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COMMENTS

POST CONVICTION PROBLEMS AND THE DEFECTIVE DELINQUENT

I. INTRODUCTION

Legislators have been attempting to solve the complex problem of the mentally defective criminal for the past fifty years.¹ Programs designed to rehabilitate the normal offender proved to be of little value when applied to the mental defective.² Unable to keep up with the normal inmates, the retarded offender stagnated. Furthermore, the presence of this type of individual was thought to have a detrimental effect on the regular penal program.³ Legislation drawn in broad language, and known as "Defective Delinquent" statutes, was passed at the urging of penologists to provide special treatment for the mentally retarded offender. These statutes are designed to protect society from the recidivistic mentally defective offender and to place him in an institution where he can receive specialized treatment.⁴ The defective delinquent is viewed as an institutional problem as much as a societal problem. He cannot benefit from the normal penal program nor can he be treated in a certain specified time.⁵ Psychologists feel that by pacing the education and training program of the retarded individual the frustration he experiences from normal competitive experiences will be relieved, and he will be able to develop the ability to cope with life's normal problems.⁶ At the same time, it is felt that releasing the defective delinquent into the community without this special treatment will present a certain danger to the community as well as to the individual. The statutes usually attempt to avoid this evil by providing for an indeterminate sentence in order to insure a reasonable

1. The first such legislation was enacted in Massachusetts in 1911, MASS. ACRS & RESOLVES 1911, ch. 595, §§ 1-12. The statute has been amended many times and now appears as MASS. ANN. LAWS ch. 123, §§ 113-24 (1965).

2. Interview with Frank C. Johnston, Superintendent of the State Correctional Institution at Dallas, the Pennsylvania Defective Delinquent Institution, Nov. 25, 1966.

3. Gov't Consulting Service — Inst. of Local and State Gov't — Univ. of Pa., Coordination of the Program of Institutional Care of Juvenile Delinquents in Pennsylvania 3 (1955).

4. Gordon & Harris, *An Investigation and Critique of the Defective Delinquent Statute in Massachusetts*, 30 B.U.L. REV. 459, 477 (1950).

5. Interview with the Staff at Dallas, Nov. 10, 1966.

6. *Ibid.*

time to complete necessary treatment.⁷ The study which follows presents an examination of the Pennsylvania Defective Delinquent Act.⁸

II. PENAL OR CIVIL

The Pennsylvania Defective Delinquent Act provides for the detention of males over the age of fifteen who have been convicted of a crime or held as juvenile delinquents, and who, in the opinion of the examining authorities,⁹ are mentally defective and have criminal tendencies, "whether or not coupled with mental instability," at the State Correctional Institution at Dallas¹⁰ as part of, or for the remainder of their sentence, or until further order of the court.¹¹ In determining the constitutionality of this commitment procedure, the primary inquiry must be directed at a judicial determination as to whether the act is civil or criminal in nature.¹² A finding that the statute is penal rather than civil will subject it to stringent examination in the areas of definition, procedural due process, and cruel and unusual punishment.

The commitment of persons who are insane, feeble-minded, or unable to care for themselves has traditionally been considered a civil rather than a criminal proceeding,¹³ the rationale being that the committed individual is the beneficiary of commitment and treatment. The state stands in the position of *parens patriae*, and the inherent safeguards of due process in criminal proceedings are considered unnecessary.¹⁴ The Massachusetts Supreme Judicial Court invoked this theory in *Ex parte Dubois* in holding that that state's defective delinquent statute was civil in nature:

The general power of the Legislature, in its capacity as *parens patriae*, to make suitable provision for incompetent persons who are unable to take care of themselves, cannot be controverted. . . . In no sense is it [Defective Delinquent Statute] a criminal or penal statute. It does not purport to define a crime and it imposes no penalty. Commitment under its provisions is not in the nature of punishment.¹⁵

7. The indeterminate sentence has been characterized as the only effective way to deal with any kind of offender and particularly with the offender who has mental problems. Menninger, *Verdict Guilty — Now What?*, Harpers, Aug., 1959, p. 60; Director of Patuxent Institution v. Daniels, — Md. —, 221 A.2d 397, 411 (1966).

