The Mentally Retarded: The Need for Intermediate Scrutiny

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THE MENTALLY RETARDED: THE NEED FOR INTERMEDIATE SCRUTINY

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>109</td>
</tr>
<tr>
<td>II.</td>
<td>THE STANDARDS OF REVIEW</td>
<td>110</td>
</tr>
<tr>
<td>III.</td>
<td>THE HISTORICAL BACKGROUND OF THE MENTALLY RETARDED: CITY OF CLEBURNE V. CLEBURNE LIVING CENTER</td>
<td>112</td>
</tr>
<tr>
<td>A.</td>
<td>Mistreatment and Discrimination</td>
<td>113</td>
</tr>
<tr>
<td>B.</td>
<td>Political Powerlessness</td>
<td>117</td>
</tr>
<tr>
<td>1.</td>
<td>Lack of Legislative Influence</td>
<td>117</td>
</tr>
<tr>
<td>2.</td>
<td>Inadequate Consideration by the Supreme Court</td>
<td>118</td>
</tr>
<tr>
<td>IV.</td>
<td>THE CURRENT STANDARD OF REVIEW FOR THE MENTALLY RETARDED: CITY OF CLEBURNE V. CLEBURNE LIVING CENTER</td>
<td>119</td>
</tr>
<tr>
<td>A.</td>
<td>The Majority Opinion</td>
<td>120</td>
</tr>
<tr>
<td>B.</td>
<td>The Concurring Opinions</td>
<td>121</td>
</tr>
<tr>
<td>1.</td>
<td>Justice Stevens</td>
<td>121</td>
</tr>
<tr>
<td>2.</td>
<td>Justice Marshall</td>
<td>122</td>
</tr>
<tr>
<td>V.</td>
<td>THE MENTALLY RETARDED REQUIRE AN INTERMEDIATE LEVEL OF SCRUTINY</td>
<td>125</td>
</tr>
<tr>
<td>A.</td>
<td>State Action Protects and Denies the Rights of the Mentally Retarded</td>
<td>125</td>
</tr>
<tr>
<td>B.</td>
<td>State Court Review of Sterilization Orders</td>
<td>127</td>
</tr>
<tr>
<td>1.</td>
<td>Clear and Convincing Evidence</td>
<td>128</td>
</tr>
<tr>
<td>2.</td>
<td>Substituted Judgment</td>
<td>129</td>
</tr>
<tr>
<td>VI.</td>
<td>CONCLUSION</td>
<td>130</td>
</tr>
</tbody>
</table>

I. INTRODUCTION

State laws and actions affecting mentally retarded individuals deserve an intermediate level of scrutiny by the Supreme Court of the United States. Use of such scrutiny is appropriate when reviewing actions of the state which have a singular impact upon an identifiable segment of society. Where a group of individuals is uniquely affected by law, the Court's closer inquiry of the facts ensures better protection of the rights of the affected individuals. Admittedly, a state may be justified in isolating a group for the legitimate purposes of protecting or providing assistance when such persons are unable to do so for themselves. When individuals bear immutable, identifiable characteristics and have been "subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," the Supreme Court has used a heightened level of scrutiny to determine whether that state action is legitimate. The Court, however, has not followed this approach consistently but instead has created precedent which will not only confuse courts in future equal protection cases, but also will allow discrimination against the mentally retarded to continue. The Supreme Court has developed three levels of scrutiny in the area of equal protection. Traditionally, under the "rational basis test," government action was held constitutional as long as it was reasonable. A

4 Plyler, 457 U.S. at 216.

109
stricter scrutiny was developed which upholds government action only if a compelling state interest could be shown to justify it.5 "Strict scrutiny" was used when classes, identified by their race or nationality, were deprived of "fundamental rights."6 A third level of scrutiny, "intermediate scrutiny," also known as "heightened scrutiny," has been used only for classes identified by gender or illegitimacy.7 Intermediate scrutiny is intended to be used for review of governmental action which affects specific classes of individuals whose characteristics require the state to take their characteristics into consideration to better protect them.8 Intermediate scrutiny requires that statutory classifications serve important governmental objectives and be substantially related to the achievement of those objectives.9 Intermediate scrutiny allows the state the legislative freedom which "strict scrutiny" might not allow, while providing sufficient protection for the rights of the affected individuals.

The Supreme Court in City of Cleburne v. Cleburne Living Center10 used the minimum "rational basis" level of scrutiny to review a municipal ordinance which violated the equal protection of the mentally retarded. The use of minimum scrutiny is inappropriate when reviewing state action that affects a class which has immutable characteristics, has been subject to a history of discrimination and mistreatment, and lacks the ability to be politically effective.11 Since the mentally retarded constitute such a class, the application of the minimum level of scrutiny to review state action which affects them is inappropriate. Like other minorities, the mentally retarded have been subjected to stereotyped assumptions and generalizations which are embedded in the social structure.12 Therefore, this note will demonstrate that the Supreme Court should use an intermediate level of scrutiny to review governmental action which singularly affects mentally retarded citizens.

II. THE STANDARDS OF REVIEW

The Supreme Court applies three standards of review when scrutinizing alleged violations of equal protection. These standards of review include: strict scrutiny, intermediate scrutiny, and the rational basis test. Strict scrutiny is the standard of review which requires the most independent judicial inquiry. Using this test "means that the justices will not defer to the decisions of other branches of government but will instead independently determine the degree of the relationship which the classification bears to a constitutionally compelling end."13 Here, the government will be required to show a "compelling . . . end — one whose value is so great that it justifies the limitation of fundamental constitutional values."14 The Court will only employ strict scrutiny when the government's classification is based upon a trait "which itself seems to contravene

8 Craig, 429 U.S. at 197.
9 Id.
11 Rodriguez, 411 U.S. at 28.
13 Nowak, CONSTITUTIONAL LAW, ch. 16, § 1, at 591.
14 Id. at 592.
established constitutional principles so that any use of the classification may be deemed 'suspect.'"15 Historically, the Court has used strict scrutiny for those laws which classify persons on the basis of their race or national origin.16 Strict scrutiny allows the Court to dissect state action involving race or national origin and to evaluate both the means and the ends desired by the government. The Court must determine that the means and ends are constitutionally sound or the state action or legislation will be nullified.

Intermediate scrutiny, also called heightened scrutiny, is probably the most confusing of the standards of review used by the Court. It is a form of independent judicial review but its analysis is not quite as rigorous as strict scrutiny. Initially, intermediate scrutiny was applied in cases involving gender-based classifications,17 but has been extended to cases involving illegitimacy18 and aliens.19 Under intermediate scrutiny, a state law or action will be valid if the government can demonstrate that a classification is "substantially related to the achievement of . . . [an] important governmental objective."20 Although, in some instances the Supreme Court states that it is applying a minimum rationality test, the Court is in fact applying an intermediate level of review.21

In recent years, the Supreme Court has also used the intermediate level of review to analyze laws and state actions which violate fundamental constitutional rights.22 The resulting decisions, however, increase the confusion. For example, in cases involving the fundamental rights to vote23 and to travel,24 the Court has looked for both "important"

15 Id.
16 Id. Wygant v. Jackson Board of Ed. is a recent example of Supreme Court strict scrutiny. In Wygant, a school board adopted a layoff provision in its collective bargaining agreement to maintain a status quo percentage of minority personnel, even in the event of necessary layoffs. Id. at 1845. The board adhered to this provision and subsequently laid off non-minority teachers. These teachers alleged violations of the equal protection clause. Id.

