Review of the laws relating to the mentally retarded with emphasis on those laws having to do with criminal responsibility in the state of Pennsylvania

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REVIEW OF THE LAWS RELATING TO THE MENTALLY RETARDED
WITH EMPHASIS ON THOSE LAWS HAVING TO DO WITH CRIMINAL
RESPONSIBILITY IN THE STATE OF PENNSYLVANIA

by

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(Advisor)

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CHAPTER I

INTRODUCTION

The need to get in the tempo of the times is powerfully revealed in a fable about the devil auctioning off his old tools; they were wearing out, and so he invented new ones. This writer is in agreement that some laws dealing with the mentally retarded should be improved and that the new laws be enforced. Indeed, there has been remarkable advancement toward justice for the mentally retarded, and, on this point one gets no argument, but there is need for improving existing laws and for making new laws. This paper is concerned with "The Law and the Mentally Retarded" with emphasis on those laws having to do with criminal responsibility. The magnitude or scope of the review will be directed to the laws in the state of Pennsylvania and the Federal law.

To consider those aspects of the law that affect the mentally retarded a study was made under the main headings: civil status; and criminal law. Both topics were limited to those laws referring to the mentally retarded in the state of Pennsylvania.
Under topic one—civil status—the writer grouped provisions for the care of the mentally retarded person and the property of the retarded person, provisions for his rights to education, employment, insurance and other advantages, the provisions for commitment and discharge from institutional confinement, and provisions for his protection from abuse.

The second topic—criminal law—included the ability to stand trial, criminal responsibility, and dispositions of the alleged offender in each particular situation.

The Problem

The laws relating to the mentally retarded should be of interest to all people for the same reasons that any human law would be of interest. Laws affect people—retarded persons are people; therefore, laws affect retarded people.

A retarded person has as much right to his human rights and privileges, as those persons who fit into the common mold accepted by society. Retarded people differ from each other as much as other people generally do, and they have needs common to all people. They have uneven development in given areas of functioning, just as other people do. "Popular myth would have us believe that the retarded are amusing people whose behavior is unfailingly entertaining
and who are a legitimate source of fun and a justifiable
target for ridicule."¹ As a first step in accepting
retarded people as people, the attitude of doing for a
people must be replaced by an attitude of doing with and
by a people.

Like other citizens, the mentally retarded must be
assumed to have full human rights and privileges. The
mere fact of retardation should never be considered in
and of itself sufficient to remove their rights.²

Equally important is the acceptance of the belief
that each child has intrinsic worth and dignity, no matter
how mentally limited. Human dignity is the central issue
of our times. Can a society be better than the people
composing it? A government that degrades its citizens,
or permits them to degrade each other, limits opportunities
for individual fulfillment and national accomplishment.

Humanity and justice, as well as respect for the
legal rights of the individual must be part of the legal
system. There must be a concern for the value of life for
all men. Carroll summed up the value of human life:

What is the definition of a human person? There is
none. You can't find one in the legal system of any

¹Alonzo G. Grace, "Education in the 21st Century,"

²U. S. President's Panel on Mental Retardation:
country. And so what we're engaged in is the graduation of humanity and each person's claim to humanity: the fetus, the paraplegic, the incurably ill, the retarded, and others.¹

On this point there are different schools of thought. This writer is of the opinion that too many people interpret legal rights as freedom, and freedom as license to violate the rights of others. Society must bear in mind that it is witnessing the opening of new horizons, but it must not pursue them too blindly, and possibly cause a slow erosion of the principles laid down by the founders of this great nation.

Clarification of Terms

One needs to be cautious in using the terminology of mental retardation and mental illness. There is a distinction between these two common terms:

Mental illness is the term used to cover a broad range of personal problems and disorders. It is applied, broadly, to those problems which arise when an individual is in a state of dissonance, or maladjustment, with his life-situation. As a result, he may have distorted perceptions of people and the world around him. He may have radical disturbances of mood which leave him at the mercy of his feelings. Such disturbances—neuroses (the mild ones) and psychoses (the severe ones) are usually considered acquired conditions amenable to treatment.²


A person who suffers from mental illness needs to be helped by psychiatric treatment. The very way the person thinks, feels and behaves reveals symptoms of mental illness.

