal Housing Authority, 442 F.2d 646, 648 (2d Cir.), cert. denied, 404 U.S. 863 (1971); Cole v. Housing Authority, 435 F.2d 807, 809 (1st Cir. 1970); Valenciano v. Bateman, 323 F. Supp. 600, 603 (D. Ariz. 1971). The Supreme Court has never addressed the question of purely intrastate travel. The majority in Shapiro did not ascribe the right to travel to any particular constitutional provision but rather to the general constitutional concepts of personal liberty. 394 U.S. at 629. In dissent, Chief Justice
classes of potential welfare recipients—those living within the state for
the prescribed period and those living within the state for less than
the prescribed period. Applying the compelling state interest test, the
Court concluded that a classification which infringes the fundamental
right to travel violates the equal protection clause of the fourteenth
amendment.

Similarly, all travelers might be classified into two groups—the physi-
cally handicapped, who have restricted access to the instrumentalities
of interstate travel, and the non-handicapped, who have complete access.
Since these discriminatory restrictions constitute an infringement on the
right to travel, transportation companies should be required to demon-
strate that a compelling state interest justifies the exclusion of the
handicapped. Of course, some governmental action must be shown
as a prerequisite for application of either the due process or the equal
protection clauses. Publicly owned transportation companies, and
even certain privately owned companies, would satisfy the “state
action” requirement.

Warren and Justice Black looked to the commerce clause for the origins of the right.
See id. at 644, 648 (Warren, C.J., & Black, J., dissenting). Justice Harlan, in dissent,
concluded that the right has its source in the due process clause of the fifth amend-
ment. Id. at 655, 671 (Harlan, J., dissenting). The Court has also found a close
relationship between the freedom to travel and the freedoms of speech and association.
See Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964). Under the view that the
right to travel stems from the commerce clause, it probably would not apply to purely
intrastate transportation. But, if the right derives from the freedoms of speech and
association, it would be difficult to deny its application to intrastate travel. See Note,

The equal protection clause does not apply to the District of Columbia.
See generally supra. For a court to find that a transportation system is in violation of equal
protection, state action must be shown. U.S. CONsv. amend. XIV, § 1. Governmental action is also
necessary for application of fifth amendment due process. See Public Utilities Comm'n
operation of a transportation company regulated under the authority of Congress con-

A privately owned municipal transit system can be so enfranchised that it is state
action for the company to engage in conduct violative of equal protection. See Boman
v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960); Williams, The Twilight of
State Action, 41 Texas L. Rev. 347, 358-59 (1963). The courts have found state action
in various other instances. See, e.g., Evans v. Newton, 382 U.S. 296 (1966) (private
organization carrying out a public function); Burton v. Wilmington Parking Authority,
365 U.S. 715 (1961) (private business an integral part of a public building devoted to a
public service); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of a
private agreement). But see Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972) (mere
licensing does not constitute state action).
The cost of solving current architectural problems through existing technology should not be a sufficiently compelling interest to justify the denial of a fundamental constitutional right such as travel. Therefore, courts may be asked to require publicly owned and some privately owned transportation systems to spend the funds necessary to make their facilities accessible to the physically handicapped.

PUBLIC BUILDINGS

The handicapped presently are excluded from many public buildings by architectural barriers ranging from monumental staircases to six-inch curbs. Although federal law requires that all new federal and federally assisted facilities designed for public use be readily accessible, there is no provision for existing structures. State statutes addressing the problem of architectural barriers also generally ignore the need for modifications of existing buildings. These buildings house a wide range of federal and state agencies and services to which the public must have access; the efforts of the handicapped individual to secure assistance and present grievances and complaints are impeded by his inability to gain physical access to the buildings. If this interference infringes the handicapped person's constitutional rights, removal of the interference may be forced by court action.