The Supreme Court here applied strict scrutiny because "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Id. at 1846, (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978)(Powell,*J.)). The Court did not believe that societal discrimination alone was a sufficient state purpose to justify a racial classification; rather, there must be an additional showing of prior discrimination in order to allow such remedial action. Id. at 1848. Under strict scrutiny, the means chosen to accomplish the state's asserted purpose must be specifically and narrowly framed to accomplish that purpose. Id. at 1850. The burden to be borne by innocent individuals was too intrusive. The Court held that despite an otherwise legitimate purpose, the provision was not tailored narrowly enough to accomplish it and was therefore unconstitutional. Id. at 1852.

17 See Reed v. Reed, 404 U.S. 71 (1971).
18 See Lalli, 439 U.S. at 259.
19 Plyler, 457 U.S. at 216.
20 Craig, 429 U.S. at 75.
21 See, e.g., City of Cleburne, 105 S. Ct. at 3249.
22 Nowak, supra note 13, at 593.
24 See Zobel v. Williams, 457 U.S. 55 (1982); Attorney General of New York v. Soto-Lopez, 106 S.Ct. 2917 (1986), is a case in which the Court uses heightened scrutiny. The case, however, involves the alleged violation of the right to travel. The precedential right to travel cases have been reviewed through the years using all three levels of scrutiny. Hence, despite what level of review the Court announces it will use, that announcement will in reality provide little precedential value to indicate the standard of review used in cases of this nature. Nonetheless, analysis of the Soto-Lopez case will illustrate the meaning of intermediate scrutiny.

The state of New York, through its constitution and state law granted civil service employment preference to New York residents who were honorably discharged veterans of the United States armed services, who had served during wartime and had been residents of New York when they
and "compelling" governmental ends. This suggests that the Court is simultaneously using both intermediate and strict scrutiny. The confusion in this standard is precisely the problem with the current standard of review which the Court uses in connection with the mentally retarded.

Traditionally, the rational basis test has been that level of scrutiny which gave the greatest deference to legislative prerogatives. Primarily used for state economic regulation, the Court will use a "lenient standard of rationality when applying this test."\(^{25}\)

Under this standard a statute will be upheld "if a legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose."\(^{26}\)

III. The Historical Background of the Mentally Retarded

A. Mistreatment and Discrimination

This misunderstanding has led to discrimination and mistreatment of the mentally entered the military service. \(\text{Id. at 2319.}\) Appellees met all criteria, except they had been residents of Puerto Rico when they joined the military. They claimed that the state had violated the equal protection clause and their constitutionally protected right to travel. Since the "creation of different classes of residents raise[d] equal protection concerns ... and where a state law infringe[d] upon a constitutionally protected right, ... [the Court] intensified equal protection scrutiny of that law." \(\text{Id. at 2321.}\)

The Court closely analyzed the benefits of which the appellees had been deprived. The Court determined the benefits which the appellees had been deprived were permanent and substantial. Thus, the Court concluded that the appellees had indeed been penalized. \(\text{Id. at 2324.}\) The Court stated that the justifications given by the state failed to withstand even heightened scrutiny because all state interests could be achieved without the prior residence requirement. \(\text{Id.}\) The Court recognized that the "long standing policy to compensate veterans with advantages over non-veterans might be deemed compelling," but nonetheless, the classification New York created between resident and non-resident enlistees was not relevant. \(\text{Id. at 2325.}\)


\(^{26}\) Id. at 196. Recently, the Court used the rational basis test in Lyng v. Castillo, 106 S.Ct. 2727 (1986), to uphold the eligibility and benefit levels of the Federal Food Stamp Program. These levels are determined on a "household" rather than an "individual" basis. \(\text{Id. at 2728.}\) The statutory term "household" was amended in 1981 and 1982 to treat parents, children and siblings living together as a single household. \(\text{Id. at 2729.}\) Appellees claimed that the statutory distinction between parents, children and siblings, and all other groups of individuals violated the guarantee of equal protection. \(\text{Id. at 2729.}\)

The Court found that the district court had improperly applied heightened scrutiny because "close relatives are not a 'suspect' or 'quasi-suspect' class." \(\text{Id.}\) Furthermore, the classification did not burden a fundamental right, thus "the legislative classification itself is rationally related to a legitimate governmental interest." \(\text{Id. at 2730.}\)

The Court found a rational basis in the "legislature's recognition of the potential for mistake and fraud and the cost-ineffectiveness of case-by-case verification of claims that individuals are separate households." \(\text{Id. at 2730--31.}\) The Court also found that "Congress could reasonably determine that close relatives sharing a home ... tend to purchase and prepare meals together while distant relatives and unrelated individuals might not be so inclined." \(\text{Id. at 2731.}\) Although close relatives may be just as honest as other food stamp recipients, "the potential for mistaken or misstated claims of separate dining in order to receive a greater share of benefits would be greater ... because a greater percentage ... prepare meals jointly." \(\text{Id. at 2731--32.}\)

retarded. During the colonial period of the United States, the mentally retarded were among those accused of witchcraft. Even after the witchscare of the late 1600's, the mentally retarded were still regarded as evil or innately inferior.

It was not until the nineteenth century that physicians began to do research on mental retardation. Using newly created intelligence tests, scientists classified levels of mental retardation. The interest in genetics and heredity which expanded in the early twentieth century was devastating to the mentally retarded. Genetic studies conducted at this time concluded that all forms of mental retardation were hereditary. This incorrect assumption was generally supported by both professionals and society until the 1940's and 1950's when advances were made in understanding the causes of mental retardation.

The American Psychiatric Association and the American Association on Mental Deficiency currently define mental retardation as “sub-normal or sub-average general intellectual functioning.” There are at present approximately 250 known causes of mental retardation. In seventy-five to eighty-five percent of the cases of mental retardation, however, the specific causes are unknown. The remaining twenty-five to fifteen percent have underlying causes which are varied and complex. Genetic factors are believed to be responsible for only a small percentage of mental defects. No one specific biological factor, however, is known to account for retardation. Recent medical research has shown that environmental conditions can also produce mental retardation. Intellectual and emotional deprivation, physical abuse, pre-natal causes like rubella or PKU (phenylketonuria), have been linked to at least ten percent of the mentally retarded population.

