The President's Panel on Mental Retardation

REPORT OF THE TASK FORCE ON LAW

Judge David L. Bazelon
Chairman

Dr. Elizabeth M. Boggs
Vice-Chairman

It is a frequent Saying in our Law-Books, De Minimis non curat Lex; which is true if it be understood of Things and minute Circumstances, but if we apply it to Persons, it is not so; for it is most certain, that our Law hath a very great and tender consideration for Persons naturally Disabled and especially for Minors. The Law protects their Persons, preserves their rights and Estates, Excuseth their Laches, and assists them in their Pleadings.

. . . . . They are under the Special Aid and Protection of his Equity, who is no less than Keeper of the King's Conscience. . . .

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PRESIDENT'S PANEL ON MENTAL RETARDATION

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FOREWORD

The President's Panel on Mental Retardation was appointed by President Kennedy on October 17, 1961, with the mandate to prepare a "National Plan to Combat Mental Retardation." On October 16, 1962, the Panel presented in its report to the President* recommendations concerning research and manpower, treatment and care, education and preparation for employment, legal protection and development of federal, state and local programs.

The Task Force which prepared the present Report was one of six into which the members of the President's Panel on Mental Retardation were sub-divided.** Section VII of the Report of the President's Panel summarized the recommendations to the Panel by the Task Force on Law. In order to develop more fully the bases of these recommendations, without the space restrictions necessarily attending the compilation of the over-all Panel Report, the Panel voted to publish the complete Report of the Task Force on Law as a separate Panel document.

This Report on the Mentally Retarded and the Law is the work of many hands, in addition to the Panel members comprising the Task Force. Initial reports on the various phases of our inquiry were prepared as follows. Socio-Economic and Philosophical Considerations: Professor John R. Seeley, York University, Toronto; Psychological and Medical Considerations: Dr. Rick Heber, (member of the Panel staff), University of Wisconsin; Protective Services: Dr. Elizabeth M. Boggs, Research Chairman and Past President, National Association for Retarded Children; Civil Rights: Professor Murray L. Schwartz, University of California School of Law; Residential Care and Treatment: Dr. Dale C. Cameron, Superintendent, Saint Elizabeths Hospital, and Professor Hugh A. Ross, Western Reserve

* A National Plan to Combat Mental Retardation: Report of the President's Panel on Mental Retardation, U. S. Government Printing Office, Washington, D.C. 1963.

** The areas assigned to the Task Force originally included both law and public awareness; the latter has been made the subject of a separate report to the Panel by Mr. W. Wallace Tudor.

University Law School; Criminal Law: Professor Henry Weihofen, University of New Mexico Law School.

Professor Seeley then undertook the major task of synthesizing our ideas into draft form. The draft was revised and the final version of this Report prepared with the assistance of Mrs. Patricia W. Weinberg, aided by a grant from the Foundations' Fund for Research in Psychiatry; Mr. Bernard D. Fischman; Mr. David T. Bazelon; and Mr. Richard Schickel. Printing of this Report was made possible through a grant from the Gralnick Foundation.

The Task Force is particularly grateful to Mr. Leonard Mayo, Chairman of the Panel, for his valuable advice and support throughout our work.

To all of the foregoing, and to others too numerous to mention, the Task Force is indebted. Responsibility for the final content of the Report, however, must rest solely upon the members of the Task Force.

Although the law is preeminently the area of formal social structure, the need of the law to advance in concert with other disciplines is, perhaps paradoxically, even more urgent. Most intellectual disciplines properly proceed at their own pace; but the law, being the final repository of social decisions, must especially *respond* to the offerings of all others, at whatever pace proffered. It is our responsibility to keep in step. In a democracy, the law has no choice between responsiveness and repression. It is committed to the former; and its problem is always and only the devising of means.

Our aim here is to chart the course of responsiveness for the law as it is presented with the new awareness of mental retardation. We have not attempted to detail means, which would have meant devising the specifics of legislation (a presumptuous task, and certainly beyond our scope), but only to indicate the general direction of receptive growth according to the sign posts furnished by the new currents of knowledge, purpose and possibility in mental retardation. And there are some: we have happily taken it as our purpose to make a place for hope in the law governing mental retardation. For example, the principles of law, as we see them, should be eagerly adjusted to account for the relatively new understanding (which the Panel Report elaborates) of the great variety of the causes and configurations of mental retardation. As the disabilities of the mentally retarded are

varied, so must the law vary its dispositional possibilities—and opportunities. We are now coming to understand that some retarded persons can function satisfactorily in particular areas, but not in others; that new training techniques offer new promise of raising the level of functioning of many of the retarded; and that recent advances concerning prevention—in pre-natal and post-natal care, nutrition, opportunities for learning—should be implemented, wherever feasible, by requirements of law. Adjustment to these portents will, we trust, be an opportunity embraced as well as a necessity met, by the law.

David L. Bazelon, Chairman

Elizabeth M. Boggs, Vice-Chairman

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I. Introduction

De Minimis non curat Lex

". . . [A] very great and tender consideration for persons naturally disabled . ..." In the United States, as in most civilized nations, this is one of our proudest boasts as well as one of our most cherished principles. The law has sometimes merely reflected this belief but frequently, in developing an increased awareness of exactly where disability lies, it has acted as a virtual tutor to the rest of society.

Particularly in recent times, the law has expressed its concern for the weak, "the naturally disabled," in a rapidly expanding body of statute and opinion. As we have come to learn more about children, for example, the possibilities for dealing justly and humanely with them have multiplied, and the law, taking account of new knowledge and new possibilities, has grown in complexity and aptness. In dealing with the class of "naturally disabled" individuals that includes the mentally retarded and diseased, however, the law has been forced to grapple with a very difficult problem.

Usually the law takes for granted a minimum "normal" set of personal characteristics in the population. But it must have means for recognizing when and where that assumption is invalid. It must also say what is to be done in a case where the departure from the norm is very great. It is in these areas that mental disability presents its greatest difficulty for the law.

The problem is threefold. The law must be able to recognize disabilities and to differentiate between them. It must take account of the provision which society already makes for its disabled members. It must be prepared to adapt to the problems and to take advantage of alternatives in disposition. Changes in scientific and professional understanding assist the law with the first problem. Changes in social organization and professional-care possibilities provide the law with possible solutions to the second problem. The third problem is the law's alone to solve. It is part of its never-ending search for coherent legal principles with which to face continuously changing social conditions.

Mental Disability and the Law

Among the disabilities of which the law has traditionally and properly taken account are the "mental disabilities." Such disabilities,

of course, may affect any mental function, e.g., perception, reasoning, feeling, imagination. And any such disability is a potential problem for the individual, for society and for the law.

A traditional, broad division of mental disabilities has been between "mental diseases" and "mental defects." While the line between the two is not always as clear cut as it was once thought to be, the former category, without attempting a full definition, includes psychoses and neuroses; the latter includes mental retardation, which is the subject of this Report. We leave to the next chapter the definition of "mental retardation." Suffice it here to note that "mental retardation" is not synonymous with "mental disease." The two are separate and distinct mental disabilities, although it is, of course, quite possible to find mentally ill persons who show mental retardation and vice versa.* In many instances where persons present symptoms of both mental disease and retardation, professional personnel concerned with treatment and management find it useful to distinguish between the two conditions, and to designate one as primary. While this distinction serves a useful purpose, decisions affecting a person's condition must always be based upon consideration of his total behavior and the causes of that behavior, not upon simple classifications.

Except for parenthetic and comparative purposes, the subject of mental disease is not considered in the subsequent sections of this Report. Here in the introductory section, however, we shall devote a few pages to consideration of some developments in the legal, medical and social approach to mental disease over the past several decades. Mental retardation has generally received less attention than mental disease—and knowledge concerning it is somewhat laggard. Therefore, a glance at progress in the field of mental disease may indirectly help us to understand a little more about mental retardation—and what new trends we can expect.

The Law and Mental Disease

Until rather recently, lawyers, doctors and laymen had to rely on very crude information about mental disease. Even given reasonable assurance against simulation or malingering, the law required extreme

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* Sometimes there will be acute problems of differential diagnosis. In what is called "Infantile Autism," for instance, opinions vary in general and from case to case as to whether mental retardation, which is present in most such cases, is secondary to severe emotional disturbance or whether both the retardation and autistic behavior are a function of brain pathology.

symptoms before an inquiry into mental condition would be thought necessary. Persons who did not present such symptoms were generally assumed not to require special care and treatment.

Around 1900 society began to assemble a vast new body of knowledge about the workings of the mind, particularly its aberrations. The first half of this century saw attempts by the general public to integrate and adapt this new knowledge to its use. New discoveries were constantly being made, tested and revised. Society in general, and medicine and the law in particular, were required to cope not only with large amounts of new and highly relevant knowledge about human behavior, but to cope with sudden revisions of this knowledge as they followed one another with incredible speed.

As this new, sometimes confused, understanding extended itself, the old understanding and a large body of the procedures resting upon it, were swept away. The very nature of mental illness was seen quite differently, as new attitudes towards it and new methods for coping with it came into being. As this knowledge became more refined, the kinds of recognized illness multiplied. Differential diagnosis, professional and lay, which had rested largely upon obvious differences in appearances had to yield to more subtle distinctions, and "expert opinion" came to be essential even to establish primary facts.

As true complexity replaced false simplicity, as new knowledge was applied, whether for medical or legal purposes, finer and finer distinctions had to be made. Sharp tools, conceptual and practical, thus replaced dull ones, and while only the expert need master the use of these, the layman must understand and appreciate their bearing on his own concerns. "Projective tests" and "electroencephalograms" for instance, are everyday tools of the psychologist and physician respectively. While they cannot properly be used by laymen, their relevance, both for everyday and for formal judgment, must be widely understood.

