

Chapter 1

INTRODUCTION AND CONSTITUTIONAL ISSUES

§ 1.01 OVERVIEW OF DISABILITY LAW

An understanding of disability law has to begin by coming to grips with disability itself, as well as by learning how disability relates to the universe of law. The understanding of disability in society has evolved over time, and is characterized by the recent appearance of a civil rights model of disability. The relation of disability and law has also changed over time, and it includes not only legal responses to discrimination but also legal responses to the fact of disability and to social attitudes about disability.

[A] Medical Models and Civil Rights Models

In a pathbreaking 1966 law review article, Jacobus tenBroek and Floyd Matson observed that the paradigm for disability law was shifting from what they called “custodialism” to what they termed “integrationism.”¹ The custodial model of disability was a medically oriented one. It gave primary attention to the physical or mental defects of persons with disabilities and studied the social and legal mechanisms by which society cared for, protected, and frequently segregated and kept itself from, persons whose medically determinable conditions made them different from others. The disabled were the other, to be cured, or if they could not be cured, to be isolated and sheltered. The authors contrasted this custodial approach with one being developed by civil rights activists working on behalf of persons with disabilities. These individuals were pressing not for protection or caretaking, but for equality and access. They desired not separation from, but integration into, the larger society, integration on a plane where they could participate and compete equally. Their attention was on removing the physical and attitudinal barriers that stood in their way — often literally, as with unramped steps, narrow doorways, and curbs without cuts, blocking the path of a person using a wheelchair for mobility.

¹ Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966). Professor tenBroek was blind and a disability rights activist. His work also had a profound effect in other fields, particularly his historical work on the Fourteenth Amendment, which influenced the Warren Court’s equal protection jurisprudence. See JACOBUS TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

Other writers developed these and similar ideas into a comprehensive civil rights model of disability. They pointed out that persons with disabilities are members of a minority group, sharing common interests and kept from integrating fully into society not by their disabilities but by society's failure to respond properly to human difference.² A central insight of the movement was that physical or mental conditions do not necessarily disable, were it not for the human-created environment of physical, legal, and attitudinal obstacles. Thus disability is both human-created and contingent on social actions and attitudes. Many variations on, and some critiques of, civil rights models have appeared over the years,³ but embrace of civil rights approaches and rejection of narrow medical models of disability are central to social mobilization and legal reform challenging disability discrimination. The Americans with Disabilities Act might be viewed as the culmination of activism and political efforts inspired by a civil rights, integrationist approach to disability.⁴

[B] Discrimination, Torts, Public Benefits, and Other Legal Topics

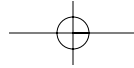
With the emergence of a civil rights approach to disability, disability discrimination has become the primary topic of discussion in law school Disability Law courses and in discussions among academics and practitioners on disability law issues. Of course, other areas of the law have special effects on persons with disabilities and the interaction of disability and society. Some topics are familiar from first-year Torts: Should the reasonable-person standard adapt for the physical or mental disabilities of a given individual? Traditionally, the answer has been yes for physical disabilities, but no for mental disabilities.⁵

² Not all of this commentary was from lawyers or focused exclusively on law. See, e.g., Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination and Activism*, 44 J. SOC. ISSUES 3 (1988) (highly influential article developing minority group model); see also JAMES A. CHARLTON, *NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT* 127 (1998) (defending continued relevance of civil rights approaches to disability); *THE DISABILITY STUDIES READER* (Lennard J. Davis ed. 1997) (collecting essays on minority group-civil rights approaches to disability).

³ Partial critiques include Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335 (2000); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335 (2001); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889.

⁴ See, e.g., JOSEPH P. SHAPIRO, *NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT* (1993); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991); Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393 (1991).

⁵ See RESTATEMENT (SECOND) OF TORTS §§ 283B-283C (1965). For illuminating discussions of disability and tort law, see Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323 (1999); Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966).



Similarly, mental disability affects matters of Contracts, Wills and Trusts, Criminal Law, and other fields, to the point where separate law school courses on Mental Disability Law are common. Disability has serious economic effects, particularly given the maladaptation of much of the workplace to persons with disabilities, to the point where people with disabilities have labor force non-participation rates of around 65% and poverty rates three times those of people without disabilities.⁶ Accordingly, Poverty Law and the law that relates to public benefits and social insurance have been relevance to people with disabilities. Issues of access to health care and other supports for social participation may turn out to be “The Future of Disability Law.”⁷

§ 1.02 OVERVIEW OF DISABILITY DISCRIMINATION

The discussion of disability discrimination includes both the conduct that fits under that general heading and the legal responses to it. Because disability discrimination has characteristics somewhat distinct from other forms of unfair treatment, it merits systematic discussion before delving into the sources of law that may address it.

