SPEECHES

RELIANCE ON STATE LAW: PROTECTING THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES*

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INTRODUCTION

Some people simply do not care about people with mental disabilities. They would rather ignore them and have their government do likewise. Others, such as the people of Cleburne, Texas, do not want people with mental disabilities living in their town.[1] Both are examples of mean-spiritedness, the kind that sometimes rears its ugly head up when an attempt is made to distribute life's goods more equitably. People of conscience take exception to a government that remains idle in the face of hardship or that does nothing to help those truly in need. People of conscience also take exception to what the little town in Texas did when its city fathers told a group of would-be residents that there was no room within the city borders for people with mental disabilities. But what are decent-minded people to do? The answer depends on who "they" are. If "they" are lawyers bent on righting legal wrongs, then the law is their recourse. But which law? To answer that question is to raise still another one about how lawyers in our society litigate social justice claims.

Today, when lawyers talk about rights, they typically employ the adjective "constitutional." When they talk of constitutional rights, they typically mean those rights secured by the national Constitution as interpreted by federal courts, usually the United

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1. *See* Dallas Morning News, July 2, 1985, at 1A, cols. 4-6. When informed that the United States Supreme Court had ordered the City of Cleburne to permit people with mental disabilities to reside in a group home within the city, future neighbors replied: "We've got some women living in this neighborhood who are literally scared to death of this thing . . . ." And, "[e]verybody I know of in five, six, and seven blocks around here was against the thing . . . ." *Id. See also infra* note 61.

States Supreme Court. Think about it. If they are talking about the rights of the disabled, they tend to define much of the world in terms of cases such as *Wyatt v. Stickney*,[2] *O'Connor v. Donaldson*,[3] or *Youngberg v. Romeo*.[4] More recently, the talk centers around the name of the case coming out of our Texas town, *City of Cleburne v. Cleburne Living Center*.[5] Where the federal Constitution is not the legal yardstick, federal statutes are. So when lawyers representing the disabled think of statutes, the numbers "504"[6] immediately come to mind. If the issue is whether or not a state government may be sued for damages for violating a federal statute, then naturally that takes us back to case law such as *Atascadero State Hospital v. Scanlon*.[7] In other words, our initial question about "which law" can now be answered by reference to federal constitutional and statutory law[8] as ultimately interpreted by federal justices. Thus, for too many lawyers the validity of what government men with "sawdust hearts"[9] do or what the Cleburne City Council did hinges essentially, if not exclusively, on federal law. That is the wrong way, particularly in civil rights cases, for lawyers to think about the law.

We, the heirs to the Warren Court legacy, have allowed American law to become lopsided. Implicit in far too much of the thinking of social and legal progressives is the notion that if rights are not protected in Washington, D.C., then they will not be honored in Cleburne, Texas, either. We are a rights-conscious society.[10] In that sense, lawyers and laypersons have become Court-watchers. Quite often, what the Supreme Court does defines our understanding of, to use the moral philosopher's words, "taking rights seriously."[11] Unlike the layperson, the civil rights lawyer is likely to

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2. 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1305 (5th Cir. 1974).

3. 420 U.S. 943 (1975).

4. 457 U.S. 307 (1982).

5. 473 U.S. 432 (1985).

6. Rehabilitation Act § 504, 29 U.S.C. § 794 (1982).

7. 473 U.S. 234 (1985).

8. Almost equally important are administrative regulations affecting the mentally disabled. *See, e.g.*, 45 C.F.R. §§ 84.1-84.61 (1980).

9. M. LERNER, ACTIONS AND PASSIONS 89 (1949) (commenting on the Wiley-Revercomb immigration bill).

10. *See, e.g.*, SIMONE WEIL READER, 323-39 (G. Panichas ed. 1977); S. WEIL, SELECTED ESSAYS 9-34 (1962). *See also* R. PETERS, THE MASSACHUSETT'S CONSTITUTION OF 1780, 48-56 (1978); Sandel, *Morality & The Liberal Ideal*, THE NEW REPUBLIC, May 7, 1984 at 15. *See generally* Collins and Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. — (1988) [hereinafter Collins and Skover].

11. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 205 (1977).

think as well in another, but related, dimension—that of federal statutory law. But such a view, at least in practical terms, suggests that we do not take the constituted law of the *states* seriously. We live in a world where free speech interests are seen in first amendment terms solely. Self-incrimination questions have become *Miranda*[12] questions simply. And after the close of the October 1984 Court Term, questions about people with mental disabilities are being touted as *Cleburne* questions. The underlying assumption in all of this is that if a state governmental act does not offend federal law, then it is without almost further inquiry presumed to be legal. Never mind whether the action of the Cleburne City Council is authorized by local law. Never mind whether it is permitted or barred by a law passed by the state legislature. And never mind anything to the contrary contained in the Texas Constitution.

My point is that not every one of our expectations of how state government should act need rise to the level of a full-blown federal right before it is incumbent on that government to act in a fair way. The rules of state law may, and frequently do, protect legitimate and humane interests in ways that the mere assertion of federal rights cannot. We need to return to a conception of government where federal statutes and the national Constitution (as construed by federal courts) are the *last* check on state action. They must not be permitted to be either the first or sole check. Yet, that is basically what has occurred. Just look at how our law schools instruct future lawyers about civil rights law. By ignoring state law, which limits what government and its citizens may do, we undermine the legal significance of political decisions that have been translated into positive law. Viewed from that perspective, I want to free a lance to defend the proposition that the City of Cleburne acted illegally quite apart from any command of the fourteenth amendment to the United States Constitution. In taking this stance let me emphasize that I am not arguing that state law should be seen as a substitute for its federal counterpart. Nor am I saying that lawyers and judges should set aside in an unwarranted or callous way applicable federal law. Rather, I say that the full force of all laws, local, state, and federal should be brought to bear on the malign actions taken by all the Cleburne City Council officials of this land. I say this both in terms of redefining our notions of good government and good lawyering.

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12. 384 U.S. 436 (1966).

I. Overview: People With Mental Disabilities and the Law of the States

The law governing the treatment of people with mental disabilities requires government, and sometimes the members of society themselves, to both refrain from certain conduct and to assume certain responsibilities. The former can be seen as an anti-discrimination principle while the latter might be labeled an "habilitation"[13] principle. Generally speaking, today there are some seventeen state constitutions and twenty provisions[14] found therein which in one way or another recognize individual rights or set responsibilities for state and local officials. Even before Representative John Bingham of Ohio had set to work on drafting the fourteenth amendment, his state constitution imposed a duty on government to care for people with mental disabilities.[15] And as early as 1890, the architects of the Mississippi Constitution hammered out a provision that prohibited the abuse of people with mental disabilities.[16] In other words, the history and the texts of the state constitutions affirm various rights and governmental responsibilities nowhere mentioned in the federal Constitution. Beyond state constitutions, there are state laws designed to protect people with mental disabilities. Thus, chapter 30 of the Louisiana Statutes is entitled "Civil Rights for Handicapped Persons."[17] Similarly, chapter 760 of the Florida Statutes addresses, among other things, the discriminatory treatment of people with disabilities.[18] As I will point out later,[19] even Texas—the *Cleburne* state—has a statutory bill of rights for persons with disabilities.[20]

Basically, state constitutional provisions affecting the disabled may be divided into three broad categories. The first is what I shall call the "provision model." This model is exemplified by the fol-

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13. " 'Habilitation,' a term of art in programs for the mentally retarded, focuses upon 'training and development of needed skills.' " G. Gunther, Constitutional Law 562 n.6 (11th ed. 1985).

14. *See* Appendix.

15. *See* Ohio Const. of 1851, art. VII, § 1 *reprinted in* 7 W. Swindler, Sources And Documents Of United States Constitutions 566 (1978).

16. Miss. Const. of 1890, art. XIV, § 262 *reprinted in* 5 W. Swindler, Sources and Documents of United States Constitutions 429 (1975).

17. La. Rev. Stat. Ann. §§ 46.2251-46.2256 (West 1982); *see also* La. Rev. Stat. Ann. § 28.171 (West Supp. 1987) (rights of patients with mental disabilities).

18. Fla. Stat. Ann. §§ 760.01-760.37 (West 1975).

19. *See infra* text accompanying notes 31-36.

