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Criminal justice and the mentally retarded.

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CRIMINAL JUSTICE AND THE MENTALLY RETARDED

A Dissertation Presented

By

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ABSTRACT

Criminal Justice and the Mentally Retarded

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The present work examines how courts in the United States decide the issue of criminal responsibility when faced with a mentally retarded defendant. Mental Retardation is defined as subaverage intelligence existing concurently with significant deficits in adaptive behavior and originating during the first eighteen years of life. Most of the research results in the field of mental retardation are clouded by faulty diagnoses caused by problematic instruments and procedures. Although these results are not clear, data bearing on issues such as incidence, ability levels as related to classification, and relation to criminality are examined.

Anglo-American thoughts on criminal responsibility are traced back to the twelfth century with the introduction of the concept of mens rea into the English legal system. Mens rea or "guilty mind" has been interpreted to mean moral knowledge, and knowledge of consequences concerning ones behavior, intentions and motives. Prior to the acceptance of mens rea, only the criminal act itself was necessary for conviction.

In order to identify individuals who should not be held responsible, courts developed tests and procedures. Since legal systems are heavily dependent on precedent many of the current problems in identifying these individuals have roots early in this history.

The M'Naghten case in 1843 is the most significant occurrence in the history of thought on legal insanity. The M'Naghten rules are currently used in most of the United States. Other tests in use are the irresistible-impulse test, the Model Penal Code standard, and the product rule. All of these tests have received more than ample criticism. An examination of this criticism reveals a similarity in content. Indeed, many problems tend to be passed from one test to another. Since decisions regarding criminal responsibility are inevitably subjective and they are made in an emotionally charged atmosphere, it is likely that many critics also sense the impossibility of making a fair judgement in that situation.

Punishment and treatment frequently occupy a central place in writings on the topic of criminal responsibility. Those relieved of criminal responsibility are to receive treatment and those held responsible are to receive punishment. This thinking, therefore, equates prisons with punishment and mental health and mental retardation institutions with treatment. The concepts of punishment and treatment are defined and compared on a theoretical level. In order to determine how well these institutions function within their theoretical roles an examination of their histories and how they presently function is

conducted. This examination reveals that all three types of institutions frequently represent punishment in the extreme. In order for the issue of criminal responsibility to have any meaning, those relieved of responsibility must, if incarceration becomes necessary, receive treatment.

Normalization, a dominant principle in human services, is defined as the use of means which are as culturally normative as possible in order to establish and/or maintain personal behavior and characteristics which are as culturally normative as possible. The application of normalization to the issue under consideration indicates that it would not be wise to relieve all retarded persons of criminal responsibility. Rather, retarded persons should be considered responsible and only if it can be shown that an accused individual lacks the ability to assume this responsibility should relief be granted.

This work recommends that the issue of criminal responsibility be removed from criminal proceedings. The concept of mens rea is interpreted to mean the ability to make rational decisions. Since guardianship and competency also speak to this ability a finding of incompetence in a guardianship hearing is equated with the inability to assume criminal responsibility. Such a procedure would make it possible to decide criminal responsibility for a given individual outside of the emotionally charged atmosphere of a criminal proceeding. Recommendations regarding the implementation of this procedure are also included.

PREFACE

The motivation to produce this work grew out of the author's experiences in the field of mental retardation. Changes which have occurred and continue to occur in the field are enabling retarded persons to be a part of the mainstream of American life. The times when retarded persons could effectively be segregated for life from the rest of society are slowly dying away. As a result of this increased desegregation, the author has found himself on a number of occasions either accompanying mentally retarded clients to court or speaking to police or prosecuting attorneys regarding the behavior of clients. In these instances, the responses of the criminal justice system can only be described as consistently inconsistent.

This confusion on the part of the criminal justice system prompted the author to explore the issue of criminal responsibility. This work is designed to serve as an educational device for legislators, persons involved with our criminal justice system, and persons concerned with the well-being of the mentally retarded. When this project was conceived it was hoped that the recommendations made in the final chapter would at some future time be adopted as law.

In order to accomplish this, a search of relevant literature was conducted. Since the vast bulk of literature on criminal responsibility addresses the issue from the perspective of mental illness, much of the discussion revolves around mental illness and so-called insanity. The approach has been to examine the issue through the perspective of

existing literature and then to determine the relevance that material has for the retarded person. This document does not include a comprehensive review of the types of treatment which should be provided to offenders. However, since what happens to an offender cannot be completely divorced from decisions regarding responsibility, the disposition of offenders relieved of responsibility is discussed in the final chapter. Finally, this work is limited in that while it can examine the problems which have occurred in determining criminal responsibility and recommend changes consistent with current knowledge, it cannot measure the probable impact of these recommended changes on our criminal justice system.

The paper will be divided into seven chapters. Chapter I clearly specifies the problem and its importance.

Chapter II contains a discussion of mental retardation including a description of the condition, its prevalence, identification and classification, and its relationship to criminal activity.

In Chapter III the history of thought on criminal responsibility in Anglo-Saxon law is traced in order to provide historical perspective. The M'Naghten or other later rules are not considered in this discussion. Of particular interest in this chapter is the determination of how rules or laws regarding criminal responsibility are developed.

Chapter IV examines contemporary rules regarding criminal responsibility. Included here is a review and critique of the M'Naghten rules, the irresistible-impulse test, the product rule, the Model Penal Code recommendations, and other proposals.

Chapter V examines the punishment-versus-treatment controversy. In order to treat the topic adequately it is examined on both theoretical and applied levels. This topic is critical since there is a considerable amount of controversy currently over the distinctions which have been drawn by various authors between punishment and treatment.

Chapter VI examines the concept of normalization and its significance for determining criminal responsibility.

Chapter VII specifies the recommended changes in methods of determining criminal responsibility among mentally retarded offenders. Additionally, a limited discussion is presented of what considerations the court should take into account when deciding the disposition of a case where the defendant has been found not responsible.

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CHAPTER I

THE PROBLEM

The purpose of criminal law is, practically speaking, to define and reduce the incidence of criminal behavior within a given society. The rising crime rate in the United States testifies to the fact that the present criminal law system is failing in one of its purposes (Clark, 1970).

The other purpose, that of defining criminal behavior, has been equally difficult to achieve. Some writers have stated that criminality should be based upon whether or not an act interferes with the public peace (Bishop, 1882, p. 125). This, of course, is an oversimplification. In fact, the defining of criminal behavior involves two separate problems. First, society must decide which acts are criminal and label them as such. Second, the conditions which render an individual incapable of committing criminal acts must be identified. In Anglo-American law, individuals are not considered criminally responsible when these conditions are met. Therefore, regardless of the behavior such persons exhibit, their acts are not labelled criminal.

The issue under investigation here is how the criminal justice system makes decisions regarding criminal responsibility for mentally retarded persons. The making of these decisions is dependent, of course, on the fact that society as a whole, rather than a few isolated individuals, has an impact on the specification of justice. The product of this work will be recommendations concerning how courts should decide criminal responsibility for the mentally retarded.

The determination of criminal responsibility for persons with mental disabilities has been, and continues to be, a deceptively complex problem for our legal system. Superficially, it appears that courts might simply define the types and degrees of seriousness of mental defects which may be considered to relieve a defendant of responsibility, relying heavily on the opinions of psychiatrists and other experts for guidance (as has been done). In fact, however, these experts are seldom able to agree among themselves on this criterion.

During trials in American courts a tacit assumption is made that persons are responsible for their behavior. When the responsibility question is raised by the defense, two issues must be decided. First, has evidence been produced which indicates that the defendant is or was at the time the illegal act was committed suffering from a mental condition (defined by law) which could relieve him of criminal responsibility? Second, if he was suffering from such a condition, does he have the characteristics which are called for in the criminal responsibility test in use in that state? Only when both questions are answered affirmatively is relief granted. Since it is the responsibility of a jury to answer these questions, the test utilized by a given state is primarily found within instructions to juries.

Currently, in the United States, the following tests are used to determine criminal responsibility:

.The M'Naghten Rules

.Irresistible-Impulse Test

.The Product Rule

.The Model Penal Code

At least theoretically, criminal responsibility and these tests are dependent on the concept of mens rea. Mens rea, in Anglo-American law, states that in order for an act to be criminal, a "guilty mind" must be present. Mens rea involves moral knowledge and knowledge of consequences concerning one's behavior, intentions, and motives. Additionally, mens rea assumes the ability to make rational choices.

The answer to the question of criminal responsibility has profound implications for a defendant. In extreme cases it can mean the difference between life and death. In less dramatic instances it can mean the difference between release and incarceration or treatment versus punishment. Treatment versus punishment is used as a major argument by many authors when calling for change. The exact meaning of this argument will be explored in a later chapter.

Although numerous writers have addressed the problem of criminal responsibility, most efforts have tended to focus exclusively on mental illness as the defect which limits responsibility. Mental Retardation, while it may be mentioned as a limiting condition is almost never fully explored. For example, The American Bar Foundation, the legal research affiliate of the American Bar Association, has recently published an intensive study entitled The Mentally Disabled and the Law, (Brakel & Rock, 1971). In the Introduction to that study the definition of mental disability includes mental deficiency (p. xv). However, in discussing criminal law this study does not direct any attention to those issues which concern the mentally retarded.

Why the retarded have been excluded from these discussions and studies is unclear, but the retarded have certainly been a generally

ignored group until recently (Kanner, 1964, p. 7). The neglect cannot be attributed to a lack of contact between our courts and the mentally retarded (Marsh, Friel, and Eissler, 1975), for the retarded appear to have greater contact with the criminal justice system than the incidence of this condition in society would seem to warrant. And there is reason to believe that the contact between the criminal justice system and the mentally retarded will increase. The primary reason for this is the current evolution of philosophy within the field of mental retardation. At the turn of the century professionals in the field believed that institutionalization was the only option for the vast majority of the retarded (e.g. Fernald, 1912). Recently, many have recognized that the detrimental effects of institutionalization outweigh its advantages (Roos, 1970, p. 34), and thus, institutionalization of the retarded is currently being discouraged (Luckey & Newman, 1975; O'Conner & Sitkei, 1975). Second, community alternatives, consistent with this change in philosophy, are being developed. These alternatives have decreased the number of admittances to institutions and have also enabled institutionalized individuals to move to community based residences (Conely, 1973, p. 82). Third, class action right-to-treatment suits are being heard and, at least in one instance, the court has granted a summary judgement including the requirement to provide the least restrictive possible residential setting for retarded individuals (Davis v. Watkins 1974). Findings such as this one can have dramatic impact on the residential services provided to retarded persons. It seems reasonable to conclude that as the number of retarded persons living within community settings increases, there will be increased

contact between these individuals and our courts.

The continual development of community-based residential services demands that the presently ambiguous laws regarding the mentally retarded offender be addressed and clarified, and a set of guidelines be formed for the use of courts in deciding criminal responsibility when confronted with a mentally retarded defendant.

CHAPTER II

MENTAL RETARDATION

Mental retardation is a label applied by society to a relatively small group of individuals. While this type of labeling may be useful not only for the individual in question but also for society, it also has potential negative consequences. There is a tendency to associate characteristics with labeled individuals that are not inherent in the definition of the label. Why this is so is not clear but such a relationship appears to be universal. Much of the research which explores community attitudes toward the retarded assumes this relationship exists. These associated characteristics tend to support the erroneous belief that labeled individuals are similar, in many ways, to one another and that the differences between these persons and the rest of society are greater than the similarities.

The present author starts with the assumption that retarded persons are more similar to others than different. Moreover, the author contends that the variability which is found among the general population is usually also present in the retarded population. Such an orientation demands that differences between the mentally retarded and others which are not inherent in the definition of retardation must be demonstrated. Where such differences have not been clearly demonstrated, the assumption must be that they do not exist.

In order for the reader to obtain a basic understanding of mental retardation, this chapter first provides a definition of the condition and includes a discussion of the functions and methods of diagnosis.

The characteristics of the retarded and the causes of this condition are also explored.

Of paramount importance in this chapter is a description of the ability of retarded persons to function independently within the community and govern their own lives. Since the severity of the handicap subsumed under mental retardation is variable, the descriptions of these abilities will be made in relation to different degrees of retardation. Finally, research bearing on the incidence of this condition and its relation to criminal behavior is presented.

Definition and Diagnosis

The most widely accepted definition of mental retardation and the one accepted by the American Association of Mental Deficiency states that "Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period" (Grossman, 1973, p. 1). As Heber (1962) has pointed out, the concept of mental retardation emphasizes the present level of functioning of the individual.

This definition can be divided into three components. First, the retardation must have originated during the developmental period. The upper age limit of the developmental period has been specified as eighteen years (Grossman, 1973, p. 11). This age limit is believed to be an aid in discriminating between mental retardation and other disorders of human behavior. Second, intellectual functioning must be

significantly subaverage. Intellectual functioning is that which is measured by intelligence tests, and subaverage defines any test score which is more than two standard deviations below the mean of the tests. In general, this is a score of less than seventy. Third, subaverage intelligence is not sufficient without a concurrent existence of adaptive behavior deficits. Adaptive behavior means the effectiveness with which a person meets the standards of personal and social responsibility expected of his age and cultural group.

The inclusion of adaptive behavior in the definition of mental retardation is fairly recent and provides several advantages. It ensures that persons are labeled retarded only when they are not able to meet the conduct standards established by society. The criterion of adaptive behavior should enable many persons who score low on intelligence tests to escape the label of retardation and thus avoid any of the undesirable effects such labeling creates. Additionally, intelligence is an abstraction which lacks any agreed-upon definition or any constellation of tools necessary to measure its components. Intelligence tests, regardless of their name, were never designed to evaluate the global concept of intelligence. Rather, these tests originated with the desire to identify students who were destined to fail in school. It is likely that problem solving skills differ between school and other life settings. Therefore, the inclusion of adaptive behavior provides a check on judgements made solely on the basis of low intelligence test scores.

The observant reader has probably noted that the definition supplied by the American Association of Mental Deficiency makes no

mention of the irreversibility of the condition. In fact, a considerable amount of data exists which demonstrates that intelligence test scores can and do change over time. Clarke and Clarke (1954) tested and retested with the same instrument a group of individuals who had been diagnosed as retarded. When a period of two years had passed between testings the authors found that the mean had risen by 6.5 points. Other researchers have found similar results (New York State Department of Mental Hygiene, 1955 and Kirk, 1965).

Although mental retardation has a clear definition and, as Bialor (1970) has pointed out, the definition of emotional disturbance has proven more elusive due to the diversity of syndromes grouped under that label, confusion between the two conditions still exists. For example, Latimer (1970), through interviews with over one thousand citizens in Kentucky, Indiana, and Ohio, found considerable confusion over the purpose of mental health and mental retardation facilities. At least one-third of the persons interviewed believed that most of the mentally retarded are mentally ill. A second study by Winthrop and Taylor (1957) found that sixty-two percent of the subjects believed mental retardation to be mental illness and forty three percent felt it could be cured as if it were mental illness.

It is possible that one reason mental illness and mental retardation are viewed similarly is the fact that they both represent deviance. Every society has established standards of acceptable behavior, and individuals who habitually violate these standards are labeled deviant. Such a label usually leads members of society to view the differences

between themselves and deviant persons as greater than they actually are and obscures the similarities. This situation can lead to fear of the deviant person (Gottlieb & Corman, 1975 and Lewis, 1973) and eventually, to the sanctioning of the abuse of such persons (Hobbs, 1975a p. 26). Thus, it may be that society views mental illness and retardation as similar to one another but different from the rest of society.

The definition of mental retardation can only be made within the context of a given society. Since deviation as represented by mental retardation implies a standard set of expectations regarding normal development (Uzgiris, 1970). A standard set of expectations and the behaviors which lie outside of that standard can only be defined within a societal context.

The labeling of a person as mentally retarded can have two purposes. It can first help to identify persons who are in need of remedial or special services. This provides help to the individual and also assists society in preserving its norms and standards. The second is to identify and separate out the labeled person, again assisting society, but often at the expense of the individual labeled as deviant.

The labeling of a person as mentally retarded in the United States usually comes about through a formal diagnosis. The diagnosis as mentioned in the definition of mental retardation should use intelligence test results, an assessment of adaptive behavior, and determinations regarding the age during which the retardation originated. Unfortunately for society, individuals empowered to label others as retarded often use only intelligence testing as criteria, and many

individuals are inaccurately labeled as retarded. Even much of the research regarding the retarded uses this single criterion. The erroneous practice is so widespread in fact, that unless otherwise noted, the research cited in this work has primarily used intelligence tests to make a diagnosis. According to the standard established by the American Association on Mental Deficiency (Grossman, 1973, p. 17), a person must manifest deficiencies in both intelligence test scores and adaptive behavior. A finding of the requisite deficit in intelligence testing without the concurrent deficiency in adaptive behavior does not call for a diagnosis of mental retardation. The converse of this situation would also not justify a diagnosis of retardation.

Intelligence tests are the most widely used standardized test in our society, probably because our culture places such a high premium on performance in academic settings. It has been estimated that over 250,000,000 intelligence tests are administered each year (Hobbs, 1975 a, p. 45). These tests are administered in a variety of settings including industry, schools, and the military. A considerable amount of time and energy is spent in developing new tests and improving old ones. Although intelligence tests are widely used and accepted in the United States, they are frequently misunderstood and test results are not infrequently misinterpreted. For example, it is not unusual to hear testers interpret an obtained IQ as indicative of innate intellectual potential or ability. In order to gain a better understanding of the meaning of these tests, a brief examination of the history of their development follows.

In the early part of the nineteenth century in France there developed an interest in establishing methods to accurately differentiate between individuals with varying mental abilities. This interest primarily grew out of the work of Jean Esquirol and Edoward Sequin, both interested in the remediation of mental retardation (Freeman, 1962, p. 4). Both men attempted to develop ways of classifying individuals by degrees of disability, but neither of them was successful. Esquirol even attempted to make these discriminations on the basis of physical measurements, particularly the size and shape of the skull. It was not, however, until the work of Binet that the intelligence test as we know it today was developed.

During the 1890's Alfred Binet conducted a considerable amount of research regarding mental abilities. His research focused on issues such as memory, imagination, attention, comprehension, and suggestibility. In 1903 the French Minister of Public Instruction approved a plan which called for the education of children who frequently failed. The plan called for the removal of these children from regular classes and their placement in a special school. In order to accomplish this, a means of identifying the children was needed, and Binet was asked to develop an instrument which would make the required discrimination. In collaboration with Simon he undertook the task and designed the intelligence test referred to as the Binet-Simon scale (Murphy, 1949, p. 354). Within this scale there were a series of tests requiring the naming of objects, comparisons of lengths of lines, the repetition of digits, the completion of sentences, and the comprehension of questions. The scale was revised in 1908, and in 1910 it was adapted for use in the

United States by Goddard. The test devised by Binet and Simon served as a model for all the intelligence tests which followed. As a matter of fact, the Stanford-Binet, the most recent revision of the Binet-Simon, is one of the most frequently used intelligence tests in the United States today. What must be kept in mind about these tests is that they were designed to predict success in a school setting, and, in fact, that is where their greatest predictive validity lies. Table 1 presents the correlations that are obtained between the Stanford-Binet and grades received in both elementary and high school (Freeman, 1962, p. 215). Other tests which have been developed correlate highly with the Stanford-Binet. For example, another widely used set of instruments are the Wechsler scales. The correlation coefficient between the children's scale of the Wechsler and the Stanford-Binet is between .64 and .76 (Freeman, 1962, p. 272).

Instruments for measuring adaptive behavior have not received the attention that intelligence tests have. For many years the Vineland Scale of Social Maturity (Doll, 1936) was the standard tool used to make this assessment. This scale consists of one hundred seventeen items, ordered from least to most difficult, and covered behavioral areas such as selfhelp, occupation, communication, and socialization. The information which this scale organizes is not obtained directly from the individual being evaluated but, rather, from another person who knows the subject well. The Vineland scale has produced reasonable reliability coefficients. Doll (1936) reported a coefficient of .92 and Hurst (1962) reported that the reliability was not likely to fall below .80. Correlations between the Vineland Scale and intelligence

TABLE 1

Correlations between Stanford-Binet Scores and School Grades by Academic Subject

Elementary School		High School	
Subject	Correlation	Subject	Correlation
Reading	.60 or higher	Reading Comprehension	.70
Arithmetic	.50 or higher	Knowledge of Literature	.60
Spelling	.45 or higher	English Usage	.60
		History	.60
		Algebra	.60
		Biology	.55
		Geometry	.50
		Spelling	.45
		Reading Rate	.45

test scores have been shown to vary from .41 to .82 (Shakespeare, 1970).

Since the Vineland Scale proved to be unsatisfactory in discriminating between fine differences in adaptive behavior, another instrument known as the American Association for Mental Deficiancy Scales of Adaptive Behavior (AAMD Scales) was developed (Nihira, Foster, Shellhaas, & Leland, 1969). Today, this is the most commonly used tool to assess adaptive behavior and the one recommended by the American Association on Mental Deficiency. The project which led to the development of the AAMD Scales was sponsored by the American Association on Mental Deficiency and had as its goals: (1) to review literature in areas related to adaptive behavior, e.g., medicine, education, sociology, child development, mental retardation, etc.; (2) to evaluate adaptive behavior as an independent dimension; (3) to develop a more precise definition of the concept of adaptive behavior; and (4) to establish a library on adaptive behavior as it relates to mental and emotional disturbance (Leland, 1973). The scale conceptualizes adaptive behavior into three behavioral sets. The first, independent functioning, is the ability of the person to successfully accomplish those tasks or activities demanded by the critical survival demands of the community and by the typical community expectations for different ages. Personal responsibility, the second set, is the willingness of the individual to accamplish critical tasks he is able to perform and his ability to assume responsibility for his behavior. The third, social responsibility, is the ability to accept responsibility as a community member and to exhibit behaviors expected by that community. The original

AAMD Scale was produced in 1969 and revised in 1974 (Fogelman, 1974). The scale has a reliability of approximately .62 and appears to have some validity. For example, it has been shown to discriminate well between five functionally homogeneous residential units at an institution for the retarded.

Intelligence tests and adaptive behavior scales not only diagnose a person as retarded but also classify the person as mildly, moderately, severely or profoundly retarded. Since these two instruments do not correlate perfectly there will be times when their diagnoses and classifications are in agreement and times when they are not. As mentioned above, the American Association on Mental Deficiency has stated that both intelligence test scores and adaptive behavior scores must fall within the retarded range for a person to be diagnosed as such. Unfortunately, the association provides no guidelines for classifying retarded persons when these instruments estimate the severity of retardation differently. If, however, we consider normal intelligence or normal adaptive behavior as another classification along a skill dimension, guidance in making such classification decisions might be gained. An examination of Table 2 is helpful in this analysis. In Table 2 X represents a score obtained from either an intelligence test or an adaptive behavior scale. As shown in the table, there is no difficulty in classifying individual A. With individual B, however, the adaptive behavior score indicates normal functioning and the intelligence test score indicates mild retardation. In these cases the American Association on Mental Deficiency recommends that the higher

TABLE 2

An Illustration of Several Different Combinations of Intelligence Test and Adaptive Behavior Scores

	Individual A		Individual B		Individual C	
Classification	Adaptive Behavior (AB)	Intelligence Test (IT)	AB	IT	AB	IT
Normal			X			
Mild	X	X		X		X
Moderate					X	
Severe						
Profound						

score be chosen in making a diagnosis. When classifying any retarded individual, it makes sense to follow the association's recommendation by choosing the higher score and thus, consistency in diagnosis and classification would be achieved. Therefore, although Individual C in Table 2 has an adaptive behavior score which indicates moderate retardation, because his intelligence test score is indicative of mild retardation, the individual should be classified as mildly retarded.