Almost no understanding of men by men was left unaffected by the psychological revolution. Among the first assumptions to yield was the notion that the average man could easily distinguish mental normality from mental abnormality. Any alteration in so basic an assumption necessarily requires radical alteration in the procedures that rest upon the assumption; and even in the nature of the questions that one may logically ask in seeking to define normality and abnormality. But as expert knowledge increases, so does the range and variety of treatments which may be adapted to various situations and purposes. As they prove their effectiveness, they become more freely and more generally available. This enhances public trust in them, and

it, in turn, encourages further allocation of resources and enthusiasm, which is capable of regenerating the entire cycle.

This process complicates the problems of other professions which must attempt to adapt to their own uses a body of knowledge developed elsewhere. But, naturally, this new knowledge reduces or solves many problems. For instance, the number of patients returned to the community from mental hospitals is now so great that an attitude of fear and despair towards hospitalization is less of a problem than it once was. This, in turn, presents the judge confronted with the mentally ill with better dispositional alternatives than he once had.

The number of institutions available to the practicing jurist may add to the possibilities of decision, but it also increases the likelihood that a good decision will have the desired effect. Thus, easy admittance to and discharge from hospitals, the existence of "open" hospitals, "day" and "night" institutions, and new forms of easy and voluntary admission, plus such innovations as "half-way houses," or "sheltered workshops," help to change the meaning of and the risks inherent in processes like "commitment" or "release," for lawyer and layman alike.

We intend to carry over from this section into our discussion of mental retardation only one basic point: that similar developments in the study of both mental disease and retardation present to the law a social need for review of long-standing legal conventions. New knowledge in both fields presents radically changed circumstances for the law to consider.

II. Mental Retardation: The Medical Context

"Mental retardation" is a term used to describe children and adults who, as a result of inadequately developed intelligence, are significantly impaired in their ability to learn or to adapt to the demands of society. Failure to achieve normal intellectual development is sometimes caused by brain damage resulting from diseases or conditions occurring before or at the time of birth, or in infancy or childhood. In other instances, factors determined by heredity adversely affect brain development. Mental retardation may also be created or accentuated by home or social conditions which lack stimulation or opportunities for learning, essential to the development of normal intelligence. The definition of mental retardation officially approved by the American Association on Mental Deficiency is: "subaverage general intellectual functioning which originates during the develop-

mental period and is associated with impairment in adaptive behavior."* There has been considerable disagreement in this country as to the most useful definition of mental retardation. This definition, however, was adopted by the major professional organization in the field. It is already used in several states and in a number of foreign countries.

The traditional concept of mental retardation in the United States has recently been extensively revised. Research has identified many previously unknown causes of retardation, demonstrated that behavioral defects found in retarded persons are multiple rather than single, and provided incontrovertible proof that real changes in the level of functioning of persons regarded as mentally retarded sometimes occur. These findings challenge the historic view of mental retardation as a constitutionally-based, unitary, incurable defect of intelligence, and have resulted in a reconsideration of the traditional classifications of retardation—moronity, imbecility, and idiocy.

There are no comprehensive surveys of the number of mentally retarded persons in the population of the United States. On the basis of studies which have been conducted, principally with children in public schools, it may be estimated that about 3% of the population of the United States will be identified as mentally retarded at some time during their lives.

The critical factor in the above definition of mental retardation is the inclusion of the dual criteria of reduced intellectual functioning *and* impairment in ability to adapt to the requirements of social living. In the past, emphasis was given either to social maladaptation or to reduced intelligence as the sole criterion of mental retardation. The use of social incompetency as the single criterion of mental retardation is indefensible: for all behavioral abnormalities represent impairments in adaptation, and regarding this as the sole defining characteristic of mental retardation leaves no basis for distinguishing the latter condition from other disorders of human behavior, such as mental illness. But neither can subaverage measured intelligence, as reflected in I. Q. scores, serve as the sole criterion of mental retardation. Tests of intelligence are only *predictors* of certain aspects of behavior and, as such, are subject to a degree of error. Regardless of what intelligence test score was used as a criterion of mental retardation, individuals would be found with scores below the cut-off point whose social adaptation was adequate while individuals with scores above the cut-off point might well show inadequate social

* Heber, Rick, *A Manual on Terminology and Classification in Mental Retardation,* Monograph Supplement, American Journal of Mental Deficiency, 1959.

adaptation. Approximately 16% of the population obtain scores on general tests of intelligence which fall more than one standard deviation below the average.* Fortunately, the majority of these persons demonstrate adequate social adaptation and are not brought to attention as mentally retarded.

There has been an over-emphasis on intelligence test scores as the sole criterion of mental retardation. The laws of many states designate specific I. Q. scores in the determination of legal eligibility for commitment to institutions or placement in special classes in the public schools. The definition of mental retardation cited above places the intellectual and social criteria in proper perspective: it is the impairment in social adaptation which calls attention to the individual and determines the need for social or legal action on his behalf. The criterion of below-average intellectual functioning merely distinguishes mental retardation from other disorders resulting in human inefficiency. Obviously subaverage intellectual functioning may be a contributing factor in adaptive impairment—and it may be the principal one.

As used in the above definition, "subaverage general intellectual functioning" refers to performance on intelligence tests which falls more than one standard deviation below the average of the performance of the population on which the test was standardized. The standard deviation is a mathematical expression of the extent a score deviates from the average. Use of the standard deviation unit in establishing a cut-off point circumvents the long-standing problem of using an I. Q. score as a cut-off point; such scores frequently do not have statistical comparability from one test to another or even from one age level to another.

"Impairment in adaptive behavior" means that, to some degree, the individual is unable to meet and abide by the natural, social, legal, and moral demands and expectations of his environment. It should be noted that these vary from one culture to another, change with technological advances, and in particular differ from one age level to another. Maturation, learning and social adjustment are three aspects of adaptive behavior which assume differential importance as conditions of mental retardation for different age groups. Maturation, which refers to the development in infancy and early childhood of such skills as sitting, crawling, standing, walking and talking, is particularly important in the identification of mental retardation during

* For example, on one of the most widely-used intelligence scales, the Wechsler-Bellevue, approximately 16% of the population may be expected to achieve a score of 84 or less.

the pre-school years. Impairments in learning ability are of course most obvious in school and, if mild in degree, may not even be noticed until the child enters school. In fact, it is during the school years that the great majority of the mentally retarded are first diagnosed and evaluated. At the adult level, social adjustment is the most important qualifying condition of mental retardation. At this level, the primary concern is with how well the person conforms to the standards of personal and social responsibility set by the community.

This concept of mental retardation places emphasis on the present level of functioning of the individual. A person may be mentally retarded at one age level and not at another; he may change status as a result of changes in the level of his intellectual functioning; or he may move from retarded to non-retarded as a result of a training program which has increased his level of adaptive behavior to a point where it is no longer of concern to society.

Mental retardation, as a symptom descriptive of the actual intellectual functioning and social adaptation of an individual, may be produced by any one of a large number of factors which impair behavioral efficiency. Therefore, the course and outcome of each case of retardation is likely to be different and, clinically, it is difficult to generalize about mental retardation.

Causes of Mental Retardation

Mental retardation is associated with many diseases and conditions which affect the nervous system: infections or intoxications occurring in the mother during pregnancy; infections in the infant which affect the central nervous system; trauma or injuries to the brain at the time of birth or shortly after; disorders of metabolism, growth or nutrition, some of which are determined by genetic factors; abnormal growths occurring within the central nervous system. In addition, the deprivation of adequate opportunities for learning in infancy and early childhood, and severe emotional disturbances and psychotic disorders which may interfere with learning, are factors which are known to create or accentuate mental retardation.

The prognosis for a mentally retarded person and the indicated direction for treatment, management, education and training are as dependent upon the underlying mechanisms responsible for the mental retardation as upon the present level of functioning of the retarded person. It is worth emphasizing, too, that although the greatest number of specific causes of retardation are associated with the pathology

of the central nervous system, the greatest number of mentally retarded are persons in whom no such pathology has been identified but who suffer from poor socio-economic and socio-cultural conditions. While science is not yet sure of the major determinants of mental retardation in this group, the relationship of a large proportion of mental retardation to socio-cultural deprivation must be recognized.

Degree of Retardation

The term "impairment in adaptive behavior" covers the entire range of impairment in human adaptation from minimal to profound. The distinction between normality and the mildest degree of retardation is, of course, arbitrary. Mildly retarded persons are more comparable to those who are normal than they are to the most profoundly retarded. Therefore, for many purposes of law, education and medicine, fine distinctions must be drawn within the range of the mentally retarded. For practical purposes, four degrees of mental retardation are differentiated: mild, moderate, severe and profound.

These levels of impairment in adaptive behavior do not always coincide with the level of a person's measured intelligence. A person with a given I. Q. does not necessarily exhibit a given level of impairment in adaptive behavior. Obviously, factors other than intelligence affect the level of a person's adaptation to his environment. Nevertheless, intelligence is so highly valued in the American culture that it is a significant part of adaptive behavior and there is a substantial—though not perfect—relationship between measured intelligence and social adaptation. For example, on one of our most common and most adequately standardized individual measures of general intelligence, persons with I. Q.'s from 84-70 will generally fall into the category of mild impairment, if any, in adaptive behavior. A substantial proportion of persons with measured intelligence within this range do not show any significant adaptive impairment and should not be considered mentally retarded. A few persons with this level of measured intelligence may show a greater degree of impairment in adaptation, but they will also generally show some deficiencies of a personal-social nature. The majority of persons with I. Q.'s from 69-55 will also show a mild degree of impairment in adaptation, though again there may be some within this category who exhibit more severe impairment.