Mental retardation, on the other hand, as stated by the late President John F. Kennedy, can be defined in this way:

Mental retardation stems from many causes. It can result from mongolism, birth injury or infection, or any of a host of conditions that cause arrested development of a faculty of intelligence to such an extent that the individual's ability to learn and to adapt to the demands of society is impaired. Once the damage is done, lifetime incapacity is likely. With early detection, suitable care and training, however, a significant improvement in social ability and in personal adjustment and achievement can be achieved.\(^1\)

The idea of rights for the mentally retarded is relatively new. Life, liberty and the pursuit of happiness are natural and inalienable rights guaranteed by the Constitution of the United States. These natural rights guaranteed by the Constitution and the Bill of Rights are often called civil rights. They are of three types. The first type guarantees the citizen certain freedoms such as freedom of speech, of assembly, and of worship. The second kind of civil rights enjoyed by Americans are restrictions upon the state. The third category concerns the

citizen's relationship to the judicial system.

Research Question

Laws frequently fail to distinguish between the mentally retarded and the mentally ill. In 1967 the International League of Societies for the Mentally Handicapped convened in Stockholm a symposium of experts from all over the world to consider legislative reform in behalf of the retarded.

The first general principle was stated:

The mentally retarded person has the same rights as other citizens of the same country, the same age, family status, working status, etc., unless a specific determination has been made by appropriate procedures, that his exercise of some or all of such rights will place his own interests or those of others in undue jeopardy.¹

Motivated by an atmosphere of "equal rights" this researcher conceived the question: are the rights of the mentally retarded equally protected by law as are the rights of all citizens?

Summary

In defining mental deficiency, one must take into account overlapping medical, social, psychological, economic, physical and educational factors. Mental retardation is a condition. Mental retardation is not an illness or a disease.

It seems fair to say that not long ago our society, perhaps unknowingly, looked upon the mentally retarded person as hopeless, incapable, a dangerous sub-human creature. There was little, if any, thought of the mentally retarded having legally enforceable rights. This writer maintains that the mentally retarded are far from hopeless, and like their so-called "normal" brothers, need laws to serve their human needs.
CHAPTER II

PUBLIC ATTENTION

During 1970 the President's Committee on Mental Retardation continued its long-term study in the area of legal rights and guardianship of the retarded. They found that most states provisions for guardianship of the retarded are relics of a time when the mentally retarded was considered an incompetent who had to be kept away from normal social and work contacts. These provisions largely consider or assume the retarded person to be without rights, deny him due process or equal protection of the laws, and often encumber his family's estate for years as the price of the state's assuming his care. The President's Committee is working to develop model guardianship provisions that will encourage the retarded individual to exercise all of the citizen rights that he is capable of exercising, give him the benefit of equal protection under the law with all

other citizens, and promote the development, in states, of public advocates for the retarded and other handicapped who will serve both as counselors and as surrogates as necessary.

A bill to give Congressional support to a declaration of the rights of the mentally retarded has been introduced by U. S. Rep. Gilbert Gude (R. Md.). This resolution recognizes seven "general and special rights" of the mentally retarded:

... the same basic rights as other citizens of the same country and age;

... a right to economic security ... a decent standard of living ... to productive work ... ;

... a right to live with his own family or with foster parents, and to participate in community and leisure activities, with provisions for necessary institutionalization in surroundings similar to "normal living";

... a right to a qualified guardian, if needed;

... a right to protection from exploitation, abuse and degrading treatment ... and

... procedures to be used for modification or denial of rights to those whose handicaps prevent exercise of "all of their rights in a meaningful way." \(^1\)

Accepted by the United Nations at the Fourth Congress of the International League of Societies for the Mentally Handicapped, \(^2\)


recognized as necessary and legitimate by the Federal Government,¹ and the Commonwealth of Pennsylvania,² this declaration may be used to assess the civil and criminal laws which have been enacted, others which are not being implemented, and possible new laws, which in all justice must be examined, introduced and passed.