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28 Id. at n.5. See also American Association of Mental Deficiency, Consent Handbook (1977); Woody, Legal Aspects of Mental Retardation: A Search for Reliability 10-14 (1974).
30 Id.
31 Id. at 94.
32 Id. at 110.
33 Id. at 149.
34 Id. at 213.
35 Accordingly, a concept as amorphous as “intelligence” fosters debate over the definition of mental retardation. See Woody, supra note 28, at n.13.
36 Id. at n.20.
37 Id.
40 Bender, A Geneticist’s Viewpoint Towards Sterilization, 2 Amicus 45, 47 (1977). Several studies have shown that the mildly retarded individual has a high risk of reproducing a similarly affected child. However, at least 80% of mentally impaired individuals have non-mentally impaired parents. Id. See Deutsch, The Mentally Ill in America (2d ed. 1949).
42 Sherlock & Sherlock, Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives, 60 N.C.L. Rev. 943, 950 n.43 (1982) (citing 5-6 American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders 332 (5d ed. 1980)).
43 Shaman, supra note 39, at 3. See also 1 Ennis, Legal Rights of the Mentally Handicapped 19-20 (1973). Down's syndrome and other less common syndromes have also been linked to mental retardation. See also, Kopelman and Moskop, supra note 38, at 64; Bouchard, Familial Studies of Intelligence: A Review, 212 Science 1055–59 (1981).
Classification of the mentally retarded under the Stanford-Binet IQ test\textsuperscript{44} is as follows: "borderline" fall within the 68-83 range, "mild" from 52-67, "moderate" from 36-51, "severe" from 20-35 and below 20, "profound."\textsuperscript{45} The closest non-retarded classification of intelligence is "dull-normal." In most situations, it is very difficult to distinguish between a dull-normal individual and one who is a borderline mentally retarded individual.\textsuperscript{46} It is estimated that six million Americans, three percent of the population, can be classified as mentally retarded.\textsuperscript{47} Approximately five million individuals function in the 50-70 IQ range, and can benefit from special education or training.\textsuperscript{48} Since there are many contributing causes and several levels of mental retardation, intermediate scrutiny is necessary to prevent over-inclusion or under-inclusion of mentally retarded individuals by state action which might affect them. Differences among the mentally retarded may require individualized treatment, and this might only be discerned through the use of closer judicial scrutiny.

The mentally retarded, like many groups who are considered "different" or "inferior," have been subjected to a history of discrimination and mistreatment.\textsuperscript{49} Early American history shows a few instances of charitable acts for the mentally retarded, but on the whole, they retained their position of inferiority.\textsuperscript{50} If unable to work, the mentally ill or retarded were usually placed in jail.\textsuperscript{51} Government attempts to institutionalize the mentally retarded were both inadequate and deplorable. In 1727, Connecticut authorized the first house of correction for "persons under distraction and unfit to go at large, whose friends do not take care for their safe confinement."\textsuperscript{52} America's first mental ward was created in 1751 by Benjamin Franklin in a Pennsylvania hospital.\textsuperscript{53} Although these efforts were seemingly beneficial to the mentally retarded, the facilities were uninhabitable.\textsuperscript{54} Often the residents were chained or handcuffed, or their keepers would place them on public display for a small fee.\textsuperscript{55} When practicable, the mentally retarded were cared for at home, but during the 1800's, the practice of "bidding out" a mentally retarded individual was often used.\textsuperscript{56} Bidding out involved paying the lowest bidder to care for the mentally retarded. Accordingly, this often led to exploitation and low standards of care of the mentally retarded who were subjected to terrible conditions, confinement, and physical abuse.\textsuperscript{57}

Although progress was made during the latter half of the nineteenth century, mental retardation was still seen as an "evil" and steps were taken to prevent transmitting it to
future generations. Large overcrowded institutions became more prevalent.\textsuperscript{58} Institutions which were built at first for educational purposes were soon used to prevent the mentally retarded from reproducing.\textsuperscript{59} Since mentally retarded women were more vulnerable, special care was taken to segregate them in institutions such as the New York Asylum for Adult Imbecile Women built in 1878.\textsuperscript{60} H. Knight, one of the founders of the American Association on Mental Deficiency stated, "we owe it not only to the adult imbecile herself, but also to humanity and the world at large, to guard in every possible way against the abuse and increase of the [mentally retarded] class."\textsuperscript{61} Moreover, heredity studies prompted increased support for sterilizing the "socially unfit" to prevent their reproduction.\textsuperscript{62} The American Breeders Association included the mentally retarded in their list of groups who should, if possible, "be eliminated from the human stock."\textsuperscript{63} A writer of the period expressed the common view: "feeble-minded women are almost invariably immoral, and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves."\textsuperscript{64}

Many professionals in psychology believed that marriage of the mentally retarded should be restricted as a means of preventing the mentally retarded from reproducing.\textsuperscript{65} Eventually thirty nine states passed laws which prohibited and annulled marriage among the mentally retarded.\textsuperscript{66} Advocates of sterilization, thought these laws ineffective because the mentally retarded would be able to reproduce regardless of marriage laws.\textsuperscript{67}

During the twentieth century, states passed many laws restricting the behavior of the mentally retarded. For example, many states prohibited the sale of alcohol to the mentally retarded and denied them the rights to vote or create contracts.\textsuperscript{68} Protective laws prohibiting the mistreatment or public exhibition of the mentally retarded were, however, also enacted which aimed particularly at circuses and carnivals which had exploited many retarded and handicapped persons.\textsuperscript{69} Nonetheless, negative attitudes toward mentally retarded persons persisted. By 1940, most states had abandoned restrictions on marriage and sterilization as a means of controlling future generations, but exceptions existed. In some states mentally retarded persons were sterilized as part of the "parole" program of institutions.\textsuperscript{70} Other states continued to discriminate through alternative means. South Dakota had a stringent "control law" which provided for the

\textsuperscript{58} Id. at 123.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 116.
\textsuperscript{62} Id. at 154.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. It was believed that "undesirables" such as the mentally ill, mentally retarded and habitual criminals could be eliminated through sterilization programs. See Bligh, Sterilization and the Mentally Retarded, 51 A.B.A.J. 1059, 1060 (1965); Davies, The Social Control of the Mentally Deficient (1930); Kendregan, Sixty Years of Compulsory Eugenic Sterilization: Three Generations of Imbeciles and the Constitution of the United States, 43 Chi.-Kent L. Rev. 123 (1966); O'Hara and Sarks, Eugenic Sterilizations, 45 Geo.L.J. 20 (1956); Ross, Sterilization for the Developmentally Disabled: Shedding Some Myth-Conceptions, 9 Fla. St. U.L. Rev. 599 (1981).
\textsuperscript{66} Id.
\textsuperscript{67} Scheerenberger, supra note 29, at 245.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} See generally Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979).
"identification, registration, adjudication, prevention of marriage and supervision in the community of all the feeble-minded in the state." A state level agency administered this program; determinations of mental retardation were made by a lay board that relied upon intelligence test data.

During the 1950's, community services for the mentally retarded increased, but the institutionalized mentally retarded continued to receive inadequate care. Residents were frequently clad in nothing more than diapers and restricted to bed. Treatment often meant the use of medication, strait jackets, lock-ups and physical punishment. Some institutions used maximum security prison-type cells for their more "dangerous" residents. Although in the 1960's, institutions were reformed, the "deinstitutionalization" of the mentally retarded was not initiated until the 1970's.

Unfortunately, poor institutional conditions and mistreatment of mentally retarded inmates persists, thereby providing evidence of the need for the courts to use intermediate scrutiny to review state-sponsored abuse.

The abuse [in institutions] is merely a violent manifestation of the equally invidious neglect that permeates institutions ... What best defines an institution ... is its routine. Since institutions demand regularity to function smoothly, deviance cannot be tolerated and individual preferences must be subordinated to the requirements of the larger group.

In many institutions, common activities like using a telephone, having visitors and sending unopened letters are restricted. Fundamental freedoms of religion and travel are often curtailed in institutions. In addition, inmates are often subject to unreasonable searches, medical treatment without their consent and the confiscation of their property and money. Deviation from the routine can result not only in the loss of privileges but also the implementation of restrictive or harmful penalties such as physical or chemical restraint. Lack of treatment and training harms mentally retarded inmates both physically and intellectually by causing muscular atrophy and deterioration of verbal skills. Atrocities within mental institutions such as being scalded by water, restrained in strait jackets and confined in seclusion for years have been documented in judicial opinions.

