

ON THE BILL OF RIGHTS AND RELATED MATTERS

Burton Blatt  
Dean  
School of Education  
Syracuse University  
Syracuse, New York 13210

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## On the Bill of Rights and Related Matters

### The Original Papers

Why the United States? As you know, on July 4, 1776, the Declaration of Independence set down reasons. Entitled by the laws of nature and God, we are a nation equal to other nations. As individuals, we are created equal and we have certain inalienable rights. No foreign government may set aside this country's equality among the family of nations and each individual's equality within the human family. Independence had to be declared when once loyal colonists refused to tolerate a King of Great Britain who would deny us that most valuable of all freedoms, free will. Free will, which even God does not intrude upon, formed the core of the idea we call America. School children know all of this, but too few adults do.

Signed on September 17, 1787, and ratified by the States a year later, the Constitution described that more perfect union in terms of justice, common welfare, and liberty. The first ten amendments to the Constitution were enacted on December 15, 1791. Eight of these are known as the Bill of Rights. And for good reason. As the Declaration of Independence proclaimed that all men have the right to life, liberty, and the pursuit of happiness, these and later amendments enlarged and deepened such guarantees. It's all there: the form of our government, the freedoms, due process, equal protection, and equal rights.

But if it's all in the Constitution and its amendments, how did the Founding Fathers explain the treatment of certain "different" people? Why, despite constitutional guarantees, did many people have to fight for their

rights? You may not like their answer, but here it is. The idea of equal treatment is based on the premise that people are equally valuable as human beings. Otherwise, such a claim doesn't work. As for a relevant example, in the Virginia Declaration of Rights, which served as the basis of our Bill of Rights, slaves were not considered constituents of society; the principle, "all men are equally free" did not apply to them. The fact of slavery produced the "fact" of inhumanness about that oppressed group. And that fact was "necessary," else how could slavery have been tolerated by a civilized state? How indeed? So the Blacks were specifically excluded from enjoyment of supposedly inalienable rights until, of course, the Emancipation Proclamation and the 13th, 14th, and 15th amendments. And as most everyone knows, until enactment of the 19th amendment, women were denied the franchise and even today are denied a great deal more than could ever be articulated in the laws. Obviously, there are other examples that come to mind.

Tradition takes almost forever to die, especially unjust tradition. Therefore, although Blacks and women have come a long way, it's only within recent years that they have attained the semblance of true equality. Now we must examine another oppressed group, the so-called handicapped, and redress violations of their inalienable rights; the law is a human instrument that requires constant surveillance and tinkering sometimes.

The handicapped have always been a paradox to Americans. And in America. In this Land of Opportunity, they seem unable to seize opportunities. In the Land of the Free, they are enchained. In the Land of Plenty, they are in need. In America the Bountiful, they are treated meanly. For them, the idea of America is little different than the idea of the Totalitarian State. But that which was denied Blacks and women by statutes, has more often been denied the handicapped by the handshakes and winks of ladies and gentlemen. What

was legislated and implemented in the guise of friendship and compassion for the handicapped--sterilization codes, marriage prohibitions, even euthanasia--did not free but further restricted them or denied them their very lives. Especially here, the flight to legalism reflected the weakness rather than the strength of our society and what was not legislated was perpetrated, in the name of treatment or protection but often with negative consequences. What has been done to those human beings does not make for a pleasant story. What we have done does not make our lives pleasant.

Like the Blacks, the severely handicapped especially were not considered to be persons as you and I are persons. Unlike the Blacks, the founding laws of our land were silent about them. Unlike the Blacks, the handicapped were not considered to be valuable merchandise and, thus, were not a political issue. Times have changed. For whatever reasons--compassion, votes, humanism, dollars--the handicapped are big business today, are political factors not to be taken lightly. My thesis is that, had the original Constitution and Bill of Rights included the handicapped, the new Bill of Rights would be unnecessary. Furthermore, this new Bill of Rights is necessary for exactly the same reasons that the 13th, 14th, 15th, and 19th amendments had become necessary. However, because the Constitution was silent on the handicapped, there is nothing now to amend. So Public Law 94-142, the Bill of Rights for Handicapped Children.

I once wrote that, while a person may thrill to the words chiseled on the lintel of the courthouse entrance that a commonwealth must have a government of laws and not of men, it is difficult to live with that belief unshaken. There are times when one has the strong feeling that, while our government may be of laws for men, in the ultimate dimension it must be of men with laws. There have always been

people who worried about governments ruled by laws but not by the people. But that's so much theory and for many years, "all" the handicapped seemed to have had were the laws of the land; theory. There was little in the way of action on their behalf. One purpose to my writing this chapter is to examine the heresy that once there was a lot of theory and little action while today there is much action and little theory.