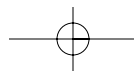
[A] Forms of Discrimination

In commenting on one disability discrimination statute, section 504 of the Rehabilitation Act of 1973, Justice Thurgood Marshall observed, “Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect.”⁸ The insight that failure to adjust mental attitudes and environmental conditions need not have an evil intent behind it is crucial to understanding the forms of discrimination that persons with disabilities experience. The failure to adapt or make accommodations and the maintenance of

⁶ According to the 2004 National Organization for Disabilities Harris Poll, 35% of working aged people with disabilities reported being employed full or part time, compared to 78% of similarly aged people who do not have disabilities, and three times as many people with disabilities live in poverty. *Landmark Disability Survey Finds Pervasive Disadvantages* (June 24, 2004), available at <http://www.nod.org/index.cfm?fuseaction=page.viewPage&pageID=1430&nodeID=1&FeatureID=1422&redirected=1&CFID=11306531&CFTOKEN=36268683>. A variety of other helpful statistical compilations on employment, poverty, and many other matters for persons with disabilities can be found at the web site of the University of California San Francisco Disability Statistics Center, at <http://dsc.ucsf.edu/main.php> (last visited Feb. 6, 2007). Differences in definitions of disability as well as the age of some of the data may call for some caution in using some of the statistical information.

⁷ See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 4 (2004) (“In short, the future of disability law lies as much in social welfare law as in antidiscrimination law.”); see also Weber, *supra* note 3 (discussing social insurance and public benefits issues for persons with disabilities).

⁸ *Alexander v. Choate*, 469 U.S. 287, 295 (1985).



rules that apply across the board but harm persons with particular disabilities disproportionately and lack adequate justification constitute much of disability discrimination. If every prospective law student, seeing or blind, must take the same paper and pencil law school admissions test, the treatment is in a sense equal, but it discriminates against the person who needs Braille or a computerized reading system to compete fairly. Similarly, if class is held in the same classroom for everyone, but the room is up a step from ground level, persons using wheelchairs cannot participate.

Beyond the simple failure to accommodate and maintenance of rules and practices that have disparate impacts, discriminatory conduct may take the form of paternalism — keeping a person with a chronic disease out of a dangerous job for his or her own safety when the person would prefer to make the decision which risks to take — or it may take the form of stereotyping — assuming that a person with depression or another mental impairment cannot be relied on to perform a critical function. Sympathy in the form of pity or condescension may lead to systematic underestimation of the capabilities of individuals with disabilities; discomfort in dealing with someone who is physically or mentally different may lead to social avoidance that closes off avenues of advancement at work or school for persons with disabling conditions.

Some disability discrimination, however, comes in traditional animus-driven form. People with disabilities frequently experience harassment at school, at work, and in other settings. Negative attitudes towards persons with disabilities are common, and are continually fueled by the regular depiction of villains in movies and literature as persons with disfigurements, other visible disabilities, or mental illness.⁹ If the law is to respond to disability discrimination, it must address both thoughtless indifference and invidious animus.

[B] Sources of Law

Numerous legal sources relate to disability discrimination issues. Constitutional provisions, statutes, and even international conventions bear on disability law. The primary statutory provisions that will be discussed in this book are section 504 of the Rehabilitation Act of 1973 (“section 504”)¹⁰ and the Americans with Disabilities Act of 1990 (“ADA”).¹¹

⁹ See, e.g., LENNARD J. DAVIS, *BENDING OVER BACKWARDS: DISABILITY, DISMODERNISM & OTHER DIFFICULT POSITIONS* 52 (2002) (noting classic literature’s use of deformity as sign of evil); Hugh Gregory Gallagher, “*Slapping Up Spastics*”: *The Persistence of Social Attitudes Toward People with Disabilities*, 10 *ISSUES L. & MED.* 401 (1995) (discussing negative attitudes toward persons with disabilities); see also Ann Hubbard, *The ADA, the Workplace, and the Myth of the “Dangerously Mentally Ill,”* 34 *U.C. DAVIS L. REV.* 849, 850-52 (2001) (discussing widespread fear of persons with mental illness).