Mental Retardation and Prognosis

On the basis of present knowledge we can predict that the great proportion of persons identified as mentally retarded will remain so throughout life. But it must be recognized that because of the arbitrary nature of the line between normality and significant impairment in behavior, some persons will move from retarded to non-retarded during the course of their life and others will move from non-retarded to retarded at some time during the developmental period. These changes in classification may take place because of a change in the level of functioning; as a result of differences in the meaning of the term mental retardation at the pre-school, school, and adult life periods; or as a result of education, training and rehabilitation which have affected the behavioral effectiveness of the person.

Though mental retardation is not, in general, reversible, programs of education, training and rehabilitation can result in improvement in the general level of functioning. Indeed, research findings indicate that most people who are mildly mentally retarded can, with appropriate education and training, become in adult life self-supporting and contributing members of society who get married, raise normal families, and abide by the law. On the other hand, it is possible that retarded children can become more retarded through failure to detect their condition early and to provide effective measures of treatment and training.

Mental Retardation and Other Disorders of Behavior

There is usually no essential relationship between mental retardation and other disorders of human behavior such as mental illness or delinquency. There are several factors, however, which can contribute to the incidence of behavioral disorders among the mentally retarded. The intellectually retarded person is predisposed to a life of failure in our highly competitive culture and, in compensation, may develop failure-avoidant patterns of behavior which could be categorized as emotionally disturbed. Sometimes, the retarded child may develop compensatory aggressive or withdrawal patterns as a result of being rejected by his peers or even members of his own family. Occasionally, the same factor which produced the damage to the nervous system causing retardation may also produce convulsive seizures, cerebral palsy, mental illness or other behavior disorders. The vast

majority of the mentally retarded are persons reared in slums or other depressed environments; they are, therefore, exposed to the same factors which increase crime and delinquency, alcoholism, drug addiction, mental illness, prostitution, etc., in these environments.

III. Law and the Retarded: The Social Context

Growing understanding of a broad disability such as retardation usually sets off three altogether different processes, each of which affects the others, and has a bearing on practical decisions.

First, general understandings, the presumptions on which people operate every day, are altered so that human behavior comes to be seen in a substantially different light. This has occurred in relation to what we have learned both about mental disease and mental retardation. Second, important institutions such as school, church and home alter their views, doctrines and practices in the light of new knowledge. Lastly, new, specialized social institutions and services designed to deal with the problem are brought into being.

Ours is a society in flux. It accommodates the mentally retarded in changing ways, both in its ordinary social institutions and by special provisions for the retarded. These provisions and accommodations—present and projected—are the subject of much of the full Report of the President's Panel, to which this Task Force study is an adjunct. The law must consider not only new knowledge concerning the retarded but also the new contexts in which such knowledge is found.

What especially needs discussion is the bearing on our problem of changes in our ordinary social institutions. These institutions are of two kinds: those addressed to other social problems such as delinquency, dependency, chronic disability, etc., and those not concerned with "problems" as such, but with wider aspects of living, such as the church, the school and the law generally.

Thus, what the public school system does, or leaves undone, influences what it means to be or to have a mentally retarded child. It also affects the burden laid on more specialized institutions.

A major principle of the American school system is free education for *all* children. Many state constitutions guarantee each child the right to basic educational opportunities at public expense. These mandates do not specifically exclude children because of physical or mental handicapping conditions. Obviously, retarded children require special educational services and programs if they are to receive oppor-

tunities equal in value, if not in kind, to those received by normal children. The responsibility for applying this principle has been placed upon the local school systems with stimulation and support being provided from the state and federal governments.

In varying degrees, and with more or less success, local school boards have tackled the problem of providing services for educable,

mildly retarded children. But on the whole, they have fallen short of what we conceive to be their obligation to moderately and severely retarded children. To the extent that the moderately retarded can learn academic skills, they may be provided for. But they, and the severely retarded, can profit by *training* both in personal habits and in simple unskilled occupations. The moderately retarded, for instance, may sometimes be trained to undertake semi-skilled work. It is in providing for these trainable retarded children that our public school systems have generally failed.

The emergence of governmental and non-governmental service programs, not specifically addressed to retardation, profoundly affects the context of the retardation problem. The various social security and disability insurance programs have already had a notable effect. Even things as seemingly remote as the formation or extension of a Boy Scout troop, a family service association, a factory inspections service, or a state program to provide visual aids in schools, are all relevant.

The richer these general services, and the more easily available they are, the less the need for special services for the retarded. (It should be noted, however, that even where general services exist, they may in practice be "unavailable" to the lower classes simply because their procedures are not adapted to lower-class life, and their vocabulary and way of looking at things may be incomprehensible to lower-class people.) The general services remove from the special services for the retarded only that part of their burden which the special services were not organized to bear, but are required to bear if others will not. The optimum condition obtains only when each fulfills its proper function, e.g., when mental hospitals have to accept non-psychotic retarded persons because waiting lists are too long at residential care facilities, both the mentally ill and the retarded are hurt, and the hospital is crippled because it is trying to perform a function for which it was not intended.

What is true for general services and institutions is also true for general law. For instance, to the extent that the law protecting minors generally is adequate, the burden of providing special legislation for the retarded minor is reduced. Such general protective legislation is

like the salt in a body of water; its presence is helpful to all swimmers, but especially so for the weaker and less skilled. Similarly, general improvements in social conditions, such as higher levels of affluence, education, wisdom or morality, are likely to ameliorate the lot of the mentally retarded. The higher the level of education, the more likely it is that disabilities will be seen and treated for what they are.

Next in importance to these changes in general conditions is the enormous multiplication of programs, services and personnel designed to aid individuals and groups in society. An index of the new professions and services is sizable—visiting nurses, psychiatric social workers, remedial reading specialists, group therapy leaders, participant observers in youth programs, guidance specialists, marriage counselors, to name a few. They not only deal with the problems of retardation, they also represent resources for dealing with the problems which the retarded provoke in their immediate environment, e.g., the family distress that may spring from caring for the retarded. To some degree their presence also helps ameliorate the social causes of retardation.

Many studies have shown that the vast bulk of social work, money and effort goes into so-called "multi-problem" families. Such families frequently exhibit crime, delinquency, mental illness, physical defects, "excessive drinking," broken family relations, physical sickness, sometimes in different members of the family, but quite commonly in the same members. This is at least partially because, both for the individual and the family, one misfortune generally reduces capacity to fend off others. The same aggregation of defects and disabilities frequently affects the retarded. Here as elsewhere each additional misfortune exacerbates the effect of the previous one, and each additional misfortune helps pave the way for the next. Thus to the extent that the community successfully attacks the other social problems, the burden of mental retardation will become easier to bear.

In dealing with these problems, there is, lately, a tendency to increase the individual's mobility between institutions and services. Such mobility is as vital in this context as the physician's freedom to change his patient's prescription as the patient's condition changes. Effective coordination between services permits the disabled person to move between various levels of support or security as his needs vary.

There is also a recognition of the need to spread as far down the line as possible responsibility and initiative in handling the person. This means moving away from the formal towards the informal, from the organized towards the spontaneous, from higher levels of government towards the local, from the mandatory towards the encouraged,

from "strangers" towards "kin," from the specialist towards the non-specialist—in general, as far as possible towards the resources of the person himself, his family, friends, neighbors, etc., strengthened and buttressed, as need be, by more formalized resources.

Laws and their administration influence the extent to which the mentally retarded are permitted to benefit from these trends and advances.

IV. Justice for the Retarded

We are a nation pledged to "liberty and justice for all." But we do not conceive "liberty" as license; unlimited liberties for all are untenable in theory and in practice. Justice is concerned, in part, with achieving maximum liberties, within the limitations of physical and biological circumstances and the needs of an orderly society. We regard the law as an instrument of justice reflecting, although imperfectly, the principles of fair play acceptable to most members of society. Yet laws differ among the fifty states. These differences sometimes reflect inadequacies in formulation, or delay in reformulation of laws to express current understanding and mores. They also reflect differences in social and political values.

It is deceptively easy to measure liberty by the relative lack of physical confinement. This is but one, and not always the most important, aspect of liberty. More fundamentally, liberty is freedom of choice within the general system of laws and social values. The individual's liberty is impaired when he is not permitted the same range of choices as his peers. Many people in our society, the retarded included, suffer from unauthorized or unsanctioned curtailment of their liberties. It must be our constant concern to correct and offset these, especially since the people directly concerned are often unable to struggle effectively on their own behalf.

In a system which values order and consistency, the interests of individuals are intertwined, and all of us are threatened when the rights of any of us are abridged. To the extent that the citizen sees himself or his child or his friend potentially in a similar situation, to that extent is his interest in justice intensified. Conversely the citizen is least likely to protect the rights of another with whom he has trouble identifying. Therein lies some hazard to the retarded.

To say that the interests of different individuals and the assurance of their respective liberties are intertwined is not to deny that they may sometimes be competitive and even antithetical, at least in the

short run. When the disparate needs of the retarded and normal child compete, the way of justice may be very difficult indeed.

If there were no antithesis of interests among the members of society, there would be little need for laws, and less for lawyers. The antithesis between individual and individual is usually the focus of the civil law and the antithesis between the individual and society is usually the focus of the criminal law. Both must be explored. The resolution of inequities between persons is likely to revolve around damages and restitution; the resolution of conflict between the individual and society involves the ambiguous concepts of "guilt" and "punishment," which have altered meaning for some of the retarded.

"Equality before the law" is predicated on the assumption that everyone has roughly comparable capacities to invoke its protections and to abide by its proscriptions. The minimum set of personal characteristics, which the law ordinarily takes for granted, may not be totally present in the mentally retarded person, but neither will it be totally absent. He will have, in some measure that "subaverage general intellectual functioning" and "impairment in adaptive behavior" explored in section II.

From "impairment in adaptive behavior" we must infer some inability to handle one's affairs with ordinary prudence and foresight. Bertrand Russell has noted that, "Forethought, which involves doing unpleasant things now for the sake of pleasant things in the future, is the most essential mark of mental development." In those with limited mental development, forethought is erratic. In the majority of the mentally retarded, foresight, and the ability to act upon it, is partial and distorted. Many are influenced by immediate prospects and ignore the distant consequences.