20. *See infra* note 35.

lowing provision taken from the Arkansas Constitution: "It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb and the blind, and also for the treatment of the insane."[21] Phrased in less demeaning and more contemporary terms, the Michigan Constitution provides: "Institutions, programs and services for the care, treatment, education or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported."[22]

State constitutional provisions that may be classified under the "provision model" generally speak to the following kinds of problems identified by a New York State assemblyman:

> Until the Willowbrook scandal exploded into the public conscience 14 years ago, people diagnosed as mentally disabled were in most instances dumped into large, state-run institutions—often little more than human warehouses—where they were left to languish with minimal care and no hope
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> . . . .
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> The young were given no education and taught no skills. There was no anticipation of, or preparation for, a future beyond the institution. The public and Government averted their eyes from this denial of human dignity and humane treatment.[23]

Clearly, constitutional provision requirements impose affirmative duties on legislators to prevent the horrid state of affairs that came to typify life in Willowbrook. There is no such provision in the New York Constitution. Whether, or to what extent, these duties may be enforced by way of judicial review depends on a number of factors. Still, the responsibility is of constitutional dimension. If for that reason alone, it is incumbent on those who represent the disabled constantly and forcefully to remind state officials of their respective duties. One way this might be accomplished is by enactment of statutes which more specifically define the nature and scope of the government's obligation. Perhaps equally valuable might be newly proposed administrative regulations or executive orders or guidelines to the same effect.

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21. ARK. CONST. art. XIX, § 19.
22. MICH. CONST. art. VIII, § 8.
23. Sanders, *A Future for the Disabled*, N.Y. Times, Aug. 24, 1985, at 23, col. 4.

The second category is what I refer to as the "anti-discrimination model." This model may in turn be divided into two components; namely, the "state action" and "private action" categories. One example of a state action, anti-discrimination provision is article I, section 3 of the Louisiana Declaration of Rights, which in relevant part provides: "No law shall arbitrarily, capriciously or unreasonably discriminate against a person because of . . . physical condition. . . ." This type of law could well give rise to a cause of action for employment discrimination against people with disabilities—an option not available under federal law in light of what the Court ruled in *Atascadero State Hospital v. Scanlon.*[24] The "private action" component of the "anti-discrimination model" is best exemplified by article I, section 19 of the Illinois Constitution, which states: "All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." Significantly, article CXIV of the Massachusetts Constitution prohibits discrimination against the disabled "under *any* program or activity within the commonwealth." Under these kinds of laws, discrimination of the type present in *Cleburne* and *Atascadero* would be illegal regardless of whether the action was public or private.

Finally, there is the "specific rights" model. This class of laws identifies a particular area of government and/or private conduct to be regulated. For example, article I, section 15-a of the Texas Bill of Rights declares:

> No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind and to provide for a method of appeal from judgments rendered in such cases.

Similarly, article XIV, section 262 of the Mississippi Constitution requires the legislature to enact "suitable laws to prevent abuses by those" entrusted by the state with the care of people with mental disabilities. Under this provision involuntary sterilization practices, like those purportedly conducted on patients of Virginia mental hospitals,[25] would either be illegal or regulated to the ex-

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24. 473 U.S. 234 (1985).

25. *See* Allen, *Va. Finds 4 of 7,200 Sterilized Patients*, Wash. Post, Aug. 28, 1985, at

tent necessary to prevent any "abuses" against people with disabilities.

It is not my intention to suggest that any or all of the state constitutional provisions to which I have referred are necessarily the best models of a fair and humane provision applicable to people with mental disabilities. Nor do I want to be understood as suggesting that any of these provisions could serve as a substitute for federal law. Rather, my point is that such laws can serve as a constitutional foundation upon which to construct varying types of legal claims made on behalf of the disabled. In some states, such as Florida, Illinois, and Massachusetts, the constitutional provisions have given rise to important implementing legislation. Appellate decisional law in this area is dwarfed by its federal counterpart, partly because of the widespread failure to raise state claims. Nevertheless, there does exist some case law like the decision of the New Hampshire Supreme Court recognizing a right to refuse treatment.[26]

Assuredly, there is a role for state law, including the law of the various constitutions, to play in the protection and habilitation of people with mental disabilities. This law is antecedent to, though it may well complement, almost anything set out in federal statutory or constitutional provisions. In a world where *Atascadero*-like cases limit access to federal law and where *Cleburne*-like cases may confine the desirable reach of that law, reliance on state law should be viewed as all the more necessary.