#### Education of All Handicapped Children

There should be something called "The Law of Inertia." With seeming inevitability, when action on an important issue is indicated, it is either too early or too late to do anything at the moment. Furthermore, the predominant theme of the day is "business as usual." And nowhere are these two motivations--"inertia" and "business as usual"--observed with more regularity than in government. If forming this nation had been contemplated during our time, the Founding Fathers might have waited so long to declare its independence that it never would have happened; people would have surely become bored with the whole thing. Research on an important issue doesn't seem to matter either, such as the research on exercise. If you don't exercise, you will experience 25% increased danger to your vital system. If you do exercise, you will also experience 25% increased danger because of something that has to do with shock to a flabby and indolent body. It seems that today we can't get a school bus to go on an agreed route much less create a country--or an educational mandate. Of course, school busing is an important and complex issue. But that's the point; we can't seem to deal with important and complex issues. Maybe technology itself is part of the fault as well as the solution. A computer mistake gets multiplied, its effects influencing the lives of thousands of people. Maybe the telephone is partially to blame; a lie is transmitted all too quickly. Maybe the tube; the mistake is immediately made known to the world (the living room bore

offers almost instantaneous knowledge of what were once the dark secrets of kings and king makers). Maybe as it now seeks to come to our rescue, technology itself must bear some responsibility for the many leaders today who lead so few and for the many advocates in a culture that is characterized by such weak advocacy. Maybe with the magnification of mistakes today, few in government will take responsibility to act. Of course, there is another explanation of the notion that governments change slowly. There's something to the belief that organizations are most successful when they deal vigorously on behalf of individuals but conservatively on issues related to complex systems. Nevertheless, the point remains that governments respond reluctantly to the demand for major systems change, however powerful a case for change may be.

Hence, "everyone's" surprise with the passage of P.L. 94-142. It catches us unprepared, still stunned and still unbelieving. And who's to blame us? Who's to believe that by 1982 the federal government will invest 3.1 billion dollars a year in this program? I don't. But that's my problem more than it need be your reality. So I'll act as if my cynicism is but another of my aberrations. And I'll not appear as if I'm searching for the likely perversions of the legislation. Yet admit it, isn't it a surprise that our government enacted this law and scheduled its full implementation by fiscal year 1978? Didn't most of us merely go through the motions of trying to give support to the bill that eventually became the law? Weren't there only a zealous few who believed in its inevitability? Of course. And who ever believes zealots?

As Goodman noted (1976), the law is a blockbuster. Not only will the handicapped feel its influence, not only will the schools feel its influence, but the entire nation will feel it. Overwhelmingly passed by the Congress,

it puts the nation's stamp on the claim that the handicapped child is entitled to a first rate education, thus making the claim for all children. But why did the Congress pass what's believed to be the most significant federal legislation relating to the schools since the enactment of Title I of the Elementary and Secondary Act of 1965? And why now?

As reported to the Congress, the situation is alarming. There are reputed to be more than 8,000,000 handicapped children in the United States, but more than half of them do not receive appropriate educational services. A million of these children are excluded or exempted from any public school opportunities, appropriate or otherwise. Because of the unavailability of adequate programs within the public schools, many families are forced to look elsewhere for services, and at their own expense. It seems that teacher training institutions are in better positions than ever before to provide sufficient instruction for regular and special education teachers to serve this group. It seems that now, more than ever before, state and local agencies accept responsibility to provide services to the handicapped, but inadequate resources prevent them from fulfilling such responsibilities. Simply, it was the conclusion of the Congress that it will be in the best interest of our nation if the government sought would engage more directly and vigorously in educational programs on behalf of the handicapped. The law became the exception to the Law of Inertia.

P.L. 94-142 has been written about to the point of saturation, at least for those who have been on the lookout for it (such as the people who will read this book). However, because this will be the first chapter of the book, it may be well to briefly note some of the major elements comprising this Law: (Gettings, 1976).

1. A new entitlement formula goes into effect in fiscal year 1978. Under it, states will be able to receive amounts equal to the number of handicapped children between ages 3 and 21 receiving special education services multiplied by a specified percentage of the average per pupil expenditure in public schools in the United States. Federal aid will increase from 5% in fiscal year 1978 to 10% in fiscal year 1979. In fiscal year 1982 and in succeeding fiscal years, federal aid will have grown to 40%.