For the most part, the legal rights of the mentally retarded lie between the letter and the spirit of the law. Statutes exist that allow the retarded to vote, to marry, to own property, and to be educated—in short, to exercise all the inalienable rights that every citizen has. But the difference, says Philadelphia attorney Dennis Haggerty, comes in the "application of these laws, which too often are used to exclude the retarded from enjoying their rights. It's fair to say we have laws that presumably protect the rights of all people," he says, "but it is also fair to say that not all people are being equally protected."³

Based on studies made by Boggs the history of federal legislation for the mentally retarded may be divided into the professional years (prior to 1945), the parent years (1945-1955), the Congressional years (1955-1960), and the


Presidential years (1960-1970). Federal interest in mental retardation during the professional years was exhibited by the Children's Bureau, the United States Office of Education, the Bureau of Census, and the National Institute of Mental Health. The Social Security Act of 1935 and amendments to the vocational rehabilitation legislation of World War II provided funds for state assistance for mental retardation and extended rehabilitation services to them.

During the parent years, parents discovered the inadequacies of the facilities and the services for these individuals and organized the National Association for Retarded Children. Relevant federal agencies began to inaugurate and expand clinic, rehabilitation and educational services for the children. With the advent of the congressional years, federal funds were provided for research, education, teacher training, and eighty clinical programs in all parts of the country. Interpretations of the Hill-Burton Act of 1946 and the Social Security Law were revised to include mental institutions and mentally retarded children. There was a general quickening of activity in

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most relevant agencies in the Department of Health, Education and Welfare.

Significant legislation during the Presidential years provided for the establishment of the National Institute of Mental Health and Human Development, the construction of mentally retarded facilities and comprehensive research centers. The funding of advances in rehabilitation programs, changes in the Immigration and Nationality Act to allow mentally retarded to enter the country under certain conditions, the extension of training programs for special education personnel, and the inclusion of the mentally retarded in the "Medicare" Bill and the Elementary and Secondary Education Act of 1965 have evolved from recommendations proposed to the President's Committee on Mental Retardation.

The Commonwealth of Pennsylvania, in carrying out a federal mandate for action, formulated a comprehensive plan to combat mental retardation. A two year study (1963-1965) focused on two broad themes.

1. What does it mean for mentally retarded citizens, to say that all persons should have equal opportunity to develop their human natures as fully as they can?

2. What are the most economical, equitable, realistic means to achieve this ideal?1

The governor and his staff reviewed the major services offered to mentally retarded individuals, identified the branch of state government which was or should have been discharging each responsibility noted, and assessed the extent to which each function should be strengthened. The Mental Health - Mental Retardation Act of 1966 was proposed and passed as a result of this study. In addition to providing funds and facilities for mentally handicapped persons, the law ordains that the state must establish and maintain working relationships with other governmental bodies and public and private agencies, institutions and organizations so as to assure maximum utilization of services and facilities which each of these agencies may have. This legislation has been cited as the most progressive for the mentally disabled in the nation. Implemented on July 1, 1969, it is administered through the Department of Public Welfare. Community Health Centers were charged with guaranteeing the "continuity of care" of each client. This includes consultation, and education, rehabilitation, training and aftercare as well as interim care. The legislature makes an appropriation each year for the program,

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and each administrative unit develops its own plan and budget. Previously Congress set a goal of 1975 as the time when this nation should finally be ready to serve all disabled people promptly.

**Summary**

It may be said that many public programs for the mentally retarded have developed during the seven decades of the twentieth century. The rapid population growth has multiplied the number of retarded citizens, and medical progress has improved their chances of surviving to adulthood. Moreover, the family itself often needs public support in providing for the needs of a retarded member. The past twenty-five years have been a period of progress in legislation for the mentally retarded. This has not come about spontaneously but has been the product of the efforts of parents and friends, of pressure put upon governmental agencies, of governmental regulation of its duty to the unfortunate. The development of a Credo statement on the rights of the mentally retarded may serve as a guide to the federal and state government in the analysis and revision of statutes and civil procedures affecting the retarded.
CHAPTER III

CIVIL STATUS

It was the opinion of the members of the President's Panel on Mental Retardation that the mentally retarded person would have in some measure inadequate intellectual development and a degree of impairment in the ability to learn and to adapt to the demands of society. So " . . . the law must take into account the prevailing chronic character of mental retardation, along with the disparities and divergencies in abilities displayed by members of the group."\(^1\)

Legislators, lawyers and judges had not been ignorant of this, but the law itself tended to deal in absolutes. The defendant is either responsible or not responsible, the retardate is either competent or not competent, committed or freed, punishable by ordinary standards or subject to exoneration.