The results of the disability are not necessarily predictable, and are of varying significance in different situations. Some mentally retarded adults can handle money, but show no judgment in the selection of companions and models for their own behavior, while in others the situation may be exactly reversed. Some of the mentally retarded can, through ordinary forms of discipline, learn to modify their behavior; others do not distinguish punishment from accidental misfortune. One may report truth, another fantasy; one may be capable of recollecting a temporal but not a logical sequence of events, another neither. One may be capable of forming intent to harm; another neither intends nor foresees the consequences of his act.

This variability has long been understood by those who work with the mentally retarded, and has been the subject of much specific investigation in the last half century. While legislators, lawyers and

judges have not been ignorant of this developing knowledge, the law itself has tended to deal in absolutes. Before it, the retardate is either incompetent or competent, committed or free. The defendant is either responsible or not responsible, triable or not triable, punishable by ordinary standards or not at all.

With the development of new alternatives in treatment, our community and residential institutions are in a better position to overcome the rigidities of the law in the interest of giving the retarded individual the benefit of modern knowledge concerning his growth, development and ability to learn, and to modify his behavior in response to various social stresses and situations.

We recognize that, for practical purposes, provision must be made for forms of mental retardation so severe as to cause complete lack of responsibility for criminal acts, general incompetence, total inability to participate in a trial, and so on. But these are extremes. The law must take more explicit account of less severe cases, which are, after all, the majority.

It has been said that the constitutional mandate of equal protection under the law requires that "all persons . . . shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." * Sometimes it is apparent that some specific factor is needed to provide equal treatment for the unequally endowed. If a stenographic record of trial proceedings is necessary for an adequate appeal, the defendant who cannot afford one is entitled to receive a free copy in order that he may appeal on an equal basis with others. If height is an advantage, the short man may at least be given a box to stand on. But bolder and more far reaching supplements may be needed where intellectual stature or social adaptability lies far beneath customary standards.

To give a person liberty to choose between alternatives of which he can have no appreciation is to defeat and mock the concept of liberty. It goes without saying that restitution of a missing capacity in the person himself, through every available form of treatment, should be the primary objective. But for those among the mentally retarded for whom restitution of the capacity to use liberty is not now and not foreseeably possible justice requires an effort at substitution. Just as a paralyzed limb may be amputated and a prosthetic device which functions with comparable effectiveness substituted, so occasions arise when a vitiated legal right must be excised and some substitution made. Protective intervention may be the device which

* *Hayes v. Missouri,* 120 U.S. 68, 71-72 (1887).

maximizes liberty in such a case. But as the surgeon conserves all usable tissue, and removes only that which interferes with the patient's human function, so the court must adjust its determinations and dispositions.

The possibility of doing justice, and thus fulfilling the function of the law, turns upon at least two conditions: correct appreciation of the relevant circumstances, and a suitable range of possible dispositions. Failing the first, justice is truly blind; failing the second, it is impotent. Justice is blind if it does not inquire into the significance of mental retardation as a relevant circumstance, and impotent if it has no dispositional variants suited to the conditions it finds.

For convenience, we can say that justice, like all public policy, must deal with immediate problems, with short-run problems, and with long-run problems. The immediate problem is the disposition of the specific case which has brought the retarded individual into court, taking into account both what has brought him there and the services available to rehabilitate him. This is a matter, so to speak, of minimum injustice under immediately unalterable conditions. Short-run concerns would include for example, improvements in the special education system for the retarded and provision of recreation or counseling services to prevent the accentuation of retardation. Such action partially offsets prior injustice by providing improved solutions.

The long-run problem for justice in regard to retardation is to ensure that every American child has the opportunity to be "created equal"—in the sense that he be neither born so badly that his equality is destroyed before he comes into it, nor born into such circumstances that the promise of his equal birth is broken before his life is fairly begun. The state cannot assure a child a good set of genes; nor can it assure every child that he is born, wanted, to loving parents, who have the means both material and spiritual for his succor. But it does not lie beyond the reach of justice to insist that no child be negligently born (without elementary pre- and post-natal care) or negligently exposed after birth to surroundings, physical or social, that alter his chances for a rewarding maturity.

To fail to supply, as quickly as possible, as specifically as possible and as efficiently as possible any reasonable medical, social or legal remedy for retardation is to impose upon a child the greatest injustice of all.

V. Mental Retardation and Civil Law

Before discussing specifics we shall briefly mention some general principles which we think should control the application of civil law to the mentally retarded.

We would minimize intervention by the law insofar as possible. The courts should be regarded as a residual resource, if not a last recourse. Clearly, the intervention of public authorities is not required where social or personal interests can be served by other means.

Legislation to protect all the disabled under one rule or provision is, where practicable, clearly preferable to legislation for special classes of the disabled. Where, for instance, identical legislation would equally serve the needs of all "exceptional" children, this should be preferred to ad hoc legislation on behalf of each of the sub-groups of this class.

There will nevertheless remain a need for some legislation dealing with specific disablements. This legislation should be such that nothing is done for the retarded person, his family, kin, guardian or community organization that they can do for themselves. On the other hand if we are thus to devolve responsibility, we must insure that they have means at hand to perform their tasks.

We would minimize mandatory requirements wherever voluntary compliance can be obtained. As we have said, the richer and better the services available to the retarded, the less need there is of coercive intervention to provide care. It is rare nowadays that the law has to be invoked to force a necessary operation or blood transfusion on an objecting person. Unfortunately, it is not rare for the law to be brought into play to secure needed action where mental disorder is concerned. This is partly because some of the people affected are in no position to make judgments about what is best for them, partly because there are real doubts in the public's mind about the value of admitting the disordered individual to a mental hospital. But, as the mental hospital improves, and as people are made aware of its improvement, it can be predicted that the necessity for involuntary commitments will lessen. Indeed, this has already begun to happen. A similar trend should be fostered with respect to the retarded. The need for coercion thus stands in inverse proportion to the value of the services offered and the current public knowledge about them. While one branch of law provides for, and to some extent insures the improvement of services, another branch of law benefits by a reduction in the unpleasant duty of forcing decisions that should be voluntary.

Assuming the necessity of special law directed toward the mentally retarded, some additional principles must be observed if that legislation is to be efficient and effective.

First there must be a precise identification of the group to whom the special laws will apply. This identification, and any sub-classifications, must reflect the purpose and function of the law, not merely some abstract definition of mental retardation. For example, if the law is designed to make available special education services, the definitions should reflect the educational objectives, recognizing that these objectives are to be accomplished differently with children of different intellectual capacities or patterns. If the purpose of the law is to protect society from behavior of a socially unacceptable variety, then the law should define those retarded persons who present this threat and specify the procedures by which they will be identified. If the purpose of the law is to compel the use by a retarded adult, not otherwise incompetent, of a therapeutic or educational program, the law should describe in functional terms the characteristics of those who may be the subject of this compulsion. If the law is to define long-term protective supervision, then eligibility and sub-classification should be clear. Such classifications will lean heavily on our knowledge of impaired adaptive behavior.

Experience has shown that when several handicapping conditions coexist, law and administrative practice may, by classification, create a no-man's land. An example is the blind mentally retarded child who receives service neither from the agency for the blind nor from the agency for the mentally retarded. Hence, two qualifications add up to a disqualification. These oversights and injustices are best met by legislative and administrative attention to defining the functions of agencies so that every person having a right to service on any count will receive it from some source.

Even when the gross category to which a person belongs has been established, there still remain substantial differences among individual needs. Legislation should not only allow for but direct attention to such personal differences, and to the ways in which they change with time.

The law must also face the difficult task of encouraging flexibility of operation in all institutions and services for the retarded without abandoning its beneficent protection of their rights. The way of appeal to it is never to be foreclosed, and the law must always be able to command information essential for the defense of the defenseless. Judicial intervention should be reserved for significant and critical occasions when instrumentalities "down the line" have failed,

however. Justice will be better served when those instrumentalities are bolstered within a network of authorized checks and balances. We shall propose later some specific ways in which this network may be strengthened.

The critical issue between the law and the caretaking professions is the question of authority to impose "superior" judgment on an unwilling, unconscious, unprotected or uninformed subject. Society has worked out some general rules which cover most of these situations: the willingness of the parent is substituted for that of his minor child, the consent of next of kin suffices for the unconscious adult, and so on. Concurrence of a professional and a partisan of the patient protects all of them. But mental disability in the adult lends itself to no such relatively easy solutions. The advances of science have complicated rather than simplified the debate between the law and the caretaking professions—medicine, social work, administration and the rest. This is not to be deplored, so long as the patient's benefit remains the goal of each.

Constant communication between the law and the other professions is essential for proper accommodation of their competing concerns. Law and medicine are among the most valuable disciplines on which the retarded have a claim. Their capacity to do good is great but by no means boundless. It can be dissipated in a system which demands needless formalities and which, through the abrasion of routine, dulls the professional acumen which should be the retardate's greatest defense. A just society will allocate to the cause of the retarded a fair share of the time and attention of its precious corps of talents in science and social management. But a system which requires like rules to be applied to grossly unlike situations wastes time and talent and destroys liberty. The processes of commitment to mental institutions in many states are inadequate wasteful. They actually impede justice.

Because of the nature of retardation and because of the many advances in dealing with it, it is essential that the whole body of relevant law be reviewed from time to time in each jurisdiction. Indeed, it would be wise to provide machinery for more and more frequent review.