¹⁰ 29 U.S.C. § 794 (2000).

¹¹ 42 U.S.C. §§ 12101-12213 (2000). Title IV of the ADA is codified outside this framework and instead included in the telecommunications laws. 47 U.S.C. § 225 (2000).

Section 504 provides that no otherwise qualified individual with a disability may be subject to discrimination under, excluded from, or denied the benefits of, any program or activity receiving federal financial assistance, solely on the basis of his or her disability. It also bars discrimination by federal executive agencies and the United States Postal Service.

The ADA forbids discrimination against individuals with disabilities in a number of different contexts and settings. Title I bars employment discrimination against qualified individuals with disabilities. Title II prohibits disability discrimination in state and local government activities. Title III forbids discrimination in privately operated places of public accommodation, such as stores and business offices. Title IV requires the provision of communication services that are accessible to persons with disabilities. Title V contains general provisions. Findings and definitions are contained in the opening sections of the statute.¹²

Unlike some other anti-discrimination laws, neither section 504 nor the ADA outlaws discrimination on a given basis across the board, for everyone. Generally, only a person who meets the definition of a person with a disability is protected by the statute and able to benefit from the anti-discrimination provisions.¹³ Thus there is no such thing as a reverse-discrimination case under the ADA.

Other federal statutes carrying great significance for disability discrimination cases but with somewhat narrower application are (1) the Individuals with Disabilities Education Act (originally passed in 1975),¹⁴ which requires states receiving special education funding from the federal government to guarantee that all children with disabilities receive a free, appropriate public education, in settings with children without disabilities to the maximum extent appropriate; (2) the Fair Housing Act Amendments of 1988,¹⁵ which forbid various forms of disability discrimination in housing and establish accessibility requirements; and (3) the Air Carrier Access Act of 1986,¹⁶ which bans discrimination in commercial air transportation and mandates accessibility.

In addition to these federal provisions are state constitutions, statutes, and common law. Because these sources of law are so varied, they will be cited in this book only in the context of discussing specific disability discrimination topics.

¹² 42 U.S.C. §§ 12101-12102 (2000).

¹³ There are exceptions, as with the provisions barring retaliation and coercion, and some other provisions.

¹⁴ 20 U.S.C.A. §§ 1400-1487 (2006).

¹⁵ 42 U.S.C. §§ 3601-3614 (2000).

¹⁶ 49 U.S.C.A. § 41705 (2006).

§ 1.03 OVERVIEW OF CONSTITUTIONAL ISSUES

Numerous issues of constitutional law come into play in disability discrimination cases. A major topic, that of Eleventh Amendment and related immunities, applies to cases against state government defendants, and so will be addressed in Chapter 6 of this book. Other constitutional issues of salience, however, are introduced here. They concern equal protection and due process of law guaranteed by the Fourteenth Amendment (and for the federal government, the Fifth Amendment), as well as protection against cruel and unusual punishment in the Eighth Amendment.

[A] Equal Protection

In the period since the emergence in Supreme Court case law of different levels of equal protection and substantive due process scrutiny for laws that target certain classes of people, courts have asked whether people with disabilities, or at least some categories of persons with disabilities, are a “suspect class”¹⁷ and whether laws that use a disability classification should be subject to elevated scrutiny. In *City of Cleburne v. Cleburne Living Center, Inc.*, the Supreme Court considered that issue in an action over denial of a permit to open a group home for persons with mental retardation, and said no.¹⁸ Cleburne Living Center proposed to open a group home for 13 men and women with mental retardation, but the city denied a special use permit and the Center sued, claiming a denial of equal protection. The district court ruled for the city, but the court of appeals reversed, holding that mental retardation is a quasi-suspect classification and that therefore the zoning ordinance barring operation of the home was subject to intermediate-level scrutiny. It failed the equal protection test because it did not substantially further any important governmental interest.

In an opinion by Justice White, the Supreme Court affirmed the invalidation of the zoning ordinance as applied to the proposed group home, but it vacated the court of appeals’ judgment in all other respects. In defending its application of a rational-relationship test instead of one demanding heightened scrutiny, the Court first said that mental retardation reduces the ability to function in the everyday world, and there is a great deal of diversity in levels of functioning. The difference between persons with mental retardation and others was said to make the states’ interest in dealing with and providing for them a legitimate one. Professional judgment guiding legislators would perhaps be superior to the

¹⁷ Embracing the idea of persons with disabilities as a suspect class, the findings and purposes section of the ADA declares that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of powerlessness in our society” 42 U.S.C. § 12101(a)(7) (2000).