58 See Committee on Barrier Free Design, supra note 7. Some of the statutes provide that accessibility is required only if economically feasible and not unreasonably complicated. Others require that the building have one entrance which is accessible while ignoring other barriers. See id. Four states have laws covering publicly used, privately owned buildings; fourteen explicitly cover remodeling. See id. Like the federal government, most states have no provision for existing structures. One county in Ohio did consent to erect an elevator in the existing county courthouse after suit by a local resident. Consent Decree, Wargowsky v. Novak, Civil No. C-72-138 (N.D. Ohio, March 30, 1973). Another county in Ohio consented to remove barriers from its court houses and the health and welfare building. Friedman v. County of Cuyahoga, Case No. 899961 (Cuyahoga County Ct. 1972).
The Supreme Court long has recognized that citizens have the right to come to their "seats of government" to transact business and petition for redress of grievances. This freedom to petition is protected by the first amendment and applies to all branches of government, including the administrative agencies. The judiciary has been vigilant to prohibit infringement upon the citizen's right to communicate freely with the government. In Brown v. Louisiana the Supreme Court upheld the right of the citizen to be physically present in a public building to petition for redress of a grievance related to the operation of 60 The seat of government is where the courts, executive and legislature are located. Cf. Edwards v. South Carolina, 372 U.S. 229, 235 n.10 (1963).
61 See Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867); Passenger Cases, 48 U.S. (7 How.) 282, 491 (1849) (Taney, C.J., dissenting). Although courts recognize the extreme importance of the right to petition, it has received much less attention than the rights of speech and assembly. This may be due to the fact that it is closely intertwined with the latter rights. See United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) (speech, assembly and petition intimately connected and equally fundamental). See also De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (right to petition an integral part of republican form of government).
In a recent case the appellants argued that the imposition of filing fees on indigents in divorce actions violated their first amendment right to petition. See Boddie v. Connecticut, 401 U.S. 371 (1971). The Court, however, viewed access to the courts as an element of due process in this instance because the judicial process was the only means available for dissolving the marriage. Id. at 375. Why the Court chose due process is not clear since issues such as service of process would not have been necessary to resolve had they relied on the first amendment. See La France, Constitutional Law Reform for the Poor: Boddie v. Connecticut, 1971 Duke L.J. 487, 529 (the author was counsel for appellants).
Moreover, in *Edwards v. South Carolina* the Court viewed the defendants' efforts to enter the state house grounds, a public facility, to present their grievances as an exercise of first amendment rights in its most "pristine and classic form." Thus, while public agencies have the right to regulate access to their facilities, they may not do so in an unreasonable and discriminatory manner. Since the physical barriers which impede the handicapped individual's access generally exist because of poor planning choices and serve no useful purpose, they may be attacked as unreasonable and discriminatory. The possibility of alternative means of communication is irrelevant. The defendants in *Brown* and *Edwards* had other means of communication, but the Court nevertheless found the restrictions on defendants' access to be an unjustifiable burden on their first amendment rights.

Since the right to petition is protected by the first amendment it may only be infringed when a danger exists to interests which the state lawfully may protect. The state clearly has infringed the rights of the handicapped since, although it did not create their physical condition, by constructing physical barriers it created their exclusion. The state had the alternative when building its facilities to use designs which would have made them fully accessible at similar cost. By an official

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65 *Id.* at 142.
67 *Id.* at 235.
70 *See Brown v. Louisiana, 383 U.S. 131* (1965) (statute infringed right to enter library to petition for end to segregated library system); *Edwards v. South Carolina, 372 U.S. 229* (1963) (statute infringed right to enter state house grounds to express grievances).
71 *But see Adderly v. Florida, 385 U.S. 39* (1966) (state's interest in controlling jailyard property was sufficient to uphold convictions of demonstrators); *Cox v. Louisiana, 379 U.S. 559* (1965) (activities near court house may be limited in deference to judicial integrity).
73 Even if no first amendment right of access exists, the handicapped individual may be denied equal protection of the laws if the state creates an unreasonable classification between the disabled and the non-disabled without a rational relationship to some state interest. *See note 23 supra* and accompanying text.
74 Cost estimates by the National League of Cities based on seven hypothetical buildings indicate that the additional cost involved in making them barrier free would be less than one-half of one percent. See NATIONAL COMMISSION ON ARCHITECTURAL BARRIERS, *Design For All Americans* 7 (1967). Studies based on three buildings actually constructed indicated that the cost was increased by only one-tenth of one percent. *See id.*
choice of construction\textsuperscript{74} the state has infringed the rights of the handicapped without countervailing state interest. Therefore the state has a duty to eliminate all such impediments to the free exercise by the handicapped of their rights.\textsuperscript{76} Some changes, such as ramps and railings, may be effected at minimal financial outlay;\textsuperscript{76} others may involve expensive structural changes. The courts, however, will order costly protections when Bill of Rights freedoms are involved.\textsuperscript{77} Thus, the handicapped individual may have a remedy against either the state or the federal government for violation of his first amendment rights.