Making available richer and better services in community and/or residential institutions, and developing new alternatives in treatment seemed to the Panel a wiser

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way to deal with problems the retardate would face. They felt that formal legal intervention should be regarded as a residual resource and should not occur where social or personal interests could be adequately served without it. But:

Where the law must intervene, the community should look first to see whether laws of general application would be adequate. If they are not, the community should turn to law which protects the disabled as a group. Only in the last resort should the community rely on ad hoc legislation for a specific handicapped group.1

Nevertheless, although formal, mandatory and coercive legal action toward the retarded should be kept at a minimum, the law must, at the same time, protect their rights; it cannot rely exclusively upon the good intentions of those concerned. Too, it must be recognized that many of the retarded are not able to assert their rights; consequently society must provide additional protection.

The Mental Retardation Act of 1963 marked the first substantial commitment of federal resources to help build buildings and train people to serve the mentally retarded. In 1967, President Lyndon B. Johnson signed into law amendments to this Act which authorized more funds for the construction of new facilities for research and direct service, plus expanded training programs.

1Ibid., p. 148.
In addition to extending and broadening the above programs, the Commissioner of Education had been granted authority through fiscal year 1970 to continue and expand the programs of training educational personnel to work with handicapped children, and to inaugurate a new grant program in physical education or recreation for the mentally retarded and other handicapped children. The grants might include training, research and demonstration projects.  

The Social Security Act which provided in 1956 protection for adult mentally retarded persons aided an estimated 168,000 mentally retarded adults in 1970, and 8,000 mentally retarded workers received 156 million dollars. During 1970 the Social Security Administration launched a new program instituting biennial, on-site reviews in State mental hospitals and schools for the retarded to examine in depth the way in which these institutions are managing social security benefits on behalf of patients. Under Social Security's "Childhood Disability" provisions, lifetime monthly payments may enable the retardate to be cared for at home instead of in an institution.

1Special Education Newsletter, Mental Retardation, St. Louis, Mo. (January, 1968), pp. 21-22.


3Ibid., p. 66.
The Handicapped Children's Early Education Assistance Act (Public Law 90-538) provides federal funds for model programs to develop new ways of assisting pre-school handicapped children, including the mentally retarded. Children as young as a few days old may be given their first chance to keep up with those who do not have handicaps.

Beginning in 1958 with the enactment of Public Law 85-905 and 85-926, Congress moved to provide legislation specifically designed to increase the availability and quality of education for handicapped children, including the mentally retarded. In 1966 and 1967 amendments to the Elementary and Secondary Education Act of 1965 gave legislative authority for comprehensive federal support for the education of the retardate as well as other handicapped children.¹

The Vocational Education Amendments (October 16, 1968) updated several previous vocational education acts (Smith-Hughes Act of 1917, the George-Barden Act of 1946, and the Vocational Educational Act of 1963). Their major provisions have been extended to the handicapped by specifying priorities for spending which would result in distributing funds to students who have special needs and who were not receiving aid under the 1963 Act. The Committee on Education

and Labor of the House of Representatives in its report was most explicit in making educational activities, services and opportunities available to the handicapped:

Retarded individuals who have been institutionalized are placed in the care of state rather than with federal agencies. The Mental Health and Mental Retardation Act of 1966 passed by the Legislature of Pennsylvania provides within the state services for all persons who need them. Voluntary and involuntary admissions for residential care in institutions must be based upon sound professional considerations. The reason for placement must depend upon the individual's need for the service, not for the convenience of others. Each commitment must be reviewed at least annually by a committee appointed by the director from the professional staff of the facility to determine whether continued care and commitment is necessary.¹

Each state has its own medico-legal definition of mental retardation. In Pennsylvania:

Mental Defective shall mean a person who is not mentally ill, but whose mental development is so retarded that he has not acquired enough self-control, judgment and discretion to manage himself and his affairs and for whose welfare, or that of others, care is necessary and advisable.²

Handicapped children, even the most severely handicapped, do learn when given the chance to participate in educational programs tailored to meet their special needs. The incredible number of mentally handicapped not receiving any educational services is one of the great tragedies in the American way of life. The U. S. Office of Education reports that less than forty per cent of the seven million

¹Pennsylvania, Comprehensive Mental Retardation, Plan (1965), p. 3.
²Editorial, The Sparc, February 6, 1971, p. 3.
handicapped children receive the educational services they need. 1 A project funded by the Bureau of Education for the Handicapped known as "Closer Look" receives 15,000 inquiries a year from parents seeking appropriate educational services for their children. 2

Recent decisions in various judicial jurisdictions have attempted to define and guarantee the rights of handicapped citizens. In the past, the reason for excluding these children from their right to an education has not been clear.