It is a basic democratic principle that no diminution of human rights and human dignity can be countenanced by the law for any person—let alone any class of persons—except for good reason, following due process, and then to the minimum degree necessary and for the shortest period possible. A correlative principle is that, where human rights have lapsed from disuse, the law should revitalize them

and provide alternatives for those that cannot be exercised as the law originally intended. The primary justification for limitation of the retardate's rights must be that he lacks minimum capacity to assess and act upon his own self interest and to assert his own human and legal rights upon which the law otherwise applicable to him is predicated. A second justification lies in the jeopardy in which his incapacity may place the rights of others. The retardate needs protectors who place his interests first and look to his rights above others, but the law must serve the interests of all impartially.

Protection of these rights cannot, in our opinion, be completely delegated by the courts to non-judicial personnel. Where there is a partial delegation, as when a retardate is placed in the custody of the superintendent of a residential center or under the care of a guardian, an appeal by or on behalf of the retardate must always be available from their decisions.

Those charged with the care and custody of the mentally retarded will naturally urge that the patient be left to their ministrations. They will argue sincerely—especially the competent and devoted workers among them—that the patient will receive maximum benefit when the experts are allowed to exercise full discretion without interference from outside agencies and without the necessity of cumbersome formalities. Cumbersome formalities—especially where they are unnecessary—we would all be willing to dispense with. Regrettably the law cannot deal in good intentions. The law is always the ultimate recourse where rights are in any way suspended.

Our basic position is that all rights normally held by anyone are also held by the retarded. We turn now to a specific discussion of the nature of limits that must be placed upon the retarded in some circumstances and to the problem of protecting their rights in those circumstances.

(1) Activities

The retardate must have unhampered access to all lawful activities, except those for Which he is disqualified by lawful restrictions.

Such restrictions may be of several kinds. The first includes activities for which some general "capacity," "competency," "soundness of mind," or similar standard is the legal touchstone, such as the right to enter into enforceable contracts or to make a valid will. A second category relates to special restrictions which have no direct reference to "general competence" and which most adults, but only

some who are retarded, can satisfy. Some retarded people can drive a car safely, for example, others of equal "general competence" cannot. A third category concerns activities for which the law requires a named competence beyond the customary knowledge and achievements of the general population, e.g., licensing requirements for a wide variety of businesses and professions, particularly where the licensing requires formal examination, or the demonstration of special experience or skill.

The retardate may thus be excluded from a number of activities, or precluded from the exercise of what would be his rights if he were not retarded. This can happen without any formal challenge, or identification of retardation. But it does not render the procedure contrary to his interest, or to the public interest, provided the statutory or adminisrative requirements are reasonably related to the performance of the regulated activity. It is, however, important to avoid indiscriminate disqualification from a particular activity because of a finding of "incompetence" under a statute regulating other activities of different type.

(2) Social Relations

a) Marriage: Mental retardation in and of itself should not be a legal disqualification for marriage. A study carried out in one state on persons identified in school as retarded showed a normal proportion successfully married. State laws qualifying the right of the retarded to marry vary considerably, only eight being entirely silent on the subject. Statutes prohibiting the marriage of "idiots and imbeciles" are common. A few states disqualify the "feeble-minded," although it is not always clear how they are supposed to be identified. Other states disqualify persons who have been confined in an institution because of "feeble-mindedness."* The statutory exceptions to the prohibitions are sometimes impossible to fulfill. For instance, a "feeble-minded" person would ordinarily be unable to show that he had been "cured," as one statute requires. But the principle objection to this type of legislation is that disqualification in one sphere can be translated into disqualification in another without further review.

Here again justice must weigh the rights of the retarded and the rights of others. There are three questions to be answered. Can the

* See Lindman and McIntyre, *The Mentally Disabled and the Law,* Table VII-A, p. 207 (1961).

retarded prospective spouse assume the responsibilities of marriage? Will the minimum expectations for care and nurture of any children be realized? Will the genetic risks be so small that society can permit them to be taken? There are no general answers to these questions, for the answers do not necessarily depend on the degree of retardation. We merely point out that the rights and dignity of the retarded, their access to permissible activities, and to the comforts, companionship and protection of marriage, must be considered. Generally speaking, we suggest that marriage by a retarded person who is under guardianship should be permitted only with the consent of the court, acting with the advice of the guardian. Certainly it should not be categorically denied to all retarded persons.

b) Sterilization: Sterilization is a surgical procedure, otherwise harmless, which physically prevents conception. There are operations applicable to men and to women. Even with the intervention of additional surgery, the operations are very rarely, if ever, reversible in women; and reversible in men only in a very small percentage of cases.

Distinction must be made between voluntary and involuntary sterilization. To the extent that voluntary sterilization may be considered a right, as it is by some people, it is one to which the mentally retarded person should have access if he is capable of voluntary action.

The arguments put forward in favor of sterilization of some mentally retarded persons are usually either social or eugenic. The social argument addresses itself to the right of every child to be born to parents who can give him at least minimum opportunities, and conversely to the right of a mentally retarded adult not to be deprived of marriage when the complications of child rearing would tip the balance against him in a marginal case. A limited number of voluntary sterilization operations have been performed on such grounds in recent years.

Laws authorizing involuntary sterilization of some retardates are in effect in more than half the states today. These laws were passed early in this century and their purpose was primarily eugenic—to prevent the retarded from reproducing other retarded persons in or out of wedlock. There are serious questions about both the validity of the scientific assumptions on which these laws were based and the way in which it is decided who should be sterilized.

Only a small percentage of retarded children inherit their condition from retarded parents. Thus even if sterilization of the retarded

were total, the incidence of mental retardation would drop only slightly. Types of retardation vary, and their heredity characteristics if any, vary as well.

Most of the statutes which authorize involuntary sterilization apply only to persons who are at the time confined in institutions. The procedures by which selection for sterilization is made vary widely. In practice, great discretion is placed in the superintendent of the institution. Legal protections for patients range from the slightest to a very careful system of judicial review. In view of the general irreversibility of sterilization, no laxity in protecting the retarded can be allowed.

Although the basis of laws providing for involuntary sterilization is usually claimed to be eugenic, and as such should apply equally to men and women, they are in practice applied more frequently to women. It is clear that in cases where the retarded woman is able to be maintained or to maintain herself economically in the open community, the real issue being decided is whether procreation is to be prevented by segregating her in a controlled environment instead of by surgical means.

We do not take a position on whether sterilization can ever be ethically justified. Our recommendations are limited to urging that the operation not be allowed to result from misjudgment as to its scientific need or from inadequate opportunity for administrative and judicial review.

c) Adoption: Some laws operate to the detriment of retarded children by making overly difficult their adoption by informed and willing prospective parents. On the other hand, parents who unwittingly adopt a retarded child may, under some laws, seek annulment of the adoption at any time within five years. We doubt that the rights of the child are adequately protected by such laws. It would be more equitable to hold that from adoption forward the risks which adoptive and natural parents are expected to sustain should be the same.

(3) Privacy and Dignity

In the case of many of the disabled, the retarded among them, rights to privacy and dignity are peculiarly difficult to preserve. The term "retarded" is frequently stigmatic in the minds of the ill-informed. The establishment of a differential legal status, even if neces-

sary for beneficial purposes, frequently entails the attachment of a damaging label. We therefore recommend that judicial and administrative procedures be adapted to provide as much privacy as possible for the retardate and his family.

(4) Services

The retardate must have unhampered access to programs and services appropriate to his particular needs. Unhampered access is not to be construed to mean forced use.

(5) Liberty

The transcendent question of liberty must not be obscured by the development of social services and programs of care which now grade into one another, with varied degrees of restrictions in each. Nor may liberty be truncated on the ground that a hearing whose results could deprive the retardate of liberty may be harmful or even traumatic; nor on the ground that he failed to object to a decision affecting him. This last should be avoided with particular care since retardation too often implies an incapacity to make a proper objection.

At this point, proper protection of rights shades into the proper right to protection. The securing of both of these should, in our view, be the concern of a single agency in each state. We now turn to matters connected with guardianship of the person and with care and custody for the retardate outside his own home.

Guardianship

Guardianship is a mechanism through which the court, acting for society, "guards" the rights and liberties of a retarded person when he cannot guard them for himself. It accomplishes this by transferring the legal power of choice in certain personal (or financial) matters from the retarded person to another who is able and willing to exercise it. In the past the law has seemed to place more emphasis

on the protection of property rights of the retarded than on protection of their personal rights. Both are important and we would seek to redress the balance.

Retarded children, like normal children, usually enjoy the "natural guardianship" exercised by parents. But where legal guardianship of any kind is required, it should be carefully adapted to the specific requirements of the case. For some, of course, a comprehensive guardianship will be needed. But we urge that, as far as possible, mentally retarded adults be allowed freedom—even freedom to make their own mistakes. We suggest the development of limited guardianships of the adult person, with the scope of the guardianship specified *in* the judicial order. For example, the guardian's discretion to arrange for care for the retarded person in a foster home, boarding home, *or* other day or residential care facility should be defined in the court's order.

Plenary guardianship should be reserved for those who are judicially determined to be incapable of undertaking routine day-to-day decisions and who are found to be incapable of basic set-management. Where this is the case, discretion or even objection on the part of the ward can have no relevant meaning. It follows that his liberty to choose place of residence and regimen of care must be removed by the court. But the court is properly concerned with the generic need for protection and care, not with its substantive details. This is where the duties of the guardian begin. The law may properly leave to him the decision whether to arrange for family care or select some sort of private or public institutional care for his charge.

In the case of a retarded adult whose disabilities do not preclude the conduct of everyday affairs but are sufficiently severe to make unlikely the prudent management of substantial business or financial interests, we recommend the institution of a conservatorship, handling property problems only. Indeed, even when the person must be placed under guardianship, the handling of any substantial amount of property might well be vested in a conservator especially qualified to handle the particular land of assets involved rather than in the personal guardian. We do not suggest any general rule since this is an area where the significant factors will vary from case to case, but the two functions should be severable when the occasion warrants.