**Employment**

**Private Employment**

Only a small percentage of the estimated 14 million physically handicapped Americans who could work if given the opportunity actually are employed.\textsuperscript{78} The handicapped individual's unemployment

\textsuperscript{74} See United States v. Raines, 362 U.S. 17, 25 (1960) (requirement of state action met when source is person or agency formally identifiable).

\textsuperscript{75} Cf. Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (remedies to constitutional infringement must be enforced). A court might find that the state's duty to provide access could be fulfilled by means other than barrier removal, such as providing agents to assist the handicapped individual in securing services he otherwise might be unable to obtain. While this may be an administratively logical solution, it does not seem to be fully within the meaning of the constitutional imperative that there be no infringement.

\textsuperscript{76} National Commission on Architectural Barriers, supra note 73, at 3.


\textsuperscript{78} 118 Cong. Rec. 1472 (1972) (remarks of Senator Williams). One study showed that 25 percent of the unemployed handicapped respondents had tried but were unable to find jobs. See A.D. Little Co., Employment, Transportation and the Handicapped, July 1968, at 30 (U.S. Social and Rehabilitation Serv., Dept. of Health, Education, and Welfare, No. C-69492).

Among the more severely handicapped, however, fully a third of those surveyed were unable to obtain employment. \textit{Id.} at 31. The rate of employment for the entire sample was 50 percent, varying from a high of 75 percent for individuals with back and spine problems to a low of 29 percent for amputees. \textit{Id.} at 29-30.

In addition to private employment, sheltered workshops funded by the state vocational agencies provide training and work for some handicapped individuals. These workshops are partially exempt from the minimum wage requirements of the Fair Labor Standards Act. \textit{See} 29 U.S.C. § 214(d) (1970). Encouraged as a necessary alternative for the disabled, the workshops are criticized for providing inadequate wages and facilities. \textit{See Handicapped Hearings—Senate} 1046-47. \textit{See also} H.R. Rep. No. 92-1135, 92d Cong., 2d Sess. 43 (1972). Additional jobs are provided under the Randolph-Sheppard Act of 1936 which grants blind people licenses and initial financial aid for the operation of vending stands. 20 U.S.C. § 107 (1970); \textit{see} H.R. Rep. No. 92-1135, 92d Cong., 2d Sess. 49-55 (1972). These jobs may be limited by the increasing
naturally impairs his ability to support a family and to participate fully in the daily activities of society. Some, unable to rely on family support or other resources, are forced to accept welfare. Although transportation and physical barriers play significant roles in restricting employment possibilities, a crucial factor is employer attitude. In addition to stereotyped prejudices, many employers fear that the handicapped person will be unable to perform assigned tasks. This attitude exists despite the results of numerous studies showing that the handicapped worker, when assigned an appropriate position, performs as well as, or better than, his non-handicapped co-workers.

In spite of reassurances by insurance associations, many employers also fear that workmen's compensation rates will increase due to employment of the disabled. However, employment of the handicapped does not affect the premium rates either for non-occupational benefit plans or for workmen's compensation. Furthermore, 46 states have second-injury laws which afford the employer some protection against bearing the full cost of support if a disabled employee is reinjured and permanently disabled. Nevertheless, employer prejudice against the handicapped as an insurance liability remains.

use of automatic vending machines. Id. at 52. Encouragement to enterprises hiring the blind is also provided by the Wagner-O'Day Act which authorizes special purchases by federal agencies of blind-produced supplies. See 41 U.S.C. §§ 46-48 (Supp. 1971).