The U. S. District Court of the Eastern District of Pennsylvania has just handed down an order which provides a revolutionary landmark decision respecting the rights of the handicapped and those who support them. The case entitled, "Pennsylvania Association for Retarded Children against the Commonwealth of Pennsylvania," involved a court suit against the state for failure to educate all its retarded children. The parents of the children argued that the denial of such education was a violation of the equal protection clause of the 14th Amendment to the United States Constitution. The court noted that if education was provided for some, it must be provided for all.

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2Ibid., p. 3.
A three-judge panel has upheld a consent agreement between the Pennsylvania Association for Retarded Children and the Commonwealth of Pennsylvania which guarantees every retarded child in the state the right to a free public education. The court's action has touched off interest in similar suits in several other parts of the country and drawn into question the basic constitutionality of present school exclusion policies affecting handicapped youngsters.\footnote{Thomas K. Gilhool, Pennsylvania Association for Retarded Children vs. Commonwealth of Pennsylvania, International Conference, Atlantic City, February 4, 1972.}

The primary complaint raised in the case was that a variety of state statutes and administrative practices were being used to exclude retarded children from access to public education, thus infringing on their rights under the equal protection of the 14th Amendment of the U. S. Constitution. The class action suit filed in the Federal District Court in Philadelphia was brought by PARC against the state Department of Education on behalf of a group of retarded children and their parents. The final order, signed on October 7, includes clarification of the intent of the School Code as it relates to the mentally retarded:
AND NOW, on this 7th day of October, 1971, the parties having consented through their counsel to certain findings and conclusions and to the relief to be provided to the named plaintiffs and to the members of their class, the provisions of the Consent Agreement between parties set out below are approved and adopted and it is hereby so ORDERED.\textsuperscript{1}

The following Sections can no longer be used as an automatic reason for the exclusion of a mentally retarded child from school:

Section 1304 - Requiring beginners to have attained a mental age of five years.

Section 1326 - Using "compulsory school age" as meaning only age 8 to age 17.

Section 1330 (2) - Excluding children who are "unable to profit" from school.

Section 1371 - Defining "exceptional children" in an arbitrary way.

Section 1372 - Denying a retarded child homebound instruction.

Section 1375 - Considering some children "uneducable" and "untrainable" and having the Welfare Department provide for their "care and treatment."

Section 1376 - Not including mentally retarded under the term "Brain damage."\textsuperscript{2}

For retarded, as for normal persons, education should be a lifetime experience. Ways must be found to nurture individuality and independence, the cornerstones of selfhood for even the most severely handicapped and limited human being.


\textsuperscript{2}Editorial, Pennsylvania Message, March, 1972, p. 3.
Education is for everyone. While costs of educating a retarded child are greater than a normal child, financial considerations should not be valid grounds for denying opportunity to any child.¹

Laws on mental defectiveness, with sharp distinction from mental illness, call for codification, something highly in order and past due.

It is gratifying to know that at present The Pennsylvania Association for Retarded Children is working with a committee that has forcefully expressed their two aims:

1. Handbook on the Legal Rights of Mentally Retarded by Pennsylvania Law,

2. Implementations of the same once they are defined.²

Summary

The retarded individual should be helped to make a life as nearly normal as his handicap allows. If he can be enabled to remain at home, to attend special classes in public school, to secure and hold a productive job, it should be done. If not, he should be helped to become as independent as he can. Only if totally disabled, should he be sheltered completely from his community.