At the judicial hearing where the guardian of the person or the conservator of property is appointed, the retarded person should be present unless he is excused by the judge for good cause. When this happens the judge should see the retarded person, and the reason for non-attendance should be specified in the record. The hearings should

generally not take place in open court but should be held in the judge's chambers or another private place agreeable to all concerned. Throughout the hearing, the allegedly retarded person should be represented by counsel—appointed by the court, if necessary.

The rights of the retarded person will not be adequately protected unless the hearing is used as an instrument of genuine cooperation and exchange of ideas between the court and representatives of the care-taking professions. The court must have at its command a comprehensive clinical evaluation covering medical, psychological, educational and social factors. The refinement of diagnostic instruments and procedures in recent years can provide the courts with the kind of information required to meet our recommendation for greater variety and precision in judicial approaches and dispositions. In many states, however, the law does not require, and the court does not seek, utilization of such new skills and knowledge.

Careful evaluation and expert advice at the time of a formal hearing on the appointment of a guardian for an adult will reveal the probabilities of changes in the subject's condition and capabilities, as well as the significance of future court reviews and their optimum frequency. To require automatic review of every case with equal frequency is to do injustice both to those who need it and those who do not. In this area too there should be a wide range of choices from which the court may draw the most appropriate. Thus, the latest date for the next routine review of the guardianship should be specified in the order. Under reasonable conditions, the ward should be able to appeal to the court on issues involving the guardianship at any time. The court should also be free to act on the advice of third parties. Of course, the court may require a report on the status and condition of the ward from any guardian at any time.

Where a legal guardian has been appointed for a retarded minor, there should be automatic review, with a full judicial hearing, of the need for continued guardianship when the ward reaches the age of 21.

In appointing guardians, courts should look first to parents and other close relatives, but not necessarily in the order of formal kinship. The person most able, best situated and best motivated for the task should be sought. The guardian should express in his will his advice as to his successor.

Guardians would be encouraged to fulfill their obligations if they were upheld and assisted by community organizations. In addition to the present voluntary associations, considerable support could come from the establishment of a state protective service for the retarded. Such a service could provide consultation and referral for

the retarded and their families, for employers and other persons interested in working with the retarded.

The protection of guardianship should not be denied where there is no suitable relative available, or where the retarded person's financial assets are too small adequately to compensate a private person serving as guardian. Studies should be made to consider how best to deal with this problem. One possible solution is the establishment, perhaps through a state protective service, of a program of public guardianship of the person. Although guardianship might then be formally vested in a state agency, duties would actually be carried out by individual staff members, emphasizing the personal nature of the guardianship.

We do not wish to preclude the possibility that a private nonprofit agency or group might be instrumental in providing the personal attention, stability and continuity which gives vitality to guardianship of the retarded. Such bodies are found in Europe and there are a few of them in the United States. We. recommend, however, that only those expressly chartered for this purpose and licensed by a state protective agency be looked to by the courts as sources of personal guardians.

We believe that all retarded persons living in institutions, but not admitted on their own application, should have outside guardians who could check on the ward's treatment, care, and release possibilities. As elsewhere, the guardian would have responsibility for maintaining contact with the ward wherever he lived or received care, and of reviewing his progress with those who have professional responsibility for him. The guardian should remain throughout the spokesman for his ward, the lay interpreter of his needs, the partisan who watches over him and his interests, his alter ego in the assertion of legal rights.

Problems of Care and Custody

The greatly widened spectrum of possible programs of care, training, treatment, rehabilitation, and of living arrangements becoming available to the retarded, require us to look behind the conventional image of the "institution." As we have welcomed adaptation of the law to the richer range of possibilities, so we must recognize the law's obligation to look beneath the issue of "institutionalization" versus non-"institutionalization." The word "institution" has become a symbol for bureaucratic deprivation of liberty. Confusion is engendered when that symbol is mistaken.

The problem of arriving at an understanding of the word is complicated by the fact that we now have a whole series of institutions that preclude sharp distinctions based on such criteria as duration of attendance, portion of day in which attendance is required, mandatory versus voluntary presence, etc. But we cannot allow this difficulty to obscure the fact that a child or adult placed in a residential home for the retarded on a relatively permanent basis, segregated from normal community life, and restricted in geographical space, with his social contacts limited to people like himself (and to his caretakers), is suffering a considerable constraint upon his liberty.

We must also recognize that comparable constraint may be imposed, in practice, without the person's being "institutionalized" in the usual sense. In fact, a retarded child or adult in the home of a relative, or in a boarding home or unlicensed private nursing home, unknown to any court and having no guardian, may be more limited in space and in personal contacts than many of the residents of one of the hundred-odd facilities for congregate care which are the basis of the "institution" image. The latter, at least, generally operate on the basis of a clearly vested legal authority.

In short, the issue is not confinement, segregation, restriction or choice of companions; rather, it is one of authority, the authority to overcome the autonomy of the individual. It is to the justification for this transfer of authority that the law must attend. At present the superintendents of certain institutions, usually public, are most likely to become the legal custodians. They then decide the kind of special situations and restrictions that may be required to assure proper care, protection and habilitation of the retardate. This frequently involves eventual return to the community in a near-ordinary job and living situation. The latter circumstances scarcely resemble "confinement," although the authority to recall the "patient" remains with the superintendent.

The Mentally Retarded in Institutions

We believe that no special legislation is needed when a retarded child is sent to an institution by his parent or by a properly empowered guardian. We would rely on general laws governing parental neglect to ensure protection of the child. Additional protection should be provided by the state's careful examination of the administration of all facilities and institutions claiming to look after the mentally

retarded. This could be undertaken by the state protective service, the establishment of which we recommended earlier.

Admission procedures for retarded adults raise more complex problems. Our law has generally distinguished between "voluntary admissions" to mental hospitals and "involuntary commitments"—with judicial intervention required only for the latter. Those interested in mental health are rightly encouraging the mentally ill to seek voluntary admission rather than rely on court commitment. Generally speaking, this trend is to be encouraged in the field of mental retardation. But it is unrealistic to assume that most of the retarded have the intelligence and understanding to make a "voluntary" decision in a matter of this kind. We must rely on the discretion and good faith of the superintendents of facilities for the retarded to accept as "voluntary" admissions only those retarded adults who are capable of making such a decision. We believe the procedures now required for commitment over the retarded person's objection should also be required whenever there is doubt as to whether the retarded adult clearly understands what he is "voluntarily consenting" to do.* The judicial hearing which should be held for all "non-voluntary" admissions should have the same protections for the retarded person which we outlined in discussing the hearing on the appointment of a guardian. There is only one exception to the ideal of a hearing for all non-voluntary commitments. It is not necessary when the court has specifically given the guardian discretion to place his ward in an institution. (We earlier suggested that a plenary guardian should generally be given this discretion, but that it should not routinely be given to a limited guardian.) Even where the guardian is given discretion, however, he should inform the appointing court of the admission.

In many cases the retardate who does not seek voluntary admission will already have either a plenary or limited guardian. When

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* Judge Benjamin Brenner of the New York Supreme Court has expressed significant objections to the "non-protesting" procedure of the New York Mental Hygiene Law, § 73 as applied to aged seniles. *Matter of the Application for Certification of William R.* ———, 9 Misc. 2d 1084, 172 N.Y.S. 2d 869 (1958).

In this case Judge Brenner said, "This newly used technique effectively shunts seniles into involuntary confinement without awareness by them of their plight and without their actual approval or judicial surveillance."

Judge Brenner further asserted that the statute is "of questionable constitutionality because it is grounded on a fictitious consent given by one who concededly is confused and disoriented. Even if *positive objection* is not required by the Mental Hygiene Department, the consent thus extracted is dubious because the senile is not likely to understand that the admitting institution is a mental institution, even if he be told that it is. Often he is chagrined and humiliated following family rejection and has neither the will nor the capacity to object even if he be carefully advised . . . ."

this is the case, presumably the guardian will continue in his role. When a court orders commitment of a person not already having a guardian, the order should include appointment of a guardian for the duration of the commitment. A staff member of the state protective agency might well serve in this role if relatives are not available.

The need of a mentally retarded person to have his personal rights protected does not end with his transfer to the custody of the superintendent of an institution at the conclusion of a hearing. No matter what the purpose of institutionalization, he has a right to receive training and care which will enable him to return to society or to lead a more useful and meaningful life within the institution. He has a right—and perhaps a need—to continue his contacts with family and friends by visits within or without the institution and by correspondence. Deprivations of this right should take place only upon a clear finding that such contacts would be seriously detrimental to him.

Included in the right of personal contact should be the right, not subject to deprivation, to get in touch with legal authorities, with his lawyers, his guardian or others to challenge the validity of his continued confinement or the nature of his care and treatment. Procedures must be readily available by which all such challenges, not plainly frivolous, receive prompt attention.

While remaining within the institution, the retarded person should be permitted to exercise those of his civil rights which can physically be exercised there, so long as the commitment order or a finding of incompetence has not specifically deprived him of those rights. Institutionalization should not, of itself, preclude the retarded person from exercising his civil rights, for the purposes and bases of the institutionalization may not be related to the qualifications for the exercise of those rights. Only if the basis of commitment and the basis for disqualification from exercise of the right are the same, may the latter properly be abridged. There are, of course, degrees of further confinement and restraint of liberty possible within the institution which we have not explored. But every means should be sought to minimize the need for physical restraint and to scrutinize its use.

Finally, although the probabilities of lifetime need of a protective environment are high if the mentally retarded person is first admitted to an institution as an adult, it should not be assumed—with consequent inertia in regard to his release—that his chances of return to society are negligible. To *the* maximum feasible extent, the status of the mentally retarded patient should be reviewed by the institutional authorities and his ability to return to society reassessed by them on a periodic basis.