II. Applying State Law this Side of the Fourteenth Amendment

Shortly after the Court handed down its decision in *Cleburne*, Professor Laurence Tribe told a reporter that the ruling "reinvigorated equal protection,"[27] especially as the fourteenth amendment applies to the disabled. By contrast, Mr. Earl Luna, the Dallas attorney representing Cleburne, said he was "tickled to death"[28] by the Court's handiwork. It was, he added, nothing more than a "mi-

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D1, col. 5.

26. Opinion of the Justices, 465 A.2d 484 (N.H. 1983). *See infra* note 47.

27. Kamen, *Supreme Court Rulings Swing Back to Center*, Wash. Post, July 7, 1985, at 1, col. 2.

28. The Dallas Morning News, July 2, at 1A, col. 1.

nor"[29] victory for those championing the cause of the would-be residents of 201 Featherton Street. Whether the "irrational prejudice"[30] standard the *Cleburne* Court invoked is a major victory or a major loss for the disabled is perhaps a question best left to Harvard law professors and Texas attorneys. Time and litigation will ultimately answer the myriad of federal constitutional questions left open by the opinion of Justice Byron White and his colleagues. Meanwhile, the law of the states remains the law. And strands of that law, as Texas law so well illustrates, can be woven together to put an end to what happened in the town fifty miles southwest of Dallas.

Recall, the *Cleburne* lawsuit was commenced in a federal court. Federal law served as the backbone of that suit. So when a pendent state claim was raised by the petitioners in this jurisdiction without a state certification law,[31] the possibility of abstention became a probability.[32] Faced with this threat,[33] counsel for the petitioners "voluntarily dismissed"[34] any claim of relief to which the client might have been entitled under Texas law. And exactly what was the state law that was abandoned in the name of the fourteenth amendment? It was a section of the Mentally Retarded Persons Act of 1977.[35] The applicable portion of that Act provides:

> Every mentally retarded person shall have the right to live in the least restrictive setting appropriate to his individual needs and abilities. This includes the person's right to live in a variety of living situations, such as *the right to live* alone, *in a group home*, with a family, and in a supervised, protective environment.[36]

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29. *Id.*

30. *Cleburne*, 473 U.S. at 450.

31. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 291-95, 296-302 (1982).

32. *See Cleburne*, 473 U.S. at 450 n.11.

33. Perhaps the greatest threat posed to the petitioners is the general unavailability of state statutory provisions allowing for damages and attorney fee awards. *See* Friesen, *Damage Actions for Violations of State Bills of Rights*, 63 TEX. L. REV. 1271 (1985).

34. *Cleburne*, 473 U.S. at 450.

35. TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1985).

36. *Cleburne*, 473 U.S. at 450 (emphasis added). One wonders to what extent the existence of this law and others affecting people with mental disabilities determined the Supreme Court's view of the scope of the fourteenth amendment's protection. Consider in this regard Justice White's statement:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing apathy or prejudice and a corre-

That was the law on the books when the Cleburne City Council said "no" to the request of Jan Hannah and Bobbie Northrop to open a residential home for mentally disabled adults. On its face the command of the Texas Legislature, like those of other state legislatures,[37] is difficult to reconcile with the actions taken by the city officials. Granted, the statute quoted had not yet been construed by a Texas appellate court, but that, of course, should not have in *any* way detracted from its force as binding law. The law provides that "[e]very mentally retarded person" has "the right to live . . . in a group home."[38] Nothing in the law enacted in 1977 suggests that municipal governments may set that command aside when claims are raised about the "negative attitude"[39] of surrounding neighbors, or the possibility of difficulties associated with "five hundred year flood plain[s]"[40] and traffic congestion.[41] Nothing in the Texas statute allows it to be ignored if only local officials can conjure up some "rational" (as the word is used in a federal constitutional sense) reason for doing so. Nevertheless, those at the helm of power in Cleburne acted as if they were immune from the legislative mandate set forth in the Mentally Retarded Persons Act of 1977. In effect, what they were saying was that they were free to discriminate as they pleased so long as nothing in the fourteenth amendment provided otherwise. It was another case of transforming the final check on governmental power into the sole limitation on it. What is incredible is that they were able to accomplish this *ultra vires* feat subject only to a declaration by the Supreme Court of the land. Unfortunately, state statutory laws such as the 1977 Texas one and others like it will never stop discrimination against

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sponding need for more intrusive oversight by the judiciary.