²Pennsylvania Association for Retarded Children, Minutes of Meeting of the Law and Mental Retarded Committee, meeting of November 20, 1971. (Typewritten)
It is general knowledge that the mentally retarded individual is less apparent in adult society than in the pre-school and adolescent period. It may be that a characteristic of a wholesome society is that the mentally retarded become more and more a part of the stream of normal living. On the other hand, it might be possible that such loss of identification is due to the fact that no specific services to which the mentally retarded can turn for help are available.
CHAPTER IV

CRIMINAL LAW

Although there is a paucity of factual information about the relationship of mental retardation and crime, there has been no shortage of opinions about it through the years. To many it was widely believed that every intellectually impaired person was a likely delinquent, and that most criminals began their deviant careers because of mental retardation.

Only a small minority of the mentally retarded get into trouble with the law. ¹ But for those who do, the criminal trial process is not equipped to identify them, or it includes them under provisions designed for the mentally ill and perhaps commits them until recovery which, for the retardate, may well mean commitment for life.

It seems sufficient to cite one study which typifies much of the research done on the Mentally Retarded and Criminal Law. About the findings of a three-year empirical study of both civil and criminal laws, Allen comments:

It also seems apparent that the attitudes of some of the key decision-makers is a factor militating against such recognition and treatment. A judge who wrote us granting his reluctant permission for us to examine the file records in his court was careful to point out that: "I am not in accord with any study the purpose of which is to deprive lawful citizens of the right of protection by law by creating false safeguards against persons responsible for criminal acts.

And a psychiatric report in one of the cases included in our study contained the following statement:

In my opinion he (the defendant) could be certified as a mental defective and committed to an appropriate institution. However, in my opinion he is sane and responsible in law for his actions both at the time of the alleged crime and since.\(^1\)

Parents and concerned adults recognize that the facilities of a juvenile court should be available to all children, and that the mentally retarded need special correctional units, the services of detention-evaluation centers, and programs aimed at the prevention of juvenile offenses. Correctional units for retarded offenders should be the responsibility of the Department of Mental Retardation, should be on the grounds of existing mental retardation residential institutions, and should provide educational and vocational rehabilitation programs. To protect the adult civil liberties of youthful offenders, juvenile records should be eliminated when placement in a correctional unit is required, and offenders should be classified as retarded

rather than as delinquents. Provision should be made for an evaluation of youths in special units, and for follow-up and care of the retarded and their families for at least one year after their discharge. Regional detention and evaluation centers should be established to identify offenders with special problems prior to the court's disposition of their cases. Needed prevention practices include teacher education, school testing programs, special programs and classes within the school setting, and inservice training programs for the various professional disciplines.

Before the problems of the youthful offender can be dealt with adequately, it is recognized that steps must be taken to prevent cultural-familial retardation, provide educational experience designed to counteract the effects of deprived home environments, develop a continuum of care through effective interagency teamwork, provide for a legal distinction between the "insane" and the retarded, provide tests of credibility to confessions obtained from the retarded, teach law officers the baseline characteristics of retardation, and provide appropriate places of secondary confinement. The plea, trial, and post-trial disposition should be based on the essential medical, social, and psychological differences between the "insane" and the retarded. The possibility of a plea of innocent by reason of retardation should be considered by the courts. Arresting officers should be sure that a retarded offender understands
the full scope of the Miranda warnings.\textsuperscript{1} If a youthful offender is exploited during his stay in the initial place of confinement, permanent psychological damage can result. Programs for delinquent retardates should provide appropriate living situations for them. These programs should take place in a democratic atmosphere, be staffed by committed persons, and strive to redesign the self-image, develop new self-perception, encourage constructive qualities, and patiently modify antisocial behavior.\textsuperscript{2}

Solutions to the problems experienced by the retarded with poorly written laws in the areas of entitlement and correction lie in seeking new legislation at all levels. Some laws totally disregard the handicap, while others positively exclude the retarded from all privileges. The Law must be adaptive and based on an awareness of retardation.