¹⁸ 473 U.S. 432 (1985).

less informed views of the judiciary. As a second argument, the Court pointed to the fact that legislators have addressed the unique problems of persons with mental retardation by outlawing discrimination in federally funded activity in section 504 of the Rehabilitation Act; affirming a right to treatment, services, and habilitation in the Developmental Disabilities Assistance and Bill of Rights Act; conditioning federal education funding on rights to special education in integrated settings in the special education law; and providing hiring preferences for the federal civil service. State law also provided some rights and benefits for persons with mental retardation. This legislation supported the conclusion that relevant differences exist between persons with mental retardation and others, and so legislation employing the category was not suspect on that account. Employing a higher level of scrutiny to evaluate legislation using the category might discourage government from taking actions that favor persons with mental retardation. Third, the beneficial legislation shows that persons with mental retardation are not powerless in the legislative process, thus needing special protection from the judiciary. Finally, many other groups with immutable conditions might also be able to make claims to heightened equal protection scrutiny for legislation affecting them if persons with mental retardation were able to do so.

The Court stressed that legislation nevertheless had to meet a rational relationship test, which, it said “affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner.”¹⁹ It said that the zoning ordinance, as applied, failed to meet the test. The city did not require a special use permit for apartment houses, multiple dwellings, boarding houses, fraternity houses, dormitories, apartment hotels, sanitariums, nursing homes for convalescents or the aged. The Court found no rational basis for believing the group home would threaten the city’s legitimate interests. The reasons that the district court found to support the permit requirement were fears of neighboring property owners and elderly residents, but negative attitudes and unsubstantiated fears are not permissible bases for treating a group home for persons with mental retardation differently. Two other justifications advanced by the city council also did not stand up. The council professed to be concerned that students at a junior high school across the street might harass the group home residents, but the school itself had mentally retarded students, and the vague fears were insufficient to support the discrimination. Also, the council’s concern that the location was on a 500-year flood plain did not justify distinguishing the treatment of the group home from that nursing homes, hospitals, or sanitariums. Additional concerns about liability for potential actions of the residents of the home did not distinguish the group home from, say, a fraternity house, and the size and occupancy level of the house could not justify different treatment when residences for others could be as large or larger. The same fact applied to concerns over concentration of population and congestion or fire hazards. The Court concluded

¹⁹ *Id.* at 446.

that “requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded,” and so the city’s action violated equal protection.²⁰

Justice Stevens, joined by Chief Justice Burger, concurred in the judgment, stating doubts about the wisdom of using a rigid three-tier system in equal protection cases, in which some cases receive strict scrutiny, some intermediate, and some only rational-basis. The opinion suggested that the rational-basis test in fact embraced all categories of cases; some government classifications are presumptively irrational, while others, including those that place persons with mental retardation in a special class are not. The justifications advanced by the city for the classification here were utterly unconvincing, and so the government’s conduct was irrational and a violation of equal protection.

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment in part and dissented in part. The opinion said that the law would be considered valid if ordinary rational-basis review were applied. In fact, the majority was applying a more exacting standard. Under rational-basis review, government may approach a problem one step at a time, addressing first that part of a problem viewed as most acute. Precision of categories is not required. The opinion said that “the level of scrutiny employed in an equal protection case should 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.’”²¹ According to Justice Marshall, the interest of persons with mental retardation in establishing group homes is substantial: The right to a home is a fundamental liberty protected by due process. Moreover, classification based on mental retardation is invidious: Persons with mental retardation have been subjected to a lengthy and tragic history of segregation and discrimination. Historically, Social Darwinism and eugenics led to a “regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.”²² Custodial institutions devoted to warehousing persons with mental retardation and measures to halt their reproduction through sterilization were part of this legacy. The importance of the interest in the case and the history of discrimination were said to justify searching scrutiny of the restrictions on group homes for persons with mental retardation. Marshall also noted that heightened scrutiny had been applied to classifications like gender, which related to real differences for which different treatment may be justified. “In light of the scrutiny that should be applied here, Cleburne’s ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community.”²³

²⁰ *Id.* at 450.

²¹ *Id.* at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting)).

²² *Id.* at 462.

²³ *Id.* at 473.