2. To discourage states from including non-handicapped children in the program, the law provides limitations on the numbers who may be counted (to a maximum of 12% of total school age population between the ages of 5 and 17) and also limits to no more than 2% the percentage of children who may be counted because of specific learning disabilities.

3. To qualify for participation, the state must establish policies for all handicapped children between the ages of 3 and 18 by 1978, and between the ages of 3 and 21 by 1980. Such policies will not apply to children between the ages of 3 to 5 and 18 to 21 where mandatory services are inconsistent with state law or court order.

4. The states each will receive up to \$300 for each child between the age of 3 and 5 who will receive special education services.

5. The law requires that an individualized educational program must be developed for each handicapped child. First priority must be given to unserved children. The severely handicapped who are not receiving adequate services will be given second priority.

6. To qualify, a state must submit a plan which: guarantees that federal funds will be used in a manner consistent with the law's requirement; includes a program for personnel development; provides free services for children placed by local educational agencies in private schools;



guarantees that federal funds will supplement and increase rather than supplant state and local funds; prescribes a program evaluation system; provides for an advisory panel on unmet needs; and specific procedures for record keeping and accountability. Each participating local educational agency must submit a plan similar to the aforementioned.

7. Due process safeguards have been incorporated into the requirement for state and local participation. Federal and state monitoring procedures are included. All participants must include affirmative measures to employ qualified handicapped individuals (which may raise the issue of "deviant" staff serving "deviant" clients). Lastly, the legislation requires the Commissioner of Education to conduct whatever studies are necessary to adequately report to the Congress on progress achieved as a result of this legislation.

Obviously, there are and will be problems, some quite serious. For example, while on the one hand many parents are pleased with the "mainstreaming" thrust of the legislation, others worry about the effects of general as contrasted with specialized programming. Teachers too have their concerns. Regular teachers express anxiety about their unpreparedness to assume responsibilities for children with problems unfamiliar to them. Special educators worry about the "least restrictive environment" as another way of saying "removal of intensive specialized services". Both groups of teachers keenly feel the need for major efforts to prepare regular teachers and administrators to assume the new responsibilities demanded of them if the legislation is to work. Of course, institutions that prepare teachers have those concerns magnified in light of their direct responsibilities for preparing teachers. It seems that everyone's worried, but it also seems that everyone thinks this was good legislation and it's a fine thing that it happened at last.

Most of us are uncertain about the consequences of "Child Find." We've had too many experiences where such efforts led less to finding children in need of special services than "capturing" children in order to receive bounties (reimbursements). Nevertheless, while we worry about the bounty hunters, we're also looking forward to a day when every child in America goes to school, and in an environment that is there to serve rather than to discriminate.

#### Instructional Technology and This Law

Others are so much more erudite about instructional technology itself, that I feel a little like the child who is taught to speak only when given permission, and hoping for it not to be offered on this occasion. But no such luck, and therefore this section. Each contributor to this book was given a common definition of instructional technology, no doubt necessitated by the editors' conviction that the term is only slightly less metaphorical than the term "handicap" itself, champion of metaphors. Essentially, we were told that instructional technology is a systematic approach to the total learning-teaching interaction, encompassing the best that's known about enhancement of human development and its evaluation. That's a large umbrella. But to be asked about virtually everything connected with what's good about education in relationship to its facilitation of the most sweeping educational reform in years may be asking too much for the reader to digest and certainly too much for this writer to deliver. I think it will be quite enough if I comment upon what I think might be helpful in serving the goals of this legislation. And of course, the good editors of this volume appreciate my limitations and, I'm certain, will be quite satisfied with my modest interpretation of the charge to contributors.

First off, it is good that this law enunciates that the handicapped are entitled to full access to the best that technology has to contribute

to their education. While one might argue that people don't have the inherent right to chickens in their pots or TVs in their living rooms, this law nails down the principle that if the TV set is good for instructing all children it must be made available to instruct disabled children. What may be a costly unattainable gadget on the outside must also be a basic necessity inside the schoolhouse.

Now for the debate, which is really war disguised. I don't believe that technology can replace teaching, nor can it make poor teachers into good teachers. Those who believe that have been oversold on a pretty good thing. The probable truth is that instructional technology neither offers as much assistance as its enthusiasts claim nor is it as trivial as its detractors make out. Look at the definition itself. Exactly because it's supposed to be virtually everything connected with learning and teaching, instructional technology can't be viewed as the answer, except as a summary of many answers. Of course, beware of those who assign unnatural powers to teachers, but also be aware of those who assign such power to technologies. Mystique in any form is usually a mistake. But frankly, if I were to make such a mistake, I think it would be about the former lie and not about the latter. "Teachers" who can't organize and implement a classroom program without a great deal of technological assistance shouldn't be called teachers. The title should be reserved for those who are capable of creating as well as technically managing educational environments. Call the others what they are, technicians or aides. To be sure, instructional technology can offer enormous help to teachers, but not every user need be a teacher and not every teacher need be a user.