Characteristics

This section presents information in an attempt to define the characteristics of the mentally retarded population as a whole. Particular attention is paid to the relationship of mental retardation to sex, race, socio-economic class, personality, and adaptive behavior. The data presented originated either from agency surveys or household surveys. In the former, agencies that are likely to come in contact with and provide services for the mentally retarded report the number of cases they have identified. Household surveys involve investigating all or a representative sample of the residents in a given geographical area. In general, agency surveys present lower prevalence rates than household surveys because all the mentally retarded are not typically known to agencies, it is difficult to identify all the relevant agencies, and not all agencies cooperate with research efforts. The last part of this section provides a very brief discussion of the causes of mental retardation. The research presented relies on intelligence test scores for the diagnosis of retardation. Studies that systematically evaluated

adaptive behavior are identified as such in the work.

In general, researchers have found the incidence of mental retardation to be higher among males than females. (Lemkaw, Tietze, & Cooper, 1942, p. 275-288, New York State Department of Mental Hygience, Mental Health Research Unit, 1965). The proportion of males to females in these studies is approximately 1.5 to 1. Whether or not this difference is real or artifactual is unclear. It is possible that as Lemkaw (1956) has suggested, males are more apt to have their retardation "discovered" since in our society they are more likely to get into trouble than are females.

Since the intelligence tests typically administered have been standardized on white middle class Americans, conclusions regarding any relationship between mental retardation and race remain cloudy.

A recent study (Conley, 1973, p. 22) investigated the relationship between mental retardation and socio-economic class for children between the ages of five and nineteen. Five classes were identified on the basis of occupation, income for the head of the household, and education. This study found that children born into the lowest class are thirteen times more likely to be retarded than those born into the top three classes. Upon examining the interaction between race and class, these investigators found that children belonging to the lowest class are about seven times more likely to be retarded than their counterparts in the top three classes. Likewise, nonwhite children in the lowest class are twice as likely to be retarded as nonwhite children in the top three classes. Within each socio-economic class,

the prevalence of mental retardation among nonwhite children is higher than for white children by a multiple of three in the lowest class and thirteen in the highest three classes. Degree of retardation was also found to be affected by socio-economic class and race. Those children with more severe impairments (IQ less than fifty) are seven times more likely to come from the lowest class than from the highest three socio-economic classes. Additionally, nonwhites are more likely than whites to suffer from severe retardation regardless of socio-economic class, being twice as likely in the lowest class and seven times more likely in the top three classes.

Very little research has been conducted on the personality variables associated with mental retardation (Cromwell, 1959). The interest here, however, is not in thoroughly reviewing this area but, rather, in focusing on literature which examines the relationship between emotional disturbance and mental retardation. This decision is based upon the assumption stated earlier that the retarded are more similar to than different from the rest of the population. Therefore, the author believes that, in general, personality development among the retarded is similar to that of others. But, since the mentally retarded experience considerable failure within society as it is currently defined, and since they are frequently ostracized, an examination of the relationship between emotional disturbance and mental retardation is warranted.

A number of studies have found the incidence of emotional disturbance to be higher among the mentally retarded than would be expected.

Blatt (1958) found that retarded students in regular or special classes had a higher frequency of personality maladjustments as compared to other children. Weaver (1946) used eight thousand retarded military inductees as subjects in an investigation of the adjustment of the mentally retarded in military service. He found that forty four percent of the males and thirty eight percent of the females became psychiatric problems or were repeatedly found guilty of misconduct. Dewan (1948), studying the emotional adjustment of Canadian mentally retarded army recruits found that forty seven percent were considered to be emotionally unstable by psychiatric examination as opposed to twenty percent in the non-retarded group.

While it is clear that there is a relatively high predisposition for emotional disturbance among the mentally retarded, the exact magnitude of this predisposition is difficult to determine (Balthazar & Stevens, 1975, p. 9). The difficulty is due to the variability in diagnostic techniques used to determine both mental retardation and emotional disturbance and additionally, the relative difficulty in defining and making any diagnoses of emotional disturbance.

A number of researchers have attempted to identify the behaviors which are associated with mild, moderate, severe, and profound retardation. The profoundly retarded are persons who need lifelong care and may even be unable to feed themselves or take care of their toileting needs (Gunzburg, 1968, p. 27). These persons also require nursing care, have, at best, primitive speech, and are incapable of independent functioning (Allen & Allen, 1970, p. 3). The profoundly

retarded usually have considerable nervous system impairment (Stevens, 1964, p. 4), and other types of handicapping conditions are frequently present, such as blindness and gross physical anomalies. The American Association of Mental Deficiency (Grossman, 1973, p. 29) indicates that a person classified as profoundly retarded by the adaptive behavior scale is not capable of using all eating utensils and cannot independently take care of his dressing or bathing needs.

Severely retarded persons also frequently have considerable central nervous system damage as well as other handicapping conditions (Stevens, 1964, p. 4). Motor development and language and speech are considerably retarded and these persons need lifelong support and supervision (Gunzburg, 1968, p. 27 and Allen & Allen, 1970, p. 3). The American Association on Mental Deficiency, in categorizing the severely retarded on the basis of adaptive behavior, states that these persons cannot totally use all eating utensils, need supervision in bathing, cannot work competitively, and realize money has value but cannot make change.

The moderately retarded group represents a dramatic departure from the severely and profoundly retarded. Moderately retarded persons do not frequently have neuropathological conditions or other handicapping conditions (Stevens, 1964, p. 5). These persons can take care of their bodily needs independently, recognize words, may read, and may make change (Grossman, 1973, p. 31). According to Stevens (1964, p. 5), some of these persons may be capable of competitive employment and independent functioning.

The most capable group of mentally retarded persons is represented by the mildly retarded. A mildly retarded person is usually identified after one or two years in school when he has encountered some trouble. Generally, this level of retardation is only apparent when engaging in academic pursuits. These people are usually capable of competitive employment, and they frequently marry and live independently (Allen & Allen, 1970, p. 3 Stevens, 1964, p. 6). The mildly retarded can travel independently, communicate and understand complex verbal concepts, write letters, and can make change and purchases independently (Grossman, 1973, p. 32-33). As Gunzburg (1968, p. 184) has stated, it could be argued that the mildly retarded have a sufficient intellectual level for social competence provided their personality make-up is adequate. Since the "normal" population can be described the same way, the wisdom of labeling this group retarded at all is questionable.

From the above, it seems that the mildly retarded and some of the moderately retarded are capable of independent functioning in the community. A number of studies which bear on this issue have been conducted. Investigations by Krishef (1955), Carson (1965), Porter and Milazzo (1958), Charles (1953), Miller (1965), and Baller, Charles and Miller (1967), demonstrate that while mildly retarded persons become labeled as such because of school or other problems, these individuals as adults are typically assimilated into the community and cease to be identified as retarded by community members. These persons have assumed a wide range of skilled and semi-skilled jobs and

have married, raised children and maintained stable and self-sufficient homes (Cobb, 1972, p. 1).

Kennedy (1966) followed up a group of mildly and moderately retarded individuals released from a state institution in 1948. The retarded were compared on a number of dimensions to a group of "normals" who were matched on several socio-economic variables. Eighteen years after their release, 86 percent of the retarded and 92 percent of the controls had married and no significant differences existed for divorce or separation. Both groups had the same reproduction rate and the average IQ for the offspring of the retarded group was 99.5 as compared to 106.6 for the "normals". Both groups had the same employment rate and were rated average by employers and both had the same frequency of welfare support. The retarded subjects were, of course, a select group since they were chosen for release from the institution.

Edgerton (1967) identified 110 mildly retarded adults who were released from a state institution between 1949 and 1958. The object of Edgerton's study was to determine how well these individuals were functioning in the community. Edgerton (p. 142-143) found almost all of these persons to be functioning adequately. Only a handful had either gotten into difficulties with the law or exhibited conspicuous behavior (e.g. excessive drinking) which was in opposition to social norms.

Coakley (1945) conducted a follow-up study of seventy one retarded individuals who were released from an institution for the retarded into the community in 1944. The average number of years these persons had

been institutionalized was 6.2 with a range of 4.2 to 25.7 years. The range of IQ's was from 40 to 75. Coakley found that all these individuals were able to obtain and hold jobs and no relationship between wages and IQ scores existed. Most of the jobs obtained were in the unskilled category with several being semi-skilled jobs. Although many studies have concluded that no relationship exists between IQ and wages or ability to hold a job, it should be obvious that if the full range of intellectual ability were sampled, some sort of correlation would certainly be found.

Collman and Newlyn (1956) investigated the employment histories of two hundred mildly retarded males and females. The histories of the retarded persons were compared with one hundred six normal IQ individuals. They found a positive relationship between IQ and the ability to perform skilled work. Sex had no effect on job success across both groups. Job failures were negligible for both groups and when it did occur it had the same causes regardless of which group the person was from. These failures were associated with unstable temperament and inefficiency on the job. This study brings up an interesting point. Frequently, retarded persons have the same problems as normal individuals. However, when these problems are exhibited by retarded persons they are automatically associated with retardation and the response is frequently to place these persons into institutions. One wonders why the retarded are not allowed to fail as other people are.

Though the studies above indicate that mildly and many moderately retarded persons can function adequately within the community, several

problems exist in interpreting the data. First, all the samples are biased. For example, samples are frequently taken from groups that have been released from institutions or graduated from special education classes. A better method for our purpose would be to randomly sample all the retarded persons who were born within a particular geographic area ensuring that socio-economic variables are accurately represented. Such a sampling procedure would enable us to generalize concerning the abilities of all retarded persons with a given category. Second, if a representative sample could be identified, it would be interesting to explore the ability of persons in mild and moderate categories to manage their own lives. Examining issues such as employment history certainly bears on this topic but there are many normal intelligent persons in the community who have not been able to keep a job, yet are otherwise able to manage their lives. Third, failure is at times marked by return to an institution for the retarded. As Saenger (1957) found, such returns are precipitated by unacceptable behavior such as property destruction. No one has examined whether or not these persons should return to the institution or be brought to the attention of the criminal justice system. What is apparent is that a person labeled retarded is frequently placed in state schools or other institutions for the retarded for behavior which can be classified as nuisance or criminal in nature. Ironically, a person whose tested IQ is only a few points above the retarded category would receive very different treatment. Obviously, return to an institution does <u>not</u> mean that the individual is incapable of managing his life, although such a move is

usually interpreted by society to mean just that.

Incidence

The literature which has examined the incidence of mental retardation has, for the most part, concluded that approximately three percent of the population is retarded. The President's Panel on Mental Retardation (1962) has stated that three percent of the population would, if tested, obtain an IQ score below 70. Similarly, the National Association of Social Workers (1970) has also estimated that three percent of the population is retarded.

A number of epidemiological studies which used intelligence test scores as the primary criterion have attempted to determine the prevalence of mental retardation in our society. Table 3 summarizes the results of these studies. The variability of the rates found in these studies can be explained by a number of factors. One factor which makes comparisons across studies difficult is the criteria used by various authors to define retardation. The research conducted by the New York State Department of Mental Hygiene apparently had no cutoff point for IQ scores and included persons that various social service agencies "suspected" of being mentally retarded. In their definitions of mental retardation Lemkaw, Tietze, & Cooper (1942) used an IQ score of less than 70, Levinson (1962) considered an IQ score of less than 75 as the criterion, and Wishik (1956) used IQ scores of less than 80.

Another factor creating variability in these results is the age

TABLE 3

Prevalence of Mental Retardation Found by Studies Using Intelligence as Primary Criterion

Study	Place of Study	Prevalence
Lemkau, Tietze, & Cooper (1942)	Baltimore	1.2%
New York State Department of Mental Hygiene, Mental Health Research Unit (1965)	Onandaga County, New York	3.5%
Wishik (1956)	Oconee and Clark Counties, Georgia	3.7%
Levinson (1962)	Maine	3.2%

groups surveyed in the research. It is a well known fact that the prevalence of mental retardation increases steadily with age until the mid-teens, after which it begins to decline (Conley, 1973, p. 18). This is primarily due to the fact that most retarded persons do not get labeled as such until difficulties in school arise, and mildly retarded persons frequently do not get identified until relatively late in their school career. As mentioned in a previous section, mildly retarded persons usually blend into society and lose the label of retardation upon leaving the educational system. The age range covered by these studies is as follows: New York State Department of Mental Hygiene (1965) - one to seventeen; Lemkau, Tietze, and Cooper (1942) - all ages; Levinson (1962 - five to twenty; Wishik (1956) - birth to twenty.

The place where the survey was conducted also affects the results. As demonstrated previously, race and socio-economic class affect intelligence test scores. It is highly unlikely that these variables would be similar across the areas shown in Table 3.

An interesting study by Mercer (1973) hypothesized that the prevalence of retardation is actually one percent. This hypothesis was based on the belief that the double criteria recommended by the American Association on Mental Deficiency (IQ less than 70 and significant impairment in adaptive behavior), if consistently applied, would significantly reduce the number of persons diagnosed as retarded. In this study, 2,661 households were interviewed in Riverside, California and 423 persons were identified as possibly being retarded. These

individuals were tested with the Stanford-Binet or the Kuhlman-Binet to determine IQ. Additionally, the author conceptualized adaptive behavior as the ability to play ever more complex roles in a progressively widening circle of social systems with age. She developed a scale to measure this concept of adaptive behavior and applied it to the subjects, taking as a cutoff point on this scale the lowest three percent in each age group. Table 4 shows the results of this study when only one criterion (IQ) is used and the results when both IQ and adaptive behavior are used. It is obvious from Table 4 that the combination of IQ and adaptive behavior greatly reduces the incidence of mental retardation and brings it close to a one percent rate. This reduction is primarily due to a decrease in the number of individuals typically diagnosed as mildly retarded with some reduction occurring in the moderately retarded group.

The information provided in this study is particularly intriguing since most studies have indicated that the vast majority of the retarded are in the mildly retarded group. The New York State Department of Mental Hygiene (1965) found that per one hundred persons, the mildly retarded had an incidence rate of 1.07 and more severely retarded persons had a rate of .32. Wishik (1956) found similar results, concluding that mild retardation had an incidence of 1.37 per one hundred and more severe retardation had a rate of .59. Mercer's (1973) work clearly shows that such differences are bound to occur when only IQ is used to make a diagnosis.

TABLE 4

Prevalence of Mental Retardation Found by Mercer (1973) in a Community of 100 Persons When Either the Single Criterion of Intelligence Test Score is Used on the Double Criteria of Both Intelligence Test and Adaptive Behavior Scores

	IQ		
Criteria	0-19	20-49	50-69
IQ 70	.043	.571	1.529
IQ 70 AB 3%	.043	.543	.389

Causes

Presently, over two hundred known causes of mental retardation have been identified (Conley, 1973, p. 11). Although this figure is large, most diagnoses cannot identify causal factors with any reasonable degree of certainty. The causes of mental retardation can be conceptualized into the following three categories; heredity; prenatal, perinatal, and postnatal trauma; and socio-cultural factors (Farber, 1968, p. 6). Currently, it is believed that mild mental retardation is caused primarily by socio-cultural factors and more severe degrees of retardation originate from the other two causal categories (Clarke & Clarke, 1974, p. 49).

Heredity or genetic factors affect mental retardation in two ways. First, they can lead to abnormal development of the central nervous system or other systems which affect intelligence. Genetic causes have been found for Downs syndrome (Stevens, 1964, p. 2) and for phenylketonuria, a metabolic disorder (Clark & Clarke, 1974, p. 52). Second, it is believed that the potential for intellectual development is genetically determined.

There are numerous factors, in addition to genetics, which may affect the developing fetus or child, including infections and intoxicants. For example, the contraction by the mother during the first trimester of pregnancy of German Measles, or lead poisoning, or any condition causing a shortage of oxygen to the newborn child have all been shown to cause mental retardation. Tumors can also cause retard-

ation, and frequently retardation is caused by pathological conditions of unknown etiology in the brain.

The largest group of mentally retarded persons, however, is composed of individuals in whom there is no indentifiable pathological condition. Usually classified as mildly mentally retarded, these persons frequently come from lower socio-economic groups within society. The exact effects of socio-cultural conditions are difficult to interpret, since they dramatically overlap with the other two causal categories. Individuals from lower socio-economic groups receive poor health care compared to others in society. Undoubtedly, pregnant women in lower socio-economic groups receive inferior prenatal care and less adequate care during the delivery than others in society. Young children in this group receive inferior health care of all types (Butler & Bonhom, 1963). Additionally, these children have a higher incidence of malnutrition than youngsters in other socio-economic groups. Lilienfeld and Pasamanick (1955) have demonstrated that mildly retarded persons may have "minimal" brain damage due to perinatal complications. These problems can, of course, be classified either as prenatal, perinatal, and postnatal, or as socio-cultural in nature.

Socio-cultural factors also become confused with genetic causes. It can be demonstrated that intellectual development is related to socio-economic class. Since it is believed that intellectual potential is genetically determined one can easily infer that at least some mildly retarded persons are handicapped because of an inferior intel-

lectual potential.

There exists a body of information, however, which suggests that socio-cultural causes other than those mentioned above are critical in affecting mental retardation. This literature indicates that persons born with similar potential can develop differently. Klineberg (1940) has shown that among U.S. army recruits the average IQ for blacks was lower than for whites and additionally, blacks from the north tended to score higher than those from the south. It is easy to infer that educational opportunities for southern blacks were inferior to those available to northern blacks. Many studies have shown that mildly retarded persons from lower socio-economic groups come from highly impoverished environments (McCandless, 1952, Sarason, 1953). These environments are characterized by extreme poverty, parental abandonment, social humiliation, rejection and defeat, parental drunkenness, and parental indifference to the child's educational development. Lantz (1954) has demonstrated that failure experiences tend to prevent a child from taking advantage of practice that would improve intelligence test performance. It is likely that life experiences characterized by failure and frustration can have dramatic impact on intellectual development. Kephart (1940) has shown that the longer these mildly retarded persons spend in their home the lower their IQ scores are apt to be. Removal to a situation where quality residential and educational services could be provided result in a reversal of this trend in IQ scores.

McCandles (1952, pp. 684-685) has formulated two learning hypo-

theses to explain socio-cultural retardation. First, the environment for these individuals provides a miminum of opportunities to develop intellectually. Second, the environment of these persons provides numerous opportunities for them to learn self-defeating behaviors. That is, they learn to expect failure and acquire a belief in their own worthlessness.

Relation to Criminal Behavior

Although factual information concerning the relationship between mental retardation and criminal behavior is sorely lacking (Harbach, 1976), there have, historically, been an abundance of opinions relating the two closely. In many cases retarded persons have not even had to commit a criminal act to be considered criminal. For example, the Elizabethans regarded paupers and "wandering fools" as criminal (Haskins & Friel, 1973, Vol. 2). In the beginning of this century a considerable amount of fear was generated over the threat of mental retardation, believed to be responsible for all sorts of social maladies. It was in such as environment that a great number of theories were generated regarding the criminal tendencies of the retarded, theories which, seldom supported by facts, have fed the fears and mistaken beliefs which surround the mentally retarded today.

According to Haskins and Friel (1973, Vol. 2), the theories concerning criminality and mental retardation can be divided into three groups. Religious theories were based on the concept of original sin. Physical or genetic theories stated that criminality was inherent in the condition of retardation. And Environmental theories assert

that the retarded are more susceptible to environmental hazards which breed criminal behavior.

Henderson (1914, p. 101) and Miller (1903, p. 124) stated that there was a universal relationship between mental retardation and criminal behavior. This relationship was seen as due to sin and moral weakness. Mental retardation was seen as divine punishment or state of being "possessed" brought on by an "abnormal" state of the soul, usually created by sinful behavior of the parents. These sins could be drinking, adultery, or even evil thoughts. The theorists did not consider mental retardation to be a permanent state. Rather, it was believed that retardation could be "cured" by moral training, hard work, purity of thought, and forgiveness of the victim and his parents by God (Miller, 1903, p. 139).

Those ascribing to this avenue of thought believed that mental retardation could be erradicated through two types of actions. First, society must abolish its social ills. For example, the temperance movement had its basis in this philosophical orientation. Second, the education of prospective parents was urged in order to educate them regarding moral thoughts and actions. Since "improper" thoughts and actions could lead to a retarded child, this was seen as imperative (Miller, 1903, p. 131).

Physical or genetic theorists believed that mental retardation was coupled with criminal traits. Underlying this belief was the hypothesis that the retarded were less evolved than the rest of society in relation to intelligence and moral sentiments (SeQuiros,

1907, p. 42). Other characteristics associated with retardation were lack of shame and purity, and impulsiveness (Lombroso, 1911, p. 365). These characteristics, according to these theorists, could be repressed by education, and a wholesome environment. This point of view was influenced by phrenology, which believed that human behavior is caused by a number of separate functions or characteristics that were more or less evolved at birth but which also could be further developed during one's lifetime.

Persons ascribing to an environmental viewpoint held that all persons can be effected by adverse environmental influences but the retarded are more vulnerable. The retarded frequently live in undesirable settings since they are commonly born to uninterested parents and disordered homes (Stearns, 1931, p. 25, Goodwin, 1924, p. 13, Cantor, 1932, p. 117). McCord, McCord, and Zola (1959, p. 73) present a theory which has an environmental orientation and is more pallatable in relation to current beliefs. That is, although the retarded have low intelligence which can be inherited, low intelligence, in and of itself,is not a cause of criminal behavior. The retarded may turn towards crime because of two factors. First, conditions in the family which predispose a person towards crime can affect both the retarded and normally intelligent persons. Second, retardation has a much higher frequency in lower socio-economic neighborhoods which also appear to have a higher incidence of criminal behavior. The retarded are affected by this environment as are other normally intelligent people.

The development of the intelligence test and its arrival in the United States encouraged many investigators to attempt to prove that mental retardation was indeed related to criminality. In 1911 (Moore) it was shown that during an eighteen month period in New Jersey, forty six percent of all new admissions to the penal system were retarded. Other early studies reached the same startling conclusion. That is, large numbers of criminals are mentally retarded (Goddard and Hill, 1911 and Morrow and Bridgeman 1912). Zeleny (1933), examined one hundred sixty-three of these early studies and concluded that no relationship between mental retardation and criminality had been shown. He found that not only were tests frequently given by untrained persons, but also that the criterion for identifying retardation was commonly a higher IQ score than is currently recommended.

Several recent studies have supplied better information. A research project for the state of Kentucky (Cull, 1975), had as one of its objectives to identify and evaluate the adult mentally retarded population living within correctional facilities in Kentucky. Information was gathered which had previously been produced by the criminal justice system regarding more than ninety percent of the inmates in Kentucky. Using an intelligence test score of less than 70 as the criterion, (these scores were obtained from a variety of instruments) it was found that 5.2 percent or one hundred twenty two inmates were retarded. Out of this sample of retarded inmates, three were classified as severely retarded, twenty six as moderately retarded, and ninety three as mildly retarded. The Correctional Services for the Developmentally Disabled

(1975), using a methodology similar to Cull, found 27.5 percent of the inmates of two correctional facilities in Illinois to be retarded. Brown and Courtless (1958) mailed surveys to two hundred seven correctional facilities. Eighty four percent of these institutions replied and supplied data regarding their inmate populations. Using an intelligence test score of 70 as criterion, these authors concluded that 9.5 percent of the inmates were retarded. The percentage of the surveyed population which scored within the moderate retardation range was 1.6 and several scores even placed persons in the profoundly retarded category. Studies examining this issue typically gather information previously generated by penal institutions using both unqualified persons to administer tests and intelligence tests with suspect reliability and validity.

Haskins and Fried (1973, Vol. 4), unlike the investigators above, attempted to establish what percentage of inmates are retarded by having the Department of Corrections in Texas use qualified persons to apply the Weschsler Adult Intelligence Scale, a scale widely recognized as one of the most reliable intelligence tests available. They found that only five percent of this population was retarded and none of the individuals scored below the moderate retardation level. The authors, however, did <u>not</u> conclude that retarded persons are more apt to commit criminal acts than other persons. They stated that their data was affected adversely by several problems. First, probation is dependant upon a steady job, and since the retarded have fewer marketable skills and thus a greater tendency to be unemployed, they are

denied probation more than would otherwise be warranted. This bias is also strengthened by the fact that fewer community agencies are willing to serve the retarded and thus, the courts have fewer alternatives in the case of the retarded offender. These problems inhibiting retarded offenders from obtaining probation lead to the existence of a greater proportion of retarded persons being found incarcerated at a given time than that of other offender groups. Another issue which Haskins and Friel believe clouds their results is the fact that the retarded, because of their lower intelligence, are probably caught and convicted more easily than other offenders.