It is estimated that rehabilitation by federally financed state vocational rehabilitation agencies of 51,084 handicapped persons saved over $40.3 million in public assistance payments. H.R. Rep. No. 92-1135, 92d Cong., 2d Sess. 12 (1972).

See Handicapped Hearings—Senate 515, 534-35; A.D. Little Co., supra note 78, at 30; notes 43-45 supra and accompanying text.

One study showed that all disabled groups were subject to prejudice and that personnel directors would prefer to hire a former prison inmate or mental hospital patient than an epileptic. See Richard, Triandis & Patterson, Indices of Employer Prejudice Toward Disabled Applicants, 47 Journal of Applied Psychology 52 (1963). See also M. Gandy, supra note 2.


See id. at 6-8.

The Association of Casualty and Surety Companies pointed out that rates are based solely on the relative hazards in the company's work and the company's accident experience. Id. at 45. Statistics show that a company actually might minimize their accident experience by hiring the disabled since they have eight percent fewer accidents than their co-workers. See Handicapped Hearings—Senate 539.


See Handicapped Hearings—Senate 535. Although many of these laws are limited in the types of injuries covered and the amount of liability, some states are attempting to strengthen the laws. Id. at 536. See also Hearings on H.R. 8395, H.R. 9847 and Related Bills Before the Select Subcomm. on Education of the House Comm. on Education and Labor, 92d Cong., 2d Sess. 113 (1972) (hereinafter cited as Handicapped Hearings—House); U.S. Employment Standards Administration, Dept of Labor, Bull. No. 212 (1971).
Present governmental efforts promote voluntary action by employers and encourage placement activities but do not aid persons refused employment because of handicaps. Other groups, especially blacks, also face serious discrimination in hiring by private employers. Gradually barriers are being overcome and jobs are being opened to qualified persons without regard to race. Progress has been achieved by litigation based either on recent or on Civil War era legislation. There may be some hope for similar progress through the courts for the handicapped.

The primary federal law prohibiting discrimination by private employers, Title VII of the Civil Rights Act of 1964, clearly does not prescribe discrimination against the handicapped. However, a 1968 Supreme Court decision, Jones v. Alfred H. Mayer Co., involving racial discrimination, may provide a possible avenue of relief. The Court held that Section 1982 of title 42 of the United States Code, a relatively obscure statute originally derived from the Civil Rights Act of 1866, applies to private racial discrimination in the sale of housing. In refuting the general belief that state action was required, the Court

87 The President's Committee on Employment of the Handicapped works with industry to gain acceptance of the handicapped worker and sponsors a National Employ the Handicapped Week to publicize its efforts. See Handicapped Hearings—Senate 540, 1036-37. Each state has a Governor's Council on Employment of the Handicapped which works closely with the President's Committee. In addition there are over 1,000 local committees. Id. at 539.

88 In accordance with a 1971 Presidential directive, the vocational rehabilitation agencies, in conjunction with the United States Employment Service and the Veterans Administration, are placing special emphasis on training and job placement of Vietnam veterans. See Handicapped Hearings—Senate 254-56.


93 Title VII makes it an unlawful employment practice to discriminate against any person because of race, color, religion, sex or national origin. Id. § 2000e-2(a) (1970). Efforts have been made to expand it to include the handicapped without success. See notes 8-10 supra and accompanying text. Even if efforts to include the handicapped in Title VII are successful, no Title VII remedy exists against employers of less than 25 workers. 42 U.S.C. § 2000e(b) (1970).


96 Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

97 392 U.S. at 420.

98 See id. at 409, 419-20, 436. Prior to Jones it generally had been assumed that section 1982 required state action. See Larson, The Development of Section 1982 As a Remedy for Racial Discrimination, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 36, 57 (1972); 35 BROOK. L. REV. 275, 276-77 (1969). But see United States v. Morris, 115 F.2d 322 (E.D. Ark.)
indicated that a companion statute, Section 1981,99 is applicable to private discrimination in employment.100

The Jones Court examined the legislators' intent in enacting the 1866 Act and the thirteenth amendment, the latter stating that "[n]either slavery nor involuntary servitude . . . shall exist within the United States . . . ." 101 An enabling clause grants Congress the power to enforce the amendment by appropriate legislation.102 The Jones Court considered the amendment to have both a negative aspect—the abolition of slavery—and an implicit positive corollary—the establishment of universal freedom.103 While specifically declining to decide whether the amendment itself did any more than establish universal freedom,104 the Court held that Congress, under the enabling clause, had the power to decide what acts constituted "badges and incidents of slavery" and

99 The statute provides that "All persons . . . shall have the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981 (1970).