Pennsylvania, in its comprehensive Mental Retardation Plan, proposes a draft of a new mental health act, and certain of its provisions deal with retarded or allegedly retarded persons accused of criminal offenses. Under this draft Mental Health/Mental Retardation Referral and Investigation Service is to be organized by the county commissioners

\begin{itemize}
\item[\textsuperscript{1}]Dennis Haggerty, private interview (Philadelphia, Pennsylvania), February 10, 1972.
\item[\textsuperscript{2}]Pennsylvania, Comprehensive Mental Retardation, Plan (1965), p. 55.
\end{itemize}
through the appropriate county directors of mental health and mental retardation programs. Under the provisions of this statute when police officers take into custody a person who is thought to be mentally disabled and who is considered to be a danger to himself or to the community, the Referral and Investigation Service would be empowered to order a mental health examination. Persons examined and found to be in need of care in an appropriate "mental health establishment," shall be delivered to the mental health establishment for commitment. If the examination by the Service finds that the accused person does not need care in a mental health establishment, then the legal process proceeds according to criminal law.¹

It is not enough to know that a child has come in conflict with society, but very essential to know why this has happened and what can and must be done in order to give him a fighting chance for a more satisfying way of life.

The laws of most states have established special procedures outside the normal processes of the criminal law for defined categories of offenders: juveniles, youthful offenders, sex offenders, and defective delinquents, for example. Perhaps the closest conceptual model to the exceptional offenders court, among extant judicial institutions, is the juvenile court with which there are at least two significant points of similarity: first, both are concerned with persons who are inadequately equipped to meet certain responsibilities of adulthood-in the case of the juvenile, because of his tender years, and in the case of the mentally retarded, because of his

¹Pennsylvania, Comprehensive Mental Retardation, Plan (1965), p. 98.
intellectual deficit; and second, like the juvenile court, the exceptional offenders court would have as a primary objective the welfare of retarded persons coming under its wardship, rather than imposing punishment for criminal offenses.

It has occasionally been suggested that the processes of the juvenile court should be made applicable to mentally retarded persons charged with crime.

More, however, is required than merely conferring jurisdiction on the juvenile court. A mentally retarded adult has different needs and presents different problems than a child of normal intelligence. Because of these differences, juvenile detention, probation, correctional and training facilities would be inappropriate for the adult retardate, and other dispositional alternatives, such as foster home placement, would be almost totally unavailable. Further, there is the problem of identification. While juveniles at the upper age ranges of jurisdiction of the juvenile court may look older than their years, most children are easily identifiable as children; whereas recognition of the retarded person as such is more difficult.

What is here suggested is a specially constituted court, empowered to assume wardship over any adult person shown to be substantially impaired in his intellectual capacity, who has committed an act which, if committed by an adult without such impairment, would constitute a felony or serious misdemeanor. It is suggested further that jurisdiction be transferred to such court at whatever point the existence of severe mental retardation is suspected—whether prior to trial on a criminal charge, or after conviction, sentence and incarceration for such offense.

Upon referral to such a court, there should first be a determination of the existence of gross intellectual deficit. Such determination should be made by the judge, and should be based on expert evidence presented at a hearing at which the alleged exceptional offender is represented by a guardian AD LITEM. The criteria for such determination should be flexible.1

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1Richard C. Allen, "Toward an Exceptional Offenders Court," Mental Retardation, IV (February, 1966), pp. 3-4.
In Pennsylvania the mentally retarded, as do all others, are subjected to the M'Naghten's rule. The Supreme Court has rejected the argument that rule laid down in M'Naghten's Case should no longer be followed and that Pennsylvania should adopt the "irresistible impulse" test, and after reviewing the M'Naghten rule, the irresistible impulse test, and the "Durham Rule" states: "The science of psychology and its facets are concerned primarily with diagnosis and therapeutics, not with moral judgments. Ethics is the basic element in the judgment of the law and should always continue to be. Until some rule other than 'M'Naghten,' based on a firm foundation in scientific fact for effective operation in the protection and security of society is forthcoming, we shall adhere to it. We shall not blindly follow the opinion of psychiatric and medical experts and substitute for a legal principle, which has proven durable and practicable for decades, vague rules that provide no positive standards."¹

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

distinguish between the fact and the appearance of friendliness. Some of the retarded are characterized by a desire to please authority; if a confession will please, it may be gladly given. 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.

Courts in Pennsylvania still hold to the M'Naghten's Rule--"If you know right from wrong--you are guilty."¹

Summary

The pendulum has swung to create a new concept of social justice--justice to the individual. Judge H. S. Levin of Philadelphia points out justice and punishment clearly in these words: "You tailor the garment to the person in front of you. You don't buy a dozen suits and make the people fit them."²


CHAPTER V

PUBLIC AWARENESS IN PENNSYLVANIA

There is a bold new approach on the rights, the treatment, and the needs of the mentally retarded. The general public are being made aware of this from headlines appearing in daily public newspapers.