A number of other issues could also be contributing to the disproportionate number of retarded persons found in prisons by previous investigators. Harbach (1976) believes this condition exists because retarded offenders usually receive inadequate counsel since the client often appears to be noncommunicative and uncooperative to lawyers, and retarded individuals on trial many times plead quilty because of a lack of understanding regarding the legal process and their rights and privileges. Additionally, it should be obvious from the descriptions provided of the various research efforts that adaptive behavior has never been used in the assessment of inmates. It is likely that the incidence of retardation in prisons would be significantly reduced if both criteria were used. The studies cited above appear to be confounded by the variable of socio-economic level. As was previously shown, the reported higher incidence of retardation among lower socio-economic classes may be caused by biased intelligence

tests. It also appears that there is a much higher proportion of individuals incarcerated within penal institutions who come from lower socio-economic groups than their numbers in society would indicate. Unless studies control for the socio-economic levels of the samples taken, the frequency figures of retardation within these institutions are bound to remain inflated.

Summary and Conclusions

Mental retardation is defined as subaverage intelligence existing concurrently with significant deficits in adaptive behavior and originating during the first eighteen years of life. In order to diagnose retardation, an assessment of both intellectual ability and adaptive behavior must be completed. To assess intellectual ability an intelligence test must be administered. Intelligence tests can classify retarded persons as mild, moderate, severe, or profound in their intellectual deficits. The American Association on Mental Deficiency has recommended that the AAMD Scales be used to evaluate adaptive behavior and, as with intelligence tests, this instrument can classify persons as having mild, moderate, severe, or profound behavioral deficits. This classification is indicative of the extent of the retardation. Although problems exist with these instruments, they appear to represent our best method of currently making this diagnosis.

In making a diagnosis of mental retardation, test results indicating intellectual ability and adaptive behavior must <u>both</u> fall

within the retarded range. In classifying a person regarding the severity of retardation, the results of both tests are considered. When both tests place the individual within the same class (e.g. moderate), the person is classified in agreement with these test results. When the tests differ in their results (e.g. the AAMD Scale indicates moderate retardation and the intelligence test indicates severe retardation) the highest classification is to be used.

Although the American Association on Mental Deficiency recommends and this work supports a dual criteria for the determination of mental retardation, in practice this rarely occurs. In studying the research reports in the field of mental retardation one cannot help but be amazed at the number of investigations that use only intelligence test results in making diagnoses. The practice is so common that only rarely does one encounter the use of dual criteria. Obviously, this is problematic in interpreting research results.

A considerable amount of literature indicates that mildly retarded persons can commonly live independently within a community setting. These individuals can obtain and hold a competitive job, marry, and buy a home. A fair number of the moderately retarded are also capable of the same achievements. Although research has not been conducted which examines the ability of the mildly and moderately retarded person to make informed life decisions (lack of this ability indicates the need for a court appointed guardian), it appears that all the mildly retarded and some of the moderately retarded do have

this capability. This conclusion follows from the author's personal experience and from the research regarding the ability of the retarded to function within community defined roles. Although a small number of mildly retarded persons are not able to obtain jobs and remain employed, the reader must bear in mind that a small number of persons who are not retarded have difficulties obtaining and keeping jobs. This inability obviously does not mean the individual is incapable of making informed life decisions. Severely and profoundly retarded persons need guardianship and other protective services as a group.

Although the incidence of retardation in the United States is commonly held to be three percent, there is reason to believe that this figure is inaccurate. A great deal of variability is found across surveys due to data-gathering techniques, reliability of information, the intelligence test score criteria, the age group surveyed, and the geographical area where the survey is conducted. Additionally, Mercer's (1973) work indicates that the incidence rate may be closer to one percent. She found this by applying the dual criteria of adaptive behavior and intellectual ability.

Though it is apparent that retarded persons are incarcerated in significant numbers within the penal systems in the United States, the exact number of these persons has not been made clear for two primary reasons. First, problems with the studies themselves include the unreliability of data, the inconsistent and ambiguous criteria used to diagnose retardation, and the lack of any given consideration to variables such as socio-economic level. Second, there are biases

in the administration of the criminal justice sytem that lead to the upward distortion of the number of retarded persons in prisons. For example, parole is more difficult for retarded persons and the capture and conviction of these persons appears to be easier than for other offenders. It is apparent that the relationship between mental retardation and criminality, if a relationship exists at all, is not known.

CHAPTER III

HISTORICAL PERSPECTIVE (PRIOR TO M'NAGHTEN)

This chapter examines the history of criminal liability before 1843. Since the law regarding criminal responsibility in the United States is an offspring of English law, most of the literature examined is British. Although numerous authors have explored this topic, only a few have made important contributions. The views of Bracton, Littleton, Fitzherbert, Coke, Hale, and Erskine (as expressed in the Hadfield case) are of primary importance. Other less important contributors are also considered, but those mentioned above have established the foundations of Anglo-American law on criminal responsibility. It will become apparent to the reader that these authors frequently repeated each others ideas in their formulations. This process of repeating ideas continues into the present and thus, our "modern" ideas regarding criminal responsibility can usually be traced to very old philosophies.

Criminal Responsibility

Among ancient peoples a mental disability was regarded as something to be feared and/or worshipped. Mentally disabled persons were generally thought to be possessed by spirits. These spirits were generally considered to be evil; to be possessed by them was frequently seen, therefore, as some sort of punishment. Exorcism, torture, and operations (e.g. trephining) were the standard treatments for this

condition, designed to drive out or free the spirits.

One of the earliest references to the mentally disabled in formal law is found in the Twelve Tables of Rome in 449 B.C. (Brakel & Rock, 1971, p. 1). These laws state, "If a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone." According to Roman law, the fact that someone acted significantly different from other people was sufficient reason for relatives to assume control of his possessions and person.

In the legal writings of Cicero (106-43 B.C.), mental disability is not considered as a condition relieving one of criminal liability (Guttmacher, 1968, p.23). It was not until the reign of Marcus Aurelius (A.D. 121-180) that mental disability appears to have become a concern in criminal matters (Biggs, 1955, p. 47). Marcus Aurelius is credited with making the statement that madness is its own punishment. There is little evidence, however, to indicate how this attitude was manifested in criminal cases of the time.

The Mohammedan law was formed during the seventh century and contains the earliest definite provision that an unintentional killing by a lunatic or minor was to be considered involuntary homicide (Biggs, 1955, p. 39). Under this law, such a finding subjected a defendant only to make religious expiation and monetary compensation, for which there was a fixed tariff.

The Goths conquered Rome at the end of the fifth century, soon following with the conquest of Western Europe and Spain. The fall of

the Roman Empire marks the beginning of the Dark and Middle Ages, during which periods gains made previously in defining criminal responsibility for the mentally handicapped were lost. Beliefs that the mentally disabled were possessed by spirits again dominated and such persons were frequently murdered or maimed in brutal fashion.

Prior to the beginning of the twelfth century only the criminal act was necessary for criminal culpability to exist. During the twelfth century, however, the concept of mens rea or "guilty mind" was introduced. This concept is extremely important since it underlies our criminal law system and is said to justify special treatment for the insane. It is believed that the term comes from the ancient maxim, "Actus non facit reum nisi mens sit rea." ("The act itself does not make a man guilty unless his intentions were so") (Bishop, 1882, p. 172). Where this maxim originated is uncertain, however, sometime between 1100 and 1135 the concept of mens rea was applied to the crime of perjury in English law, and thereafter the issue of criminal intent became increasingly important in criminal matters.

Bracton, a priest and head of the highest English court, wrote the earliest comprehensive treatment of English law in the middle of the thirteenth century. His writings were heavily influenced by Roman law, and he is viewed by many as one of the important explicators of the legal aspects of insanity (Bowlby & Lloyd, 1905, p. 509). He is credited with writing, "Furiosus non intelligit quod agit, et animo et ratione caret, et non moltum distat a brutes" - "an insane person is one who does not know what he is doing, and is lacking in mind and

reason, and is not far removed from the brutes" (Bowlby & Lloyd, 1905 p. 510). Two concepts used in tests of criminal responsibility at various times in the history of criminal law can be traced directly to Bracton. The first is the knowledge test which still has marked impact in our legal system. According to this test an insane person is one who does not know the nature or the quality of the act under consideration. The second is the wild beast test which has been used in the past and defines an insane person as one who does not know what he is doing more than an infant or wild beast would. Since insanity was not admitted as a defense in criminal matters in England until the fourteenth century, Bracton probably intended his formula to apply only in civil matters.

During the reign of Edward I (1272-1307) insanity was considered sufficient grounds for mitigation of punishment (Biggs, 1955, p. 83), and although it did not relieve persons from criminal responsibility, many insane individuals were pardoned after being found guilty. Insanity began at last to be recognized as a defense during the reign of Edward II (1307-1321). In 1342 the statute De Prerogativa Regis was passed, (see Glueck, 1966, p. 125 and Bowlby & Lloyd, 1905, p. 483), referring specifically to mentally disordered individuals. It established the King's jurisdiction over the retarded and the insane, and made a distinction between insanity and mental retardation. The retarded were alleged to be born without reason and always to remain so. The insane were labeled non compos mentis and were seen as sick persons who were not born that way and might recover. Legal confusion

over these two groups of persons existed early and is evident in this statute, for another section of it states that a retarded person is not necessarily so from birth and such a person may enjoy lucid intervals (Bowlby & Lloyd, 1905, p. 483). It is important to note this early difficulty, since our judicial system frequently demonstrates, even today, confusion and lack of knowledge concerning the retarded.

During the reign of Edward III (1326-1377) an amorphous group of persons who suffered from "complete madness" were relieved of criminal responsibility (Brakel & Rock 1971, p. 376). This represents a major shift since it established insanity as an entrenched defense within the English legal system, It is, however, difficult to see how verdicts in cases using this defense were reached, since a definition of "complete madness" was not provided.

Sir Thomas de Littleton, a judge of the Court of Common Pleas in 1466, directed attention towards the civil rights of the insane in a treatise on the law of England in which he referred to persons who were not sane as non compos mentis (unsound mind) and then explained the civil law in relation to such persons (Bowlby & Lloyd, 1905, p. 512). For example, a person was not allowed to plead insanity in civil matters when property was involved.

A mentally retarded individual was defined by Fitzherbert in the early sixteenth century as a person who could neither count twenty pence, tell who his mother or father was, nor how old he was, nor possessed any understanding of what would be beneficial or detrimental to himself, (Glueck, 1966, p. 129). Fitzherbert further stated that

if a man knows his letters and can read then he is not a "natural fool." Obviously, there is considerable difference between a person who cannot count twenty pence, know his age, or know his mother or father and a person who knows his letters and can read. For some reason the test requiring the ability to count twenty pence is the only test ever mentioned in later trials.

Lord Coke, an admirer of Littleton who wrote in the seventeenth century, did not try to identify the type or intensity of insanity that could serve as a defense against criminal charges. Rather, he simply stated that criminal intent or a guilty mind (mens rea) was necessary. However, he also stated that non compos mentis is not an excuse from criminal responsibility in a case of high treason (Coke, 1836 a, p. 405). High treason refers to attempted murder of the sovereign, and Lord Coke felt that since such an extreme act would adversly affect everyone in England, it should be dealt with harshly. This represents an exception to the requirement of guilty mind in defining criminal responsibility.

According to Coke, "in criminal causes, as felony,...the act and wrong of a madman shall not be imputed to him...for in these causes he is...without his mind or discretion; and...a madman is only punished by his madness. And so it is of an infant, until he be of the age of fourteen, which in law is accounted the age of discretion." Coke's statement that "a madman is only punished by his madness" was frequently quoted in later cases.

Coke used non compos mentis as a generic term and divided in into

four types: (a) idiots who are born with a permanent handicap rendering them non compos mentis; (b) people who, through accident, illness, or grief, lose their memory and understanding; (c) lunatics who sometimes possess understanding and sometimes do not; (d) a person who is drunk (Coke, 1836 b, p. 247).

According to Lord Coke, no person who fits into the first two categories could be held criminally responsible. In the third category, a person was exempt from criminal responsibility if, at the time of the act, he lacked memory or understanding. It is interesting to note that Coke made no mention of the knowledge of right and wrong. Instead, Coke felt the person who was non compos mentis was incapable of criminal intent and therefore, should be relieved of criminal responsibility. Since the fourth type specified by coke--a person who is non compos mentis is directly responsible for his own state, Coke felt that he should not be relieved of responsibility. Coke apparently believed that no test for criminal responsibility was necessary. These ideas became part of the law of England through the Beverley case (Glueck, 1966, p. 130).

Lord Hale, Lord Chief Justice of the King's Bench (1671-1676), exerted considerable influence on later judicial opinions and made the concept of criminal intent or guilty mind his starting point in dealing with mental disability cases. He was the first writer to distinguish between insanity which would and would not excuse a person from criminal responsibility (Hale, 1847, pp. 29-37). Lord Hale assumed that criminal intent was intimately related to the defense

of insanity. He attempted to deal with this problem by first categorizing the types of mental handicap and used the term "dementia" to refer to these. Hale identified three types of dementia:

1. Idiocy "...such a one is described by Fitzherber, who knows not to tell 20's, nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the instruction of another, then he is no idiot... These, though they may be evidences, yet they are too narrow, and conclude not always, for idiocy or not is a question of fact triable by jury, and sometimes by inspection." It is interesting to note that this last sentence of Hale's has been generally ignored. Hale appears to be saying that no single test can adequately determine criminal responsibility, and that these tests are merely evidences, and that it is the jury, as a fact-finding body, which must determine whether or not a person is to be defined as an idiot.

2. Dementia accidentalis vel adventitia caused by an accident or illness. This type can further be divided into "partial insanity" and "total insanity." "Partial insanity" refers to persons that either possess a competent use of reason in respect to some subjects but are under a particular dementia in respect to other subjects, or those whose dementia is of such a degree that it interferes little with the use of reason. Hale stated that partial insanity could excuse a person from criminal responsibility but that such cases would be rare since most persons who commit felonies are suffering from a degree of partial insanity when they commit the offenses. He recognized the difficulty

in drawing the line between partial and total insanity. "Total insanity" is defined as a total inability to reason. He proposed the following to determine when a person is "totally insane:" When a person does not have "as great understanding, as ordinarily a child of fourteen years hath," then that person can be considered totally insane and not criminally responsible. This follows from the fact that at that time, in England, children under fourteen years of age were not criminally responsible, and Hale believed that children under fourteen could not distinguish between good and evil. This was the first time moral knowledge had been presented as a test for insanity. Again, however, the jury was left to make the ultimate determination.

3. Dementia affectata--drunkenness. Hale concluded that these persons are criminally responsible.

In summary, although Hale seemed to say that no test can be conclusive, he suggested two tests himself. First, he recommended Fitzherberts' test for idiocy. Second, he suggested that the intelligence of a fourteen year old child be used as criterion for discriminating between partial and total dementia. He implied that the ability to discriminate between good and evil is a criterion. Hale apparently felt that the mere fact of mental illness was not sufficient in itself to relieve a person of criminal responsibility.

In 1724 Edward Arnold was tried for shooting at Lord Onslow under the delusion that Lord Onslow had injured him. During the trial, Judge Tracy's instructions to the jury were based upon ideas put forward by

previous writers and contained the following: "It is not every kind of frantic human or something unaccountable in a man's actions, that points him out to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; therefore, I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth shew a man who knew what he was doing, and was able to distinguish whether he was doing tood or evil, and understood what he did" (Weinhofen, 1954, p. 56). This is clearly a combination of Hale's fourteen-year-old test and Bracton's "wild beast" theory.

Isaac Ray, writing in 1838 (1962, p. 22), described the Arnold case as follows:

> Arnold seems to have been of weak understanding from his birth and to have led an idle, irregular, and disordered life, sometimes unequivocally mad and at all times considered exceedingly strange and different from other people; one witness describing him as a strange, sullen boy at school, such as he had never seen before. It was testified by his family and his neighbors that for several years previous they had considered and treated him as mad, occassionally if not always, although so little disposed to mischief, that he was suffered to be at large. Contrary to the wishes of his friends, he persisted in living alone in a house destitute of the ordinary conveniences; was in the habit of lying about in bars and under hayricks; would curse and swear to himself for hours; laugh and throw things about the house without any cause whatever, and was much disturbed in his sleep by fancied noises. Among other unfounded notions, he believed that Lord Onslow, who lived in his neighborhood, was the cause of all the tumults, disturbances and wicked devices that happened in the country, and his thoughts were greatly occupied with this person. He was in the habit of declaring that Lord Onslow sent his devils and imps into his room at night to disturb his rest and that he constantly plagued and bewitched him, by getting

> into his belly or bosom, so that he could neither eat, drink, nor sleep....he declared in prison it was better to die than live so miserably and manifested no compunction for what he had done. Under the influence of these delusions, he shot at and wounded Lord Onslow. The proof of insanity was strong enough, but not that degree of it which the jury considered sufficient to save him from the gallows, and he was accordingly sentenced to be hung.

If we carefully analyze Judge Tracy's instructions we will find that he told the jury to use practically every test that had been proposed up until this time. First, he stated that persons who are not criminally responsible do not know what they are doing. Second, he mentioned a total deprivation of memory and understanding. Third, this lack of memory and understanding had to be similar to a brute, wild beast, or infant. (Here, it appears that Judge Tracy saw the mind of an infant to be similar to that of a brute or wild beast.) Fourth, he stated that persons relieved of responsibility must not be able to distinguish between good and evil. It appears that the Judge attempted to utilize all the ideas which had been written prior to this trial. Judge Tracy's tendency to call upon all previous formulations may certainly be indicative of confusion over how to proceed.

The Arnold case is frequently cited as exemplifying the use of the "wild beast test" (see Glueck, 1966, p. 139). Why the other test used in this case is ignored is not clear; however, it is apparent that once a test becomes associated strongly with a case, however erroneously, the test and the case tend to be cited as precedent.

The next case of importance is that of Earl Ferrer, an English nobleman, tried for the murder of his steward in 1760. The importance

of this case stems from the directions the Solicitor-General for the Crown gave to the jury. The Solicitor-General's address to the jury summarized Hale as follows (quoted from Glueck, 1966, p. 142):

> ...The result of the whole reasoning of this wise judge and great lawyer (so far as it is immediately relative to the present and purpose) stands thus. If there be a total want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offense was committed, it will acquit the prisoner; but if there be only a partial degree of insanity, mixed with a partial degree of reason; not a full and complete use of reason, but (as Lord Hale carefully and emphatically expresses himself) a competent use of it, sufficient to have restrained those passions, which produced the crime; if there be thought and design; and faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offense proved, the judgement of the law must take place.
>
> ...The question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity? ...Was he under the power of it, at the time of the offense committed? Could he, did he, at the time, distinguish between good and evil? The same evidence, which established the fact, proves, at the same time, the capacity and intention of the noble prisoner. Did he weigh the motives? Did he proceed with deliberation? Did he know the consequences?

The right-and-wrong test contained in the Earl Ferrer case is today the most universally used test in American cases where the question of insanity is raised. Since judicial law is heavily dependent upon precedent, judges have tended to use the test uncritically and regardless of the inconsistencies between it and the theoretical foundation for criminal law, mens rea, which clearly involves much more than moral knowledge. The case is also notable as one of the earliest in which a physician was called to testify as an expert witness.

Hawkins (1824, p. 1), writing in the late eighteenth century, stated that guilt regarding lawbreaking supposes deliberate disobedience

to the law. Such guilt can never be imputed to persons who are either incapable of understanding the law or of conforming themselves to it. Individuals who are relieved of responsibility are those who either lack reason or are under the power of others.

Hawkins (p. 2) advocated as a test the ability to distinguish between good and evil. Infants under the age of discretion, "lunatics," and "idiots" were seen as unable to make this discrimination. Hawkins viewed "idiots" as lacking understanding from birth and used Fitzherbert's definition for retardation. "Lunatics" were defined as persons who are mad.

Hawkins obviously felt that persons using insanity as a defense were dangerous since he advocated "strict custody in such a place and manner as the court sees fit" in cases where a person charged with a felony is found not guilty due to insanity. Disagreeing with Lord Coke, Hawkins (p. 3) felt that, even in cases of High Treason, a person can be relieved of responsibility.

Hawkins' writings display confusion. He first states that persons who are incapable of understanding the law or of conforming to it are relieved of responsibility and then advocates the ability to discriminate between good and evil as a test. Obviously, knowledge concerning law is different from moral knowledge, and the ability to conform to law is not reflected in moral knowledge.

In 1800 one of the most important cases occurred, the Hadfield case. Erskine, the defense attorney, attacked the right-and-wrong test on both medical and legal grounds. Hadfield was a veteran of the French

wars (Guttmacher, 1968, p. 24) and had received a sword wound in the brain. He was placed on trial for attempting to shoot the King, George III. He believed that God was guiding him and that he had a holy mission to sacrifice himself for the salvation of the world. By killing the king he believed that the state would execute him and therefore assist him in his martyrdom.

Erskine faced the task of defending Hadfield on the basis of insanity with only the definitions of Coke and Hale as precedent. He decided to attack their definitions, and he proposed that "delusional insanity" define criminal responsibility. There is no record of this argument before that time (Bowlby & Lloyd, 1905, p. 527). Erskine's speech first refuted the doctrines of Coke and Hale with the following words (Glueck, 1966, p. 144):

> The Attorney-general, standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from criminal responsibility, there must be a total deprivation of memory and understanding. I admit that his is the very expression used both by Lord Coke and Lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the court. If a total deprivation of memory was intended by these great lawyers to be taken in the literal sense of the words: If it was meant, that, to protect a man from punishment, he must be in such a state of prostrated intelligence, as not to know his name, nor his condition, nor his relation toward others - that if a husband should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house, nor his property in it - then no such madness ever existed in the world. It is idiocy alone with places a man in this helpless condition....But in all the cases which have filled Westminster Hall with the most complicated considerations - the lunatics and other insane persons who have been the subjects of them, have not only had memory in my sense of the expression - they have not only had the most perfect knowledge and recollection of all the relations they

> stood in toward others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable - the disease consisting in the delusive sources of thought; all their deductions within the scope of the malady, being founded upon immoveable assumptions of matters as realities, either without any foundation whatsoever, or so distorted and disfigured by fancy as to be almost nearly the same thing as their creation.

Instead of using the absence of intellectual faculties as the basis of determining criminal responsibility, Erskine proposed that the presence of delusions be used.

Erskine summarized his views as follows (Glueck, 1966, p. 147):

> Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity....In civil cases...the law avoids every act of the lunatic during the period of the lunacy; although the delusion may be extremely circumscribed; although the mind may be quite sound in all that is not with the shades of the very partial eclipse; and although the act to be avoided can in no way be connected with the influence of the insanity; - but to deliver a lunatic from responsibility to criminal justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connection is doubtful, the judgement should certainly be most indulgent, from the great difficulty of diving into the secret sources of the disordered mind; but still, I think, that, as a doctrine of law, the delusion and the act should be connected.

Although the trial was far from over when Erskine delivered his speech, the court practically ordered an acquittal of Hadfield and the case was won.

Glueck (1925, p. 148) has pointed out that this case is interesting in that it sheds light on the development of law. Erskine proposed a definition of criminal responsibility that had no precedent in law and further, ran counter to definitions then in effect. Nevertheless, it

was accepted by the court and literally written into law (Bowlby & Lloyd, 1905, p. 529). The case contradicts the popular belief that judicial decisions must be based upon law and precedent and that somehow the theory underlying the law makes all elements consistent with one other.

Another important case occurred when Bellingham shot and killed the First Lord of the Treasury in 1812 (see Bowlby & Lloyd, 1905, p. 532). Believing that the government owed him about $500,000, he attempted to collect it by appealing to cabinet ministers and Parliament. Though in fact, no such claim existed against the government, Bellingham attempted to enlist the aid of the First Lord of the Treasury, and finding him uncooperative, shot and killed him.