71 Id.
72 Id.
73 SCHEERENBERGER, supra note 29, at 312.
74 Id. at 313.
75 Id. at 314.
76 Id.
77 Id. at 315.
78 Id.
79 Id. at 316.
80 See Note, supra note 70, at 1645.
81 See the testimony of Dr. Philip Roos in Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977). Halderman was a class action suit brought on behalf of residents of a Pennsylvania state institution for the mentally retarded. The action was brought because of overcrowding, understaffing and abuse of the inmates. The institution provided no rehabilitative programs and used inhuman physical restraints. See also Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The Wyatt opinion contained descriptions of grotesque conditions existing in several Alabama state hospitals for the mentally retarded. Overcrowding, brutal treatment by aides, and unsanitary kitchens and dining areas were among those characteristics listed. Id. at 1310–11.
Abuse within state institutions is, in fact, discrimination because it is a state-sponsored infringement upon the fundamental rights and freedoms of the mentally retarded. Discrimination of the mentally retarded, however, continues today beyond institutional walls. Legislation in many states discriminates against the mentally retarded. Most states disenfranchise the mentally ill and mentally retarded. Some states prohibit the sale of firearms, admission to the state national guard or invalidate contracts to which the mentally retarded may be a party. The mistreatment and discrimination against mentally retarded persons both in and out of institutions compels the use of intermediate scrutiny.

B. Political Powerlessness

1. Lack of Legislative Influence

The mentally retarded have suffered discrimination and mistreatment similar to that of other minority groups which receive intermediate scrutiny from the courts. Moreover, the mentally handicapped, like other minorities afforded special protection by the courts, are politically powerless due to the nature of their disability. Often the mentally retarded may lack understanding or awareness of the legislation which affects them; thus, they are dependent upon governmental action. Since the 1960's, there have been attempts at the national level to assimilate the mentally retarded into the community. Congressional acts have sought to achieve equal employment opportunities and to ensure the availability of legal advocacy for the mentally retarded. Yet, because of administrative inertia and insufficient funding, very little substantive change has occurred. Although legal advocacy groups which strive to protect the rights of the mentally retarded have developed, interest and aid has generally been provided by the public sector. These public programs have inadequate financial resources and often direct their dollars to other groups such as the elderly or welfare recipients.

Congress has authorized the Legal Services Corporation to provide public service lawyers and in 1977 amended the act creating the Corporation to require that efforts be made to serve the handicapped. In 1981, however, the Corporation submitted a report to Congress stating that institutionalized persons have a myriad of legal needs that go unmet because of a lack of legal resources. Local programs to aid the mentally

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82 See Note, supra note 70, at 1645.
83 Id.
86 Schwartz, Protecting the Rights and Enhancing the Dignity of People with Mental Disabilities: Standards for Effective Legal Advocacy, 14 Rutgers L.J. 541, 551 (1982).
87 Herr, The New Clients: Legal Services for Mentally Retarded Persons, 31 Stan. L. Rev. 553, 577-78 (1979). Legal service assistance priorities are usually established in response to initial client contact. A mentally retarded individual may not necessarily have the capacity to take the initiative to make that contact. Id.
89 Schwartz, supra note 86, at 551-53. See also Kopelman and Moskop, supra note 38, at 193.
retarded often receive minimal support to provide adequate representation. Poor coordination among the advocacy programs on behalf of the mentally retarded has resulted in wasted efforts, inefficient use of resources and an overall lack of national direction. The mentally retarded cannot effectively protect their own rights and interest groups attempting to do so are not consistently effective. Therefore, the mentally retarded should be viewed as a distinct group without any, or at least, minimal political power to protect their legal or constitutional rights.

2. Inadequate Consideration by the Supreme Court

The earliest case involving the mentally retarded, *Buck v. Bell*, upheld the sterilization of an 18-year-old mentally retarded girl. In *Buck*, Justice Holmes expressed the contemporary attitude of the Court at that time: "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

Since that time, the Supreme Court has not shown any indication of a protective interest in the mentally retarded. In *Stump v. Sparkman*, an allegedly mentally retarded young woman was sterilized in an operation which she understood to be an appendectomy. The Court, however, avoided the issue that the judge granting the sterilization order had violated the woman's constitutional right to procreate. Instead, the Court decided the case on grounds of judicial immunity and held that the judge was not liable for civil damages.

In cases where the mentally retarded have prevailed, the Court has nonetheless been reluctant to base its decisions on constitutional grounds. For example, in *Jackson v. Indiana*, a mentally retarded deaf-mute was charged with two thefts of small amounts, but was found incompetent to stand trial because of his handicap. Without determining his guilt or innocence, the Indiana court ordered him to be confined by the Department of Mental Health until "sane." In this case, the Supreme Court found a violation of equal protection not because his constitutional right to trial had been violated, but because the state of Indiana had used "a more lenient commitment standard and . . . a more stringent standard of release than those generally applicable to all others not charged with offenses."

The Supreme Court has been cautious in its consideration of the rights of the mentally retarded within state civil institutions. In *O'Connor v. Donaldson*, an inmate of a mental institution brought action against a Florida state hospital for intentionally and maliciously depriving him of his right to liberty because the staff refused to release him. Although "responsible persons" had petitioned for his release, the hospital determined that the patient needed treatment and could only be released to his parents. Instead

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90 Id.
91 274 U.S. 200, 207 (1927). This case has not been expressly overruled.
92 Id. at 207.
94 Id. at 359.
96 Id. at 717–19.
97 Id. at 730.
99 Id. at 568.
of stating that the mentally retarded had a constitutional right to freedom, the Court stated that: "a state constitutionally cannot confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends" (emphasis added). The lower court held that "regardless of the grounds for involuntary civil commitment, a person confined against his will has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." The Court found "no reason ... to decide whether mentally ill persons ... have a right to treatment." The Court did eventually consider the right to treatment in *Youngberg v. Romeo*. Here, a mentally retarded individual who had been involuntarily committed to a Pennsylvania state institution filed a civil rights suit because of unsafe conditions within the institution and a lack of adequate training programs for the inmates. The Court held that the mentally retarded individual had a constitutionally protected right under the due process clause of the fourteenth amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as might be reasonably required by these interests.

The Court has also exercised caution when setting constitutional limits on procedures by which people are committed to institutions. The Supreme Court did discuss the standard of proof required for civil commitment of the mentally retarded in *Addington v. Texas*. The proper standard for civil commitment, according to the *Addington* Court, is akin to that used in deportation proceedings. To sustain confinement of an individual in a mental hospital only "clear and convincing" evidence is required, while in criminal cases the more stringent standard of "beyond a reasonable doubt" is required. In these cases the Supreme Court did not give the mentally retarded the careful scrutiny used for other classes who have been similarly discriminated against or mistreated. The Court instead skirted the crucial issues raised by the mentally retarded parties and decided the case on other grounds which in effect deprived the mentally retarded of their constitutional rights.