The problem with understanding instructional technology is that people don't ask the right questions about the area. It's like the SST. Almost daily, there's an article in the newspapers about the SST. But the questions

asked about the SST have to do with whether it pollutes, whether it's too expensive, or whether it's safe. The real question, the question to ask first, is whether anyone needs to travel between London and New York City in three hours.

Take Camphill Village in Copake, New York. Camphill is a community for people some would call "mentally retarded". But to those who live there, Camphill is a self-sustaining village whose citizens choose to be there. When I visited Camphill I found it easy to believe that the people there choose to remain together, the so-called retarded and the others. You will be hard pressed to locate another community that offers more of the good life. For example, the farmers at Camphill milk by hand. Why? A basic principle of the village is that every member must be given opportunities to make contributions to the welfare of the community. Everyone works. Hence the hand milking. However, from the point where milk has been delivered from cow to pail, technology takes over. Pasteurization, refrigeration, storage, and transportation of the milk is accomplished in the cleanest, safest, speediest, and most efficient manner known to the dairy industry. Camphill Village represents the utilization of technology in a manner which truly serves people rather than makes them useless or unnecessary.

Instructional technology offers us opportunities to help great teachers extend their influence, and to help good teachers become better teachers, and to help all teachers better understand what they are doing. But, left to its own devices, instructional technology is silent on the "why" questions. Instructional technology is silent on objectives; and while having an objective doesn't solve a problem, it gives one a reason to work to solve a problem. And what happens when technologies are implemented without reason shouldn't happen in education. The consequence of such mindlessness is often as if you would save the bottle and pour the Johnny Walker down the drain, buying the real goods to get the by-product on the container. If one isn't careful,

he becomes too fond of the panel of flashing lights that tell him the machine is working, so he buys the jazziest model for the sake of its flashing lights or its bells and whistles. Or, he installs an instructional system that is designed to solve a problem he doesn't have and ignore a problem he does have. For example, oftentimes the problem is not that one hasn't been able to get a computer printout of information, but he hasn't been able to get accurate data to feed the computer. So the mechanisms and reforms of data gathering that would make the computer feasible might also make it unnecessary. And furthermore, until the data gathering system improves, it would be valueless. Certainly, instructional technology offers opportunities that can't be spurned. Nevertheless, we should recognize that so much of instructional technology has yet to be controlled, to be used intelligently and to help solve our problems to serve us and not be our masters. The dog has to wag the tail.

Technology should extend the capabilities of people rather than limit or subvert human talents and accomplishments. Prescribing technology without thoughtfulness and applying it without limitation is like lovemaking without love, a bodily function, not human. Instructional technology is a powerful beast that demands taming. At what better time and in what better context could it appear than today as we embark on a visionary and crucial educational experiment?

#### Theory and Practice

In the same manner that the Emancipation Proclamation was not only about Black people, this law is not only about handicapped people. In one way, The problem in special education is simple. In a way, there is virtually no problem. Yet, special education has proved to be not only a problem but a monumental one. I mean by the above that society has it within its capabilities to include the handicapped not only in its regular school programs but everywhere. If we but thought differently about certain things,

we would behave differently. It is not that we can't, but we choose not to. And indeed, because we choose not to, we have the seemingly insurmountable problem.

There's another point of view from a different mountain, the idea of those who would enjoin us to simply change ourselves and stop the foolishness of creating legislation and bigger opportunities for people in the business of special education and its derivative occupations. That point of view will not argue against the wisdom that society can change and, thus, The problem could be solved by us merely changing ourselves. However, they do indeed argue that, because there must be laws about something and somebody, there should be such a law as we have before us. They argue that while Public Law 94-142 may not have been necessary had we not made it necessary, the way things are today it's a Godsend, or at least the best we know how to do. Therefore, irrespective of agreement that we would all be better off if we stopped the foolishness around special education, there is also agreement that this law has been long overdue.

We should now turn to the claim that The problem is quite simple. All serious human problems are simple. Simple to avoid and simple to end. For example, ending pollution of the environment is simple to achieve. That kind of problem is not like such complex affairs as finding a cure for cancer or eradicating heart disease. In the former, it seems as if we don't want the problem to go away. In the latter, we can't make the problem go away. Obviously, the situation is different for the individual. The person deals better with his own than with society's problems, be they simple or complex. That's a truism that only the ignorant would argue about.