Although this case is similar to Hadfield's, the judge rejected Erskine's position regarding criminal responsibility, and the jury was instructed to use the right and wrong test in deciding the guilt or innocence of Bellingham. The interpretation of this test was very narrow in that only if the defendant was totally deprived of the power of reasoning could he be excused from responsibility. Bowlby and Lloyd (1905, p. 532) have stated that according to the Bellingham case "there can be no such thing as criminal insanity; the only irresponsible man is he who has so completely lost his power of reasoning that he is not able to entertain an intention to do anything. In other words, an insane man becomes exempt from punishment only when he becomes so insane as not to be able to commit an intentional act!"

Since this represents a reversal of the delusion doctrine which

relieved Hadfield of responsibility twelve years earlier, it is helpful to understand how such decisions occur. Glueck (1925, p. 149, footnote) presents information which indicates that this interpretation was not due to examination of law, knowledge concerning the insane, or a consideration of theory, but rather was based on factors such as the emotional reaction of the judge or those of society as a whole. When Bellingham committed his crime there was a great public outcry as the First Lord was very popular. Although it was customary to allow fifteen days between the date of the offense and the date of arraignment, Bellingham was arraigned after only four days. His counsel pleaded for postponement saying, "I never saw the prisoner before, and it has not been in our power to bring forth all the evidence to prove whether he be sane or insane." Further, in addition to the instructions above, the judge informed the jury that the people as a whole would suffer from the victim's untimely death and gave considerable praise to the First Lord. It appears likely that the Judge's behavior was directed towards obtaining a conviction. And again, this was a precedent setting case.

Two other trials were held in England in 1812: Parker's Case and Bowler's Case (see Biggs, 1966, p. 92). In those cases juries were instructed to use both the right-and-wrong test and the delusion test. The instructions stated that "...it was for them to determine whether the prisoner when he committed the offense...was or was not incapable of distinguishing right from wrong, or under the influence of any illusion which rendered his mind at the moment insensible of the

nature of the act he was about to commit, since in that case he would not be legally responsible for his conduct." Thus, the delusion doctrine was again being used in English courts.

At that time in American history the courts were following the precedents provided by English law. However, two American cases are worth noting. The first is the Richard P. Clark case heard in 1816. Clark was charged with petty larceny for stealing $7.50 worth of property. In its instructions the jury was told that, "...such was the humanity of law, that no man could be held responsible for an act committed while deprived of his reason; and that a madman was generally considered, in law, incapable of committing a crime. But it is not every degree of madness or insanity, which abridges the responsibility attached to the commission of crime. In that species of madness where the prisoner has lucid intervals; if during those intervals, and when capable of distinguishing good from evil, he perpetuates an offense, he is responsible. The principal subject of inquiry, therefore, in this case, is whether the prisoner, at the time he committed this offense, had sufficient capacity to discern good from evil. Should the jury believe he had such capacity, it will be their duty to find him guilty."

The critical issue here was whether or not the accused had moral knowledge, apparently the only question considered to be of worth. It was also held that mentally disabled persons who have lucid intervals are responsible for criminal acts during those intervals.

The second case involved John Ball, tried in 1817 for arson. He

was known as a person frequently intoxicated and abusive to his children and his wife, who had been planning a separation. With the apparent motive of revenge expressed to a number of acquaintances Ball set fire to his house with his wife, family, tenants, and himself inside. Fortunately, the fire was quickly extinguished, and Ball was found hiding under the bed in his room. With a razor which was found near him, he had cut his throat (though not fatally). On being drawn out from under the bed he attempted to tear open his bleeding wounds and shouted that "if it had been only a half hour longer, I should have had my revenge." Although he was frequently intoxicated, he was not in that state on the day of the fire and numerous witnesses testified that the defendant was sane. But the defense attorney took the position that the act was so terrible that it indicated an insane defendant.

The jury was instructed that "...if they believed the defendant, actuated by revenge or through despair, committed this act, it would be their duty to find him guilty. It did not necessarily follow, as had been contended on behalf of the defendant that the act of which he had been charged was the result of insanity, because, from its nature, it was horrid and unnatural. The only question on this part of the case is, whether, at the time he committed the offense, he was capable of distinguishing good from evil." This case supported moral knowledge as the discriminating condition and refused to accept the "unusualness" of the act as evidence of insanity. This refusal continues to exist in our judicial system.

In 1831 Offord was indicted in England for shooting and killing Chisnall (see Biggs, 1955, p. 93). Offord, suffering from the delusion that the inhabitants of his town were attempting to deprive him of his liberty and life by issuing warrants against him, carried a list of 40 or 50 names of persons he believed were plotting against him, Chisnall among them. The jury was instructed that before they could relieve Offord of responsibility they must be satisfied that "he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offense against the laws of God and nature?" Obviously this test requires the jury to look at both legal and moral knowledge. It is interesting to note that both Bellingham and Offord exhibited similar behaviors and the juries received similar instructions. However, Bellingham was convicted and executed and Offord was acquitted on the basis of insanity.

Unlike the tests mentioned above, the irresistible-impulse doctrine originated in the United States in 1834 with the State v. Thompson case (1834). During the trial the jury was told that the defendant was responsible if at the time of the act he could distinguish between right and wrong, was aware of the wrongfulness of the act and had the power to perform or not perform the act. In this case the right-and-wrong test was expressed somewhat differently, for the defendant not only was required to be able to distinguish between good and evil at the time of the act but also to know that the act itself was wrong. Further, if the defendant appeared to have been unable to control his

his behavior, he was not to be considered responsible.

In 1840, Oxford, who was mentally unsound, attempted to kill Queen Victoria by firing a gun at her (see Glueck, 1925, p. 152). The jury was instructed to relieve the defendant of responsibility" if some controlling disease was, in truth, the acting power within him, which he could not resist. The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime." This appears to ask for knowledge concerning the physical act, morals, and law. At another point the jury was told that, "Upon the whole, the question will be, whether all that has been proved about the prisoner at the bar shows that he was insane at the time when the act was done - whether the evidence given proves a disease in the mind as of a person quite incapable of distinguishing right from wrong..."

Several points were introduced here for the first time. First, the irresistible-impulse test which had appeared in American courts is suggested by the phrase "which he could not resist." Second, "the nature, character, and consequences of the act" is used as a test. This test is used in many subsequent cases where it is set down side by side with or confused with the right-and-wrong test (Glueck, 1925, p. 153). Furthermore, the right-and-wrong test was given as an <u>illustration</u> in this case of one <u>possible</u> symptom of individuals who

should be relieved of criminal responsibility.

Summary and Conclusions

A number of conclusions are indicated by the preceding case histories. First, prior to 1843 much of contemporary doctrine concerning criminal responsibility was formed. The development of this doctrine was heavily dependent on the rather arbitrary circumstances of who happened to be writing on the subject or to occupy a particularly visible judicial position. Judges chose to accept some parts of precedent-setting definitions and reject others, and the rationale behind these decisions appears to have been at times personal and social rather than legal, moral, and theoretical.

Second, while some efforts were made to distinguish between the retarded and other types of offenders in defining criminal responsibility, these efforts were infrequent and sporadic. Much of the difficulty today in discriminating legally between the retarded and the mentally ill has its roots in these early historic confusions. Since mentally ill and retarded individuals have different constellations of problematic behavior, the inability to define these groups legally has undoubtedly added to the problems of defining criminal responsibility.

Third, this period saw a move from strict liability for acts (before the twelfth century) to the recognition that certain persons are exempt from criminal responsibility. Exceptions were defined by the various tests and should, at least theoretically, have been

based on the concept of mens rea. Again, writers and judges tended to choose elements of mens rea as tests and ignore other aspects. There is no evidence to indicate that anyone attempted to apply all the aspects of mens rea in defining responsibility.

CHAPTER IV

CONTEMPORARY PERSPECTIVE (FROM M'NAGHTEN TO THE PRESENT)

This chapter completes the examination of the history of criminal responsibility, beginning in 1843 with the M'Naghten rules, the single most influential happening in this history. Next under scrutiny is the irresistible-impulse rule, the product rule, the model penal code and Vermont rule, and finally, the abolition of the defense of insanity.

The M'Naghten Rules

In 1843, Daniel M'Naghten, laboring under the unfounded belief that Prime Minister Robert Peel had injured him, shot and killed Edward Drummond, mistaking him for Peel.

During M'Naghten's trial (1843) the jury was instructed to determine "...whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of the opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him." Essentially, these instructions were the knowledge test. The jury was to judge whether or not M'Naghten had knowledge regarding morals and the law of the land at the time the offense was committed. This

knowledge had to be specific to the act committed. The jury found M'Naghten not guilty on the ground of insanity.

The verdict raised an uproar in England (see Glueck, 1966, p. 162) since at that time attacks upon English officials had been numerous, and unrest and violence were common. Thus, the House of Lords was concerned over the verdict enough to address a series of probing questions to the judges who had tried the case. Because of the extreme importance of this case the questions asked and the answers supplied by the judges are presented verbatim (M'Naghten, 1843).

> Question 1 - What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing supposed public benefit?
> Answer 1 - Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law by which expression we understand your Lordships to mean the law of the land.
> Question 2 - What are the proper questions to be submitted to the jury when a person afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime (murder for instance), and insanity is set up as a defense?
> Question 3 - In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?
> Answers 2 and 3 - As these two questions appear to us to be more conveniently answered together, we submit our opinion

to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction. That, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing that act the accused was loboring 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 did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course therefore has been to leave the question to the jury,whether the accused had a sufficient degree of reason to know he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and corrections as the circumstances of each particular case may require.
Question 4 - If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?
Answer 4 - The answer must of course depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exist were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

> Question 5 - Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all witnesses, be asked his opinion as to the state of the prisoners' mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?
> Answer 5 - In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

These answers emphasized a number of points. First, to be criminally responsible, a person must know the nature and quality of an act when the act is performed. However, exactly what is meant by the "nature and quality" is not clear. Second, a person must have knowledge of right and wrong concerning an act at the relevant time. This knowledge refers to both legal and moral knowledge. Since the judges indicated that, in general, juries should be asked to decide criminal responsibility on the basis of knowledge of right and wrong, the first point becomes relatively unimportant and the M'Naghten rules are simply a restatement of the knowledge test. Third, only juries have the right to make decisions regarding criminal responsibility, and physicians are firmly established as expert witnesses in trials where the sanity of the defendant is in question.

These answers have become a part of the fabric of American law. Before looking at their expression in American law we will examine the criticisms which the M'Naghten rules have raised, criticisms primarily concerned with the result of the application of these rules. That is, how do these rules affect the decisions which juries make and how well do these effects fit with a particular critic's ideas concerning justice.

Since the answers which defined criminal irresponsibility were responses to questions concerning persons who were suffering from insane delusions, it is apparent that the M'Naghten rules were formulated for individuals who are considered mentally ill and not for the mentally retarded. Furthermore, because the questions and answers focus on persons suffering from delusions, they do not address other behaviors associated with mental illness. Therefore, it is likely that the judges never intended that these rules apply to all cases where criminal responsibility is in question. It should be kept in mind that these judges were under considerable pressure to explain their actions to persons who believed that a miscarriage of justice had occurred. The stress they felt is apparent in the judge's expressed regret that the questions were not argued by counsel rather than being answered by them (M'Naghten, 1843). Obviously, the judges were uncomfortable with their position and would naturally have preferred not to have been required to justify their decisions in court. The answers supplied are merely a conglomeration of previous ideas, offering little or nothing which extends or improves upon

these ideas.

The M'Naghten rules have been severely criticized by numerous authors (e.g. Bowlby & Lloyd, 1905 p. 544; Hall, 1960, p. 519; Fitzgerald, 1962, p. 153). Sir James Stephen (1883) writing forty years after the case, voiced criticisms of M'Naghten which are frequently echoed today. According to Sir Stephen, (Vol. II, p. 154), a judge himself, the answers provided by the M'Naghten case do not deal with many of the issues involved and in fact tend to confuse juries. Further, Stephen states that the M'Naghten rules were never meant for general adoption by courts and in fact, the answers given were designed primarily with an interest in justifying the behavior of the judges in the M'Naghten case (see Biggs, 1955, p. 108). In addition, it is apparent from the statement at the end of the third answer, "...and this course we think is correct, accompanied with such observations and corrections as the circumstances of each particular case may require," that the judges did not mean these rules to apply to all circumstances.

Another criticism leveled by Stephen (p. 155) is that according to M'Naghten isanity is regarded simply as a case of innocent ignorance or mistake, failing to recognize the effects this condition can have on the emotions and will. This criticism has been much voiced, in one form or another. Fitzgerald (1962, p. 135) criticized M'Naghten for the emphasis on reason and the entire disregard of emotion. Biggs (1955, p. 109) feels that M'Naghten is misleading since it examines

only one variable in determining criminal responsibility. It is interesting to note, however, that although many individuals have criticized these rules, the literature of law contains almost no discussions of the problems which M'Naghten created by making no distinction between mental illness and mental retardation.

While Stephen (p. 154) has serious questions regarding the M'Naghten Rules, he nevertheless recommends the judges follow these rules until "...some more binding authority is provided, especially as the practice has now obtained since 1843." Stephen, as a prominent judge, obviously was in a position to affect England's laws regarding insanity and yet he refused to take the initiative, preferring to rely on precedent. This behavior exemplifies what seems to me to be a major problem with criminal law in general. That is because judges are expected to rely on precedent, they avoid initiating significant changes even when they believe that justice would be better served by the change. While stability is certainly necessary in law, this over-strong emphasis on precedent makes any change very difficult to achieve.

The M'Naghten rules appear to be based upon phrenological concepts. That is, each function is considered to be directed by a different faculty of the brain. Within this theoretical framework it is very possible for the moral faculty to be affected by insanity while the conative-emotional aspects of the individual remain "normal."

Another frequently named objection to M'Naghten is that because of its subjectivity, it is extremely difficult for juries to interpret (see Bowlby & Lloyd, 1905, p. 550). These critics demand a more

objective "yardstick" approach for objectively measuring a defendant's responsibility. Such criticism appears to me to have little value since such decisions are by their very nature subjective. The primary need is for legal definitions and tests which enable society to recognize the intent of the criminal law and increase its ability to identify those who should not be held responsible. In the final analysis, providing such a framework upon which to base subjective judgements must create a greater hope for just and rational findings.

Since the M'Naghten rules were created they have found expression in the American judicial system in numerous ways. Why English legal decisions in 1843 should have determined American judicial decisions on the issue today is explained solely by the fact that Anglo-American courts traditionally have had difficulty with this topic, and most states have followed British law rather than grapple with the problem themselves. Once the M'Naghten rules were applied in America, judges tended to view it as precedent and, as previously stated, extremely difficult to change.

Though the M'Naghten rules were imported by the United States, they were not always accepted in their totality. Two early cases (State v. Spencer, 1846 and Genz v. State, 1896) held that the only true test for insanity is whether or not the defendant realized that he was morally wrong at the time the act was committed. No other criteria were allowed by these courts. In both Commonwealth v. Freth (1858) and Commonwealth v. Heidler (1899), the juries were told that in order to find the defendant not guilty due to insanity they must believe that the offender, at the time of the act, was not capable of dis-

tinguishing between right and wrong. Additionally, if the defendant was suffering from delusions, he would be excused if the mistaken beliefs would have served as a defense if they had in fact been correct. Bolling v. State (1891), State v. English (1913), and Bell v. State (1915) held that if, at the time of the act, the defendant was suffering from a disease of the mind such that he did not know the nature and quality of the act he was committing or did not know he was doing wrong then he would be relieved of criminal responsibility. State v. Duestrow, (1897) defined insanity as the inability to distinguish between right and wrong in reference to the act in question, and, also, the inability to comprehend the character and nature of the act. In People v. Schmidt (1915) the judge took great pains to define the word "wrong." Knowledge of law was not held to be a deciding factor in criminal responsibility. To be relieved of responsibility, the offender must lack moral knowledge. Simply having a moral view at variance with those that find expression in the law is not enough; rather, this variance must have originated from a disease of the mind.

When mentally retarded persons have been brought into court on criminal charges, judges have defined insanity in similar fashions. Courts have typically looked upon knowledge of right and wrong as the deciding factor (see State v. Saxon, 1913 and Wartena v. State, 1885). In an unusual case (State v. Richard, 1894), the judge, when instructing the jury, stated that the evidence was sufficient to indicate that the defendant had committed the act. The question was whether or not the prisoner had the mental capacity for criminal intent. Realizing that

knowledge of right and wrong and consequences and effects is a matter of degree, the judge utilized a formula proposed by Lord Hale. He instructed the jury to reach a verdict of not guilty due to insanity if, in the jury's opinion, the defendant had a mental capacity less than the average fourteen year old child. It is interesting to note that evidence regarding IQ testing was frequently not admitted in these early cases.

In concluding this section, it must be made clear that the M'Naghten rules were designed to assist courts in making decisions regarding criminal responsibility when confronted with mentally ill defendants who were suffering from delusions. The M'Naghten court made no attempt to distinguish between different types of mental conditions which might affect criminal responsibility decisions. The retarded person is placed in a particular disadvantageous position when the M'Naghten rules are applied, for while he may recognize that a particular act is wrong, he may not be able to fully comprehend the seriousness or consequences of the act.

The idea behind M'Naghten, that a person cannot be guilty of a crime without criminal intent (or mens rea) is basically sound. For example, a man who suffers a stroke while driving a car and kills a pedestrian is not guilty of a crime. However, if the driver intentionally hits a person then a crime has been committed.

The implementation and results of M'Naghten, however, present a number of problems. First, M'Naghten tends to confuse issues such as ability to distinguish between right and wrong. It is doubtful that

anyone can be totally unable to make that distinction, and yet this is what M'Naghten apparently seeks. Second, while varying degrees of mental illness are recognized in contemporary thought, partial insanity as conceptualized in this history is not accepted today as a valid type of mental disorder. Third, although probably these rules were never meant to apply to all types of defendants and situations, they have been applied as if they were. Fourth, there is considerable difficulty in applying these rules through juries in courts. Fifth, numerous critics believe that these rules do not remove criminal responsibility from many persons who should be so relieved. Sixth, these rules specify as a criterion lack of knowledge concerning law. As is commonly known, ignorance of the law has never been an accepted defense in Anglo-American courts and its inclusion in these rules has tended to be confusing. Seventh, the judges generated considerable confusion by including knowledge of the nature and quality of the act as one of the tests and at the same time failing to define nature and quality. Eighth, medical persons were established as expert witnesses in these cases, but the sole use of a physician in making a diagnosis in all cases creates a problem in itself. In addition, courts have relied on physicians to answer questions regarding these tests such as knowledge of right and wrong. Certainly physicians are no more qualified to answer these questions than other persons and, at times, may be less able to give an accurate answer. And last, the judges formulated these rules in an attempt to establish justice for insane offenders without reference to the post-

acquittal issue. M'Naghten, in fact, spent the rest of his life in confinement. This case provided a model for other courts, and up until recently it has been common practice for individuals acquitted for even minor charges to be kept in institutions for life.

The Irresistible - Impulse Test

The irresistible-impulse test is never the sole test of criminal responsibility but in at least fifteen states it is used in conjunction with the M'Naghten right-and-wrong test (see Brakel & Rock, 1971, p. 380).

It has long been a tradition in Anglo-American law that persons who have no control over their behavior are not responsible for their actions. For example, if a person, under threat of death, is coerced into committing a robbery, he is not criminally liable. With the irresistible-impulse test, however, it is not clear that the behavior is irresistible since the elements which make the behavior irresistible cannot be observed. The assumption in this test is that sanity is associated with the ability to resist impulses while insanity is associated with opposing conditions. The test is relevant in cases where the offender knows the quality and nature of the act and can also distinguish between right and wrong but is not able to resist committing a criminal act because of an overpowering impulse originating from mental disability. The test is believed to take into account the conative-emotional aspects of an individual's personality.

The test has received a considerable amount of criticism stating

that the only proof of irresistible-impulse is the actual occurrence of the act. The question is, whether or not it is possible to distinguish an unresisted impulse from an irresistible impulse associated with insanity. Clearly juries are responsible for deciding whether or not the offender's mental condition rendered him unable to resist committing the criminal act. Additionally, they must decide whether or not an inability to resist committing an act originated from mental illness.

The irresistible-impulse test is American in origin and was first expressed in Ohio in 1834 in State v. Thompson. The judge in that trial instructed the jury to reach a verdict of not guilty if the defendant was unable to either discriminate between right and wrong or was unable to resist the act. In 1844 Chief Justice Shaw (Commonwealth v. Rogers) instructed the jury to use the M'Naghten rules in deciding criminal responsibility and additionally "...if the disease existed to such a degree that for the time being it overwhelmed the reason, conscience, and judgement, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."

In a frequently quoted case (Commonwealth v. Mosler, 1864). Chief Justice Gibson appeared to recognize the difficulties in using this test and attempted to give the jury cautious and clearly defined

instructions. The Chief Justice told the jury that the defendant would be relieved of responsibility only when his perception of right and wrong was totally absent. In further instructions the justice defined "moral" or "homicidal insanity" as "...consisting of an irresistible impulse to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual, but that it may be is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, though aware of the heinous nature of the act. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature."

Numerous other states adopted irresistible-impulse as a defense (see State v. Felter, 1868; Blackburn v. State, 1872; Hays v. Commonwealth, 1896; State v. Clancy, 1915; Clark v. State, 1843). All of the courts permitting irresistible-impulse as a defense hold that the impulse must be the product of mental disability. An irresistible impulse cannot be the uncontrolled passion of a "sane" person.

There are a number of problems with this test. First, as with the M'Naghten rules, it is primarily concerned with mental illness and does not focus on the mentally retarded. Second, this test in action has proven to be difficult for juries due to the fact that, as previously mentioned, this judgement cannot be made through observation. Rather, juries must examine both the behavior of the defendant and the testimony of psychiatrists in order to make the inferential leap this test requires.

The Product Rule

In 1871 the New Hampshire Supreme Court discarded the M'Naghten rules as inadequate and established what was later to be labeled the product rule (State v. Jones, 1871). The product rule, as stated in this case, held that no man shall be criminally responsible for an act which is the "offspring and product of mental diseases." In its criticism of the M'Naghten rules the court stated that in most cases where it is apparent that "disease has attacked the mind...it has not wholly obliterated the will, the conscience, and mental power, but has left its victim still in possession of some degree of ability

in some or all of these qualities." This decision actually came out of a minority opinion voiced by Judge Doe in an earlier New Hampshire case (State v. Pike, 1869).

New Hampshire was alone in using this rule until 1954 (Durham v. U.S.) when it was adopted in its essence by the Federal Courts of Washington D.C. In this case, if the defendant's act was the product of a mental disease or defect he was not criminally liable. In attempting to clarify this rule, "disease" was defined as a condition "which is considered capable of either improving or deteriorating" and "defect" was defined as a condition which would not either improve or deteriorate and which could either be cogenital, the result of injury, or the residual effect of mental or physical disease.

In Durham v. U.S., Judge Bazelon criticized M'Naghten as concerning itself only with the cognitive aspect of man's functioning. Bazelon stated that the problem was not that the right and wrong test rests upon an inadequate, invalid, or indeterminate sympton or manifestation but rather, that it rests upon <u>any</u> particular symptom. This case additionally held that <u>all</u> relevant professional disciplines could testify in court.

The product rule was refined by two later cases in Washington, D.C. First, McDonald v. U.S. (1962) further defined "disease" or defect" as any abnormal condition of the mind substantially affecting mental or emotional processes and substantially impairing behavior controls. Second, Washington v. U.S. (1967) clarified the role of the psychiatrist in court. Psychiatrists were prohibited from testifying as to whether

or not the criminal act was the product of a mental disease or defect. This question was to be answered only by the jury. Psychiatric witnesses, however, could testify on how the disease or defect related to the development, adaptation, and functioning of the defendant's behavioral processes. In 1972, the United States Court of Appeals for the District of Columbia rejected the product rule and adopted the Model Penal Code rule (United States v. Brawner). This change occurred primarily from the unfounded belief that the Durham decision would release a large number of potentially harmful individuals (Gasch, 1959).