8. PA. STAT. ANN. tit. 61, §§ 541-1 to 542.6 (1964); PA. STAT. ANN. tit. 19, § 1161 (1964). The Act was first passed in 1937, amended in 1945, and the present institution at Dallas was created by statute in 1953. Dallas opened in 1960.

9. PA. STAT. ANN. tit. 61, § 541-3 (1964). The statute provides for an inquiry by a psychiatrist and a psychologist or by two qualified physicians, but does not set any further qualifications.

10. The Institution was formerly known as the Pennsylvania Institution for Defective Delinquents; this was changed to the State Correctional Institution at Dallas by PA. STAT. ANN. tit. 61, § 542.2 (1964).

11. PA. STAT. ANN. tit. 61, § 541-3 (1964).

12. Initially, the legislative classification must be a rational one. This problem will be dealt with in Section III *infra*.

13. Mihm, *A Re-Examination of the Validity of Our Sexual Psychopath Statutes in the Light of Recent Appeal Cases and Experience*, 44 J. CRIM. L., C. & P.S. 716, 718 (1954).

14. See, e.g., *Minnesota ex rel. Pearson v. Probate Ct.*, 309 U.S. 270 (1940); *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942).

15. 331 Mass. 575, 578-79, 120 N.E.2d 920, 922 (1954).

The Massachusetts act closely resembles the Pennsylvania statute. In Massachusetts, a person over the age of fifteen who is charged with a crime which is dangerous to life or limb (other than murder) may be examined by two experts. If he is found to be mentally defective, and a hearing reveals that he has exhibited dangerous tendencies, he may be committed to a department for defective delinquents.¹⁶ Both the Pennsylvania and Massachusetts statutes exclude the insane and the feeble-minded from the definition of a mental defective.¹⁷ The *Dubois* court drew its support from rulings which validated the above type commitment,¹⁸ without considering the statutory requirement that an individual be charged with a crime as a prerequisite to his commitment. In extending the *parens patriae* doctrine to the defective delinquent, the court apparently adopted the view that the mental defective cannot be distinguished from the feeble-minded or insane in so far as the imposition of an indeterminate sentence is concerned.¹⁹

The Maryland Court of Appeals recently held Maryland's defective delinquent statute to be civil in nature in *Director of Patuxent Institution v. Daniels*.²⁰ Before considering the *Daniels* case, however, it is important to note the difference between the Maryland and the Pennsylvania and Massachusetts statutes. The Maryland statute is broader than the Pennsylvania and Massachusetts statutes in that it includes the sexual psychopath within its coverage.²¹ A defective delinquent is an individual who demonstrates aggravated criminal behavior and who is found to have *either such intellectual deficiency or emotional unbalance, or both*, as to clearly demonstrate an actual danger to society.²² The Maryland act therefore provides for the mentally disordered as well as the mentally deficient. In construing the statute, the *Daniels* court considered only the *emotional unbalance* aspect of the definition:

We further point out that the purpose of this act is so closely akin to the so-called "Sexual Psychopath" laws enforced in some twenty (20) states and the District of Columbia, that the decisions of the Courts in those jurisdictions that each of their laws is civil in nature is ample authority to conclude that the Maryland Act is regulatory. (Citations omitted.)²³

The court cited a line of cases which have continually treated sex offender statutes as civil proceedings analogous to sentencing hearings and hearings

16. MASS. ANN. LAWS ch. 123, § 113 (1965).

17. PA. STAT. ANN. tit. 61, § 541-3 (1964); MASS. ANN. LAWS ch. 123, § 113 (1957).

18. *Sporza v. German Sav. Bank*, 192 N.Y. 8, 84 N.E. 406 (1908); *In re Dowdell*, 169 Mass. 387, 47 N.E. 1033 (1897).

19. Neither the Pennsylvania nor the Massachusetts statutes define "mentally defective." This problem will be considered in Section III *infra*.

20. ____ Md. ____, 221 A.2d 397 (1966).

21. Pennsylvania's sexual offender statute is referred to as the Barr-Walker Act. PA. STAT. ANN. tit. 19, §§ 1166-74 (1964). The Massachusetts act appears as MASS. ANN. LAWS ch. 123A, §§ 1-11 (1957).