What needed to be done was done. For the first time since I entered this field years ago, I witnessed the passage of legislation that contained

the best thinking in our field, imperfect as it is, and a plan for the most vigorous action. Earlier, I suggested that what is wrong with so much of society, for example the university, is that it's all theory and no action. Others have suggested that what's wrong with society, for example the government, is that it's all action and no theory. Here we have a law based on the best theory available, funded at a higher level than any previous legislation, and which promises to deliver the goods fairly quickly. That's impressive.

#### The Right Bill for the Right Time

I once said something like, "People should be judged by what's best about them, but governments must be judged by what's worst." If there were such an understanding, the capacity of an individual would be determined less by the averaging of his scores and more by the highest score he received. However, with governments, which in principle should be distrusted, there would be an element of disbelief, of knowing that someone somewhere among the politicians or the bureaucracy is trying to pull the wool over our eyes. Therefore, where governments are concerned, the rule should be that if the behavior is rotten, it's to be expected and incurable. And if the behavior is exemplary, it's an accident or a mirage.

Applying the above law to judgment of our nation's efforts on behalf of so-called handicapped children, we score poorly. The children aren't getting their due. Too many are in inadequate or no classrooms. Too many are growing up without the proper tools they will need to serve society and themselves as well as they might have otherwise.

The early bird catches the worm. But had the worm been late, he wouldn't have been caught. Being early can be good. Being late can be good too. Forget those arguments and recriminations. Today and tomorrow

are all that matter now. So what better time than now is there to correct the errors of those who misinterpreted the original Bill of Rights, of those who had unfortunately concluded that the handicapped were to be held exempt from many of the rights and opportunities enjoyed by other citizens? What better time than now is there to proclaim to the world, but most of all to proclaim to ourselves, that each human being counts for something, that merely to be a human being entitles one to a privileged place within society? Probably today more than ever before, we must live as if a decision to deny a person any right enjoyed by others is to be made only after proof is given that the person is a serious threat to the public's good, and only under the most carefully supervised equal protection and due process guarantees, and only after all other means have been exhausted. P.L. 94-142 may become the instrument to correct the errors of the past.

Sure, there will be problems attendant to this legislation. Certainly, there is a definitional issue and, consequently, an epidemiological issue. Are there 8,000,000 handicapped children in the United States? Some say there are more and others say there are less. That's what happens when subjects determined by metaphors are counted. What will be the effects of categorical labeling? Of zero reject? Such questions are not unrelated to ones concerning voting rights for people with severe limitations. Some people do not approve of the extension of the right to vote to severely mentally retarded people, and such sentiment is not merely the voice of prejudiced people venting their meanness. Similarly, there may be problems when the handicapped themselves participate in the development of their educational programs. There may be problems if the demand that evaluation instruments not be racially or culturally discriminating is taken seriously. Will they be intellectually discriminating? Will



new norms to be developed from the guidelines be useful in separating children who learn well from those who can't or don't learn well? Undoubtedly, there will be problems arising from the intensification of efforts to locate and identify youngsters with handicaps. If such efforts are weak, we will not do well in locating unserved children. On the other hand, if efforts are strenuous, certain children may be unnecessarily labeled or unnecessarily separated from the mainstream.

What I'm trying to indicate is that there must be a prudent balance between discovery and creation, between what needs to be changed and what should be preserved. And because so little of our society is prudent or balanced today, we should expect problems. We should expect that public involvement in the adoption of policies is a real plus, but such involvement raises the specter of confusion and indecision. Does democracy work in the clinic? We'll find out. And employment of the handicapped themselves in order to implement the legislation may offer new opportunities, but also problems. Is it better to make a special effort to employ the handicapped or a special effort to employ the best workers? You know the arguments, both ways. And, of course, some current supporters--some of those who led the way to passage of this legislation--may be the same people who will eventually resist implementation. When implementation begins to rock one's own domain, or future, the friend sometimes becomes the foe.

Surely, there will be problems. But there will also be opportunities never before possible. There can be a day when historians and your children's children will look back on this period and say, "That was the time when our ancestors finally learned that, while all humanity is a wonderful and awesome creation, each individual is fragile and dependent. While our people are strong and free, each person needs the protection of the total

society. That was the time when our forebearers learned that each human being is an irreplaceable link to the past and to the future. Each life is priceless."

That's the message in Public Law 94-142. I pray we take it as seriously as if our very souls depend on it.

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