IV. THE CURRENT STANDARD OF REVIEW FOR THE MENTALLY RETARDED: *CITY OF CLEBURNE V. CLEBURNE LIVING CENTER*

The Supreme Court must change its analysis of equal protection cases involving the mentally retarded. The decision of *City of Cleburne v. Cleburne Living Center* illustrates
this necessity. Indeed, the concurring opinions in Cleburne indicate that under appropriate circumstances, the Court may change its approach. Cleburne reiterates the Court's reluctance to use more than the minimum standard of review in cases dealing with the mentally retarded. In Cleburne, the Supreme Court held that the mentally retarded are not a quasi-suspect class. Therefore, the Court used the minimum standard of judicial review ordinarily used for economic and social legislation.109

The respondent in Cleburne was required to obtain a special permit in order to use a building for the operation of a group home for the mentally retarded because under city zoning ordinances the home would be classified as a "hospital for the feebleminded."110 After a public hearing, the application for the permit was denied by the city council.111 In district court, the Cleburne Living Center challenged both the validity of the ordinance and the denial of the permit, but was unsuccessful.112 The Fifth Circuit Court of Appeals held, however, that the mentally retarded are a "quasi-suspect" class. Consequently, the court, using the test of intermediate scrutiny, found that the ordinance violated the equal protection clause because it did not achieve the city's stated governmental purposes.113 The factors that the court of appeals considered were the history of mistreatment and discrimination, the lack of political power, and the immutable characteristics of mental retardation. Although the ordinance did not infringe upon a fundamental right, a group home was deemed "very important" to the mentally retarded because it integrated them into the community.114 The court of appeals found that the ordinance did not substantially further a governmental interest. Therefore, the ordinance failed the intermediate scrutiny test and was held invalid by the court.115

A. The Majority Opinion

The Supreme Court affirmed in part and vacated in part the Cleburne appellate decision. The Supreme Court agreed that the application of the ordinance violated equal protection, but refuted the appellate court's classification of the mentally retarded as a quasi-suspect class.116 Justice White, writing for the majority, reviewed those cases in which the Court had used heightened scrutiny.117 According to White, only cases concerning race, alienage or national origin triggered the use of strict scrutiny because such characteristics were seldom relevant to the achievement of any legitimate state interest.118 Moreover, the Court held that strict scrutiny was only necessary when states impinged upon constitutional personal rights.119 Justice White also discussed those cases in which the Court had applied intermediate scrutiny to certain quasi-suspect classes. Under

109 Id. at 3254.
110 Id. at 3252.
111 Id. at 3253.
112 Id.
114 Id. at 196 (quoting Craig, 429 U.S. at 190).
115 Id. at 201–02.
116 City of Cleburne, 105 S.Ct. at 3255–58.
117 Id. at 3255 (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Mills v. Habluetzel, 456 U.S. 91 (1982)).
118 Id. (citing McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Graham v. Richardson, 403 U.S. 365 (1971)).
intermediate scrutiny, state action would be held valid to the extent it was "substantially related to a legitimate state interest."\textsuperscript{120} Justice White noted that this level of scrutiny had been used for classifications based upon gender and illegitimacy because those characteristics are beyond the individual's control and frequently bear no relation to their contribution to society.\textsuperscript{121} Additionally, Justice White noted that intermediate scrutiny had been denied to the aged because they had not "experienced a 'history of purposeful unequal treatment' [nor had] been subjected to unique disabilities on the basis of stereotyped characteristics."\textsuperscript{122} Where a group's characteristics are relevant to interests that the state can legitimately protect, the courts should be reluctant to closely scrutinize the legislation.\textsuperscript{123}

The Court found that the court of appeals erred because: (1) the reduced capabilities of the mentally retarded make them different in relevant respects, therefore, the state's interest is a legitimate one; (2) national and state legislation addressed the unique problems of the mentally retarded so that oversight by the courts is unnecessary; (3) the great amount of legislative response to the needs of the mentally retarded contradicts the argument that they are politically powerless; and (4) if the large and not strictly definable class of mentally retarded were deemed "quasi-suspect," it would be difficult to distinguish them from other groups such as the aged or disabled who also have immutable characteristics.\textsuperscript{124}

The Court stated that the mentally retarded did not require quasi-suspect classification because they were adequately protected from invidious discrimination under the minimum rationality standard.\textsuperscript{125} Under the minimum rationality standard a "state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."\textsuperscript{126} The Court applied the minimum rationality standard to the ordinance in \textit{Cleburne} which required the respondents to obtain a special building permit for a group home to house the mentally retarded. The Court found this particular application of the ordinance unconstitutional, but not the ordinance itself. Special classification and treatment of the mentally retarded was not rationally related to the city's legitimate governmental purpose in \textit{Cleburne}. It is conceivable however, that situations might arise where mental retardation would be rationally related to a governmental purpose.\textsuperscript{127}

B. The Concurring Opinions

1. Justice Stevens

Justice Stevens, with whom Chief Justice Burger joined, criticized the delineation of "three clearly defined" standards of review. "I have never been persuaded that these so-

\textsuperscript{120} Id. (quoting \textit{Mills} 456 U.S. at 91).
\textsuperscript{121} Id. (citing \textit{Frontiero} 411 U.S. at 677 (gender); \textit{Mathews v. Lucas}, 427 U.S. 495, 505 (1976)(illegitimacy)).
\textsuperscript{122} Id. (quoting \textit{Massachusetts Bd. of Retirement v. Murgia}, 427 U.S. 307, 313 (1976)).
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 3256–57.
\textsuperscript{125} Id. at 3258.
\textsuperscript{126} Id. (citing \textit{Zobel} 457 U.S. at 61–63; U.S. Dept. of Agri. v. Moreno, 413 U.S. 528, 535 (1973)). These cases cited by the Court to define minimum rationality were previously analyzed to show the Court using more than minimal scrutiny.
\textsuperscript{127} Id. at 3260.
called standards adequately explain the decisional process." Justice Stevens stated that he personally used a single "rational basis" standard, but defined "rational" to mean: "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcended the harm to the members of the disadvantaged class." According to Justice Stevens, the reason government action affecting "quasi-suspect" classes is occasionally invalidated is not because of an intermediate level of scrutiny, but because "the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose." Mental retardation, according to Justice Stevens, is a classification which legislators may rationally take into consideration if that difference is relevant to government action. Justice Stevens believed that the city of Cleburne denied the permit because of the "irrational fears of neighboring property owners," and not because of the need to protect the mentally retarded from "the hazards of the neighborhood." Since Justice Stevens agreed with the majority that zoning ordinances could not be justified by the city's argument that the discrimination was meant to protect the mentally retarded, he concurred in the opinion.

2. Justice Marshall

Justice Marshall, with whom Justices Brennan and Blackmun joined, concurred in part and dissented in part in the judgment. Justice Marshall agreed that "retardation per se cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability." Justice Marshall, however, found fault in the Court's reasoning which prompted this result. The test which the Court proposed and the test which it actually applied were different. Under the rational basis test, legislation which does not make prima facie classifications to achieve its purpose is presumptively valid and not closely scrutinized. Thus, according to Justice Marshall, if the Court had used the traditional rational basis test, the city ordinance would likely have been upheld since it would be presumptively valid.