22. MD. ANN. CODE art. 31B, § 5 (Supp. 1966).

23. *Director of Patuxent Institution v. Daniels*, ____ Md. ____, ____, 22 A.2d 397, 410 (1966).

for the commitment of the insane.²⁴ In following the guidelines laid down by the Supreme Court in *Kennedy v. Mendoza-Martinez*,²⁵ the court in *Daniels* concluded that the statute when viewed on its face demonstrated a purpose to protect society and treat the individual so as to effectuate a cure, and not to promote the aims of punishment, deterrence or retribution.²⁶ It should be noted that the steady stream of cases cited by the *Daniels* court as characterizing proceedings under sex offender statutes as civil in nature have not rendered that question moot. In recent years, a growing concern has centered around an apparent lack of procedural safeguards in these statutes.²⁷ In 1938, the Michigan Supreme Court, in *People v. Frontczak*²⁸, overturned a sexual offender statute as violative of the due process clause of the Michigan Constitution. In discussing the statute, which was part of Michigan's code of criminal procedure, the court noted that: "When the law penalizes an overt act it cannot, under criminal procedure and under the guise of hospitalization, in another court and a different jurisdiction, try him on the footing of his conviction elsewhere and add to or subtract or change his sentence."²⁹ The court distinguished the sex offender proceeding from an insanity hearing, since jurisdiction in the latter case attaches only by reason of the accused's insanity, whereas under the sex offender statute, jurisdiction accrues only after conviction and the determination of sanity.³⁰

The court in *Daniels*³¹ also relied heavily on the Supreme Court's decision in *Minnesota ex rel. Pearson v. Probate Court*³² where a similar statute was held not violative of the equal protection clause. Petitioner Pearson had claimed in the alternative that the Minnesota statute was

24. *Miller v. Overholser*, 206 F.2d 415, 417 (D.C. Cir. 1953); *Gross v. Superior Ct.*, 42 Cal. 2d 816, 820, 270 P.2d 1025, 1028 (1954); *People v. Chapman*, 301 Mich. 584, 596, 4 N.W.2d 18, 26 (1942); *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 232 S.W.2d 897 (1950).

25. [W]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), as quoted in *Director of Patuxent Institution v. Daniels*, ____ Md. ____, ____, 221 A.2d 397, 410 (1966).

26. *Director of Patuxent Institution v. Daniels*, *supra* note 25, at ____, 221 A.2d at 411. The effect of the *Daniels* decision is to affirm an earlier Maryland decision which held that detention under the Act is not punishment for a crime, but is preventive and therapeutic. *Eggleston v. State*, 209 Md. 504, 121 A.2d 698 (1956).

27. See, e.g., *Gross v. Superior Ct.*, 42 Cal. 2d 816, 270 P.2d 1025 (1954); *People v. Beshears*, 65 Ill. App. 2d 446, 213 N.E.2d 55 (1965). See also Note, 41 NOTRE DAME LAW. 527 (1966); Recent Legislation, 100 U. PA. L. REV. 727 (1952); Legislation, 13 U. PRR. L. REV. 739 (1952).

28. 286 Mich. 51, 281 N.W. 534 (1938).

29. *Id.* at 58, 281 N.W. at 536.

30. *Id.* at 59, 281 N.W. at 537. Shortly after the law was declared unconstitutional, the Michigan legislature passed a new law which was not part of the criminal code, but which was substantially the same as the prior act. This law was upheld as a civil proceeding in *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942).

31. *Director of Patuxent Institution v. Daniels*, ____ Md. ____, ____, 221 A.2d 397, 410 (1966).

32. 309 U.S. 270 (1940).

lacking in the procedural safeguards required by the due process clause of the fourteenth amendment. While the Court did not discuss the procedural challenges, it cautioned that if the statute were used to abuse the constitutional rights and privileges of the sex offender, the Court was prepared to reconsider its constitutionality.³³

Six months prior to the *Daniels* decision, the Court of Appeals for the Third Circuit opened a new era in the field of sexual offender statutes in *United States ex rel. Gerchman v. Maroney*,³⁴ when it unanimously held that the commitment proceedings provided for in the Barr-Walker Act (Pennsylvania's sex offender statute) are criminal in nature, and that the constitutional safeguards of confrontation and cross-examination must therefore be afforded a defendant who is subject to the statute.³⁵ The court in *Daniels*, in citing the many sexual offender statute cases as authority for its decision, failed to recognize the *Gerchman* case. This judicial oversight detracts significantly from its value in determining whether Pennsylvania's defective delinquent statute is civil or penal in nature.