The Product Rule has not been widely accepted and, as a matter of fact, only two other jurisdictions, Maine and the Virgin Islands, have adopted it. Obviously, the Product Rule does not include the concept of insanity. Whether or not the definitions of mental disease and defect are an improvement is debatable. As with other tests, the jury has two tasks. It must first decide whether or not the defendant has a relevant mental condition. Second, if the accused does have a relevant mental condition, the jury must determine whether or not the act was a product of that condition. Apparently there was an attempt to include mental retardation as a relevant condition under the label of defect. But this definition leaves so much to be desired that its use will probably do very little to assist juries in making these decisions.

A second criticism involves the concept of product. The product rule calls for juries to make a causal connection, and making this

connection is a formidable task. Critics arguing the above two points assert that M'Naghten was superior since it defined criminal responsibility in more definite terms (see Sobeloff, 1958 and Guttmacher, 1968, p. 34). The New Hampshire and District of Columbia decisions deliberately built in ambiguity, since these courts felt that replacing one set of theories with another would lead to problems, the generation of new knowledge possibly making any well-defined rule outdated. Though this may indeed occur the wisdom of refusing to use all available current knowledge is dubious. The issue seems to revolve around the need to recognize when current conceptions are clearly outdated and to take appropriate corrective action.

A third criticism is that the ambiguities involved in the product rule enable many persons who ought to be punished to escape justice and thereby allow these individuals to continue to present a threat to society. Whether or not this criticism is borne out by fact is still unclear, since relevant research has yet to be conducted. It is clear, however, that society reacts with fear to persons who have committed offenses and suffer from mental disabilities. The District of Columbia, soon after the Durham decision, enacted legislation which mandated institutionalization for individuals found not guilty by reason of mental disability in their courts. The implications of this type of action are very negative and will be explored in more detail in a later chapter.

The Model Penal Code Standard and Vermont Rule

The Vermont legislature, in 1959, (Vermont Statutes Annotated, 4801) enacted a law which essentially rejected the M'Naghten Rules and instituted instead a rule almost identical to that proposed in the Model Penal Code (American Law Institute, 1962, p. 66). The Vermont law states "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 adequate capacity either to appreciate the criminality of his conduct or to conform to the requirements of law." In attempting to clarify "disease" and "defect" the law further states that these terms do not include any abnormality manifested only by repeated criminal or antisocial conduct but that they do include congenital and traumatic mental conditions as well as disease.

The Model Penal Code differs from the Vermont law only in two respects. First, it substitutes the word "substantial" for "adequate." Whether or not this difference has any impact on jury behavior is unknown, but it is reasonable to assume that it does not. Second, the code includes "(wrongfulness)" after the word criminality and thus clearly indicates that appreciation of morality is important.

This formulation has been adopted by at least ten states and at least eight of the eleven federal circuits (see U.S. v. Shapiro, 1967; U.S. v. Freeman, 1966; and Wion v. U.S., 1963).

This test for criminal responsibility is nothing more than a

broadening of the M'Naghten and irresistible-impulse rules. The broadening is accomplished by requiring only a substantial impairment of capacity rather than total impairment. Since one of the criticisms of M'Naghten is its all or none quality, this represents an improvement.

A number of criticisms have been leveled at this formulation (see Brakel & Rock, 1971, p. 385; Hall, 1957 and Roche, 1958, p. 180). First, the phrase "result of" creates the same problems associated with causality in the product rule. Second, the Vermont wording can be interpreted to exclude moral knowledge and to require only that the defendant have legal knowledge. As mentioned in relation to M'Naghten, the requirement of legal knowledge is problematic. Third, there appears to be too much reliance upon cognition. Fourth, while it appears that Vermont includes the mentally retarded in their test, it is not clear that the American Law Institute does likewise. Fifth, the definitions of disease and defect are ambiguous. In general, many of the same criticisms levelled at M'Naghten can be brought to bear against the Vermont or Model Penal Code tests.

Abolition of the Insanity Defense

A number of authors have suggested that the insanity defense should be abolished. These writers can be divided into two camps. The first group (e.g. Menninger, 1968; Wooton, 1963; and Alexander & Staub, 1927) maintains that psychiatry is an important element in <u>all</u> criminal proceedings. When a defendant is before the court, the issue is <u>never</u> whether or not the accused is insane. Rather, if the defendant

committed the act in question, the question is what type(s) of treatment can be offered to ensure the rehabilitation of the offender. According to this theory, the psychiatrist plays a dominant role in diagnosis and the prescription of treatment.

This philosophy views criminal behavior as indicative of an illness (Menninger, p. 254, Wooton, p. 76), and maintains that when an illness has been identified, treatment should be applied. The object of treatment is to protect the community from a repetition of the offense in the most economical method possible. Menninger (p. 263) states that, at least for the present,this treatment must occur within prisons, since mental hospitals cannot provide the security which most of these people require. However, he expects that if his plan is implemented, mental hospitals would soon provide the bulk of these services.

A major problem with this formulation is the belief that psychiatry can effectively change criminal behavior and that mental hospitals represent treatment (a full discussion of this issue will be contained in a later chapter). In fact, there is no evidence to suggest that psychiatric techniques can effect these changes and further, it is common knowledge that mental hospitals are frequently little more than prisons themselves. Menninger's expressed faith (p. 263) in the treatment value of mental hospitals is difficult to understand.

This philosophy advocates that psychiatrists not only determine when it is safe to release a convicted person, but also, that they should determine when treatment is impossible and detain those offenders

indefinitely. Giving psychiatrists this extremely broad authority would likely threaten the security and freedom of all people in our society. Even if society were willing to trust psychiatrists with its freedom, the differences which exist between these professionals as evidenced by the battle of the experts phenomenon in courts makes this recommendation utterly unworkable.

The second group of writers (e.g. Szasz, 1963 and Morris, 1976) suggest that psychiatrists should be kept completely out of the criminal justice system. These authors feel that the intrusion of psychiatry has led to the neglect of the civil liberties of offenders (Szasz, p. 103). Violations of civil liberties have indeed occurred when persons relieved of criminal responsibility have been placed in mental hospitals. Psychiatric involvement is seen as an inappropriate intrusion into a criminal justice system which should aim at identifying and penalizing offenders. According to Morris, the mentally disabled defendant should be granted the same rights as are guaranteed to all offenders under the constitution.

The basic questions asked by this philosophy are as follows (Brakel & Rock, 1971, p. 378):

1. Should the criminal justice system make a distinction between offenders who should be treated and those who should be punished?
2. Do penal and mental health institutions bear any resemblance to punishment and treatment, respectively?
3. Is the defense of insanity in any formulation workable?
4. What is the value of psychiatric testimony in criminal

proceedings?

The elimination of the insanity defense appears to be unconstitutional. The attempts of Washington, Mississippi, and Louisiana to abolish this defense all were found to be unconstitutional in three separate cases (State v. Strasberg, 1910; Sinclair v. State, 1931; and State v. Lange, 1929).

It appears that insanity will continue to be a valid defense since its elimination has received no support within our judicial system. The questions, however, which are raised by this viewpoint are important and should be addressed. The first question asks whether or not courts should identify some offenders as being not responsible for their behavior and thus, recommend treatment rather than punishment. Certainly, in our society there are persons with such severe mental deficits (e.g. a profoundly retarded person) that they are denied many of their civil rights. Since society believes that these persons are incapable of caring for themselves and making informed decisions, it is a travesty of justice to hold them responsible for any behavior classified as criminal. The punishment versus treatment issue is complex, and will, therefore, be explored in depth in a later chapter.

The second question posed is whether or not mental hospitals and prisons represent treatment and punishment respectively. As mentioned previously, mental hospitals are all too often little better than jails and any resemblance to a treatment facility frequently is accidental.

The third question asks whether or not any formulation of the

insanity defense is workable. Such a question ignores the fact that any process designed to identify those guilty of offenses is faulty. That is, with all the safeguards built into the American system, it is not unusual for persons to be wrongly convicted. What is at issue is not to find a perfect way of distinguishing between responsible and irresponsible defendants but, rather, to discover how to best use current knowledge to accurately identify these persons and, at the same time, to preserve societal interests.

In the last question, the value of psychiatric testimony is questioned. Indeed, this author believes that the value of psychiatric testimony as it has been used in the past is indeed dubious. The exclusivity of psychiatric testimony when gathering evidence on criminal responsibility has certainly presented a problem. Since insanity is a legal rather than a medical term, it is difficult to see why others would not testify. Psychiatrists are not trained to answer questions related to a person's capability for moral knowledge. Certainly psychiatrists are no more qualified than anyone else to answer these types of questions.

Summary and Conclusions

Insanity as a defense was first recognized in English courts during the reign of Edward II (1307-1321) and became entrenched in law under the sovereignty of Edward III (1326-1377). The test used to determine criminal irresponsibility in most cases has been whether or not the defendant had knowledge that the alleged act was wrong when it was

committed. We have seen that this knowledge test originated in the writings of Bracton during the thirteenth century. The M'Naghten case of 1843 firmly established the test in both the English and American judicial systems.

The M'Naghten rules have been criticized almost from the time of conception and therefore, alternative rules have been established in the United States. The irresistible-impulse test, first formulated in the United States and often used in conjunction with the knowledge test, excuses persons from criminal responsibility when they are unable to control their behavior because of mental illness. Another test established in the United States is the product rule, which declares that if the criminal act is a product of mental disease then the defendant is not criminally responsible. The Model Penal Code standards and Vermont rule were also formulated in the United States and are little more than a restatement of the knowledge and irresistible-impulse tests.

Attacks on and criticisms of these tests continue today. It is easy to conclude that our difficulties with criminal responsibility are rooted in the past. Many of the ideas generated in the past and used at later dates were results of the arbitrary circumstances of who happened to be writing about legal insanity rather than of a clear analysis of contemporary knowledge concerning relevant mental conditions, societal outcomes desired, and mens rea. It is likely that a number of factors have contributed to this situation. First, judges are expected to rely on precedent, once a precedent exists, there is a

tendency to follow rather than change it. Second, when ideas regarding criminal responsibility were first being formulated, knowledge regarding relevant mental conditions was considerably less than it is now. Even today our understanding of these conditions is limited. In the past, judges apparently felt compelled to follow the advice of almost anyone who claimed to be an authority. And again, once precedent is set, judges tend to use it as the rationale behind later decisions. Third, persons who can successfully be defended on the grounds of insanity are characterized by many as socially deviant. Most persons react towards these deviant individuals with fear. Any judge or legislature attempting to liberalize criminal responsibility tests is bound to incur the wrath of the public, as evidenced by public reaction following the M'Naghten case. Even when the Durham decision was reached, a considerable amount of criticism came from the press, and soon after, the legislature passed a law mandating institutionalization of persons in Washington D.C. found not guilty by reason of insanity.

If one examines the arguments contained in this literature, it appears that the major question is where society is to draw the line between those who are to be held responsible for criminal acts and those who are not. The author included Figure 1 as a useful tool in this analysis.

Within Figure 1, mental condition represents an abstract variable which in one of its extremes can relieve a defendant of responsibility. For example, it can represent intelligence or mental health such that

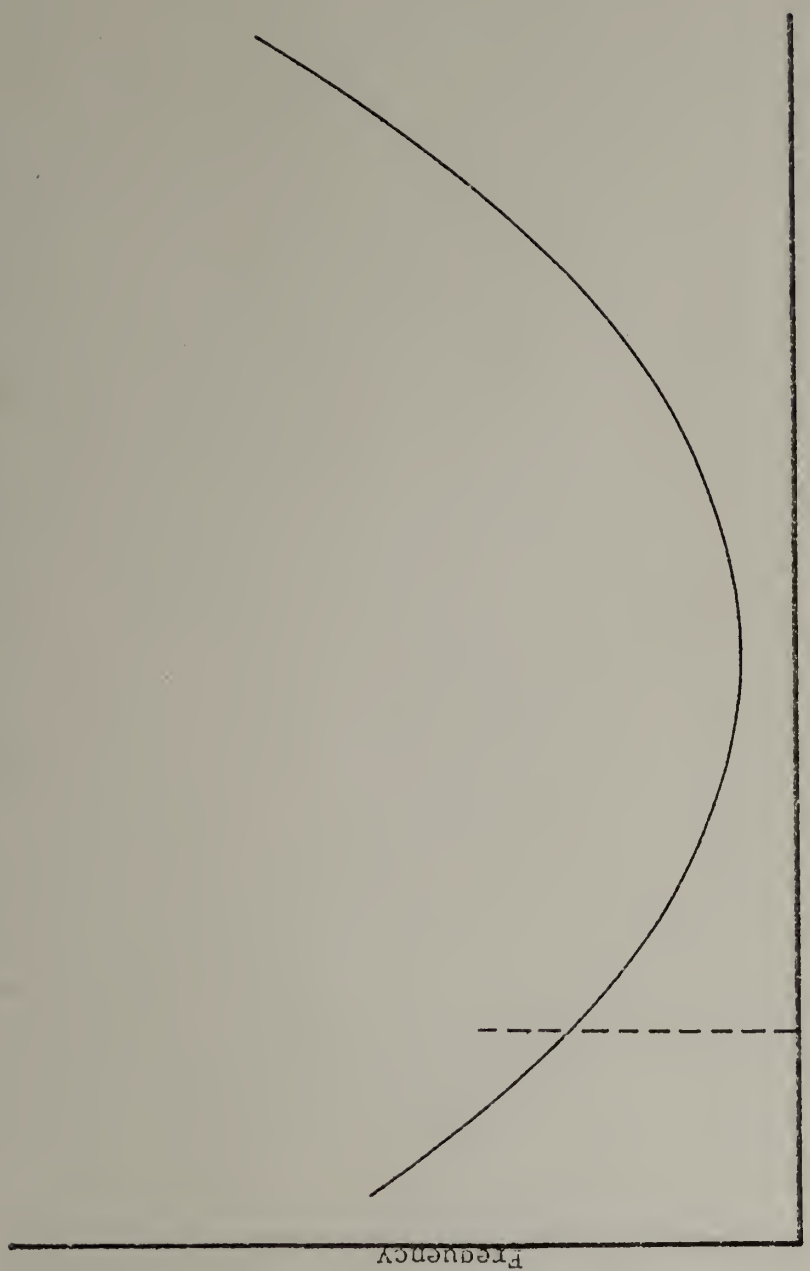

Fig. 1. Theoretical curve illustrating the incidence of insanity within society

the right side of the distribution is the more healthy or intelligent portion of the population. Point A represents that point along the continuum where we separate those individuals who are responsible for their actions from those who are not. Since persons who are not responsible are located to the left of A, the ability of persons relieved of responsibility increases and the number of persons so relieved increases as A moves to the right. Since there is no absolute way to determine where point A is placed, its location is dependent upon each person's ideas concerning how justice would best be served. This, of course, involves subjective judgement.

Figure 2 is included to further illustrate this point. The quadrants can be conceptualized as containing frequency counts. This figure shows how individuals perceive cases where insanity is used as a defense. When justice is served, an entry is made in the upper left quadrant (x) or lower right quadrant (x). Such entries indicate that the court and the perceiver place point A in Fig. 1 at the same place. In such cases, critics do not appear. However, when entries are made in other quadrants, criticism arises. In the upper right quadrant (y) the perceiver believes the accused to be insane but the court finds him to be sane. In this case the perceiver would criticize the test used by the court as too restrictive. Only when the court moved point A in Fig. 1 further to the right would this critic be satisfied. In the lower left quadrant (z), the perceiver believes the defendant is sane and the court finds him to be insane. Here the perceiver sees the court as too lenient, and again, criticism

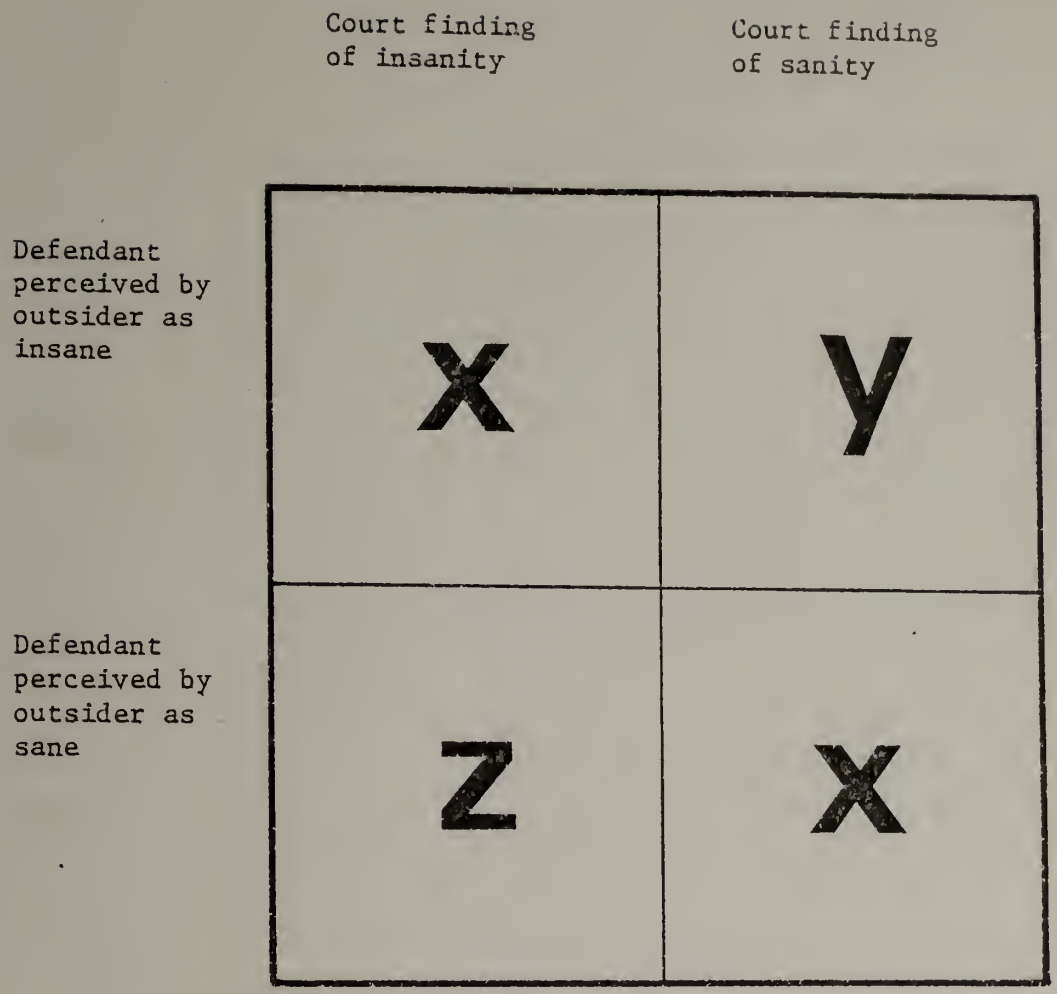

Fig. 2. Individual perceptions of justice in cases where the defense is insanity.

would occur. In this case however, there is not a concern for the well-being of the defendant. Instead, fear probably occurs with the belief that deviant persons who represent a threat to society are being placed back on the streets. Only when the court's test moved point A in Fig. 1 to the left would this critic be satisfied.

Of course, these examples are extremely simplified but they do serve a purpose. The figures demonstrate that two distinct subjective judgements frequently are made by critics. First, where to place point A in Fig. 1 is a subjective judgement. Second, whether or not a given defendant is significantly affected by a relevant mental condition is a subjective judgement. This author believes that decision rules which more clearly show where the courts consider point A to be and more clearly indicate when incapacitating mental conditions exist would help to decrease the variability among the judgements made by various jurors. Interestingly, courts have refused to use current knowledge in framing these decision rules and even today there tends to be confusion among the various mental conditions which can lead to relief of responsibility.

The public's fear regarding the insanity defense is quite reasonable, given that our learned courts display extreme confusion in so many cases. The author has personally witnessed, on a number of occasions, our criminal justice system refuse to try persons who have engaged in criminal activity but do not have any mental conditions which would legally relieve them of responsibility. These cases have involved persons living in institutions for the retarded, and thus, the court

has attached the label of retardation to them without examining data regarding diagnosis. However, if these persons had committed serious crimes (e.g. murder) they would very likely have been tried.

The public's faith in our criminal justice system's dealings with insanity is further undermined by the "battle of the experts" spectacle. Where there are cases in which the defendant is supposedly suffering from a mental disability, opposing psychiatrists frequently give contradicting testimony. The public cannot help but conclude that if we cannot even accurately identify persons who are mentally disabled, then justice cannot be served in these proceedings. The outcome in these cases is, therefore, seen as threatening to society.

Not only does there exist a neglect of current knowledge, but little research in this area has been conducted, and that which has been done has not led to solid conclusions. For example, the Predident's Commission on Crime in the District of Columbia (1966) found that since 1962, under the Durham rule, "insanity acquittals have stabilized at two or three percent of all defendants." Another study has found that insanity acquittals in the District of Columbia before Durham were between 0.2 percent and 0.6 percent of all defendants, and following Durham these acquittals rose to six percent (Simon, 1967). Why such variability among research results should exist is not clear. It is evident, however, that it is difficult, if not impossible, to draw conclusions from these data.

Although works such as the present one can point in new directions, firm conclusions regarding criminal responsibility cannot be reached

until considerable research has been conducted. To increase the utility of this type of research, the legal profession must establish standards, methods, and procedures which will allow comparisons across projects. Only when such comparisons occur can sense be made of the literature in this area.

CHAPTER V

PUNISHMENT AND TREATMENT

Most literature regarding criminal responsibility is concerned with punishment and treatment, asserting that those who are not held criminally responsible should receive treatment for any illegal actions. Treatment, if successful, assists the individual in staying within legal boundaries. On the other hand, persons who are convicted of criminal offenses are candidates for punishment, a method intended to discourage the offender from committing such criminal acts in the future. According to this line of reasoning, prisons are primary agents for delivering punishment to offenders, and mental retardation institutions or mental health institutions deliver treatment to those relieved of criminal responsibility.

This chapter will examine the merits and validity of the punishment and treatment differentiation as used by the criminal justice system. The concepts themselves will first be explored to distinguish the theoretical differences between them. Next, the actual performance of prisons, and mental health and mental retardation institutions will be presented together with a discussion of the development and history of these facilities.

Punishment and Treatment as Concepts

Punishment, as utilized by the criminal justice system, is intended as more than merely a noxious or painful experience. Equally important are the notions of authority and morals (Fitzgerald, 1962, p. 199 and

Hall, 1960, p. 309). Punishment can be defined as a coerced privation that is inflicted by the state (an authority figure) upon persons who have violated a set of rules established by society. The extent of punishment is, at least theoretically, somehow equivalent to the extent of the harm created by the violation.

The infliction of punishment upon those who have violated societal laws has a long history (Barnes & Teeters, 1950, p. 391), beginning in primitive societies where it was used partially to protect the community from further violations but for the primary purpose of placating the gods by whom the wrong-does was believed to be "possessed."

In modern society, punishment is said to have four major objectives. These objectives are retribution, deterrence, incapacitation, and individual intimidation (Tappan, 1960, p. 241).

Retribution satisfies society's desire for revenge against the offender (Clyne, 1973, p. 86). This retaliation is based on the belief that man has free will and is responsible for his acts, and that, therefore, society has the right to "balance the accounts." Obviously, the major thrust for retribution is moral. Throughout history, retribution has been the single largest component of punishment (Leinwand, 1972, p. 22). While retribution still is a significant force in our criminal justice system and is evidenced by statements such as "making the punishment fit the crime," the morality of this motivation and the wisdom of pursuing this objective is highly questionable. It is likely that it is impossible to erradicate the moral outrage felt by society when serious crimes are committed, but

the criminal justice system can and should be above such emotional reactions. Retribution does not assist in achieving the stated aim of the criminal law to protect society and, in fact, may be counter-productive. A response which is oriented toward preventing future offenses and thus protecting society would be more sound.