Tracking much of the argument in Justice Marshall's opinion, prominent commentators have described the *Cleburne* decision as in fact the application of something stricter than ordinary rational-basis equal protection review.²⁴ Nevertheless, in a later case, the Supreme Court applied an ordinary rational-relationship test when sustaining a law that treated persons subject to civil commitment on the basis of mental retardation less favorably than persons subject to civil commitment on the basis of mental illness.²⁵ More recently, in *Board of Trustees of the University of Alabama v. Garrett*,²⁶ the Court declared that *Cleburne* established no higher scrutiny than the rational-basis test for the disability classification it considered. The Court used this view of *Cleburne* to support its conclusion that permitting ADA damages claims against state governments in employment cases violates principles of Eleventh Amendment immunity. The Court reasoned that Congress cannot provide damages against states for violating a law unless that law is proportional to and congruent with a violation of the Fourteenth Amendment. Relying on *Cleburne*, it concluded that the Fourteenth Amendment forbids only irrational discrimination on account of disability. Thus, failure to provide accommodations does not violate equal protection and cannot supply the basis for damages liability against a state.²⁷

Even if laws that disadvantage persons on the basis of mental retardation or disability in general are currently not viewed as subject to elevated scrutiny, equal protection still plays an important role in disability law. Not only does the equal protection issue affect the debate over the application of Eleventh Amendment immunity to state agency defendants in contexts other than employment, but equal protection claims continue to be a basis for actions challenging government-enabled harassment and irrational government policies.

[B] Due Process

Issues of procedural due process frequently arise in cases dealing with disability discrimination. For example, a person may not be subjected to civil commitment on the basis of mental illness without the use of adequate procedures,²⁸ a right that applies even to a prison inmate whose liberty interest is significantly diminished due to penal confinement.²⁹ Crucial to that conclusion is the recognition of the massive curtailment of liberty that civil commitment for mental illness entails, as well as the "stigmatizing conse-

²⁴ *E.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.2.3, at 688 (3d ed. 2006) ("Although the Court expressly declared that it was applying rational basis review, it appears that there was more 'bite' to the Court's approach than usual for this level of scrutiny.")

²⁵ *Heller v. Doe*, 509 U.S. 312 (1993).

²⁶ 531 U.S. 356 (2001).

²⁷ See generally *infra* Chapter 6 (discussing Eleventh Amendment immunity and *Garrett* case).

²⁸ See, e.g., *Zinerman v. Burch*, 494 U.S. 113 (1990); *Addington v. Texas*, 441 U.S. 418 (1979).

²⁹ *Vitek v. Jones*, 445 U.S. 480 (1980).

quences of a transfer to a mental hospital for involuntary psychiatric treatment.”³⁰ Similar principles come into play in claims that children may not be excluded from educational placements on account of disability-related behavior or conditions without notice and the right to be heard.³¹

Substantive due process issues are perhaps even more prominent in the disability case law than procedural due process issues are. Quite apart from those concerns of substantive due process that overlap with equal protection, special substantive due process concerns apply when persons are institutionalized, as frequently occurs for persons with disabling mental conditions. For example, in *Youngberg v. Romeo*, the Supreme Court interpreted due process obligations with regard to persons involuntarily committed on account of mental retardation to include provision of adequate food, shelter, clothing, medical care, and reasonable safety.³² The Court said that restraint is not to be used unless professional judgment deems it necessary, and that the government has a duty to provide training and habilitation to the extent that an appropriate professional would consider reasonable to permit the person who is committed to enjoy reasonable safety and the ability to function without restraint. The tenor of the Court’s reasoning was that freedom is taken away from a person who is involuntarily committed to an institution for persons with mental retardation. Reasonable safety and habilitation must be provided in return.

Civil commitment for persons who are mentally ill must also be tied to a valid governmental interest. The Court in *O’Connor v. Donaldson* ruled that a person who was not dangerous who is mentally ill cannot simply be involuntarily confined when capable of surviving safely in freedom either on his or her own or with family and friends.³³ Nevertheless, confinement of persons with mental disorders, even long-term confinement, is permitted under due process principles when required for the safety of society.³⁴

Other deprivations of life, liberty or property besides civil commitment may also be visited on persons with disabilities, and objections based on due process of law may be raised. One deprivation of liberty is forced sterilization. In *Buck v. Bell*, the Supreme Court upheld the compulsory sterilization of a woman who was deemed “feeble minded” against a challenge that the practice violated substantive due process and equal protection.³⁵ Justice Holmes’ opinion fit well with the principles of the Eugenics Movement, which postulated that the human population could be improved by excluding physically or mentally unfit persons

³⁰ *Id.* at 494.