Despite the majority's claim that heightened scrutiny is not required for the mentally retarded, in Justice Marshall's opinion, the Court used "precisely the sort of inquiry associated with heightened scrutiny." Justice Marshall deemed the majority's test "second-order" rational basis scrutiny because under the traditional test, the Court would

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128 Id. at 3261.
130 City of Cleburne, 105 S.Ct. at 3261-62. In a footnote Justice Stevens suggests comparing Reed v. Reed with Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) to demonstrate when the characteristic of gender may be constitutionally taken into consideration to establish a class. Id. at n.9.
131 Id. at 3262. Petitioner argued that the location of the group home near a junior high school would subject the group home residents to harassment. They also argued that the group home was located in a five hundred year old flood plain. Justice Stevens found both reasons unpersuasive. Id. at 3263.
132 Id. at 3262.
133 Id.
134 Id.
136 Id. at 3264.
have given greater deference to legislative enactment. The majority closely scrutinized the record of the lower court. The traditional test, however, does not entail a determination that policy decisions are supported by a firm factual foundation. Thus, Justice Marshall concluded that the Court put the burden of persuasion on the city of Cleburne to show that the classification was reasonable rather than following the minimum rationality practice of presuming legislation to be constitutional. As Justice Marshall recognized, the majority states that it used a rational basis review, but in effect they applied a closer scrutiny. Since the Court did use a closer scrutiny, Justice Marshall believed that the Court should expressly state that intermediate scrutiny is used to review state action affecting the mentally retarded in order to avoid confusion in future decisions. The mislabeling of the test used by the majority has two negative implications: (1) the traditional rational basis test will now allow the searching inquiry the Court gave the Cleburne record, and (2) the Court gave no indication of what factors trigger the more searching inquiry that it performed. In all likelihood, the analysis in Cleburne will only confuse lower courts in the future.

Justice Marshall's preferred standard of review for equal protection cases would "vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn'."

When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes.

Applying this heightened scrutiny test to the facts of the Cleburne case, Justice Marshall first determined that the mentally retarded have a substantial, if not fundamental, interest in "the right to 'establish a home'." Forbidding the group home deprived the mentally retarded of "what makes for human freedom and fulfillment — the ability to form bonds and take part in the life of a community." Second, Justice Marshall noted that the mentally retarded, like other suspect classes, have a history of legal and social segregation and discrimination. Justice Marshall detailed the history of the "grotesque" treatment of the mentally retarded in the United States. He explained the ways in which the mentally retarded had been victims of de jure discrimination, "eugenic marriage and sterilization laws that extinguished for the retarded one of the 'basic civil rights of man' — the right to marry and procreate." In addition, other fundamental rights were denied by laws which prevented the mentally retarded from

1987] MENTALLY RETARDED SCRUTINY 123
voting or receiving a public education. According to Marshall, since the mentally retarded have a history of discrimination which has resulted in the loss of their fundamental rights, the Court should use greater scrutiny than is required by the rational basis test to review state action affecting the mentally retarded.146

Moreover, Justice Marshall disagreed with the majority's justifications for using the minimum rationality standard because he believed that the mentally retarded were "politically powerless."147 Although constitutional principles of equality have changed over time, and legislatures might be cognizant of these changed principles, Marshall indicated that this was not sufficient justification to reduce the level of scrutiny applied.148

[R]ace-based classifications [did not become] any less suspect once extensive legislation had been enacted on the subject . . . Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.149

Justice Marshall disagreed with the majority's determination that intermediate scrutiny should not be used when legislative classifications affecting the group are more likely to be valid. First, although some mentally retarded persons have reduced capacities which at times may be considered relevant by legislatures, this did not justify the consistent use of retardation as a reason to place mentally retarded persons in a separate class.150 Second, the majority asserted that the standard of review depends upon the frequency that the legislature could legitimately take the characteristic into consideration.151 Justice Marshall found this illogical because in cases where gender and alienage are relevant characteristics, the Court consistently applies intermediate review.152 However, whether or not mental retardation is a relevant characteristic, the Court will apply a minimal review.

The fact that retardation may be deemed a constitutional irrelevancy in some circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens (emphasis added).153

The majority admitted that discrimination of the mentally retarded continued to exist; but because the vast majority of legislation which singled out the mentally retarded was legitimate, intermediate scrutiny was not required.154 Justice Marshall argued that it was "constitutional principles" and not the number of "invalid situations" which "triggered" intermediate scrutiny.155

146 Id. at 3267.
147 Id. at 3268.
148 Id.
149 Id. at 3269.
150 Id.
151 Id. at 3270.
152 Id.
153 Id.
154 Id. at 3271.
155 Id. at 3270.
In addition, Justice Marshall stated that intermediate review was appropriate for the mentally retarded because a court would not necessarily second guess legislative or professional judgment. Intermediate scrutiny would ensure that such judgments were not the products of prejudicial thoughtlessness or stereotypes which might "offend principles of equality found in the Fourteenth Amendment."\(^{156}\) Legislation concerning the mentally retarded would not be presumptively valid, but a state would not need to show a compelling state interest in order for the legislation to be valid.

In applying intermediate scrutiny to the Cleburne ordinance, Justice Marshall would have struck down the ordinance rather than merely invalidate its application to respondents.\(^{157}\) Justice Marshall criticized the majority opinion for leaving the "sweeping exclusion of the 'feeble-minded'" to be applied to other retarded groups in the future, without any guidance for valid application of the ordinance.\(^{158}\) Justice Marshall stated that the Court would have been consistent with Supreme Court precedent had it invalidated Cleburne's vastly overbroad ordinance. Thus, the city would have been forced to modify the unconstitutional ordinance. Justice Marshall concluded that the effect of the majority opinion would force the mentally retarded to continually face the obstacles created by the zoning ordinance. The Court's failure to distinguish between permissible and impermissible applications of laws affecting the mentally retarded creates confusing and ambiguous precedent.\(^{159}\)

Justice Marshall concluded that of ultimate importance was not the standard of review used, but the identification of interests at stake and the articulation of the principles underlying the classifications. These state interests and justifications must be carefully examined to ascertain whether they are based upon past prejudice or misconceptions.\(^{160}\)

V. THE MENTALLY RETARDED REQUIRE AN INTERMEDIATE LEVEL OF SCRUTINY

A. State Action Protects and Denies the Rights of the Mentally Retarded

The rule of Cleburne is inadequate to assure equal protection of law for the mentally retarded. The majority neglected to recognize that the mentally retarded continue to be deprived of fundamental rights through state law and state action. Justice Marshall, however, realistically recognized the need for the application of intermediate scrutiny to the laws affecting the mentally retarded.\(^{161}\) The Supreme Court has ruled consistently that citizens have fundamental rights to marriage and procreation.\(^{162}\) As the Court stated in *Skinner v. Oklahoma*:\(^{163}\)

> Marriage and procreation are fundamental to the very existence and survival of the race ... There is no exception for the individual whom the law touches.

\(^{156}\) Id. at 3271.

\(^{157}\) Id. at 3272.

\(^{158}\) Id.

\(^{159}\) Id. at 3273.

\(^{160}\) Id. at 3275.

\(^{161}\) Id. at 3266-67. Marshall discussed the lost rights to marry, procreate and vote.


\(^{163}\) 316 U.S. 535 (1942).
Any experiment [referring to the sterilization of certain types of criminals] which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty.

Traditionally, when other groups have been denied constitutionally guaranteed rights, the Court has used a closer standard of review than minimum scrutiny. The mentally retarded, however, continue to be deprived of these fundamental rights through statutes which either prohibit or restrict marriages and reproduction among the mentally retarded. Still the Court in Cleburne held that in cases dealing with the mentally retarded only a minimum rationality test would be used because the mentally retarded are not a quasi-suspect class. The declaration by the Court that the mentally retarded are not a quasi-suspect class could negatively affect the mentally retarded in future Supreme Court and lower court cases in which there is a potential deprivation of fundamental rights. If a state can show a "rational relation to a legitimate government purpose," then the Court will not further scrutinize the statute to discover concomitant discriminatory purposes or effects.