101 U.S. Const. amend. XIII; see 392 U.S. at 422-44.

102 See U.S. Const. amend. XIII, § 2.


104 392 U.S. at 439.
thus could be prohibited. Although the Court indicated that *Jones*
is applicable only to race, some commentators suggest that the ration-
ale of *Jones* applies to other forms of discrimination. Thus, it is pos-
sible to construct an argument asserting that the thirteenth amendment and the subsequent Civil Rights Act of 1866 prohibit employment dis-

In passing the thirteenth amendment the primary consideration in the minds of the legislators was Negro slavery in the South. However, in drafting the amendment the legislators recognized that it would make fundamental changes in the federal system and would enable Congress to establish laws insuring equality for all citizens. By enacting section one of the 1866 Act, Congress extended to “citizens of every race and color” the same rights to purchase and contract as those enjoyed by “white persons.” Section 1881, derived from section one, is even broader—encompassing not only citizens but “all persons” within the United States. The debates at the time of enactment indicate that the legislators did not intend to limit the protection of the Act to blacks. Both sides in the controversy stated that the Act applied to all persons. The legislators intended to prevent any group from being held in an inferior status by ensuring that only one level of citizenship existed throughout the land.

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105 Id. By passing the 1866 Act, Congress indicated that it considered discrimination in both the rights to purchase and the right to contract a “badge or incident”. *Id.* at 441. In an early decision the Court refused to regard private denial of public accommodations as a “badge or incident of slavery” under the thirteenth amendment since it had nothing to do with slavery or involuntary servitude. *Civil Rights Cases*, 109 U.S. 3, 24 (1883). It viewed badges and incidents as those burdens and disabilities on fundamental rights, such as the right to contract and to purchase property, imposed by slavery. *Id.* at 22. Both employment discrimination and the housing discrimination prohibited in *Jones* fall within the earlier Court’s definition.

106 392 U.S. at 413.


108 The thirteenth amendment was one of a series of post-Civil War enactments aimed at terminating the last signs of slavery and ensuring freedom. It was preceded by the wartime Emancipation Proclamation and passed to insure that document’s post-war validity. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 13 (B. Schwartz ed. 1970).


110 Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.


Due to its language and its history, section 1981 has been applied to prohibit both racial\textsuperscript{114} and non-racial\textsuperscript{115} discrimination. If the intent of the framers was indeed to secure universal freedom and to establish equality, then “white citizens,” must be interpreted broadly. This standard was selected at a time when, compared with other groups, whites did enjoy superior rights and was intended to indicate the highest form of personal liberty and freedom. The purpose and intent of the framers of the statutory provision, therefore, requires that the law not be limited to racial discrimination or to non-whites.\textsuperscript{116}

\textsuperscript{114} Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D. Mo. 1969); Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), \textit{modified on other grounds}, 430 F.2d 127 (8th Cir. 1971). The courts in \textit{Central Presbyterian Church} and \textit{Gannon} held, in effect, that when blacks invaded a white church, whites were denied the rights of “white citizens.” \textit{Contra} Perkings v. Banster, 190 F. Supp. 98, \textit{aff'd}, 285 F.2d 426 (4th Cir. 1960) (section 1981 jurisdiction not available to white claiming false arrest). \textit{See also} Dombrowski v. Dowling, 459 F.2d 190, 199 n.24 (7th Cir. 1972) (court suggests without deciding that section 1981 may not apply to white who was denied office rental because associates were blacks); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), \textit{cert. denied}, 406 U.S. 950 (1972) (section 1981 prohibits employment discrimination based on race, whether it is against blacks or whites; court however viewed section 1981 as based on fourteenth amendment); 23 \textit{VAND. L. REV.} 413 (1970) (discussion of \textit{Gannon}).