³¹ *See, e.g.,* *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

³² 457 U.S. 307 (1982).

³³ 422 U.S. 563 (1975).

³⁴ *Kansas v. Hendricks*, 521 U.S. 346 (1997) (permitting civil confinement of person likely to commit sex crimes on account of mental abnormality or disorder).

³⁵ 274 U.S. 200, 205 (1927).

from social life by confining them, sterilizing them, or even killing them. The premise was that physical or mental weakness (or its converse) is inherited and that if persons with impairments propagated, the population would be “swamped with incompetence.”³⁶ Holmes upheld the statute after citing its eugenic purpose, declaring that “Three generations of imbeciles are enough.”³⁷ In fact, *Buck v. Bell* was a sham case in which the attorney for the woman to be sterilized was cooperating with proponents of eugenics in order to get Supreme Court approval for eugenic sterilization.³⁸ Although eugenics fell out of favor as its scientific support was discredited and as revulsion grew over its links to racism and nativism, compulsory sterilization of persons with mental disabilities continues today and remains a source of controversy.³⁹

[C] Eighth Amendment

In *Atkins v. Virginia*, the Supreme Court ruled that a person with mental retardation is not subject to the death penalty.⁴⁰ Atkins and another person abducted their victim, robbed him, drove him to an automatic teller machine where they had him withdraw more cash, then took him to an isolated location and shot him. The accomplice testified that Atkins committed the shooting (although Atkins said the accomplice did it), and the jury apparently credited the accomplice’s account. The jury sentenced Atkins to death despite hearing evidence that he was mentally retarded. For technical reasons, a resentencing was ordered, where the jury heard conflicting evidence about whether Atkins was mentally retarded, and Atkins again received a death sentence. The Supreme Court ruled that the Eighth Amendment’s protection against cruel and unusual punishment would be measured by contemporary standards, not those applicable at the time of adoption, and noted that, in the years since the Court had ruled that execution of a mentally retarded defendant was not categorically prohibited by the Amendment,⁴¹ sixteen states had prohibited execution of mentally retarded defendants. Those jurisdictions joined the federal government and two others that had rejected the capital punishment for persons with mental retardation at the time of *Penry*. Emphasizing the trend in the developments and observing as well that several states permitting the penalty had not imposed it on a person with mental retardation for decades, the Court found

³⁶ *Id.* at 207.

³⁷ *Id.*

³⁸ Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 56 (1985).

³⁹ See, e.g., Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN’S L.J. 122 (1993); Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1202 (1990).

⁴⁰ 536 U.S. 304 (2002).

⁴¹ See *Penry v. Lynaugh*, 492 U.S. 302 (1989).

that the practice had become truly unusual and a national consensus had emerged against it.

The Court further supported the conclusion that the penalty was unconstitutional by stressing that diminished capacities to understand, to communicate, learn from experience, act logically, control impulses, and understand others' conduct diminish personal culpability. The Court also relied on the fact that reduced mental capacity of persons with mental retardation might lead to inaccurate impositions of death sentences due to failure to give meaningful assistance to counsel, poor demeanor, or even the possibility of false confessions. The Court left to the states the job of applying the ruling. Justice Scalia dissented, protesting that the Court's approach lacked support in the text or history of the Eighth Amendment, that mental retardation can be feigned, and that mental retardation should simply be considered as another factor in determining if mitigation is appropriate.

There may be some tension between *Atkins*' approach to the legal treatment of disability and that advanced by proponents of civil rights models. The advocate for the person with mental retardation was arguing for different treatment on account of disability, rather than treatment that is the same, and the different treatment sought was not a removal of or compensation for physical or attitudinal barriers. Instead, it was an excuse, an escape from a penalty that would otherwise be appropriate given the nature of the criminal act. Determination of what level of mental retardation is needed to trigger the ruling's application brings the question of disability rights into the study of defects and deviation from the norm, rather than the study of what needs to be done to adapt conventional ways of doing things to accommodate the whole spectrum of society. It might nevertheless be argued that the Court's opinion does show sensitivity to barriers presented by the legal system for a defendant with mental retardation: the difficulty of that person to negotiate trial process, for example. Perhaps the case may be viewed as a partial adaptation of the legal system to what would otherwise be an unthinking imposition of the same treatment on persons who are relevantly different.