Deterrence as justification for punishment was first adopted in the eighteenth century (Leopold, 1970). This justification is believed to prevent potential offenders from committing criminal acts by the threat of punishment. A potential offender, realizing that criminal activity may lead to punishment,may be motivated to avoid engaging in those activities. The effectiveness of deterrence has been questioned by numerous authorities, many of whom have cited the example provided by English justice 150 years ago (Leopold, 1970). At that time, criminal punishment was harsh and public. Picking pockets, for example, was a crime which was punishable by death, and yet when public hangings were being observed by enormous crowds, the occurrence of pocket picking was extremely high. Though this example does damage to the deterrence theory, it does not wholly disprove it, and it is still likely that deterrence has some impact on at least some individuals. Another variable which weakens the impact of the deterrence theory is that the likehood of being caught and convicted is known to be very low. Most crimes are never reported to the police, those which are reported are usually not solved, and most persons arrested cannot be convicted of the crime (American Friends Service Committee, 1971, p. 52). The thought of potential punishment as a deterrant is therefore

surely decreased as the probability of being caught and convicted decreases.

Incapacitation as an objective of punishment seeks to remove the offender from society and thereby render him unable to commit additional offenses while incarcerated. The imprisonment of criminals does indeed place severe limits on the opportunities to engage in criminal activities within the context of the society outside of prison. Incapacitation, therefore, is effective for the larger society, if only temporarily. However, incapacitation appears to have much less impact on criminal activity in general since crime inside prisons predominates (Leopold, 1970). In order to weigh the overall value of incapacitation, the probability of further criminal activity must be assessed. Whenever an individual is convicted and sentenced, the length of the sentence should be directly related to the probability of committing future offenses. There are data to indicate that frequently murderers do not commit additional crimes whereas with minor offenses such as prostitution, shoplifting, etc., there is a high probability of repetition (Tappan, 1960, p. 256). Obviously, murderers receive much longer jail sentences than persons who commit minor offenses, and therefore the function of incapacitation is frequently weakened by matching the extent of punishment with the seriousness of the offense.

Individual intimidation is directly related to recidivism in that an offender who has been punished for a criminal offense should be discouraged from repetition by this experience. Since the recidivism

rate in the United States can reach as high as sixty percent, the utility of this function is severely limited. Additionally, many persons believe that imprisonment may in fact be counter-productive in that it embitters incarcerated individuals and thus leads them to commit further crimes upon release. Much has also been written to indicate that prisoners, through their association with one another, obtain additional ideas and skills to enable them to avoid capture when committing future criminal acts.

Interestingly, treatment at times overlaps punishment. Although punishments dominant characteristic is frequently conceived as being either painful or noxious, treatment, at times, may also involve pain, often, in fact, a considerable amount. For example, one can find instances in psychology literature of the use of painful stimuli to change a person's behavior. Also, the treatment ideal states that human behavior has antecedent causes and that behavioral scientists can identify and specify these causes. The ability to specify these causes enables the scientist to change and control human behavior. This identification of causes then leads to the design and implementation of measures intended to effect behavioral changes in the interests of the individual's happiness, health, and satisfactions and also, in the interest of society (Allen, 1973, p. 193 and Rubin, Weihofen, Edwards, Rosenzweig, 1963, p. 665). Treatment then is not only concerned with the security of society but also with humanitarianism, a belief in the worth and dignity of every human being. Punishment and treatment are, therefore, both interested in protecting society and preventing

future criminal acts.

The treatment model makes a number of assumptions. First, whenever a person engages in illegal activity it is a problem of individual pathology, and the frequency of this activity can be reduced by treatment and the resultant cure (American Friends Service Committee, 1971, p. 40). The causal factors behind crime probably go beyond the individual and undoubtedly have some relationship to social variables such as poverty, parental guidance, sub-culture influence, etc. To the extent that these social variables influence the occurrence of criminal activity, the assumption of individual pathology is undermined.

Second, the treatment model assumes that we know the individual causes of crime or behavior (American Friends Service Committee, 1971, p. 41). Though society has and is generating scientific data which enables it to understand behavior better than it has in the past, our knowledge of the causal factors behind behavior remains quite limited. Outside of the laboratory, our ability to either predict or understand the causes of behavior remains very limited.

Third, the identification of causes leads to the specification of treatment interventions. Since the causes are poorly understood the types of treatment interventions which are implemented must also be lacking.

Upon examining the concepts of punishment and treatment together the differences between them on a theoretical level become clear. Punishment involves a noxious experience brought to bear on an individual who has violated societal rules. The extent of punishment

is somehow related to the degree of harm created by the individual. Treatment, while it may use noxious experiences, also uses many other approaches. The approach used is not determined by the criminal act but, rather, by the causes behind the act and inevitably by what can change the person's behavior. The treatment model therefore calls for an individualized approach. Treatment also demands the use of knowledge obtained from the behavioral sciences in designing interventions. Both punishment and treatment are aimed toward changing the behavior of the offender, but the punishment model does so exclusively for the benefit of society while the treatment model focuses on both society and the individual offender.

Prisons

Prisons, as we know them today, were first established less than two hundred years ago. Prior to that, persons were held in prisons while they waited either for trial or punishment. Punishment, at that time, consisted of torture, death, or mutilation (Leinwand, 1972, p. 24). Imprisonment was eventually eagerly substituted for this brutality.

After America gained her independence and the nation was established, Americans believed that they had uncovered the cause of criminality. With patriotic fervor and humanitarian values they believed that criminal behavior was perpetuated by the colonial criminal codes (Rothman, 1971, p. 59) which called for the application of cruel and

severe punishments. The problem with these codes was twofold. First, the severity of the punishments drove people to commit further crimes to avoid capture for the first one. Second, punishment, to be effective, had to be definite and consistant, and Americans, while under British rule, had frequently seen juries turn guilty persons free rather than sentence them to severe punishments for minor infractions.

With missionary zeal Americans expected that punishment which was certain and humane would eliminate or curtail criminal behavior, and in the 1790's a number of prisons were built as substitutes for severe punishments. This development of prisons as punishing devices was a reflection of what was happening in much of Europe (Rothman, 1971, p. 61) and was an outgrowth of the development of humanitarian ideals. Since these early Americans identified the problem of criminal behavior with the criminal code, prisons themselves were never examined. No one believed that prisons would rehabilitate offenders. Instead it was felt that the loss of freedom, in and of itself, would suffice to change the offenders' behavior. In these early prisons the sentence length was directly related to the seriousness of the crime.

By the 1820's Americans had lost faith in this early ideal, due to the failure of the system to reduce criminal behavior (Rothman, 1971, p. 62) and the popularity of writings by prison critics and reformers such as John Howard (Barnes & Teeters, 1950, p. 480). Americans, having lost their belief that the colonial criminal codes led to criminal behavior, turned to the individual offender's

environment for explanations. Many biographical sketches were made of offenders, and it seemed that all criminal behavior could be traced to a childhood which lacked appropriate education and discipline (Rothman, 1971, p. 68). If one believed that a faulty environment created criminal behavior, then all that need be done was to alter the environment in which the offender lived. Offenders could be removed to a special environment which taught discipline and was corruption-free.

John Howard, the greatest prison reformer of the time, first pointed the way for the penitentiary system by examining conditions in existing prisons and specifying the types of prisons which would lead to the rehabilitation of offenders. He made the reformation of prisons his life's work after having been captured by a French privateer and incarcerated in a number of French prisons (Barnes & Teeters, 1950, p. 480). After this ordeal ended he spent a number of years visting prisons throughout Europe, his writings not only exposing the deplorable conditions he observed but making recommendations regarding humane treatment, sanitary conditions, etc. He is also credited with first recommending that prisoners be kept isolated so that they could reflect upon their transgressions, an idea which was to lead to the development of the penitentiary (Leinwand, 1972, p. 24). The word "penitentiary" comes from Latin and suggests a place to do penance for sins, and the idea postulated by Howard was that if an offender was forced to think about his behavior, he would see the error of his ways.

The penitentiaries which were finally developed were perceived as providing a solution to a rising crime problem. More than that, however, these institutions were supposed to have dramatic impact on society as a whole by demonstrating proper socialization. When the community observed the success that these institutions had, society would adopt the practices used by the penitentiary. Given this belief, the early penitentiaries received considerable publicity and were the pride of the nation. Since penitentiaries primarily called for isolation of prisoners, architecture absorbed these early reformers. Considerable effort was put into designing a facility that made it impossible for prisoners to communicate with each other without official sanction.

Pennsylvania was the first state to establish this new type of correctional facility when, in 1829, the Eastern Penitentiary was built in Philadelphia. This institution epitomized the most influential penal philosophy ever conceived by man (Barnes & Teeters, 1950, p. 507). The dominant principle at the Eastern Penitentiary was solitude or separate confinement, a separation complete except for rare visits from "moral instructors". The facility contained "four hundred large solitary cells in seven cell blocks emanating from a central rotunda, each cell having a small individual exercise yard. Massive walls surrounded the institution and divided its parts so as to eliminate all contact and to make escape impossible" (Tappan, 1960, p. 607).

Margaret Wilson (1931, pp. 219-220) has provided some insight regarding what it was like living in the Eastern Penitentiary. When

an offender arrived he was given a hot bath and a uniform. He was then led blindfolded to the rotunda where, still blindfolded, he "met" the warden and the rules of the facility were described. Still blindfolded he was led to his cell where finally the bandage was removed from his eyes. The cell he lived in was less than twelve feet long and eight feet wide. If the cell was on the ground floor he could see a small courtyard, the same size as the cell, highly walled, within which he could sometimes exercise. The prisoner stayed in that cell and courtyard without any change for his entire sentence. He was completely cut off from the world and was not allowed visitors or mail. The guard who brought meals was the primary person who had contact with the prisoner but the guard was not allowed to speak when delivering this food. After three days in the cell the prisoner was allowed to work if he requested it. Nearly all prisoners made this request and prison reformers pointed to this as indicating that their scheme was working. However, just as eating and sleeping occurred in solitude, work assignments were carried out in the individual prisoner's cell. Prisoners were to leave the facility without knowing who else was incarcerated there. Pennsylvania quickly established a second institution, the Western Penitentiary in Pittsburgh. This facility operated on the same principles as the Eastern Penitentiary.

A second state attempting to reform its penal system was New York, erecting a penitentiary at Auburn in 1821. This facility had smaller cells than the Eastern Penitentiary: seven by three and one half feet, and no exercise yard was included. Additionally, work was not

provided. This extreme idleness and separation quickly produced a marked prevalence of physical illness and mental disturbance (Barnes & Teeters, 1950, p. 520), and in 1924 a compromise which became known as the Auburn "silent" system was adopted. The Auburn system called for solitary confinement only at night. Work activities occurred in congregate areas under a strict rule of silence. Manufacturers soon secured contracts to operate factories at Auburn which employed prisoners at low wages (Tappan, 1960, p. 609). Manufacturing enterprises within Auburn soon proved to be profitable. Auburn, in an effort to control and eliminate communication among inmates, instituted rules calling for marching in military lock step fashion when going to and from activities. Prisoners were to keep their eyes only upon their work in the workshop and on the guard when marching and silence was to be observed at all times. Violations of these rules were severely punished. The Auburn system led to greater production output than the Pennsylvania system, (Tappan, 1960, p. 609) and this, probably more than any other reason, explains the popularity of the Auburn system. The productivity of the prisoners generated revenue for the state and thereby made it less expensive to run the facility. In 1925 New York started a second penitentiary which later became known as Sing Sing, and soon most other states had followed the example of New York, opening Auburn-system penitentiaries.

Considerable controversy was generated by the differences between the Pennsylvania and Auburn systems. The debate regarding these differences was intense and was carried on until appriximately 1870

(Barnes & Teeters, 1950, p. 533). Since both models called for preventing prisoners from communicating with one another, the disagreement centered around whether or not prisoners should work silently in large groups or in solitary cells. The Pennsylvania system insisted that their model carried the doctrine of isolation and reflection to its logical conclusion. This arrangement prevented prisoners from contaminating one another. One result of allowing prisoners to gather in large groups was they would recognize one another and thus increase the probability of their getting together for criminal activities once released (Rothman, 1971, p. 87). The Auburn system was seen as encouraging cruelty since the rules in that system were frequently broken. Advocates of the Auburn system insisted that their model led to the reformation of the prisoner while at the same time being economically expedient. The controversy between these systems died out around 1879 when the inadequacy of each as a means for reforming offenders was recognized and strict rules regarding silence and solitude were gradually changed.

Not only did these penitentiaries fail at carrying out their mission of reforming prisoners but they also failed at carrying out the dictates of their models. Pennsylvania, for example, found it impossible to completely separate prisoners. Soon after the Eastern Penitentiary was in operation it became necessary to place two prisoners in one cell at selected times so that training in performing work functions could be carried on (Barnes & Teeters, 1950, p. 516). Wines

(1923, pp. 157-159) has identified the inventive techniques used by prisoners to communicate with one another. For example, prisoners established codes to tap out messages on water pipes. Soon doubling up of prisoners became necessary since state capital appropriations did not keep up with the growing population.

Since discipline was an important component in these penitentiaries and the rules established by them were commonly broken, harsh punishments became common, frequently being sadistic in nature (Rothman, 1971, p. 102). This reliance on harsh treatment was exemplified most clearly by Elam Lynds, the principal keeper directly under the warden at the Auburn prison at its inception. Lynds was a firm believer in flogging and used it to enforce the rules. When Sing Sing opened, Lynds became warden there. He believed (Wines, 1895, p. 149) that prisoners could not be changed unless their spirits were broken and that the purpose of penal discipline was to accomplish this so that offenders would develop good work habits and religious attitudes. Lynds encouraged his officers to treat prisoners with contempt and to inflict cruel punishments.

The combination of the failure of penitentiaries and the rise of social Darwinism in American thought paved the way for the current state of penal institutions. Darwin published The Origin of the Species in 1859, and during the last three decades of the nineteenth century and the beginning of the twentieth century Darwin's work dominated social thought in the United States (Hofstadter, 1967, p. 4). At that time a considerable amount of literature was generated which attempted

to apply Darwinian thought to social disciplines, spawning the resultant social darwinism. Phrases such as "struggle for survival" and "survival of the fittest" led to the conclusion that the best competitors in a society would dominate and that this process would lead to continual improvement. The development and improvement of society must occur at a very slow pace and natural selection would be the primary process in accomplishing this. Any attempts to tamper with this natural process through social reform efforts would lead only to degeneration.

Herbert Spencer, an English writer, spent considerable time applying Darwin's theory to social issues and had considerable impact on American thought. According to Spencer, sociology had the task of identifying the normal course of social evolution and condemning all types of behavior that interfer with it (Spencer, 1874, pp. 70-71). Social science should demonstrate that social control was impossible and man should readily submit to natural forces. Spencer (1864, pp. 79-80) opposed such things as banking and postal systems, poor laws, state-supported education, and regulation of housing conditions.

William Graham Summer of Yale University was the most influential social Darwinist in America and effectively spread his philosophy through widely read books and magazines (Hofstadter, 1967, p. 51). Summer, as Spencer, effectively used social determinism in his fight against social reformers. Society was the product of centuries of evolution and should not be tampered with. Attempts to refashion society could only lead to disaster (Summer, 1934, Vol. I, p. 105). To Summer, society was an organism that changed only at a very slow rate. He viewed reformers as meddlers who believed that there were

no natural laws governing the social order and that they could make the world over with artificial ones (Summer, 1934, Vol. I, p. 215). He expected social Darwinism to negate this erroneous belief.

The emergence of social Darwinism appeared to explain the failure of previous efforts to reform the penal system. Additionally, it indicated that further reform efforts were not only doomed to failure but would cause additional harm. Offenders, under the doctrine of survival of the fittest, were certainly not viewed as having desirable characteristics which society wanted to nurture. Rather, social Darwinism devalued such offenders as human beings. The American Breeder's Association, whose membership included persons such as Alexander Graham Bell, became concerned with heredity in the human race. In 1910 the association had committees on mental retardation, mental illness, criminality, deaf-mutism, mental traits, epilepsy, and immigration (Blanton, 1975, p. 177). With this type of thinking dominant, any discussion of improving conditions in prison was unlikely. The problems that plagued prisons before Darwinian thought went unresolved, and since society turned its back on prisons, conditions deteriorated.

Although social Darwinism is not today a major force in American thought, the impact this philosophy had upon the American penal system is still all too readily apparent. While there has been recent concern over prison conditions and even renewed efforts to rehabilitate offenders, these efforts have proved to be inadequate. They frequently take the form of tinkering with existing reality rather than with

enacting a total system change (Tappan, 1960, p. 237). While lip service is frequently given rehabilitating offenders, it is usually difficult to find anything in our prisons which appears to be designed to reform prisoners (Brelje, 1976). Numerous authors have supplied testimony regarding the degrading conditions of prison life (Harris, 1967; Clemmer, 1940; Lindner, 1946; Gaddis, 1955; Griswold, Misenheimer, Powers, and Tromanhauser, 1970; Cressey, 1958; and Sykes, 1958). While a loss of personal freedom is a punishing experience, the conditions within prison typically add additional punishment onto the loss of freedom.

The director of the District of Columbia Department of Corrections has stated that the term that best describes prisons is "evil" (Satten, 1963). Indeed, when individuals are placed in a desperate situation and experience a total loss of rights, serious problems are bound to occur. As late as 1967 incidents of torture, beatings, rape, murder, and medical malpractice were reported by the press to be occurring in the Tucker Prison Farm in Arkansas. Cells which were originally constructed to provide solitude for one man are frequently still in use except that now, two, three, or four man are frequently found within them and solitary confinement for long periods of time is still in use (McGraw & McGraw, 1954, p. 5). The President's Commission on Law Enforcement and Administration of Justice (1967) described life in prison as barren and futile <u>at best</u> and unspeakably brutal and degrading at worst. The Commission also cited drastic shortages of resources including personnel and facilities, poorly trained and

underpaid staff, unnecessary restrictions on inmate communication, the marching of prisoners from one activity to another, overcrowding, domination of prisoners by the most aggressive inmate, staff sanctioning of rackets, violence, corruption and coerced homosexuality, and the existence of numerous prisons that are over one hundred years old as common in our corrections systems.

Beside the application of punishment for the infraction of rules which seem meaningless, Leinwand (1972, p. 58) cites the following as representative of the ills plaguing American prisons: inadequate funding, overcrowding, poorly trained and paid personnel, inadequate professional personnel, inadequate and poor food, limited opportunities for work and recreation, inadequate educational opportunities, homosexual rapes, drug addiction, crime, brutal punishment for infraction of rules, racial tensions, and poor or inadequate medical treatment.

Ramsey Clark (1975, p. 193) has stated that prisons, by giving absolute power to the staff over nearly helpless people, lead to the corruption of power. He refers to prisons as "warehouses of human degradation". And his assessment of prisons (pp 194-201) agrees with that provided by Leinwand.

Mental Health and Mental Retardation Institutions

Rothman (1971, pp. 109-236), in an exceptional work, traced the development of mental health institutions to the first half of the nineteenth century. Prior to that time mental illness was viewed as God's will and primarily a problem of poverty and dependence.

Individuals who were mentally ill either received assistance by living with relatives or the town provided assistance to the afflicted person in their home. At the beginning of the nineteenth century, however, questions regarding the causes of mental illness and the treatment of those afflicted were raised. These questions were prompted by calculations that the incidence of the malady was increasing in America, and intensive efforts at identifying causal factors were initiated.

The cause of mental illness was felt to be related not to body chemistry but to the social organization of America. In particular, it was thought that social, economic, and political influences were critical and that the debilitating effects of these influences were only present in relatively civilized societies. Primitive societies were thought to have been free from mental illness. The concern over mental illness was heightened by this belief, since Americans typically believed their country to be the most civilized nation in the world.

The research intended to identify causal factors turned up very little that was pleasing. The new nation appeared to be fraught with dangers to mental health. A lack of stability and the dissolving of traditions were seen to create stresses and strains which at times overwhelmed individuals. The unusually fluid social order of America was not viewed with pride, but, rather, as problematic. In a society where sons did not automatically assume the work of their fathers and employment potential was viewed as unlimited and based upon individual

skills, it was inevitable that some persons, consumed with ambition, would aim at accomplishments which they were incapable of achieving. For many, mental powers were strained to their utmost and the result was often mental illness.

Dangers lay in wait even for those who achieved lofty aims, for once reached, the socio-economic level was significantly changed and the resultant change in life style was often difficult to adjust to. The change from a simple life to a more complex one was accompanied by considerable anxiety centered around the transition itself and around the desire to maintain the new position. Since upward mobility created such strains, it was felt to be a frequent contributor to mental illness.

Democracy was viewed as contributing to society's mental problems. The ordinary voter was felt to be in a state of constant turmoil over one issue or another and which candidates to vote into office. Political debates and elections created public agitation which taxed mental faculties. This burden of responsibility of a democratic society led at times to mental illness.

A lack of stability in the accepted body of knowledge of the day also took its toll. American society was going through profound change at this time. Beliefs and traditions which had previously been held were constantly being questioned and the generation of new ideas and knowledge was occurring at an ever increasing pace. If such inquiries had been confined to those who were highly educated, a problem may not have existed. But many Americans without formal education

and lacking an appreciation of logic were actively involved in discussing complex subjects. The result was excessive mental strain and frequently mental illness.

The family and the school, both having the ability to moderate the dangers found in society, were seen as chief villians in the situation and the frantic and unstable qualities of society were primarily attributed to them. Schools admitted children too early, kept them in classroom too long, crammed children with information as quickly as possible, and considered recreation and rest to be a waste of valuable time. Worse yet, the attitudes of the schools were supported in the home. Parents instilled their children with ambitions for social and intellectual achievement and insisted that schools convey ever increasing amounts of knowledge to their children. The family, which could have protected children from the adverse effects of society, was charged with heightening the impact of these factors.

Like the reformers who found the origins of crime in the community, psychiatrists linked mental illness to social organization. The implications for both crime and mental illness were similar. That is, wherever the individual turned, some hazard which was beyond his control waited for him. The existence of vice in society turned a person toward crime, and mental stress created by societal pressures led to mental illness. Concepts such as these led eventually to the belief that mental illness was curable. All one need do was to change the environment for a person who was mentally ill. Ideally, changing society would have produced the best result, but since that task was

far too overwhelming, a second solution became attractive. That is, a separate environment which did not have the stress and chaos found in the larger society would be established by psychiatrists. This new environment would exemplify the advantages of an orderly, regular, and disciplined routine. Such a setting, by isolating afflicted persons from the adverse effects of society, in addition to helping the individual in question, would demonstrate the benefits of this system to the larger society. The missionary zeal behind this movement must not be underestimated. The ideal setting which was being prescribed led to the development of mental health institutions. These institutions were not only supposed to cure mental illness but were also to lead to the education and reformation of the total society by their example.

The development of these institutions was rapid. Before 1810 only one state, Virginia, had a public institution. By 1850 almost every northeastern and midwestern state supported a mental health institution and by 1860, twenty eight of the thirty three states had public facilities. With the establishment of these institutions there also came what was later to be called the "cult of curability" (Deutsch, 1949, p. 133). The cult of curability, which was advocated by psychiatrists and their lay supporters, insisted that mental illness was not only curable but was more curable than most other ailments. It was believed that appropriately designed and organized institutions could cure almost every case of mental illness.

The new program for treating mental illness first called for the prompt removal of afflicted persons from the community. At the very

first sign of mental illness the individual was to enter a mental institution. Second, the institution was to be separate from the community. It was to be built far from population centers and was to function as independently from the surrounding community as possible. The setting for institutions was to be tranquil and rural, and the facility was to reinforce isolation by prohibiting visits and correspondence. Third, moral treatment was to be provided. Moral treatment would provide an antidote for the instability of society and would curb uncontrolled impulses by creating a fixed and stable environment. In providing this treatment, facilities had to control residents in a humane manner, creating as little stress as possible. This, of course, was a difficult task and in order to accomplish it superintendants designed and implemented an extremely rigid routine and calendar and insisted upon daily labor. A rigid, carefully spelled out schedule and regular work became the prescription for cure within these institutions. The insistence upon work was not only believed to be therapeutic but was also economically sound.

Obviously, a stress upon orderliness and rigid schedules calls for extreme control of residents in such a facility. These early facilities stressed the importance of avoiding punitive discipline in carrying out their mission and though there were institutions which did not abide by this concept, most probably did. A great deal of administrative diligence was necessary but by and large, these early institutions did succeed in doing away with harsh punishments and in treating patients in a humane fashion.