\textsuperscript{115} See Scher v. Board of Educ., 424 F.2d 741, 743 (3d Cir. 1970) (per curiam) (sections 1981 and 1983 do not apply exclusively to racial or religious discrimination; available to boy denied equal protection by arbitrary expulsion from school). \textit{Contra} Schetter v. Heim, 300 F. Supp. 1070, 1073 (E.D. Wisc. 1969). \textit{But cf.} Georgia v. Rachel, 384 U.S. 780, 791-92 (1966) (legislative history of Civil Rights Act of 1866 shows intent restricted to racial equality). The Court also has upheld anti-peonage statutes based on the thirteenth amendment regardless of the race of the defendant. \textit{See} Clyatt v. United States, 197 U.S. 207, 218 (1905). Section 1981 was enacted to enforce the thirteenth amendment and applies to all races and colors. Buchanan v. Warley, 245 U.S. 60, 78 (1917). However, the Court in \textit{Buchanan} appeared to place some weight on the reenactment of section 1981's predecessor, the Civil Rights Act of 1866, after the fourteenth amendment became effective. \textit{Id.} at 74-76. Two other cases which hold that section 1981 applies to all races and colors appear to rely at least in part on the fourteenth amendment rationale. \textit{See} Takahashi v. Fish Comm'n, 334 U.S. 410, 419 (1948) (section 1981 rests in part on the fourteenth amendment); United States v. Wong Kim Ark, 169 U.S. 649, 695-96 (1898) (acknowledges section 1981's thirteenth amendment basis but uses fourteenth amendment rationale). However, in a recent case involving denial of welfare benefits to resident aliens the Supreme Court indicated that section 1981 was separate from the fourteenth amendment. \textit{See} Graham v. Richardson, 403 U.S. 365 (1971) (state statute violated fourteenth amendment as well as federal power to regulate aliens as carried out by section 1981). Moreover, the \textit{Jones} Court stated that reenactment of the 1866 Act after the fourteenth amendment did not affect the scope of the Act. \textit{See} Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968).

\textsuperscript{116} It has been suggested that limiting the protection of the Act to blacks offends the equal protection clause of the fourteenth amendment. \textit{See}, \textit{Note}, \textit{The “New” Thirteenth Amendment: A Preliminary Analysis}, 82 \textit{HARV. L. REV.} 1294, 1315-16 (1969); 20 \textit{CASE W. RES. L. REV.} 448, 459 n.25 (1969).
The Jones Court, while calling segregated housing patterns a "relic" of slavery, applied the term to practices which could be traced only indirectly to the institution of slavery itself. Thus the expression should not be used to limit a "badge or incident" to those employment practices which existed during the period of slavery. If by "relic" the Court meant the discrimination which the black man faces, not because of his former servitude, but because of his current second-class status in society, then that same discrimination is suffered by the handicapped who are isolated and set apart from the mainstream of society. It cannot be said that the handicapped are treated as first class citizens enjoying all of the rights of "white persons." The handicapped, therefore, should be protected by both the thirteenth amendment and section 1981.

Such a view of the amendment and its purpose is consistent with the intention of its framers to secure universal freedom. Even if the framers comprehended no other discrimination than racial, the Constitution is not an inflexible document, frozen by the attitudes and conditions which prevailed at the time of its passage. Rather, the Constitution is a living institution, adaptable to the circumstances of modern society and responsive to the ideal of true equality for all people. Since the courts must determine the significance of constitutional principles by considering their growth as well as their origin, their interpretation of the Constitution can be responsive to the changing social and economic values of the nation. The evil which the thirteenth

117 392 U.S. at 442-43.
118 The Court viewed racial ghettos which are a development of the 20th century as a "relic" of slavery. Id. But see Casper, Jones v. Mayer: Clio, Bemused and Confused Muse, 1968 S. Ct. Rev. 89 (description of housing segregation during Civil War).
119 While some of the discriminatory racial practices existing today may have been in existence at the time of slavery they appear to be based less on former servitude and more on unreasoning prejudice which causes some whites to view blacks as inferior. See 392 U.S. at 446 (Douglas, J., concurring).
121 See note 103 supra and accompanying text.
124 See Note, supra note 116, at 1302-03. The lawmakers couched the amendment in terms general enough to encompass the total institution of slavery as it developed, responding fully to the evil perceived. Id. at 1302. As modern perception of that evil
The amendment originally sought to eradicate was the inherent injustice of maintaining a class of people in a position of inferiority. An interpretation of the amendment which includes all persons who suffer from such inferiority, even if not the specific intent of the framers, would be within the spirit of their enactment.25

