Response: The U.S. Constitution: Is it for Sale?
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THE U.S. CONSTITUTION: IS IT FOR SALE?

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What price human and legal rights? This is the underlying issue raised by Burton, Burton, and Hirshoren. In view of the recent flurry of legislation and litigation on behalf of disfranchised groups of citizens, it is not surprising that this type of question is being discussed, although it seems somewhat ironic that basic tenets of our Constitution were being challenged even as the nation celebrated its bicentennial.

Focusing on recent Right to Education (Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 1971) and Right to Treatment litigation (Burnam v. Georgia, 1972; Wyatt v. Hardin, 1974), Burton et al. apparently accept the legal validity of the court decisions. They also readily acknowledge that many mentally retarded children have been denied access to educational services and that “the abuses of institutionalization and the denial of rights — even unto life itself — are well known.” Hence they question neither the factual nor the legal bases of the court decisions. Nor do they debate issues of jurisdiction, nor the powers of federal courts to compel state legislatures to implement their mandates (for a discussion of these issues see, e.g., Antonello, 1973). Instead, their argument with the court decisions is confined to the potential fiscal and public relations consequences.

A QUESTION OF FACTS

The authors reach the dire conclusion that the Wyatt decision, coupled with implementation of the “zero reject” education concept, threaten to “bankrupt” Alabama. Further, they argue that the mentally retarded are likely to be considered a “menace to society” if they are responsible for an increase in individual taxes.

None of these contentions is supported by empirical data. Three years after the Wyatt court order, Alabama is not bankrupt, nor are any of the other states involved in similar litigation. Furthermore, as is apparent by reviewing the expert testimony in the major Right to Treatment cases, lack of funding is by no means the only — and in some instances not even the major — problem with inadequate institutions. As a matter of fact, a recent survey of the Accreditation Council of Facilities for the Mentally Retarded (AC/FMR) revealed that 79% of institutional administrators responding to the survey felt their facilities could meet the AC/FMR standards within the next 2 years (AC/FMR, 1975). Of those claiming that their facilities could not become accreditable within that period, only 32% indicated that a reason was “lack of money” for resources other than
staff, and only 35% indicated "lack of staff." This finding is particularly significant in that most court-imposed standards (including the Wyatt standards) are less stringent than those of the AC/FMR.

With regard to the funding of educational services so as to implement the "zero reject" concept, it is deceptive to assume that establishing services for retarded children will require massive amounts of new funding. Instead, new services could be developed by redistribution of funds already assigned to educational programs. Thus, decreasing the funding of some components of school programs (e.g., competitive sports) could generate funds to serve handicapped children. The essence of the Equal Protection clause of the 14th Amendment applied to the education issue is that all children have the same opportunity to be educated; that is, there must be no discrimination (e.g., Mills v. Board of Education of the District of Columbia, 1972). This issue has, of course, been fully explored with regard to racial discrimination (e.g., Brown v. Board of Education, 1954), and the same principles apply to discrimination based on handicapping conditions.

It is an unsubstantiated assumption that increased expenditure of tax dollars on handicapped individuals will foster a negative public reaction toward such individuals. On the contrary, historical evidence suggests that as services for handicapped and other disfranchised groups (and funding for such services) have expanded, public opinion has become more favorable toward such groups. The gradual shift in public attitudes toward racial minorities illustrates this phenomenon. Evidence from other countries where public services for handicapped citizens are well established likewise suggests more favorable public attitudes toward the handicapped than in our own country. It might be hypothesized on the basis of such evidence that when a class of individuals is treated as if its members are of little worth, they tend to be perceived negatively, whereas when they are treated as equals with other citizens they tend to be perceived as more worthwhile.