Id. at 443. Had Texas law, administrative, statutory, and constitutional, been invoked without any benefit to the petitioners, the need for federal "oversight" under the national constitution would certainly have been greater, maybe to the point of encouraging the Court to fashion a stricter standard than it did in *Cleburne*. By pressing their claims in the legal posture that they did, counsel for the Cleburne group may have unwittingly allowed an already hesitant Court to fashion a relatively weak rule (i.e., "irrational prejudice"). If so, such results may be added to the list of the other negative consequences of ignoring state law.

37. *See, e.g.*, FLA. STAT. ANN. §§ 760.01-760.10 (1985) (Human Rights Act of 1977). *See also* FLA. STAT. ANN. §§ 760.21-760.29 (prohibiting discrimination in the sale or renting of housing to the disabled). During the 1985 session the Virginia Legislature passed "The Virginians with Disabilities Act," which among other things prohibits housing discrimination against people with mental disabilities. VA. CODE ANN. § 51.01-45 (Supp. 1987).

38. TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1985).

39. *See Cleburne*, 473 U.S. at 448.

40. *Id.* at 449.

41. *Id.* at 450.

people with mental disabilities so long as lawyers permit government officials to disregard laws specifically enacted to outlaw prejudice.

Moving from the statutory to the constitutional, the Texas Bill of Rights also places restraints on the conduct of Cleburne's city fathers. For my limited purposes, it will be enough to highlight for illustrative purposes those Texas constitutional provisions applicable to people with mental disabilities. I present this by way of a reminder that even in the constitutional arena the standard of judicial review announced in *Cleburne* need not be understood as the sole or most exacting standard by which to evaluate discriminatory governmental conduct.

Article I, section 1 of the Texas Bill of Rights declares that Texas is a "free and independent State, subject only to the Constitution of the United States . . . ."[42] That same article stresses the constitutional importance of "self-government,"[43] that is the government as ordained by the constitution and laws of Texas as construed by the state judiciary. Article I, section 3 guarantees to the people of the state "equal rights" and likewise condemns any "exclusive separate public emoluments, or privileges, but in consideration of public services."[44] Also, the "due course of the law of the land" provision set out in article I, section 19[45] may have a role to play in a *Cleburne*-type case depending on the extent to which substantive due process has been made a part of the state decisional law. Taken together, it might be argued that such state constitutional provisions impose limitations equal to or perhaps even greater than those announced by a majority of the Court in *Cleburne*. But it will never be known what, if any, is the value of such laws so long as they are overshadowed by the fourteenth amendment. And as things stand in the aftermath of *Cleburne*, the Texas laws to which I have referred continue to remain an unfulfilled source of legal protection for the mentally disabled.

The *Cleburne* case raises important questions about the degree to which it is permissible for local government to treat people with mental disabilities on terms different from those it recognizes

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42. TEX. CONST. art. I, § 1. For a thoughtful commentary on Texas law, *see generally* J. HARRINGTON, THE TEXAS BILL OF RIGHTS (1987).

43. *Id.*

44. *Id.* § 3.

45. *Id.* § 19.

for others. It raises questions about the permissibility of local governmental action rooted in biased fears such as those stated by a Cleburne resident who said: "we've got some women living in this neighborhood who are literally scared to death of this thing."[46] What I have attempted to illustrate in this section is that if invoked, state law can perhaps be counted on to counter the contemptible passions which drove embittered Cleburne residents to pressure their home-town officials to take the contemptible action that they did.