**PUBLIC EMPLOYMENT**

While federal agencies are prohibited by law from discriminating against an individual because of a physical handicap,26 few states have similar statutes. Moreover, the courts have given scant attention to whether a state agency is prohibited from refusing to hire an otherwise qualified person purely on the basis of a physical handicap.27 The Supreme Court consistently has recognized that the fourteenth amendment, while granting the states power to treat classes of people in different ways,28 does deny them the power to discriminate on the basis of irrelevant criteria.29 Thus the Court, although never acknowledging grows, the response may assume an increasingly broader scope. Id. By rejecting an overly narrow interpretation of the amendment it may be more readily adapted to the "evils" of today's society. Id. at 1302-13.

25 See Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (accords early civil rights statutes a sweep as broad as their language). However, Griffin indicated that the thirteenth amendment is closely related to slavery. See id. at 105. In another decision the Court dismissed an argument that a city's action to close its pools rather than to integrate them was a badge or incident of slavery. Palmer v. Thompson, 403 U.S. 217 (1971). The Court noted that although the enabling clause of the amendment might allow the passage of legislation to control pool closings, Congress had not chosen to pass such a statute. Id. at 227.

26 See 5 U.S.C. § 7153 (1970). Only one action has been brought under this statute. See Kletzing v. Young, 210 F.2d 729 (D.C. Cir. 1954) (suit by blind man to be reinstated on Civil Service employment register; brought under section 7153's predecessor; dismissed as moot since register had expired).


the existence of a right to public employment, has held that a person constitutionally is protected by the fourteenth amendment from arbitrary employment discrimination by the state.

If a handicapped individual alleges facts which indicate arbitrary employment discrimination, action may be maintained under section 1983 of title 42 of the United States Code. Since the action of an agency through its officials is state action within the meaning of the statute, the claim is cognizable. The complainant of course must be prepared to prove that the denial of employment was due to discrimination and not to a lack of proper qualifications.

325 F. Supp. 560, 569 (N.D. Miss. 1971), modified, 461 F.2d 276 (5th Cir. 1972) (racial discrimination in hiring and retaining public school teachers); accord, Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966) (en banc). See also supra and accompanying text.

130 For many years government employment and government services have been regarded as privileges, not rights, and thus unprotected by rules of substantive due process. However, such distinctions have been so eroded that the concept remains of doubtful validity. See generally Alstyn, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).


Even if a handicapped individual has a valid claim, he faces, however, the general reluctance of the courts to oversee federal agencies' hiring practices. See Comment, Racial Discrimination in the Federal Civil Service, 38 Geo. Wash. L. Rev. 265, 280 (1969); Comment, Aliens and the Civil Service: A Closed Door?, 61 Geo. L. J. 207, 216-17 (1972).


Section 1983 was originally section one of the Civil Rights Act of 1871 which was enacted to enforce the provisions of the fourteenth amendment. Mitchum v. Foster, 407 U.S. 225, 238 (1972); see Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, as amended, 42 U.S.C. § 1983 (1970). Section one was modeled on section two of the Civil Rights Act of 1866. 407 U.S. at 238; see Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27.


However, the federal government and the District of Columbia are not states within the meaning of the statute. District of Columbia v. Carter, 409 U.S. 418, 419 (1973).
If an action is maintainable under either section 1983 or the fourteenth amendment alone, the handicapped person may have recourse against a number of employers, depending upon their relationship with the state. Under a broad interpretation an action should be maintainable against all public agencies as well as private organizations significantly controlled by the state. The handicapped individual must select the defendant carefully since municipalities may be immune from suit under section 1983. However, recovery has been allowed against

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125 Discrimination in transportation systems has been successfully labelled state action. See Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967); note 54 supra and accompanying text.