One of the most astounding discoveries in the records of this reform effort is the statistical information which these early institutions generated. The published rates for cures were greatly exaggerated and superintendents deliberately distorted data, some going so far as to declare a one hundred percent cure rate. Rothman (p. 132) believes that personal ambition played a considerable part in the distorting of this information since frequently state bureaucracies used the number of reported recoveries in determining appointments and promotions. Superintendents often found themselves in the position of trying to outdo one another, and as soon as one superintendent announced his results, other superintendants were encouraged to match if not exceed his. With the absence of any information to disprove these announcements, the erroneous claims tended to substantiate one another. In addition, the claims were used as arguments to obtain additional support from state legislatures. It was not until the 1870's that the claims were finally disproved. One cannot help but be amazed at the existence of a forty year period in our history when novel and radical claims were made, and yet no serious challenge to those claims was forthcoming. At any rate, by the end of the 1870's the cult of curability was dead and American society no longer believed it had the ability to cure mental illness.

Prior to the nineteenth century there were no public or private facilities charged with the care and education of the mentally retarded on the North American continent. Before the establishment of such facilities, retarded persons who could not care for themselves

experienced the same treatment as the mentally ill. Even after the establishment of mental health institutions the retarded continued to be a neglected group and could frequently be found in early mental health institutions (Baumeister, 1970).

The impetus for the development of institutions for the retarded originated in Europe. Johann Guggenbuhl is acknowledged as the originator of the idea of institutionalized care for the mentally retarded (Kanner, 1964, p. 30). In 1840 he established an institution to provide educational and residential services in Switzerland. Other work in Europe provided hope that the retarded could be educated. For example, the work of Jean Itard and his successor Edward Sequin affected the commonly held perceptions of a retarded person's ability to learn and develop (Best, 1965, p. 163). The two men developed two methods of teaching the retarded which were later to be adopted in the institutions of the United States (Baumeister, 1970). The first was called the physiological method and was a system of sensory-motor activities that varied from simple muscle activities to complex vocational and social skills. The second was called moral treatment and called for retarded persons to be treated with dignity, warmth, and kindness.

Samuel Howe is credited with the development of institutions for the retarded in the United States (Kanner, 1964, p. 39). In 1845 he took a group of retarded children into his home and personally supervised their education. In 1846 he was able to convince the Massachusetts legislature to investigate the condition of the mentally

retarded in the Commonwealth and also to determine whether anything could be done for their relief. Howe, as chairman of the committee, presented the report in 1848. The report convinced the legislature that methods had been found to teach the retarded and that it was the responsibility of the Commonwealth to provide education for all its children. The legislature responded by funding, for a three year period, an experimental school for a small number of retarded children. Three years later a committee evaluating the school declared the experiment a success. The legislature, based upon that evaluation, established a permanent institution which later became known as the Walter E. Fernald State School in Waltham, Mass.

Other states soon followed suit. In 1851 a residential school for the mentally retarded was opened in Albany, New York. In 1853 Pennsylvania established the third institution for the retarded, the Pennsylvania Training School for Feebleminded Children. Ohio built an institution in Columbus in 1857, and in 1858 Connecticut followed the course of the other states. By 1874 there were seven state institutions and several private ones in existence (Best, 1965, p. 170). By the end of the nineteenth century more than half of the states had either public or private institutions for the retarded.

The founders of the first institutions had as their goal the return of the retarded person to the community. The early literature demonstrates a blind faith in the efficacy of the physiological method. Mental retardation was conceptualized as a lag in the development of intelligence and with hard work the mind could be trained. Sequin even

believed that the cranium enlarged with education and that mental retardation could be cured. Considerable effort was made to inform the public that these new institutions were schools and not custodial in nature and, in fact, they made no provision for permanent custody (Baumeister, 1970).

Reports from these early institutions tended to reflect amazing results (Baumeister, 1970). The experimental school in Massachussetts declared that it was entirely successful and had proved that retardation was curable. Baumeister believes that superintendents used these glowing reports to convince a skeptical citizenry and legislature that their work was worthwhile. Indeed, many persons believed that little could be done to benefit the retarded. Reactions of fear and aversion were frequently associated with mental retardation and many persons believed that tax dollars could be better spent.

Persons, however, who were involved in establishing these facilities went about their work with humanitarian zeal and believed their efforts went toward rescuing afflicted members of society from their condition (Best, 1965, p. 171). This zeal, similar to that expressed in the movements to establish penitentiaries and mental institutions, was part of a wave of humanitarianism which swept the country. The data from the mental health institutions gave courage to the reformers in mental retardation and reinforced their belief that all handicaps could be overcome. The wave of humanitarianism was evidenced most clearly in religious papers of the time (Best, 1965, p. 191), which looked upon the movements as miraculous and

gave their total support to them. Religious papers, when mentioning the reform efforts, described them in glowing terms.

By the 1870's, however, it had become apparent that many of the earlier claims of success were inaccurate. The physiological method was no longer viewed as being capable of producing the results previously believed. The role of the institution as an educational agent began to evaporate and custodial care began to assume a position of dominance in these facilities. By 1875 leaders in the field called for long term custodial care, and a trend began toward construction of larger institutions. Indeed, the American Association of Mental Deficiency stated in 1876 that only a small number of the retarded are capable of community living (Doll, 1962). It is curious to note that institutions were built at a faster rate after they were regarded as custodial rather than education in intent (Baumeister, 1970).

Both mental health and mental retardation institutions were developed with the promise that they could provide a useful service for both society and individual clients. As with prisons, their failure to produce good results received public attention about the time when social Darwinism became popular. Additionally, the eugenics movement had dramatic negative impact on the plight of the mentally retarded and the mentally ill. The eugenics movement, more than any other factor, led to the decay of these facilities and prevented any further efforts at reform. The movement postulated that many characteristics such as mental illness, mental retardation, and habitual criminality, are the direct result of heredity and that allowing persons

with these characteristics to propagate would increase their occurence in the general population.

Richard Dugdale in 1877 published a book which was to become a landmark in eugenics literature. Dugdale, who was a penologist, noticed several persons from the same family incarcerated in a prison. He conducted a genealogical survey and was able to obtain information on seven hundred and nine descendants. Of these, one hundred forty had been imprisoned, two hundred eighty were dependent upon public support, and a majority had low moral standards. In 1912 Henry Goddard, a leader in the field of mental retardation, published The Kallikak Family. Goddard claimed that his research showed beyond a shadow of a doubt that mental retardation and other undesirable characteristics had been transmitted by heredity for generations in a given family. Ando so, for a time, this type of literature abounded (Kanner, 1964, pp. 128-138). To make matters worse, it was believed that the efforts made to assist mentally retarded or mentally ill people inevitably led to an increase of these conditions in society by enabling such persons to live without supervision.

The eugenics movement had several results. First, any thought of educating the retarded or helping the mentally ill to live in the community became unthinkable. Why should society assist devalued persons when such assistance can only increase the community's problems? Second, in an effort to prevent these afflicted persons from procreating, a number of states passed laws prohibiting them from marriage and gave the state the authority to sterilize certain individuals.

In 1914 (Smith, Wilkinson, & Wagoner, 1914) thirty nine states had laws forbidding persons such as the retarded, the mentally ill, and epileptics from marrying. Assisting in the marriage of or engaging in intercourse with such persons could be punishable by imprisonment. Twelve states gave the authority to sterilize certain persons in prisons, mental health institutions, and mental retardation institutions. Included in the list of persons eligible for surgery were habitual criminals, the mentally ill and the retarded. Third, the nature of the early institutions for the mentally ill and the retarded was changed. When they were established, those institutions, were primarily concerned with the well-being of individual clients. But after the coming of the eugenics movement, they became primarily concerned with protecting society (Emerick, 1912). Fourth, the eugenics movement further devalued the mentally ill and retarded and increased the fear associated with these groups, creating an atmosphere in which many forms of client abuse were allowed to develop and prosper.

One need make only a casual search of the literature on the subject to conclude that mental health institutions have still not recovered from the adverse effects of social Darwinism and the eugenics movement. To Thomas Szasz (1970, p. 58), mental institutions appear harsh and oppressive. Other researchers (e.g. Herz, Endicott, & Spitzer, 1975; Sommer, 1959; and Nettler, 1952) have shown a negative relationship between length of stay in these facilities and outcome. Grimes (1949), who through his work with the American Medical Association was able to personally visit forty percent of the insti-

tutions in the United States and read reports regarding the remaining sixty percent, concluded that treatment tended to be totally absent in these facilities. He found that psychiatrists did not help matters and that their "orders, euphemistically called treatments, are carried out by guards, behind locked doors, to the accompaniment of insult, intimidation, and abuse" (p. 16). Abuse of patients in the facilities was rampant and involved diverse approaches including beatings with a bar of soap in a sock of forcing a patients head under water until he strangled (pp 101-102). All patients were abused at one time or another, and the most abused group tended to be those who are the most helpless and thus, most in need of assistance (p. 58). Institutions were typically overcrowded, and the residential areas violated fire codes (p. 70). Many residents spent twenty-four hours a day naked, filthy, and in restraints or seclusion rooms. Grimes concluded that through public neglect and a lack of legislative financial support,these institutions are "little more than concentration camps" (p. 69).

Other authors have found that staff members in these institutions wield all the power and that patients find themselves in a position always subservient to staff (Devereux, 1944; Bateman & Dunham, 1949, and Stanton & Schwartz, 1954, p. 170). The American Civil Liberties Union became so concerned over the violation of patients' rights that they supported the publication of a book advising these patients of their rights (Ennis & Siegel, 1973). LeBar (1964) found that the roles which develop among institutionalized mental patients are frequently

not consistent with therapeutic goals and there is a tendency for dominance-submissive relationships to be formed. Conditions in these institutions have been so bad that courts have at last become involved. For example, at St. Elizabeth's Hospital, the mental institution in the District of Columbia, the court, in answering a right-to-treatment suit, found that patients frequently receive no treatment at all (Rouse V. Cameron, 1966). It is important to note that under the Durham ruling, persons found not guilty due to insanity were frequently sent to St. Elizabeths.

Bateman and Dunham (1949), in exploring the realities of institutionalization for mental patients, concluded that patients spent a considerable amount of time protecting themselves from the more vicious or dangerous aspects of their environment. They also found that these facilities tended to impede recovery by an insufficient quantity of organized activity, therapeutic interventions and staff training. There also tended to be a lack of respect for patient wishes and an emphasis on detailed and, at times, trivial rules whose violation predictably resulted in punishment.

Lima State Hospital in Ohio, a mental health facility for the criminally insane, was rocked by an expose conducted by The Plain Dealer, a Cleveland daily newspaper. The articles described vicious beatings (Whelan & Widman, May 14, 1971), the abusive use of drugs by staff to control patients (Whelan & Widman, May 17, 1971), the use of electric shock treatments as punishment (Whelan & Widman, May 20, 1971), homosexual rape (Whelan & Widman, May 25, 1971), negligent medical practices

(Whelan & Widman May 26, 1971), and murder (Whelan & Widman May 27, 1971 1971). Obviously, such as environment can hardly be called therapeutic.

Mental retardation institutions appear to be plagued with the same problems as mental health institutions. As of 1968 there were 167 mental retardation institutions in the United States (Baumeister, 1970). The rated capacity of these institutions was 191,587 persons and, since this rated capacity included some institutions that had not yet opened and the actual population was found to be 199,694 individuals, it can be concluded that considerable crowding exists. The professional staff in these institutions frequently does not meet the qualification standards acceptable in the community (Baumeinster, 1970, 1967). For example, many physicians in these settings are not licensed for private practice. Attendants, who are the most influential staff in respect to the everyday welfare of the mentally retarded client, are poorly paid, receive little if any training, and usually have poor skills relative to the tasks they have to perform (Baumeister, 1970).

A number of authors believe that institutions have detrimental effects upon the ability levels of mentally retarded persons residing with them. Herber and Dever (1970) believe that present institutions, because of their isolation from the community, the regimentation of clients, and the existence of numerous and repressive rules, are poor settings for habilitation. These settings create their own cultures which are at contrast with the community and therefore, when a retarded client moves from the institution to the community, adjustment

difficulties occur. While some research efforts have not demonstrated that institutions have adverse effects upon retarded clients, the vast bulk have so stated. Research by Badt (1958) Denny (1964). Lyle (1959), and Schlanger (1954) have shown that institutions have deleterious effects on such behaviors as language ability, ability to abstract, and ability to learn discrimination tasks. Courts (Parisi, et. al. V. Carey et. Al., 1975), have even found that treatment tends to be entirely absent in many of these facilities.

Other information exists which suggests that not only do mental retardation institutions fail to provide treatment but that they all too frequently represent cruel and unusual punishment. Blatt and Kaplan (1966), visting one of these facilities during the Christmas season of 1965, labeled it a "hellhole" and found human beings living in conditions that the community would not tolerate for animals. A right to treatment suit brought in Alabama for two mental health institutions and one mental retardation institution found that clients had been denied their right to treatment and the conditions at these facilities were "grossly substandard, hazardous and deplorable" (Wyatt et. al. V. Stickney et. al., 1972). The court was so disturbed over the conditions it found that it issued an emergency order to protect the lives and well-being of the clients. The court concluded that these institutions were not furnishing treatment and only led to deterioration and debilitation of clients. Safety and sanitary conditions were so poor that the health and lives of residents were endangered; wards were grossly understaffed and overcrowded; conditions

were such that simple custodial care became impossible. Clients were frequently mistreated, abused, and subjected to corporal punishment.

A right to treatment suit filed in Massachussetts (Ricci, et. al. V. Greenblatt, et. al., 1973) on behalf of clients residing in a mental retardation institution claimed that a lack of treatment was only one problem at the facility. Conditions at the institution were said to be "so shockingly oppressive, unsanitary, unhealthy and degrading that they are an affront to basic human decency." Not only was there an absence of developmental services, but medical services were typically poor or absent. The brief cited frequent heterosexual and homesexual attacks, physical assualts, the abusive use of chemical and physical restraints, the frequent use of cruel punishment, the existence of residential areas which violated the State Sanitary Code, the presence of excrement and urine which were visible and unattended, the overpowering odor which was present in living areas, the fact that raw sewage had at times backed up into residential areas, a continual shortage of sanitation supplied, and an ever-present clothing shortage, which caused many clients to be continually nude. The court found the cited charges to be a reflection of actual conditions and consent decree in favor of the plaintiffs was accepted.

A right to treatment suit filed in Ohio (Sidles, et. al. V. Delany, et. al., 1975) alleged similar conditions. The court recognized the allegations as accurate and accepted a consent decree proposed by state officials. During a recent conference, Michael Thrasher (1976),

from the United States Justice Department, stated that his office was currently involved in twenty-two right to treatment suits. These suits involve both mental health and mental retardation institutions and his visits to these and other similar settings has led him to conclude that mental health and mental retardation facilities frequently represent cruel and unusual punishment rather than treatment.

Summary and Conclusions

Traditionally, arguments regarding criminal responsibility have revolved around whether the offender should receive punishment or treatment for the offense. Persons found not guilty due to insanity are typically sent to either a mental health institution if they are emotionally disturbed, or to a mental retardation institution if they are retarded. These two types of facilities supposedly provide treatment to the offender. Prisons, on the other hand, are supposed to represent punishment.

Punishment is defined as the delivery of a noxious experience by an authority figure to someone who has violated the law. Punishment can have one or more of the following as its goals; retribution, deterrence, incapacitation, and individual intimidation. Treatment refers to an individualized approach in that each offender is evaluated to determine the cause of the criminal behavior which results in a plan of action designed to prevent law breaking in the future. The plan of action can involve noxious experiences, and both punishment and treat-

ment have behavior change as an objective.

Prisons and mental health and mental retardation institutions are conceptualized as total institutions (Goffman, 1961 p. XIII). A total institution is a "place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life." All these facilities are fairly recent and were "invented" during the nineteenth century in reform movements. Prisons were developed first to end the cruel and harsh punishments formerly given out in court, and second, to change the behavior of convicted criminals by placing them in a vice-free environment and forcing them to reflect on the error of their ways. Mental health institutions also originated in a concern for the well-being of certain individuals. At that time it was believed that societal instability was the cause of mental disturbance and, therefore, that placing a mentally disturbed person in a stable environment in an institution should lead to recovery. Besides being interested in helping their client populations, both prisons and mental health institutions also had a much more ambitious goal. Leaders in these reform movements believed that prisons and mental health institutions, by demonstrating what they could do, would lead to the reform of society as a whole. Mental retardation institutions originated with a concern for the retarded individual, and the mission of the early facilities was to provide developmental services in order to enable retarded persons to live in the community.

Both the origins and histories of these total institutions are similar. In the first few decades of their existence many claims of success were made. These facilities were "curing" criminals, the mentally disturbed, and the mentally retarded. By the 1890's no one believed that these facilities were completing their missions. At the same time the popular acceptance of social Darwinism and the eugenics movement changed the nature and function of these institutions. These institutions changed from being concerned about their clients' well-being to protecting society from criminals, the mentally disturbed, and the retarded, who were perceived with fear and thought to be dangerous in relation to societal interests. With the influx of such thinking, the institutions began to deteriorate rapidly. By establishing a dramatically unequal power distribution between staff and clients, removing activities from public view, and finding it necessary to control and regiment the behavior of residents while at the same time suffering from severe resource shortages, the facilities eventually become citadels of degradation and dehumanization for residents.

It seems that any argument which assumes that prisons are for punishment and mental health and retardation institutions are for treatment is making erroneous assumptions. The present author believes that any society which does not try to prevent criminal behavior is closings its eyes to reality. Though present day understanding of the causes of criminal behavior is sorely lacking, research which utilizes the treatment model and is oriented towards identifying

effective interventions appears to be warranted. If effective interventions became known, it would be wise to apply them regardless of the issue of criminal responsibility. The present author's concern over criminal responsibility does not revolve around the idea that some offenders should be punished and others treated but, rather, originates from the idea that persons who are not criminally responsible should not receive any "services" at the direction of the court unless certain other conditions are present (their behavior strongly indicates that they are a danger to the community and there is a guarantee that appropriate services can be provided.)

CHAPTER VI

NORMALIZATION

Ravenel and Bush (1976) believe that the recent improvements in services for the mentally retarded in this country are primarily due to the acceptance of the principle of normalization as the philosophical base for changing and developing these services (Mesiboy, 1976). The present author, however, believes that normalization has not been accepted by most professionals in the field beyond the verbal level, as evidenced by the conditions which still too frequently exist. There has been, however, a trend toward change in the last ten years which appears to be gaining momentum, and the changes which have occurred usually have shown the effects of normalization. The author, observing this trend and bringing some degree of optimism to bear, can easily envision a time when normalization will be typically evidenced by the service system for the retarded in the United States.

The philosophy within the field of retardation, therefore, appears to be changing from one based on fear and revulsion toward the retarded to one of action on behalf of individuals possessing developmental potential and human and legal rights. Because of the growing importance of normalization in the field of developmental disabilities and, because this concept appears to be relevant to the discussion of criminal responsibility, it is examined in this chapter. In addition to exploring the meaning of the concept, its application in mental

retardation systems and its meaning for the criminal justice system are included.

The Concept of Normalization

The concept of normalization was first used by Bank-Mikkelsen, head of the Danish Mental Retardation Service, when he stated that the retarded should experience an existence as normal as possible (cited in Nirje, 1969). Bank-Mikkelsen was able to convince the legislative body to include this principle in the 1959 Danish law regarding services for the mentally retarded. Nirje (1969) was the first person to elaborate the principle and publish it in the United States. According to Nirje, normalization "refers to a cluster of ideas, methods, and experiences expressed in practical work for the mentally retarded" as adopted in the Scandanavian countries. Normalization means "making available to the mentally retarded, patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." This principle is not meant to apply only to a subgroup of the mentally retarded population but, rather, to all of these persons including severly and profoundly retarded individuals and those who are multipli-handicapped. The Joint Commission of the Accreditation of Hospitals, the major standard setting body for mental retardation services in the United States, has adopted and defined the principle of normalization in its handbook entitled Standards for Residential Facilities for the Mentally Retarded (1975) as "the use of means which

are as culturally normative as possible to elicit and maintain behavior which is as culturally normative as possible, taking into account legal and subcultural differences." The most comprehensive treatment of the normalization concept has been produced by Wolfensberger (1972). His definition states that normalization is the "utilization of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviors and characteristics which are as culturally normative as possible" (p. 28). These definitions seem to indicate that the normalization principle is culture-bound in that each culture has its own standards for behavior. "Normative" refers to statistics rather than morals and could be conceived as that which is typical.

The normalization principle is based upon the reasonable assumption that a normative environment elicits and maintains normative behavior. On the other hand, environments which are significantly different than that found in society lead to the development and maintenance of behavior which is maladaptive in society. It seems obvious that placing an individual with a learning disability in an environment which encourages the development of inappropriate behavior further handicaps that person should he return to society.

Many authors have written about problems with the concept of normalization. Throne (1975) contends that the retarded become identified as such only when normative procedures have been attempted and have failed. Therefore, normalization is misleading since the retarded do not develop normally in response to normative procedures.

Throne calls for the application of extraordinary procedures for speeding up the developmental rate for retarded persons and sees normative procedures as perpetuating the same retarded developmental rates which they were responsible for establishing in the first place. This criticism of normalization has taken a superficial view of a deceptively complex principle. When Wolfensberger calls for "procedures which are as normative as possible," he obviously intends a great deal of flexibility in procedures to establish the desired end, a normal developmental rate. However, procedures must deviate as little as possible from cultural norms in meeting desired goals, and a blanket statement that different procedures must be used for the retarded without stipulating that these procedures must deviate minimally from culturally normative ones leaves the door open for establishing more of the faulty institutions which are all too prevalent in our society and which in the author's opinion, deprive the retarded living within them from experiencing a normal existence, thus leading to the development of maladaptive behavior.

Mesibov (1976) acknowledges that the normalization principle has been extremely valuable but sees a need for additional refinement of the concept. As with any such concept, normalization should be continually re-examined and refinements and changes made when appropriate. A major difficulty has been that while normalization is intuitively appealing as a concept, there are no acceptable criteria for evaluating the effectiveness of the normalization model against alternative formulations. Thus, normalization is not readily amenable

to confirmation or refutation.

Edgerton, Eyman, and Silverstein (1975) have noted that there has been little effort to clarify what exactly is meant by normalization. For example, what is meant by "local" or "subculture" standards? How do we determine what the standards of the majority are? How does one establish when a strict interpretation of normalization should be violated? And how can we identify the optimal point at which the mentally retarded individual experiences a maximum of growth and development? These questions continue to be unanswered, and it appears that no simple answers exist. While we may, at some point, be able to better answer such questions as how to specify subculture standards, it is unlikely that we will ever easily be able to decide to what extent normative standards should be violated with any given individual. Since great variability exists among human beings, and simple consistent formulae for action appear impossible, the most valuable product of the normalization principle is probably the orientation it provides in demanding that we make strenuous efforts to meet normative standards.

The Application of Normalization

Frequently, it is believed that subscribing to the normalization principle will enable quality services to be delivered less expensively than they are typically provided today and that retarded persons will make greater developmental gains, reducing the prevalence of retardation. Nirje, (1969) has stated that normalization can aid many retarded

persons in achieving complete independence and social integration and that many who will always require assistance will make developmental gains due to normalization. No one is seen as being immune to the beneficial effects of this principle.

Normalization has two major implications (Wolfensberger, 1972, pp. 31-42): the first is concerned with the interactions between the mentally retarded individual and his environment, and the second is concerned with how the retarded are perceived by others.

Regarding interactions, normalization dictates that we maximize the behavioral competence of the retarded person which should lead to normative interactions with other individuals and inanimate objects in the environment. While services are in existence which increase the behavioral repertoire of the retarded, this increase, in and of itself is not sufficient. For example, expanding the vocabulary of a person is not sufficient if pronunciation and speech patterns are not similar to what is culturally accepted and the mentally retarded individual who displays this verbal deviance from accepted community standards requires programmatic interventions to ameliorate this difference. Another example lies in the area of nutrition. Assuring that individuals receive nutritious diets is important but does not totally meet the requirements of normalization. If a person's weight is outside of the normal range as dictated by the community, then efforts to change his weight accordingly are indicated.