III. Amending the Past: A Proposal

I began by asking a question about "which law?" should be employed in the service of securing fairness for the disabled. Up to this point I have answered that question by reference to existing laws—local, state and federal. Yet if we are to be truly forward bound in our mission we must look beyond the present to the possible, beyond what is to what could be. I share the enthusiasm expressed by Professor Alan Meisel who, in a highly informative article, stated that "state constitutional provisions may be the most promising source of rights for the mentally ill in the decade of the 1980's."[47] Drawing on that enthusiasm, I want to close with a proposal. I propose the creation of a state constitutional commission on the rights of the disabled. This commission could be governmentally or privately funded or both. Its primary purpose would be to make recommendations based on an analysis of existing laws. The commission, which might be composed of lawyers, judges, professors of various disciplines, state government officials and lay advocates for the disabled, would prepare a report followed by recommendations. The report should include a detailed study of the history and implementation of state constitutional provisions pertaining to people with disabilities.

Having completed that phase of its duties, the commission might present several model state constitutional provisions, replete with a commentary on the respective advantages and disadvantages of each model. Thus, for example, there might be a proposed specific rights model patterned after article I, section 19 of the Illi-

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46. *See supra* note 1.

47. Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 Law & Contemp. Probs. 7, 9 (Summer 1982). *See infra* note 62.

nois Constitution.[48] The report would discuss Illinois's experience with that guarantee, while the commentary might analyze the value, if any, of extending constitutional protections to other areas of private action. Or the commission might propose a needs-based or provision model patterned after article VIII, section 8 of the Michigan Constitution.[49]

Having settled, if settle it can, on the most desirable wording for each of the state constitutional models, the commission might also consider some discussion and commentary of proposed legislation designed to implement the respective provisions.[50] At the very least, the essential components of such legislation might be identified.

The object of all of this is to make information available to those concerned about the plight of the disabled. Such information could provide them, and the public at large, with the knowledge necessary to make the best choices about future state constitutional and statutory proposals. Implicit in my proposal is a lingering faith in the humanity of our state systems of democracy. At the expense of sounding old-fashioned, I think it important always to stress the potential role of the legislative and popular processes in protecting rights. It is no easy task making such a statement[51] to a generation of lawyers charmed by the idea of federal judicial review. Still, those trained in the law cannot ignore the state law-making processes. To the extent possible, they must become part of those processes, if only to direct them toward the noble and away from the base.

In the course of things that means placing some degree of faith in people's potential for goodness. I am reminded of a Woody Guthrie quip: "I can safely say that Americans will let you get awful hungry but they never quite let you starve."[52] Something of the same, perhaps even more, might be said of Americans' attitude to-

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48. *See* ILL. CONST. art. I, § 19. *See also supra* text accompanying notes 24-25.

49. *See supra* text accompanying note 22.

50. *See, e.g., supra* note 33; *see also infra* note 62.

51. I do not mean to deny, of course, the ever-present tension between majority rule and minority rights. Still, my hunch is that today's liberals far too often undermine the rights-protecting aspects of our system of representative democracy. There is a tendency to forget the constitutionally uplifting history of that system along with a corresponding tendency to ignore the historical downsides of judicial review. For a powerful commentary on these points, see Max Lerner's *comments in* CONSTITUTIONAL GOVERNMENT IN AMERICA 496-97 (R. Collins ed. 1980). *See* Collins and Skover, *supra* note 10, at note 10, at ___.

52. J. KLEIN, WOODY GUTHRIE 405 (1980). *Cf. infra* note 60.

ward the disabled.[53] This spirit of other-caringness can be spotted in the political experiences in Massachusetts[54] in 1980 and in Illinois[55] and Florida[56] in the 1970's. For it was in those states and in those times of our lives that the legal process took it upon itself to bring about a measure of fairness which had not existed previously. And all of this was accomplished without even so much as the drop of a gavel.

The future *may* bring with it a time when civil rights lawyers shun the opportunity of taking a case to federal court, particularly a newly constituted United States Supreme Court. If so, the move will be towards state courts and maybe even towards state constitutional conventions. Perhaps I am being a bit politically naive when I say that I might prefer to take my chances with the Texas Supreme Court or legislature outlawing discrimination against people with mental disabilities than I would with attempting to convince the United States Supreme Court[57] to apply the fourteenth amendment much beyond the specific facts that gave rise to the *Cleburne* holding.