There is no reasonable support for laws which prohibit only the mentally retarded from marrying. Common law arguments maintained that a contract, such as a marriage contract, was void or voidable if the parties to the contract lacked the capacity to understand the contract. A somewhat antiquated legitimate government purpose, therefore, was to protect the mentally retarded from entering a marriage contract when they inherently lacked the capacity to comprehend the meaning of marriage. The fear of the legislature, however, was not that the mentally retarded would marry, but that the mentally retarded would reproduce. Although the old arguments were based upon eugenic theories, a state could use other reasons to justify prohibiting the mentally retarded from reproducing because: (1) the mentally retarded are themselves unable to adequately care for their children; and (2) if permitted, the mentally retarded will only create more mentally retarded who will have to be cared for by the state. Given that a distinction between mentally retarded persons and non-mentally retarded persons need only be supported by a rational basis, a court might be reluctant to look beyond these possible justifications which, on the surface, appear to be protecting the health and safety of citizens, but in actuality may be over-inclusive and continuing discrimination of the mentally retarded. As discussed earlier, it is inaccurate to assume that all forms of mental retardation are transmissible. The justification that the mentally retarded would be unfit parents is both over-inclusive and under-inclusive. Not all mentally retarded individuals would necessarily be unfit parents since many mentally retarded persons are educable. Moreover, other non-retarded persons may be unfit to be parents, but nonetheless are not prohibited from reproducing.

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164 Id. at 541.


166 Williamson, 348 U.S. at 488.

167 See Shaman, supra note 39, at 73.


169 Id. at 466.

170 Sherlock & Sherlock, supra note 42, at 962.
Initially the enactment of sterilization laws was encouraged because of false assumptions that the mentally retarded population was growing at a faster rate than the "normal" population. Generally these laws were enacted because of stereotypes which characterized the mentally retarded as having no morals or sexual self-control.\textsuperscript{171} In the last decade of the nineteenth century, sterilization operations became feasible. With the growth of the eugenic movement many states enacted compulsory sterilization laws.\textsuperscript{172} The state sterilization laws focused primarily on three classes of individuals: the mentally retarded, the insane and the epileptic.\textsuperscript{173}

Despite the seemingly harsh consequences of sterilization, situations could arise where an unwanted pregnancy would inflict physical or psychological harm on the mentally retarded individual, or where a child would be neglected because of a mentally retarded individual's incapacities. In these situations, the state would ultimately bear the burden of the unwanted pregnancy.\textsuperscript{174} Sterilization operations should be performed when appropriate, but prior to granting a sterilization order, the Court should carefully weigh the reasons for the sterilization against the fundamental interests of the individual.

B. State Court Review of Sterilization Orders

Ironically, despite the occasional unconstitutional treatment of the mentally retarded by law, state courts when granting or denying petitions for sterilization use much closer scrutiny than would be required under the minimum rationality standard used by the Supreme Court in \textit{Cleburne}.\textsuperscript{175}

When deciding on sterilization petitions, a majority of state courts are guided by applicable statutes. There are primarily two types of statutes: (1) statutes which provide initial non-judicial review by a board to determine the advisability of sterilization,\textsuperscript{176} and (2) statutes which grant judicial determination in the first instance.\textsuperscript{177} The statutes have a variety of rationales and requirements for findings of fact. The argument can be made that courts should rely upon statutes rather than create their own guidelines, since "[i]nvoluntary sterilization is a complete and irreversible taking of a basic human right."\textsuperscript{178} Courts should not be expected to provide all of the answers, rather there should be discussion and decision in the public domain. It is consistent with this argument that the

\textsuperscript{171} Gould, \textit{supra} note 27, at 361. The two most common procedures used were the vasectomy on males and the salpingectomy on females. The first recorded sterilization was performed in the United States in 1889, and state institutions began performing them in 1899. \textit{Id}.


\textsuperscript{174} Ross, \textit{supra} note 65, at 612--24.

\textsuperscript{175} See, e.g., \textit{Matter of Hillstrom, 363 N.W.2d 871, 875 (Minn. 1985)} (court used strict scrutiny to review granting of sterilization).


\textsuperscript{177} See \textit{N.C. Gen. Stat. § 35-42} (1976); \textit{W. Va. Code § 27-16-1} (1980). Some state statutes only apply to institutionalized individuals such as the laws of Delaware, Mississippi, South Carolina and Utah. At least one district court indicated that such a law may violate equal protection. \textit{See Ruby v. Massey, 452 F. Supp. 361} (D. Conn. 1978).

\textsuperscript{178} Linn, \textit{supra} note 12, at 39.
majority of state courts refuse to grant a sterilization order when no statutes authorize jurisdiction.\textsuperscript{179}

In a growing minority of states, however, courts of equity use their own discretion in granting or denying petitions for sterilization. The two standards of review used by these courts are: (1) the state must show by “clear and convincing evidence” that sterilization is in the best interests of and medically essential to the mentally retarded individual,\textsuperscript{180} or (2) the court will use “substituted judgment” by deciding for the incompetent what he would have decided were he competent.\textsuperscript{181}

In general, this minority view is criticized because of the variety of standards used by the courts and differing interpretations given to these standards.\textsuperscript{182} Although judicial discretion may allow courts the flexibility to decide on a case by case basis, legislative guidance is argued to be the better way to protect mentally retarded individuals. In the public forum, there is a chance for competing interests to ensure that the proper authority protects the best interests and constitutional rights of the mentally retarded individual while protecting the health and safety of all of its citizens.\textsuperscript{183}

1. Clear and Convincing Evidence

Under the “clear and convincing” standard, two tests are generally conducted in determining the sufficiency of proof: (1) the medical necessity test, and (2) the best interests test. To demonstrate a medical necessity, there must be sufficient proof to show that sterilization will preserve the life or health of the individual. To meet the “best interests” test, three elements are generally considered: (1) the inability of the mentally retarded to consent; (2) the capacity of the individual to reproduce and the likelihood of sexual activity; and (3) the existence of a less restrictive means of birth control.\textsuperscript{184}

Where consent is considered, some state courts base their decisions on whether consent was given by the parent, guardian or the individual himself.\textsuperscript{185} Considering parental or


\textsuperscript{180} Sherlock & Sherlock, supra note 42, at 966. The “best interests” test is usually used in child custody and support litigation. It presents advantages over other tests for sufficiency of proof because it focuses on the particular person and it can be applied in a variety of situations.

\textsuperscript{181} Id. A patient’s “inability to consent” is often difficult to determine because of varying levels of mental retardation and because of an individual’s potential of improvement. It is difficult to predict if the individual could develop sufficient understanding and judgment to take care of his own needs.

Variations occur in this standard. For example, North Carolina courts also consider the likelihood that the mentally retarded individual will engage in sexual activity that would result in pregnancy. See Matter of Truesdell, 329 S.E.2d 630 (N.C. 1985). Some courts require an almost impossible showing that the individual’s disability could not be treated in the near future. Less drastic alternatives to sterilization are also considered, such as the feasibility of other birth control methods which would be less intrusive or reversible. See generally Struble, Protection of the Mentally Retarded Individual’s Right to Choose Sterilization: The Effect of the Clear and Convincing Evidence Standard, 12 CAP. L. REV. 413 (1983).

\textsuperscript{182} Struble, supra note 181, at 418–33.

\textsuperscript{183} Sherlock & Sherlock, supra note 42, at 966.