"Mentally Retarded Deserve Better Than Warehousing."¹

"Retarded to Comprise Montco Households, Commute to Work."²

"Lawyer Fights for Rights of the Mentally Retarded."³

"A Dream May Aid Retarded."⁴

"Pennsylvania Starts Plan for the Retarded."⁵

"Public Fails to Act on Concern for Retarded."⁶

Progress is being made. It is another example of the old adage—in union there is strength.

¹The Philadelphia Inquirer, November 24, 1972.
⁶The Philadelphia Inquirer, December 1, 1972.
Finally from the Pennsylvania Committee who are working to update laws and to arouse public interest comes the report: "After exhaustive research, it is obvious that the status of the law in Pennsylvania and in fact, the entire country is vague and inconsistent."¹ It stated that "court law has absolutely" nothing on the human and legal rights of the retarded person.

Presently in Pennsylvania there is no statute which deals specifically with guardianship for the retarded.

Pennsylvania law prohibits the issue of a marriage license. Pennsylvania has no compulsory sterilization law.²

Summary

Are the mentally retarded in Pennsylvania groping in the dark? Has society refused to help them? Very few persons, other than those who are engaged professionally in the field, are aware of the extent of the problem.

Despite the remarkable progress, however, much remains to be done with respect to improving the public image of and attitude toward the retarded, especially with respect to real understanding of the nature of the affliction and the potentialities of the less severely retarded.


²Ibid.
Implications

Can a segment of society actually make itself heard? Can they be heard above the shouts of "We Shall Overcome"? The answers to these questions depend on the conviction and belief behind the voice—the conviction that each human being has a worth and dignity to be realized and recognized.

Our judicial system does not encompass the problem of retardation in any precise way. A retardate, in legal matters, is treated like a mentally incompetent person, whereas, in fact, he may not be; his substandard intelligence has not made him incompetent in all circumstances. Because of this attitude, however, focus on the retardate's problems is diverted from one of the main causative factors—poverty. Thousands of mentally retarded people escape attention because they have been assimilated by a segment of society, the ghetto, whose inhabitants do not survive or compete on the basis of academic intelligence. The retardate is more like the indigent or impoverished rather than the incompetent. Ghetto areas are generally characterized by poverty, disease and ignorance. Because of the retardate's limited intelligence, he, too, possesses these characteristics and consequently is submerged in ghetto life. He survives because he has practical abilities that are not measured by I.Q.
Special education has become a major component of the educational enterprise. The last ten years have witnessed a sky-rocketing in state and federal legislation to support its growth. This progress has not been easy, for it has encountered resistance from the education establishment. This resistance is often reflected in a sense of paranoia on the part of special educators and parents of handicapped children.

There is very little question that the battles that have been fought have made it possible for many handicapped children to obtain an otherwise unavailable education, and to become self-fulfilled citizens. And more battles will have to be waged against a system that fails to educate its children. The question that is being raised in the profession, the courts, the legislatures and in the community is whether special education consciously or unconsciously, in its goal to help children, has denied some children their basic rights.

Traditionally, special education meant special classes. This is not so today. There is a distinct movement to encourage other program options such as resource aides to the regular classroom teachers, resource rooms, itinerant services, etc. This trend is not meant to discredit the special class, but rather to view it as one placement on a continuum of special education services.
Most laws involving the mentally retarded are so elastic that one questions their usefulness.

Proper terminology will itself do much to make the general public understand the true situation. In adjudging one of this class more is to be considered than the result of mere intellectual tests. Nowhere are precise measurements more difficult except in the affective domain.

Wrongful terminology is found in very considerable measure in legal literature, and hardly less so in some general literature dealing with public or social matters. Much legal language in reference to mental defectives is confusing and is in need of thorough overhauling. There should be full examination of what is needed and what is not needed in legal conceptions on the subject.

Court systems and methods of carrying out justices have changed as society has changed. Over the centuries the changes have been enormous.

Since the purpose of this paper has been to look at the rights given by law to the mentally retarded and to examine future plans in the State of Pennsylvania, on the basis of this survey it can be predicted that in the near future there will exist more harmonious relations between the law and the mentally retarded on both local and national levels.
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