A QUESTION OF VALUES

Even though the validity of Burton et al.'s conclusions is questionable on factual grounds, the basic issue raised by these authors has major ethical and legal implications. It involves "serious questions . . . as to the rights of the courts to apply the 14th Amendment in order, perhaps, to bankrupt a state while acting in the interest of a minority group." The important issue raised, then, is whether constitutional rights of citizens should be blatantly violated on the basis of potential financial and/or public opinion considerations. An affirmative response to this question would logically lead to such consequences as the following: (a) Some human beings are less human than others, and constitutional rights do not apply to them. (b) Fiscal considerations take precedence over legal and humanistic considerations. (c) The potential of negative public opinion is grounds for sacrificing the legal and human rights of certain human beings.

These premises are antithetical to the ethical, legal, and religious foundations of our society. Until recent years, gross violations of basic rights of various
disfranchised populations (e.g., certain racial minorities, mentally retarded persons, "mentally ill" persons, etc.) have generally been ignored. But now that these violations have been dramatically articulated by advocacy groups, and now that the courts have clearly interpreted their legal bases, the problem can no longer be ignored, nor will it quietly go away. The time for hypocrisy is past: Either the Constitution is recognized as the law of the land, or the time has come for major constitutional amendments which would negate those principles which have been fundamental to our ethical and legal systems.

CONCRETE QUESTIONS

Burton et al. do raise two concrete questions which they apparently consider partial solutions to the "dilemma" resulting from the court decisions. They raise the important issue of accountability and ask, "Are we going to have 'normalization' and 'zero-reject' by court order, or will this litigation merely provide new, clean, and efficient 'warehouses.'" Although it is hard to imagine how Right to Education litigation could lead to "warehouses," this potential outcome could result from Right to Treatment cases. Review of the major cases will reveal, however, that the standards promulgated by the courts are embodied in the consent decrees (e.g., Horacek, et al. v. Exxon, et al. 1973; New York State Association for Retarded Children v. Carey, 1975) which include important components to provide accountability and protection against "warehousing." These include establishment of monitoring bodies (such as Human Rights Committees or Review Panels), specific strategies for shifting residents into progressively less restrictive environments, systematic de-escalation of the size of institutions, individual program plans for every resident (usually including a specified minimum number of hours of active programming per day), and periodic re-evaluations of every resident. The establishment of independent monitoring bodies, which usually have their own paid staff and are ultimately accountable to the court, promises to be a particularly effective approach to accountability.

The second concrete suggestion advanced by Burton et al. is to "eliminate once and forever the large institutions" and provide "a more efficient community-based program of services." Although there seems to be general agreement that large institutions as currently structured are undesirable, the complete elimination of institutions is generally considered impractical within the foreseeable future, and experts tend to consider relatively small institutions (less than 150 residents) as one of several valid models for residential services (Roos, 1976). Shifting retarded persons from institutions to community-based residential facilities is predicated on a well established continuum of community services designed to meet all the needs of the retarded. But residential facilities alone are not enough. Experiences with massive "dumping" operations in some states have demonstrated the potential dangers of premature attempts at "deinstitutionalization."

The assumption that community-based services are more efficient than services provided by large institutions has not yet been adequately validated. There is a serious question of whether, when all services are included in com-
puting costs, community programs are less expensive than institutional programs. Benefits may well be greater, however, for the majority of retarded persons, and most community programs are probably less restrictive than those of most institutions, hence legally preferable. Obviously cost–benefit studies are urgently needed in this area, and premature supersimplistic solutions based on incomplete data should be avoided.

CONCLUSION

The premise advanced by Burton et al. that the court decisions protecting the legal rights of mentally retarded persons will bankrupt states and generate negative public opinion is unsubstantiated and at variance with available evidence. Regardless of the validity of this premise, the basic issue is whether human and legal rights, as defined by the U.S. Constitution, should be violated whenever they may result in added expenses or negative public reaction. Unless we propose to abandon our most fundamental legal, ethical, and religious concepts, the answer to this question must be a resounding "No!"

References

Accreditation Council of Facilities for the Mentally Retarded (AC/FMR). Questionnaire for superintendents of public residential facilities that have not applied for survey. Chicago: Joint Commission on Accreditation of Hospitals, Evaluation Project, 1975.