A system of guardianship for the mentally retarded living in institutions should contribute towards reducing the danger of institutionalization continuing longer than is necessary. Besides such review as may be instigated by the guardian or by the ward himself,periodic court review should be mandatory in the case of all non-voluntarily institutionalized adults. Judicial review of commitment should be required in the case of any retarded person living m an institution at the time he reaches the "age of 21, unless he clearly indicates his desire to remain on a voluntary basis—in which case the court should make a finding to that effect. After the age of 21, we believe that there should be judicial review of the need for continuing commitment every two years. We recognize that in many cases no relevant change in condition will have occurred within that period. there there has been little material change, the review will naturally be brief. Unless the retardate expresses a desire to appear before the reviewing court, the court should have authority to act on the basis of information supplied by the institution, the guardian, or the state protective agency. It would be a rare case in which any of these would recommend an unnecessary continuation of commitment and we believe that a court acting on the basis of ihformation supplied in this way will find its task simplified while the retardate's rights remain adequately protected.

VI. Mental Retardation and Criminal Law

The Retarded as "Insane"

The term "insanity" is now in disfavor among people professionally involved in the fields of mental illness and mental retardation. But its use continues to be widespread in the law, and particularly in criminal law. The latter often speaks, for instance, of the "insanity test" rather than of the test of criminal responsibility; and the verdict "not guilty by reason of insanity" is returned when the test is met by either the ill or the retarded. Continued use of the term "insanity" should be discouraged even when it is applied to the mentally ill. It should not be applied at all to the mentally retarded. To the layman, an insane person is one who suffers from a mental disease—who is mentally ill rather than mentally retarded. To speak of the latter as insanity poses an unnecessary semantic problem for a jury which should discard its habitual associations with the word when it is faced with a mentally retarded defendant. We therefore propose that the

term "mental retardation" be substituted for "insanity" in all cases where the former term is applicable to the mental condition involved. Of course we should prefer also to drop the term "insanity" in cases involving the mentally ill, since it is medically disapproved. If this were done, some general phrase such as "mental disability," "mental disorder," or "mental handicap" could be substituted to cover both mental illness and mental retardation.

Competence to Confess

It is an established principle of Anglo-American law that a confession cannot be used in evidence against the accused unless it was given voluntarily. Conviction on the basis of a coerced confession not only offends our concept of justice; it may also result in the conviction of the innocent, since confessions under duress are notoriously untrustworthy.

Our courts have repeatedly held that use of a confession obtained by police coercion violates the due process provision of the Constitution. There is an inherently coercive element about the setting in which police interrogation typically takes place, and the courts have experienced some difficulty in deciding just when the circumstances of a confession render it involuntary. The usual factors weighed include such objective matters as the length of the interrogation, its continuity, the use of physical brutality or techniques of psychological coercion, and the length of time between arrest and arraignment before a magistrate. But the ultimate test is a subjective one: whether the foregoing circumstances and others have overborne the will of the individual concerned, and procured from him a confession not freely given.

In holding confessions involuntary—and hence inadmissible in evidence—the Supreme Court has, in recent years,* recognized mental retardation as a factor diminishing the subjective ability to resist police pressure. The insight shown in those opinions is an important contribution. The very notion of any confession being "voluntary" in the face of police interrogation is a strained one. It reaches the breaking point when it is applied to the mentally retarded.

A retarded person, even when not coerced in the usual sense, may be unable to understand police procedures and their consequnces, and therefore be unable to make a genuine decision in relation to them.

* *Reck* v. *Pate*, 367 U.S. 433 (1961); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Fikes* v. *Alabama*, 352 U.S. 191 (1957).

He is more likely than the average person to be unaware of his constitutional right to refuse to answer incriminating police questions, and of his right to consult with an attorney; even where the interrogator advises him of these rights, he may be unable to appreciate their significance. His confession might often more properly be called "non-voluntary" rather than "involuntary"—yet it should be just as inadmissible. The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force, because their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. "Cheating to lose," allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications or consequences of his statements in the way a person of normal intelligence will.

The prosecution in some jurisdictions may seek to introduce into evidence, as a tacit confession of guilt, the mere fact that the defendant remained silent when accused of the crime. Whatever the objections to such evidence in the usual case, there are decisive and compelling grounds for disallowing it when the defendant is retarded. Lack of intelligence may render him unable to understand what is being said; but even if he understands, he may lack the verbal facility to make an appropriate reply.

We do not say that all confessions by mentally retarded defendants should be excluded from evidence. But we do emphasize that courts should fully consider whether the accused's state of mind, in view of his mental retardation, was such that he was unable to give a confession that was genuinely voluntary, reliable, and that may fairly be used against him.

We think it unrealistic to rely on police discretion not to exercise undue pressure. In the first place, "undue pressure" on a retarded person may be very light—perhaps no more than suggestive questioning. Second, mental retardation may not be apparent at the time of interrogation. Third, judicial and academic admonitions to the police to exercise restraint in obtaining confessions have all too frequently gone unheeded. Nevertheless, the factors which we have

mentioned should be brought to the attention of police departments. It would be particularly valuable if such departments would work out self-imposed standards for questioning the retarded. They might conclude, for instance, that it would be improper to question anyone they had reason to suspect was retarded, unless his attorney, parent or guardian was present.

Competence to Stand Trial

The law does not proceed against a criminal defendant who, at the time of trial, is found to be "insane." It is immaterial whether the disabling condition arose out of mental illness or mental retardation. The legal test of "insanity" for the purpose of determining competence to stand trial is different from that used to decide criminal responsibility, which is discussed in the next section. The former is limited to determining the defendant's capacity to understand the nature and object of the proceedings against him, his comprehension of his own condition in reference to the proceedings, and his ability to make a rational defense.*

To make an adequate defense, it is necessary that the accused be able to remember and relate his side of the story to his counsel, and have the ability to help counsel obtain, examine and cross-examine relevant witnesses. But competence may require more than this. The manner in which the retardate's condition will affect his ability to testify, if he should be put on the witness stand, must also be considered. Defendants are generally assumed capable of coping fairly with the attack of cross-examination relied upon in our adversary system of justice to elicit the truth. The mentally retarded defendant, however, even though telling the truth, may be unable to give the impression of doing so because he is easily confused under the pressure of an effective cross-examination. Thus, he might be discredited in the eyes of judge or jury—or, worse, be induced to testify untruthfully.

Pertinent considerations on the issue of competency include the complexity of the case and the anticipated nature and duration of the trial, the type of offense charged, the intricacy of the proceedings and arguments. All are relevant to determining the defendant's ability to understand the charge, the proceedings, and his relation to them. In short, the question is not simply competence to stand trial, but competence to stand what *kind* of trial.

* Weihofen, *Mental Disorder as a Criminal Defense*, p. 431 (1954).

In the case of the mentally retarded defendant, unlike the mentally ill, there is often little point in finding inability to stand trial at the moment but requiring that a trial must follow "recovery." Limited, though valuable, gains may be possible if the patient receives treatment and training, but for the majority of the retarded, the likelihood of great change remains slight. In many cases, holding a retarded defendant incompetent to stand trial will, as a practical matter, dispose of the entire criminal proceeding.

If a mentally retarded person is found incompetent to stand trial, it does not necessarily follow that he is also incompetent to be at large or that he must automatically be committed to an institution for the so-called "criminal insane"—or any institution. Such a person will doubtless require some protective care. Its nature should depend in part on the degree to which he endangers society. There is no reason to believe that the small percentage of the mentally retarded who run afoul of the criminal law are prone to commit crimes of violence. Therefore, automatic confinement in an institution for an indefinite period is clearly unjustified. The type of care required might range from full custody to normal life at home, with parents or guardian admonished about the need for closer supervision. Disposition should depend on a judicial determination, arrived at following consultation with experts, as to his propensity for future lawbreaking—particularly whether he is likely to commit acts of violence. Much will depend on whether he has family and friends who are able to help him adjust to society's standards—and perhaps on what social services the community provides for the mentally retarded.

At present a finding of incompetence to stand trial will, in all likelihood, result in the defendant's being incarcerated in some type of custodial institution; but even if he is not incarcerated, he will carry the stigma of having been charged with a crime. For the mentally retarded, who stand less chance of being "cured" than do the mentally ill, it is thus crucially important to avoid a finding of incompetence to stand trial in cases where, if a trial *were* held, there would probably be no conviction. To achieve this end, the American Law Institute's Model Penal Code has adopted a valuable proposal by the Judicial Council of Massachusetts. In summary, it calls for a "post-commitment" hearing after a finding of incompetency to stand trial. In order to obtain such a hearing, counsel for the defendant must satisfy the court that, based on facts or law, he has reasonable grounds to believe that there is a defense to the charge, other than mental disease or defect excluding responsibility. If the defendant lacks funds, then the court is to assign counsel. The hearing is by the

court without a jury. After the hearing, "the Court may in an appropriate case quash the indictment or other charge, or find it to be defective or insufficient, or . . . otherwise terminate the proceedings on the evidence or the law." The proposal also provides that, "unless all defects in the proceedings are promptly cured," commitment to an institution as incompetent to stand trial shall be terminated and the defendant discharged unless civil commitment proceedings are instituted.* Amendment of the law along these lines would be most valuable. However, the defendant should not, upon an initial finding of incompetency, automatically be committed to an institution and then have to seek release. Of course he will have to be confined if he is thought to be dangerous, otherwise he should be released, perhaps on bail, pending the hearing.

Mentally Retarded Defendants: Their Criminal Responsibility and Treatment after Trial

Throughout the English-speaking world the most widely used test of criminal responsibility is the M'Naghten Rules. They provide that an accused shall not be held criminally responsible if he "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

Since the Rules were laid down by the House of Lords in 1843, they have been subject to increasing criticism. Now they are held in disrepute among most medical men and by a substantial body of lawyers. We need not discuss objections to the *M'Naghten* test as applied to the mentally ill; our concern is whether it is appropriate for the mentally retarded.