Actions of hospitals, too, have come under judicial scrutiny. See McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971). In McCabe the court held that since the hospital was a public institution, the plaintiff need not point to specific state statutes compelling them to act as they did in order to meet the “under color of state law” requirement of section 1983. Id. at 703-04. It is the source of the defendant’s authority, not only the laws that purport to justify the action, which determine whether the defendant has acted under color of law. Id. at 704. Whether or not the state's role in regulating private hospitals would be sufficient to make their actions “state action” has been considered by several lower courts. The majority seem to have concluded that due to the states' role in disbursement of funds under the Hill-Burton Act private discrimination is state action. See Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (excellent discussion of Hill-Burton; racial discrimination); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972) (violation of religious belief); Sams v. Ohio Valley General Hosp. Ass'n, 257 F. Supp. 369 (N.D.W. Va. 1966) (discrimination against out-of-state physicians); Hill-Burton Act § 622(f), 42 U.S.C. § 211(e)(f) (1970). But see Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971) (receipt of state or federal funds did not transform private hospitals into public institutions). The court in Place indicated, however, that there might be a cause of action if a public hospital refused to hire. Id. at 1246.

126 See Monroe v. Pape, 365 U.S. 167, 191 n.50 (1961) (Chicago not “person” under statute). The decision has caused considerable confusion in the circuits, and some courts either have interpreted the Court's statements narrowly or have considered Monroe overruled sub silentio by later opinions which failed to consider whether the entity sued was proper under section 1983. Other courts have distinguished between actions for damages, such as Monroe, and those for equitable relief, or have ignored Monroe completely. See Johnson v. Cincinnati, 450 F.2d 796 (6th Cir. 1971) (ignored Monroe); Harkless v. Sweeney Independent School Dist., 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971) (restricted Monroe to its facts and granted equitable relief under section 1983); Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir. 1969) (Monroe limited to money damages); Local 858, Am. Fed'n of Teachers v. School Dist. No. 1, 314 F. Supp. 1069, 1073 (D. Colo. 1970) (Monroe rendered irrelevant by Supreme Court cases ignoring it); Note, Civil Rights—School Officials Not Persons For Purposes
entities such as school boards\textsuperscript{137} and state universities.\textsuperscript{138} Even if an immunity exists, the plaintiff may sue the state employee who deprived him of his rights in the employee’s individual capacity.\textsuperscript{139} Thus, the handicapped may have a potent means of redress for public employment discrimination.

**CONCLUSION**

Although concern for the plight of the handicapped may be increasing, they still face serious obstacles in their effort to achieve equal treatment by society. While many areas merit attention, education, physical access, and employment are among the most significant. Although there has been little litigation involving the rights of the disabled, possibilities for redress do exist. By carefully selecting strong cases in which the right denied is extremely important, and the discrimination and damage are evident, the handicapped may be able to achieve some success through the courts. However, the theories discussed herein are only suggestions for legal action; they are largely unexplored and do not preclude the development of other strategies.

It is nonetheless imperative for the handicapped to continue to focus efforts on Congress and the state legislatures. Legislation ensuring the rights of the handicapped would be the most uniform and far reaching solution to the problems presented. The inclusion of the handicapped among those protected by the Civil Rights Act of 1964\textsuperscript{140} is the most desirable solution on the federal level. Such an amendment would allow the handicapped access to the Act’s complaint mechanisms and to the


\textsuperscript{137} See, e.g., Walton v. Nashville Special School Dist., 401 F.2d 137 (8th Cir. 1968); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968); Wall v. Stanley County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967).


\textsuperscript{139} See Monroe v. Pape, 365 U.S. 187, 192 (1961). Suits against the individual, however, may have a limited effect on the public agencies’ policies and may produce little in the way of monetary recovery. See Note, Developing Governmental Liability Under 42 U.S.C. § 1983, 55 Minn. L. Rev. 1201, 1209 (1971) (discussing recovery against policemen).

expertise of its enforcement offices. The enactment of legislation will not, however, be the end of the struggle. Rather, it will be the beginning of a process which eventually must ensure that every handicapped individual has an even start with the rest of society.