If the goal of the commission I propose could be actualized, I think that its work might go a long way in advancing the cause of protecting the rights and interests of the disabled. Its proposals could be introduced and considered during state constitutional conventions. Its work could serve as a foundation for a proposed state initiative measure. A conscientious state legislator[58] might draw upon this body of information in order to introduce state legislation, either constitutional or statutory. If acted upon, such laws would amount to a truly significant step in developing yet another tier of law to safeguard the welfare of the disabled.

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53. If one looks hard enough behind the curtain of legalese in *Cleburne*, is this not apparent? Whatever the shortcomings of the decision, it is truly significant that *nine* members of the Court agreed in the judgment finally rendered. That is, they agreed that whatever the law is or should be, it simply cannot be permitted to allow what happened in Cleburne. *Cf. infra* note 61.

54. *See* Crane, Howard, Schmidt & Schwartz, *The Massachusetts Constitutional Amendment Prohibiting Discrimination on the Basis of Handicap: Its Meaning & Implementation*, 16 SUFFOLK U. L. REV. 1 (1982).

55. *See supra* note 48.

56. *See supra* note 37.

57. *See, e.g.*, B. WOODWARD & S. ARMSTRONG, THE BRETHREN 369-83 (1979).

58. *See* Applebome, *Texas, to Settle Suit, Will Increase Spending for Mentally Retarded*, N.Y. Times, Oct. 15, 1987,k at A.22, col.2 (state agreed to spend $80.6 million over next 3 years).

I opened with talk of law and lawyers. Those who assume the responsibility of representing any of America's six million disabled have an obligation to ensure that the full potential of the legal process is actualized. Whatever is done, state laws, constitutional and statutory among others, must not be neglected. Finally, there is an important role to be played by lawyers acting as advocates in the lawmaking process. When we have finished our discussion about law, lawyers and the disabled, there remains the reality of life on the "outside." I mean the reality for the Gary and Maureen Poes[59] of this world who more than anything else want that simple respect that comes with a chance to begin to experience life like others. It is the chance, said a woman whose twenty-three year-old son hoped to live in the Cleburne house, "to live in a normal home in a normal neighborhood . . . ."[60] In the end, law cannot itself open the hearts and minds of people.[61] But it can open the doors to that house at 201 Featherton Street.[62]

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59. *See* Harrington, *A Struggle for Dignity*, Wash. Post Mag., March 3, 1985, at 6. Walt Harrington's article is a moving and informative account of Gary and Maureen Poe, both of whom suffer from cerebral palsy and are mentally disabled. In 1982 they married. Of Gary Poe, Harrington writes: "He faces the world—and all its painful rebuffs—with humor, dignity and determination, forcing straight people to see him not as disabled, but as an individual with strengths and failings." *Id.* at 8. " 'I used to be against him going into the outside world and fighting it out,' Maureen says of Gary. 'Just settle for handouts. Because people take you in like they care and then they just drop you—you're like a yo-yo on a string! I don't feel that way anymore.' " *Id.* at 20. Finally, Gary Poe adds: " 'I want to own my own place someday!' " *Id.* at 25.

60. Dallas Morning News, July 2, 1985, at 1A, col. 6.

61. Despite what the Court said in *Cleburne* about today's more enlightened societal attitudes towards the mentally disabled, the specter of prejudice, typically "irrational," continues. It is horrifying to discover recent reports such as the one that came out of Clinton County, Illinois. An AP story reports: "A sheriff says he hopes to arrest some members of an unruly crowd who shoved and shouted at paramedics treating an easily frightened, mentally handicapped man for heatstroke. The man [David L. Daniels, 25] later died. People in the crowd grabbed paramedics' equipment, and some tried to turn the spectators into an angry mob, said Clinton County Sheriff Jerry Dall. 'I can't visualize people like that, turning into animals the way they did,' Dall said . . . ." Desert News (Salt Lake City, Utah), July 16-17, 1985 4A, col. 1.