The test is generally construed to cover the mentally retarded or defective as well as the mentally ill, although as originally laid down, the requirement that the "defect of reason" arise out of a "disease of the mind" might have appeared to limit its application to the mentally ill.

The first part of the test, providing for non-responsibility if the defendant does not know "the nature and quality of the act," has been construed so narrowly as to be rarely satisfied. If the mentally retarded defendant is to be exonerated at all, it will usually be because he "did not know he was doing what was wrong." The difficulty here is in achieving an adequate definition of "know." A three-

* A.L.I. MODEL PENAL CODE § 4.06, Alternatives 3 and 4 (1962).

year-old child may "know" that murder is wrong, without having any very clear idea of what murder means—or what wrong means, either. He may "know" that murder is wrong simply because he has been told so by his parents; and he may even be able to repeat the reasons they gave him. But real knowledge means knowledge in depth, plus emotional appreciation. It requires the ability to put matters in an appropriate factual and moral context. Courts and juries have usually ignored this broader interpretation of "knowledge." The British Royal Commission on Capital Punishment, recognizing the narrow judicial interpretation of *M'Naghten,* held it to be an unsatisfactory test:

> If a feeble-minded person commits a murder, it will seldom be possible to maintain that he did not know that he was killing his victim or that he did not know that what he was doing was forbidden by law. He may not have appreciated how wrong the act was or understood its full implications-it may have seemed to him no more than mere "naughtiness" —and his power of resisting sexual or aggressive impulses and controlling his actions may have been very much less than that of a normal person. In some cases these defects of reason or self-control, although so great that it would not be right to hold him morally responsible for his actions, will not bring him within the ambit of the M'Naghten Rules. . . .*

All courts agree that a person who meets either of the *M'Naghten* criteria should not be held responsible or punished. The debate centers around the question, which *other* mentally disabled people should be excused. Some American jurisdictions have qualified *M'Naghten* with the "irresistible impulse" doctrine. As its name implies, this test excludes from criminal responsibility one found to have committed a crime as the result of an impulse which, due to mental disorder, he was unable to resist. This test, like *M'Naghten,* is considered by psychiatrists to be almost meaningless. Quite apart from difficulties in proof—once the act is done, how can it be shown that the defendant could have resisted it?—the test apparently places undue emphasis on spontaneity. Construed in such a manner, criminal acts which no one denies to be the result of disordered minds have been punished because they followed a period of brooding and reflection instead of occurring on the spur of the moment.

A number of proposals have been made for bringing the law on criminal responsibility into line with modern psychiatric knowledge of human motivation. We do not specifically endorse any particular test. Indeed, we should prefer that lawyers, judges, lay and medical

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* *Report of the Royal Commission on Capital Punishment 1949-1953,* p. 120.

men fully consider the moral, social and medical issues involved in determining responsibility of the retarded, rather than adopt even a modern-sounding formula without adequate thought. This is an area in which there is probably no single correct solution, so it is ideally suited to experimentation by those concerned with the problem.

It would, however, be misleading to discuss the traditional tests of responsibility and ignore the more modern proposals. In the District of Columbia, the *Durham* decision of 1954 rejected *M'Naghten* and provided that an accused should not be held responsible if the "act was the product of mental disease or mental defect."† This test was recently held to require the issue of criminal responsibility to be assessed by a jury in the trial of a mentally retarded defendant whose I. Q. was 68. The court emphasized that the jury should consider testimony concerning the development, adaptation and functioning of mental or emotional processes and behavior controls.* The American Law Institute has put forward the following test: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." The terms "mental disease or defect" are qualified so as not to "include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."** This test has recently been adopted or proposed in a few American jurisdictions. The British Royal Commission on Capital Punishment proposed a more flexible test: "to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."*** Parliament did not adopt this proposal but instead retained the M'Naghten Rules and provided separately for defendants who sought to claim "diminished responsibility."

We need not go into the complexities of "diminished responsibility" as it operates in England and the United States; but it is a doctrine increasingly urged as a solution to the vexing question of responsibility, particularly appropriate for certain mentally retarded defendants. It embodies the notion that some defendants are neither wholly responsible nor wholly irresponsible, but are somewhere in between. This has a certain humane appeal. But we believe the doctrine should be rejected because, in practice, it entails punish-

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† *Durham* v. *United States*, 214 F. 2d 862 (D. C. Cir. 1954).
* *McDonald* v. *United States*, F. 2d (No. 16,304, D. C. Cir. Oct. 8, 1962).
** A.L.I. MODEL PENAL CODE § 4.01 (1962).
*** *Report of the Royal Commission on Capital Punishment 1949-1953*, p. 116.

ment for the mentally retarded, as for "normal" offenders, albeit somewhat less severe. Thus, where a "normal" person would be convicted of first degree murder and sentenced to death, a mentally retarded person, on the same objective facts, might be convicted of second degree murder and sentenced to life imprisonment. Similarly, a "normal" person might be convicted of stealing a car, while a mentally retarded person might only be convicted of unauthorized use of a vehicle—and would consequently receive a shorter prison term. Of course, the punishment of death for mentally retarded persons is morally offensive. But to punish the retarded by imprisonment should also be regarded as repugnant, particularly since it overlooks their special therapeutic needs. A shorter period of imprisonment is not likely to be more therapeutic or rehabilitative for such a person than a longer one.

Once it has been determined that an offender is mentally retarded to a degree and in a manner making it reasonable to believe his affliction caused the conduct in question, then we think it axiomatic that he should be treated according to his condition. For such persons, imprisonment for the sake of punishment is never appropriate. We recognize, of course, that the safety of the community may require that some mentally retarded offenders be isolated by confinement or otherwise subjected to disciplinary controls. But we are convinced that such measures, where necessary at all, should be designed to have a therapeutic effect. The mentally retarded offender, whether dangerous or not, requires rehabilitation addressed to the sources of his deviant behavior.

If we are to treat the individual according to his need, as well as protect society, it is necessary to examine in detail the relation between the affliction and the offense in each case. An act may be performed by one retardate because of pathological propensity resulting from control having been impaired by subnormal intelligence. A comparable act may be performed by a second retardate under the influence of evil companions because he lacks proper direction. It is not to the seriousness of the offense itself but to its sources that we should look in planning subsequent management. Punishment which the retardate considers distasteful or evidence of social disapproval may be constructively incorporated in the rehabilitation plan for some retardates, but be inappropriate or ineffective for others. A suitable occupation, or closer informal supervision with remedial counseling and guidance, may be the appropriate treatment for some. The probationary approach often has much to recommend it. For others, a more rigorously disciplined program must be provided.

Even among those who should be separated from the community, there will be a variety of needs. Many of the retarded who run afoul of the law (and let us remember that murder and other crimes of violence are exceptional rather than typical) respond to the routine, the acceptance and the moderate challenges of the open residential institution which also serves the non-offending retarded of the same age and ability. Others may suffer psychotic episodes and thus be more properly treated, at least during certain periods, in a mental hospital.

There remains, however, a core group who have a propensity for serious crimes of violence. These people may have a multiple handicap, a complex psycho-pathological problem of which mental retardation is only a component. Such cases require expert treatment of a kind not generally available in penal institutions or in ordinary institutions for the retarded. Moreover, the mingling of these persons with mentally normal prisoners or juvenile offenders on the one hand or with non-offending retardates on the other threatens the best interests of all. It is important to recognize that those who threaten society at large may also threaten the internal society of an institution, particularly one where residents congregate with relative freedom.

Experts believe that mentally subnormal individuals who exhibit persistent uncontrolled behavior threatening the well-being of others are best treated in a unit where they can be grouped according to need and given attention by a specialized staff. Whether this should be an independent institution within the correctional system or within the system dealing with mental retardation, or whether it should be a sub-unit of a mental or penal institution, is an open question. It is one which urgently needs further exploration, for if the unmanageable retarded offender is placed in an inappropriate institution, serious damage will be done to him and to those who are brought into contact with him.

We strongly recommend that the court, before making disposition of a retardate, confer directly or through its probation officer with medical men and with any psychologist, social worker, rehabilitation counselor or other person who is familiar with the offender's clinical and social history, and with the administrators of programs which may be called upon to accept him.

Reform of the law in this area should be along two lines. First, restrictive rules of criminal responsibility should give way to standards which reflect contemporary knowledge of the nature and effects of mental retardation. Second, new kinds of treatment must be provided for mentally retarded criminal defendants—both those who have been

found not criminally responsible because of their mental condition and those who have been convicted. If this Report encourages wider, deeper exploration of new ways to help them, its basic purpose will be well served.

Conclusion

This Report is, of course, not intended to be a definitive discussion of how the law might change and improve its treatment of the mentally retarded. Our primary concern has been with the long-term process by which the law discovers its proper function with respect to a special class of disabled people—the retarded. We have made legislative recommendations and have mentioned specific judicial procedures which, if generally adopted, would greatly ease the burden of the law and of the retarded individual when they confront one another. But crucial though these matters are, they cannot, of themselves, solve all the problems we have raised in this Report. More trained personnel—legal, social and medical—are needed to cope with the problems presented by the mentally retarded. And, perhaps most important of all, the general public needs to be educated about the advances which have been made in treating the retarded and about the problems which still remain. Broad public awareness of need is the basis not only for supporting the new facilities which have been and which will continue to be created to care for the retarded, but also to support the training and employment of special personnel to staff them. It is also needed if the new laws and procedures which we have discussed are to be truly effective when they are applied not only for humane reasons but in defense of the rights and liberties of the retarded. In the end, the law is only as strong as belief in it. When dealing with mental retardation, the law must combat many years of general ignorance, prejudice and superstition. Only when these are defeated can the law consolidate the gains in knowledge which have been made in our time. It is toward this consolidation that this Report has been directed. It is for this consolidation that we have the highest hopes.