\textsuperscript{185} See In re Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976). But see Hillstrom, 363 N.W.2d at 876 (substituted consent of guardian not sufficient to be considered voluntary consent of individual); In re Eberhardy, 102 Wis.2d 539, 573–74, 307 N.W.2d 881, 897 (1981).
guardian consent to be the actual voluntary consent of the mentally retarded individual is fictional at best. The danger remains that such sterilization is not in the best interests of the child or ward. One writer commented that actually gaining the voluntary consent of the mentally retarded individual is unlikely because the individual may not understand the implications of consent. That individual might consent merely to gain the acceptance of those advocating the sterilization, or more likely he may not understand an explanation of the alternatives.

Clear and convincing evidence is a less demanding standard, but it ensures fundamental fairness and protects individual liberties against governmental invasion. The standard is used when there is a great degree of governmental intrusion and a need to protect the private interest because a substantial injury would result from an erroneous decision. The potential injury to the individual through sterilization is greater than the potential harm to society. Therefore, the two parties should not bear the risk of error equally. Making the state prove, however, "beyond a reasonable doubt" would be too great a burden for what might in some instances be necessary medical treatment.

The clear and convincing evidence standard should only be used when the state seeks to deprive fundamental rights by forcing a sterilization operation. Although a state might legitimately seek to protect the individual's right to choose sterilization, it risks depriving an individual of the fundamental right to procreate where that individual does not have the capacity to choose.

2. Substituted Judgment

The substituted judgment standard calls for the court to "don the mental mantle of the incompetent" and substitute itself as the individual in the decision-making process. The court does not necessarily make the "best" decision, but attempts to make the decision the individual would have made had he been competent. The substituted judgment standard was used by the Massachusetts Supreme Judicial Court in Matter of Moe to protect the fundamental rights involved in a sterilization decision. The court sought "to protect the incompetent person within its power, . . . recognize the dignity and worth of such a person and afford to that person the same panoply of rights and choices it recognizes in competent persons."

The court in Moe first stressed a need for careful adherence to established procedure and then listed the various factors to be considered in making a decision to sterilize when using the substituted judgment doctrine. The factors the court should consider

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186 Soskin, Voluntary Sterilization: Safeguarding Freedom of Choice, 2 AMICUS 40, 42 (1977). For medical treatment, most states require informed consent using a "reasonable patient standard." There must be sufficient information given concerning the treatment, the risks involved, the possible consequences and the available alternatives. Courts have found a lack of consent where an individual's reasoning was impaired by mental retardation. See Gould, supra note 27, at 366 n.79.

187 See Soskin, supra note 186, at 141.


189 Moe, 385 Mass. at 555, 432 N.E.2d at 712.

190 Id. at 563–64, 432 N.E.2d at 719, (quoting Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 746, 370 N.E.2d 417 (1977)).
are: (1) whether the individual lacks the capacity to make his own decision or that his condition is likely to change; (2) the individual's physical ability to procreate; (3) the possibility and effectiveness of less intrusive means of birth control; (4) the medical necessity — which will depend upon the facts of each case; (5) the nature and extent of the disability, i.e., how well the individual could care for a child were he/she to have one; (6) the likelihood of engaging in sexual activity that would result in pregnancy; (7) the possible psychological risks that would stem from either pregnancy or sterilization; (8) the religious beliefs of the individual or other special circumstances.

The court in Moe preferred the substituted judgment standard because the clear and convincing evidence standard required too great a burden of proof on the party petitioning for sterilization, and according to the court, no sterilization would ever be authorized. Therefore, the court held that even absent a statute providing authorization, a probate court could order sterilization of a mentally retarded individual using the factors indicated.

A "growing minority" of state courts currently use the substituted judgment doctrine. Advocates of this doctrine argue that it maintains an individual's integrity because it provides a forum in which the question of sterilization can be decided, rather than automatically dismissing it for lack of jurisdiction. Critics claim, however, that the court gives itself an "impossible task" of trying to determine what would be the wishes of a severely retarded individual were he competent. The dissent in Moe described the attempt as a "cruel charade" since there is no way for a judge to validly ascertain the wants or desires of such an individual. Thus, in reality the choice is that of the judge.

VI. Conclusion

The Supreme Court should use intermediate scrutiny for state action affecting the mentally retarded. The Court should use a higher standard than minimum rationality because, as state courts have recognized, the mentally retarded have been and continue to be deprived of fundamental rights. Sterilization of the mentally retarded is one area of potential deprivation of fundamental rights. In response, state courts have chosen either to follow legislative guidelines where they exist or to create judicial guidelines. In

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191 Id. at 566, 432 N.E.2d at 721–22. In addition to the factors considered, the court stated that a guardian ad litem should be appointed, and at the discretion of the judge, another attorney for the ward must be appointed to ensure "rough adversary exploration of the question to sterilize." Id. at 567, 432 N.E.2d at 722. A judge should also appoint, at his discretion, independent medical and psychological experts for the purpose of examining the ward and making a report to the court. Id.

192 Id. at 566-70, 432 N.E.2d at 721–24.

193 Id. at 571-72, 432 N.E.2d at 724.

194 Struble, supra note 181, at 414 n.8.

195 Id.

196 Moe, 385 Mass. at 572, 432 N.E.2d at 724 (Nolan J., dissenting). The dissent suggests that a judge in a sterilization case should also enter a detailed written report with his or her judgment indicating the factors which were persuasive. See also Matter of Storar, 52 N.Y.S.2d 563, 580 (1981)(court thought it unrealistic to use substituted judgment when the individual was incompetent since birth).

197 Id.
either case, courts closely examine sterilization cases and weigh the interests of both the mentally retarded individual and the state.

The most recent Supreme Court decision concerning the mentally retarded, City of Cleburne v. Cleburne Living Center,\textsuperscript{198} has two contradictory results. The decision creates confusion for lower courts, but indicates a willingness of the Court to raise the scrutiny level for the mentally retarded given a different set of facts. The Cleburne opinion is confusing because it espouses a rational basis test, even though the Court closely scrutinized the facts. Lower courts may interpret the Supreme Court's opinion literally and use the traditional rational basis test to review government action concerning the mentally retarded. Consequently, in the case of a sterilization order, a court might uphold a statute depriving mentally retarded persons of fundamental rights under the rational basis test, whereas a statute similarly affecting non-retarded persons would receive close scrutiny.

In addition, the decision in Cleburne indicates that where a clear deprivation of a mentally retarded individual's fundamental rights is the main issue, it is likely that a majority of the Supreme Court will use a higher level scrutiny than the Court used in Cleburne. Justice Stevens, with whom former Chief Justice Burger joined although he concurred with the majority, suggests that the level of review is of little consequence; instead the court should inquire as to the motive behind state action.\textsuperscript{199} Justice Marshall, with whom Justices Brennan and Blackmun joined, states outright that the mentally retarded require intermediate scrutiny and that the Cleburne decision departs from equal protection precedent.\textsuperscript{200} Together, these five members of the Court could, in a case concerning fundamental rights, form the majority that would raise both in substance and in name the level of scrutiny used for the mentally retarded and correctly establish them as a quasi-suspect class.

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\textsuperscript{198} 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985).
\textsuperscript{199} City of Cleburne, 105 S.Ct. at 3261–63 (Stevens, J. concurring). "The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent's home." Id.
\textsuperscript{200} Id. at 3272 (Marshall, J., concurring and dissenting).