62. Long after these remarks were originally delivered, Professor Michael Perlin published a useful and insightful article on the subject of state law and people with mental disabilities. *See* Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled*, 20 Loy. L. A. L. Rev. 1249 (1987).

APPENDIX

STATE CONSTITUTIONAL PROVISIONS & THE HANDICAPPED

STATE	SECTION	BILL OF RTS.	ANTI-DISCRIM.	"HANDI-CAPPED"	"PHYSICAL CONDITION"	PUBLIC ACCOM.	RT. TO VOTE	CIVIL COMMIT.	"DEAF" "DUMB" "BLIND"	"INSANE"	DUTY TO SUPPORT	MISC.
ARKANSAS	art. XIX, §19								X	X	X	X[a]
FLORIDA	art. I, §2	X	X[b]	X	X[c]							
HAWAII	art. IX, §2										X[d]	X[e]
IDAHO	art. X, §1								X	X	X	
ILLINOIS	art. I, §19	X	X	X	X (or mental)	X[f] (& employ.)						
LOUISIANA	art. I, §§3 & 12	X(2)	X(2)		X	X (art. I, §12)						X
MASSACHUSETTS	art. 114		X	X								X[g]
MICHIGAN	art. VIII, §8			X	X (or mental)							X[h]
MISSISSIPPI	art. IV, §86 art. XIV, §262									X	X	X[i]
MONTANA	art. XII, §3							X[j](2)			X	
NEW HAMPSHIRE	pt. I, art. 11	X			X		X					
OHIO	art. VII, §1								X	X	X	
OKLAHOMA	art. XXI, §1								X	X	X	
SOUTH CAROLINA	art. XII, §1											X[k]
TEXAS	art. I, §§15, 15a	X(2)			"mentally ill"			X		"insanity"		
UTAH	art. XIX, §2								X	X	X	
WASHINGTON (state)	art. XIII, §1				"defective youth"				X	X	X	
17	20 provisions	7 provisions	5 provisions	4 provisions	5 plus Tex. & Wash.	2 provisions	1 provision	3 provisions	6	7 plus Tex.	9 provisions	7

NOTES TO APPENDIX

a) "It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf, dumb and blind, and also for the *treatment* of the insane." (emphasis added).
b) FLA. CONST. art. I, § 2 provides in part: "No person shall be deprived of any right because of . . . *physical handicap.*" (emphasis added).
c) *See id.*
d) "The State shall *have the power* to provide for the *treatment* and *rehabilitation* of handicapped persons." (emphasis added).
e) *See id.*
f) "All persons with a physical or mental handicap shall be free from discrimination in the *sale* or *rental* of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of *any* employer." (emphasis added).
g) "No otherwise qualified handicapped individual shall, solely, by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under *any* program or activity within the commonwealth." (emphasis added).
h) "Institutions, programs and services for the *care*, *treatment*, *education* or *rehabilitation* of those inhabitants who are physically, mentally *or otherwise* seriously handicapped shall always be fostered and supported." (emphasis added).
i) MISS. CONST. art. XIV, § 262 provides: "The board of supervisors shall have the power to provide homes or farms as asylums for those persons, who, by reason of age, *infirmity*, or misfortune, may have claims upon the sympathy and aid of society; and the legislature shall enact suitable laws to *prevent abuses* by those having the care of such persons." (emphasis added).
j) "Persons committed to . . . [institutions and facilities as the public good may require] shall retain all rights except those necessarily suspended as a condition of commitment. Suspended rights are restored upon the termination of the state's responsibility."
k) "The *health*, welfare and safety of the lives and property of the people of this State . . . are matters of public concern. The General Assembly shall provide appropriate agencies to function in these areas of public concern and determine the activities, powers and duties of such agencies."
l) Although the Vermont Constitution does not contain a provision specifically protecting people with mental disabilities, the Vermont Supreme Court found that statutory requirements for treatment

may be greater than those of the fourteenth amendment. *See* In re R.A., 146 Vt. 289, 501 A.2d 743 (1985) (the court reversed and remanded district court order for involuntary treatment). *See also* Note, *Protecting Liberty Interests: Developments in Vermont's Mental Health Law as Federal Constitutional Protection Declines*, 9 VT. L. REV. 265 (1984).