In terms of the interaction between the retarded person and his inanimate environment, the building within which persons live, attend

school, work, and engage in leisure time activities assumes a position of extreme importance. If these structures prohibit individuals from developing behaviors which are typically learned by the rest of society, then they violate the principle of normalization and result in retarding the development of a person who is already developmentally disabled. Obviously, buildings can facilitate the development of skills and habits. Examples which demonstrate this power of buildings abound. If toilets have no facilities for toilet paper or towels, persons in that environment never learn to use toilet paper appropriately or to wash their hands after going to the bathroom. If, in addition, large groups of persons sleep in large overcrowded rooms, the concepts of personal space and property can never fully develop. Such an environment leads to ownership being determined by possession, and stealing in such a situation is encouraged. Visitors to institutions in different states cannot help but be aware of similar bizzare behavior among residents who may be thousands of miles apart. One behavior which is evidenced is the stuffing of possessions under one's shirt at <u>all</u> times except when showering or sleeping. Questioning of individuals who engage in this practice quickly reveals that it is an effective technique to maintain ownership of possessions. Building design can even effect behavior such as decision making. A physical environment which denies a person access to his clothes, obviously prevents him from learning to decide which clothes to wear on a given day.

The perception of the retarded individual by others is also affected

by normalization. The more a retarded person's behavior differs from cultural norms, the more he is perceived as deviant. Such a perception increases the probability of the person being rejected and encourages the development and maintenance of non-normative behavior. Examples abound in our service system for the retarded which adversly effect society's perceptions of the developmentally disabled. The presence of large institutions which are separate from the rest of society implies that the individuals within are so different that they cannot participate in normal living. The dilapidated condition of many of these facilities and the absence of minimal standards of decency, such as privacy during showering or the presence of toilet paper in bathroom, leads to the perception that the retarded are devalued human beings little better than animals. The existence of security screens or bars on windows in residential buildings and the over-emphasis on security leads to the perception of the retarded as dangerous.

The blatent absence of the normalization principle in services for the retarded sets up a circular chain of inevitable events, a self fulfilling prophecy. Figure 3 demonstrates this relationship. As can be seen, placing a person in an institution for the retarded, in and of itself, devalues the person and leads to the retarded person being perceived as less than human. The resultant behavior which develops because of the abnormal environment in the institution and the affected interaction between the retarded person and others further reinforces the belief that the retarded must be placed in these

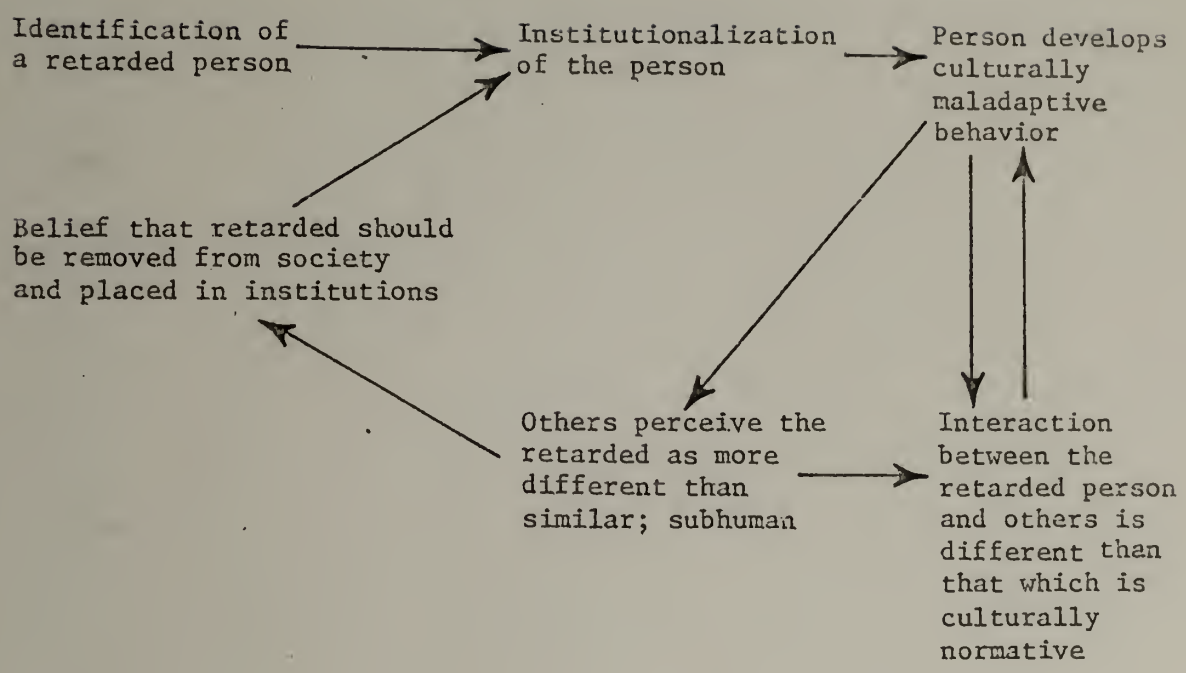

Fig. 3. Self reinforcement effects of non-normalized services

institutions.

Obviously, a major tenet of the normalization principle is that the retarded should be integrated into the mainstream of society. Wolfensberger (1972, P. 48) defines integration as "consisting of those practices and measures which maximize a person's (potential) participation in the mainstream of his culture." Integration can only be achieved when the individual lives in a culturally normal setting in normal housing,moves and communicates in ways that are typical for his age, and is able to use community resources such as hospitals, restaurants, theatres, stores, etc. The use of these and other community facilities, however, only represents physical integration. Unless social integration, whereby the retarded person is intermingled with non-handicapped persons, is also included, the integration process is incomplete.

As the above indicates, normalization mandates that the retarded be treated the same as other persons in society as much as possible. The implimentation of normalization theoretically not only benefits the retarded individual but also society. Establishing conditions which maximize the independence of the individual minimizes the amount of support which society must provide and enriches society by increasing the interaction between the retarded and non-retarded. Such as increase in interaction can only enrich the community by exposing individuals to the full range of humanity.

Normalization is obviously relevant to the issue of criminal responsibility. The principle dictates that simply applying the label

of retardation to a person does not mean that the individual should be treated any differently than others while allowing that different treatment may sometimes be necessary. However, the point at which different treatment becomes appropriate is not clear, and the principle offers no guidance other than to indicate that whenever possible all persons should be treated equally before the law and careful thought should be given in determining when special options become appropriate. In the past, tests have been adopted by various states to determine when an offender should be given special status and relieved of criminal responsibility. These tests, however, have proved to be unsatisfactory.

The reader will recall that the concept of mens rea gave birth to these tests, and while the utility of these tests is highly questionable, mens rea as a guiding principle may not be either misleading or useless. As Chapter I showed, for an act to be considered criminal a "guilty mind" must also be in evidence. That is, the offender must have moral knowledge and knowledge of consequences concerning his behavior, intentions, and motives. This definition obviously focuses on the criminal act, and that focus, in and of itself, is the problem with the way mens rea is used in the area of criminal responsibility. Suppose, for example, that a retarded person who is so severly handicapped that no one would consider him responsible for his acts, attacks another individual and injures him. Upon questioning, the retarded person states that hitting another person is wrong and that he attacked the person because he was angry and knew that he could injure

the individual. Such responses meet the dictates of mens rea and therefore, this retarded person should theoretically be considered responsible. Obviously, this situation is not acceptable. However, mens rea implies the ability to make informed, rational decisions. The reader will note that this implication goes beyond the alleged criminal act and takes into account how the person makes decisions in general. Considering how an offender makes decisions in all spheres of his life would appear to provide a wealth of information in deciding whether or not someone is responsible for his actions. The author, in fact, seriously questions how juries use the criminal responsibility tests prescribed by various states. It is likely that, while the court attempts to focus on the criminal act itself, jurists are influenced by the behavior exhibited by the defendant in other areas.

The ability to make informed, rational choices is also important in the area of competence and guardianship. Guardianship has been defined as a "legal mechanism for substitute decision making" (Kindred, 1976). The need for guardianship is predicated on the inability of the ward to make informed, rational decisions. The question of whether or not someone needs a guardian is answered in an incompetency hearing. Someone who is found to be incompetent loses civil rights and cannot do such things as obtain a license to drive a car, establish a checking account, buy or sell property, or register to vote.

It would seem that the issues of competency and criminal respon-

sibility are closely related and this relationship has roots in the birth of the United States. Jefferson, in writing the Declaration of Independence, stated that "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed...."As Becker (1951, p. 14) has indicated, this statement can be reduced to four principles. First, man is subject to the law of nature which is the revelation of the will of God. Second, all men have certain natural rights. Third, the only justification of government is to secure these rights for men. And fourth, all just governments derive their security and power from the consent of the governed. Retarded persons ajudicated incompetent not only lose civil rights and thus personal freedom to pursue happiness as they see fit, but they also lose the right to vote, and thus, they are governed without consent. These losses occur not because they have committed acts which lead society to conclude that they are unworthy of these rights but, rather, because they suffer from a handicapping condition which leads others to conclude that they cannot make rational, informed decisions.

The loss of freedom experienced by incompetent persons would seem to affect responsibility for violation of the law. Responsibility and freedom have a strong relationship in American society (Gustafson & Laney, 1968, p. 61 and Roberts, 1965, p. 13), and it is difficult to see how

society can limit someones freedom through an incompetency hearing and yet not allow this decision to affect the issue of responsibility. It would seem more reasonable that limits on personal freedom due to incompetency should also limit the responsibility associated with actions by the incompetent individual.

Summary and Conclusions

Within the field of retardation there has been a growing trend toward change. The philosophical base for this change has been the concept of normalization, which can be defined as the use of means which are as culturally normative as possible in order to establish and/or maintain personal behavior and characteristics which are as culturally normative as possible. While this concept has certain difficulties in its application, such as determining when means or ends are as normative as possible, its primary value lies in the orientation it provides. That is, retarded persons should be treated as other individuals unless treatment differences can be justified. With such an orientation, simply the label of retardation does not imply different treatment.

The application of the normalization principle should assist the retarded in developing behavior which is considered normal by society. This positive behavior change originates from two sources. First, education of the retarded should have as a goal the development of normal behavior, and placing the retarded individual in a culturally normative environment should assit in eliciting and maintaining

behavior which is normal. Second, the more retarded persons are capable of demonstrating normal behavior and seen as living in a normal manner, the more others will perceive the retarded as more similar than different from the rest of society. This should lead to the retarded being treated in a more normal manner by others and thus, the development of normative behavior will be encouraged.

While normalization calls for treating the retarded normally, it does allow for deviation. The question for the criminal justice system to decide is when a retarded offender should be treated differently and thus be relieved of criminal responsibility. Unfortunately, normalization does not provide an answer to this question. It is obvious that previous tests based upon the concept of mens rea have proved inadequate. The present author, however, believes that the problem with the interpretation of mens rea has been that it focuses on the criminal act where in the case of retarded persons, it would seem that a consideration of the individual's ability level, in general, would be more appropriate. Mens Rea can be interpreted to also include the ability to make informed, rational choices. This shift in focus would de-emphasize the criminal act itself and stress the ability of the offender to make choices.

Interpreting mens rea as the ability to make choices clearly brings up the issues of guardianship and competency. Since a guardian is essentially a substitute decision-maker, a finding of incompetence signifies the inability to make choices. A legal determination of an individual's incompetency would appear to indicate that the

person should not be criminally liable for two reasons. First, a determination that an individual's incompetency would appear to indicate that the person should not be criminally liable for two reasons. First, a determination that an individual's decision-making ability is so deficient that a loss of personal freedom and civil rights becomes necessary clearly indicates that a normative approach in legal matters is not appropriate. Second, historically, responsibility and freedom go hand in hand in the United States, and severly curtailing someone's freedom because of a handicapping condition would appear to imply that the responsibility such a person assumes should also be curtailed.

CHAPTER VII

CONCLUSIONS

Since most of our practices concerning the determination of criminal responsibility have historical roots prior to 1843 and have proved unsatisfactory or unworkable in many instances, the present work can be viewed as a challenge to our legislators and criminal justice system administrators to pull the issue out of the mire created by false beliefs and past knowledge gaps. The current author, however, believes that to present his recommendations as ultimate solutions would be naive. Rather, these recommendations should be viewed as a set of ideas, some new, some not so new, which may function toward stimulating changes enabling the retarded individual to be treated fairly by our criminal justice system.

All human service system issues, including the present one, should be dealt with in a spirit of ongoing research. Too many times in the past change efforts in human services which had been viewed as providing ultimate solutions, created with their failures a loss in motivation toward solving the original problems as evidenced by the development of prisons, mental health institutions and mental retardation institutions. While we know much more about human behavior today than we did during the nineteenth century, mankind's body of knowledge is always in a state of flux, some ideas being discarded as new ones are found.

Rather than proffer ultimate solutions, then, the present author proposes that with the issue of criminal responsibility and with human

services in general, an action research approach in which change efforts become hypotheses rather than solutions be adopted. These hypotheses must include a clear statement of objectives, means, and assumptions, and also provide a means for validating themselves. Further, the more readily change efforts can be divided conceptually into separate components or hypotheses for separate validation, the better able we will be in coming to grips with human problems in our society. This approach, of course, is common to scientific endeavors in general. The "space race" of the late 1950's and early 1960's, offers an illustration of this research method in action. The United States was obsessed with "catching up with the Russians" in space exploration, and many of our attempts to orbit a capsule around the earth had ended in failure. Because the United States was so determined to close the gap perceived between this country and the Soviet Union, one of the most dramatic all-encompassing research efforts of all time was launched. The system being explored was conceptualized as the rocket, having many components, and thousands of experiments went into verifing the effectiveness of each component. Further, experiments were then conducted to validate the relationships between these various components. This incredibly methodical and thorough approach led eventually to the desired successes, when the U.S. orbitted a man in space. This author feels strongly that human services could benefit greatly from this research approach.

This chapter presents recommendations, many of which will hopefully prove useful as components of laws or procedures in the criminal justice

system. Additionally, a limited conversation of related issues for those found not criminally responsible will be presented.

The Determination of Criminal Responsibility

The purpose of criminal law is to define and reduce the incidence of criminal behavior. In fulfilling their role in meeting this objective courts in the United States have assumed that persons are typically responsible for their behavior, and mens rea has been used as the underlying philosophical principle in developing procedures to determine whether or not a given offender is to be held responsible. These procedures must first show that the individual is suffering from a condition which makes him eligible for such a consideration and secondly, must demonstrate that the person meets the requirements established by the test adopted in the particular state. Juries typically make these decisions.

This author recommends that persons continue to be considered responsible unless evidence can be presented which indicates otherwise. Mens rea should be maintained as a guiding principle, but its interpretation should be broadened to mean the ability to make rational, informed decisions.

While broadening the definition of mens rea would still call for a subjective judgement, and this subjectivity is one of the complaints frequently voiced in regard to criminal responsibility, it would bring mens rea into line with competency and guardianship factors. The establishment of laws which equate a finding of incompetency with the

inability to assume responsibility for any violation of criminal codes can remove decisions regarding criminal responsibility from the emotionally charged atmosphere which frequently accompanies criminal trials. The development of procedures within states that dictate that all retarded persons who are eighteen or over be periodically evaluated regarding their competency and need for guardianship would appear to be valuable. Such a procedure would potentially provide increased agreement in these decisions by removing the determination of criminal responsibility from the atmosphere generated by behavior which society sees as harmful.

To clarify the types of conditions which call for such a consideration, the definition adopted by the American Association on Mental Deficiency should be adopted on behalf of the retarded individual. That is, retardation is demonstrated by a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." A retarded person could, therefore, be identified only by acceptable testing instruments and procedures which measure intelligence and adaptive behavior. Since all of these instruments present some problems, tests which are the least problematic should be selected. Obviously, better tools are needed and as they are developed, they should replace existing ones. States, however, must identify which instruments and procedures are acceptable. In order for a conclusion of retardation to be reached both intelligence and adaptive behavior must be at least two standard deviations below the mean.

The Joint Commission on Accreditation of Hospitals through its manual entitled Standards for Residential Facilities for the Mentally Retarded (1975) is serving in a leadership capacity in the field of mental retardation, and many of the standards specified in the manual are being adopted by state legislatures and by the federal government in reimbursement programs. One part of these standards calls for interdisciplinary evaluations of retarded persons once a year. These evaluations are supposed to be comprehensive in nature and lead to the indentification of developmental and other needs and also to the specification of programs to meet these needs. While many states are calling for annual evaluations by interdisciplinary teams, they are not, at this time, mandating that these teams also evaluate the decision-making ability of clients in order that recommendations regarding competency and guardianship can be made to the court. If, however, comprehensive evaluations were conducted annually; questions determining decision-making ability, competency, and guardianship needs were addressed to retarded persons eighteen years and older; conclusions that an individual is not capable of making rational and informed decisions were presented to courts so that competency and guardianship decisions could be made; and the inability to make decisions was equated with the inability to be criminally responsible; the issue of criminal responsibility would be resolved before criminal acts occurred.

Since a number of states have two types of guardianship, guardianship of person and guardianship of estate, clarification is in order. Guardianship of estate simply means that the individual lacks the

ability to make informed decisions regarding assets. Guardianship of estate does not involve a general loss of civil rights such as voting. In Contrast, guardianship of the person signifies that the individual cannot make rational decisions in many of life's spheres and a general loss of civil rights is involved. Therefore, the present author believes only guardianship of the person should be indicative of the inability to assume criminal responsibility.

Laws regarding competency and guardianship are usually inadequate (Brakel & Rock. 1971, p. 251). Frequently, states do not clearly define conditions which may warrant guardianship but include such terms as "insanity", "lunatic", etc. Other states do not address the subject of ability per se but state that the existence of any diagnostic label determines in itself the need for guardianship. At times, the fact that a person lives within a mental retardation institution is taken as proof that guardianship is required, irrespective of ability level. Obviously, the present author believes that the definition of mental retardation presented previously should be adopted as identifying a condition where the possibilities of incompetency and need of guardianship should be considered and not automatically assumed. Institutionalization should also not be assumed to imply incompetency.

The determination of incompetency and guardianship needs should occur only through hearings, which, as Allen, Ferster, and Weihofen (1968, pp. 83-89) have shown, are frequently casual affairs and must be changed if they are to assist society in criminal matters. In proceedings to establish incompetency, factual events which demonstrate

the person's ability or lack thereof are theoretically required to be presented. Often, this theoretical requirement is not met, and statements introduced as evidence often consist merely of opinions and conclusions reached by a physician with no specification presented of the facts upon which the conclusions were based.

Since these proceedings can mean the loss of civil rights and, if the recommendations made in this chapter are adopted, will determine an individual's standing before the criminal court, it is imperative that safeguards be adopted which better enable the court to make just decisions. Therefore, it is recommended that those alleged incompetent have legal counsel at these hearings and that evidence be limited to behavior and facts which indicate decision-making ability. Recommendations regarding competency should only be made by interdisciplinary teams. The counsel for the alleged incompetent should also have at his disposal an interdisciplinary team which can make upon request, an independent determination of decision-making ability.

Adopting the recommendations specified in this chapter would give courts the knowledge of whether or not an offender is criminally responsible outside of the context of a harmful act. Retarded adults who are known to the mental retardation system would have either been determined to be incompetent or competent before any harmful act has occurred. However, there would still be occasions when a retarded individual not known to the retardation service system might commit a criminal act. If such as individual has been living independently and therefore, demonstrating that he is capable of making informed

decisions, then that person would be held responsible for criminal acts. In situations where retarded offenders are living with others who it can be demonstrated function in a guardianship capacity without legal sanction, the question of criminal responsibility can be raised. Laws and procedures providing guidance for judges in these cases must be established. Chapter IV demonstrated that some ability exists to categorize retarded persons so that an estimate of their abilities can be determined. Persons who are mildly retarded are typically able to live completely independently and usually "disappear" into society. Moderately retarded persons can sometimes be competitively employed and many achieve independent functioning. Severly and profoundly retarded individuals need supervision, cannot work competitively, and need assistance and supervision in such basic tasks as bathing and eating. Therefore, it is recommended that persons classified as mildly retarded be treated as responsible and severly and profoundly retarded individuals be regarded as not responsible. Only in the case of moderate retardation does the issue of criminal responsibility become debatable. Since this work argues for the use of intelligence tests and adaptive behavior results in determining diagnosis and category, and since these data can be conflicting, two additional recommendations are made. First, differing results between intelligence and adaptive behavior tests should be resolved in favor of the higher score as indicated in Chapter IV. Second, when the prosecuting and defense attorneys present different information, the court should mandate an independent evaluation, and power to make the final decision as to category should reside with the judge.

If a judge decides that severe or profound retardation exists and thus, that the individual cannot be held responsible or make informed decisions, a finding of incompetence and the assignment of a guardian should follow. A determination of mild retardation implies the ability to make rational, informed decisions and such persons should be held responsible. Moderate retardation, however, represents the gray area where questions of responsibility must be determined by a hearing. These decisions should be made outside of the context of criminal proceedings. Hearings which conform with the recommendations for such hearings provided above should be held regarding competency and guardianship.

Related Problems

A finding that someone is not responsible does not totally resolve the matter, for it must also be determined whether or not the individual committed the alleged act and if so, what disposition should be made. These decisions can only be made by our judicial system, which means that a guardian and counsel must be assigned to the offender. Persons who are not held to be responsible for their behavior and have been shown to have committed illegal acts should not be subject to either the criminal justice system or the mental retardation service system unless the following condition is met. It must be shown by <u>behavior</u> and not by inferences nor conclusions that the person presents a threat to others and will probably continue committing harmful acts. This again is a subjective judgement, and a threat to others may be

constituted by threat of bodily harm or a violation of property rights. Individuals who are perceived as presenting a continual threat to society should be placed in the least restrictive environment where they will receive reasonable supervision. This should be determined primarily by the seriousness of the harmful acts. Treatment in such a setting must be available, and the court, since it is committing the individual, must assume the responsibility for reviewing the adequacy of treatment to assure that it meets minimal standards. The present author, however, does not believe that habilitation or rehabilitation should be limited to retarded offenders. Any society which does not attempt to establish a responsible citizenry has its head buried in the sand, and while there are problems with the treatment approach as discussed in Chapter V, if expanded to include an evaluation of the individual and his environment, it can lead to the discovery and development of interventions which assist the criminal justice system in meeting its objectives. When making commitments of persons not judged to be criminally responsible courts must mandate that facilities specify what the goals of treatment are and periodically evaluate whether or not the goals of their treatment have been met. As soon as these goals are met, the person should be free from involuntary commitment. In any case, an involuntary commitment for illegal activity should include a time limit which is no longer than that called for in the criminal codes. In order to extend this time limit, the facility must be able to demonstrate that the person, through his observable behavior continues to present a clear and present danger

to the safety of others. These proceedings should be adversary in nature and the committed individual should be represented by a guardian and counsel. Extended involuntary commitments should be reviewed at least annually.

Obviously, the recommendations made in this chapter call for more than the writing of new laws and procedures. The education of professionals within the criminal justice system is also necessary for such changes to be realized. Additionally, the education of these professionals should go beyond the issue dealt with in this work if the retarded are ever to experience justice in our courts. As Marrow (1976) has indicated, retarded persons are frequently not recognized by criminal justice professionals, and therefore, many of the rights built into the system to protect accused persons from erroneously being convicted are not realized by the retarded. For example, the Miranda decision which mandates that defendants be appraised of their constitutional rights can be confusing to someone of normal intelligence who is caught up in the emotional state accompanying arrest. For the retarded person, an additional handicap exists which makes the understanding of these rights even more difficult. Until society becomes educated regarding the needs and limitations of the retarded and builds in procedures to assure these rights regardless of a person's limitations, justice will be a rare commodity for individuals who possess developmental disabilities.

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