The commitment procedures in the Barr-Walker Act are so similar to those of the Defective Delinquent Act that the judicial determination in the *Gerchman* case should certainly be applied to that statute. The court in *Gerchman* determined that the Barr-Walker Act involved an independent criminal proceeding³⁶ rather than a simple sentencing procedure which would be considered civil in nature.³⁷ In analogizing to the decisions in *Kennedy v. Mendoza-Martinez*,³⁸ *Oyler v. Boles*,³⁹ and *Chandler v. Fretag*,⁴⁰ the Third Circuit found that the conviction of one of the enumerated crimes under the Barr-Walker Act, although a prerequisite to the invocation of the law, was only subordinate to the new issue of the defendant's potential threat to society.⁴¹ Similarly, conviction of a crime or an adjudication of delinquency is a prerequisite to the application of the defective delinquent statute,⁴² but it is also subordinate to a new issue — whether the defendant is mentally defective and has criminal tendencies. The *Gerchman* court ruled that the Barr-Walker Act

33. *Id.* at 277.

34. 355 F.2d 302 (3d Cir. 1966), 12 VILL. L. REV. 183 (1966).

35. The Barr-Walker Act is the Pennsylvania sexual offender act. PA. STAT. ANN. tit. 19, §§ 1166-74 (1964). Following the Supreme Court opinions in *Pointer v. Texas*, 380 U.S. 400 (1965) and *Douglas v. Alabama*, 380 U.S. 415 (1965), which held that the rights of confrontation and cross-examination were basic to a fair trial under the sixth amendment, and were obligatory upon the States through the fourteenth amendment, the Court of Appeals established this requirement for the Barr-Walker procedure.

36. *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966).

37. *Williams v. New York*, 337 U.S. 241 (1949).

38. 372 U.S. 144 (1963). Draft evasion conviction was held to be preliminary to, but separate from the penal denationalization procedure.

39. 368 U.S. 448 (1962).

40. 348 U.S. 3 (1954). The Court construed these habitual offender acts as creating new offenses and requiring notice, an opportunity to be heard, and a criminal proceeding on the issue of identity.

41. *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966).

42. PA. STAT. ANN. tit. 61, § 541-3 (1964).

removed the discretionary feature of judicial sentencing,⁴³ and that a court must make a new finding of fact with regard to a defendant's potential threat to society. Once the judge finds the person a threat and invokes the act, he must impose a sentence of from one day to life.⁴⁴ The case then passes to the Board of Parole.⁴⁵ This factor, coupled with the placement of the Barr-Walker Act in the section on criminal procedure,⁴⁶ indicated to the court that a criminal proceeding was involved.

The Defective Delinquent Act also appears in the section on criminal procedure,⁴⁷ but it varies from Barr-Walker in the amount of judicial discretion exercisable under commitment procedures. The court may commit a defendant to the institution for defective delinquents as part of the term of his sentence, or until further order of the court.⁴⁸ Presently, there are 78 inmates at Dallas who were committed under indefinite sentences (maximum and a minimum)⁴⁹ and 501 committed who were under indeterminate sentences.⁵⁰ An offender committed directly upon conviction may be subject to an indeterminate sentence, whereas an inmate transferred to Dallas from another institution will have at least some chance of retaining his original sentence.⁵¹ But while the commitment procedure under the Defective Delinquent Act involves more judicial discretion than is permitted under the Barr-Walker procedure, a great deal of similarity to Barr-Walker is revealed when the release procedure under the Defective Delinquent Act is considered. An individual is released from Dallas: "When, in the opinion of the board, it appears that the mental condition of any inmate has so improved that his release will be beneficial and not incompatible with the welfare of society. . . ."⁵² Release, therefore, is strictly the responsibility of the board at Dallas.⁵³ There is no provision for review by the Board of Parole, and even if an inmate is under an indefinite sentence, the board can petition the court to retain custody of him.⁵⁴ The practical effect is the same under both Acts — the length of an inmate's sentence is removed from the discretion of the court.

43. *Williams v. New York*, 337 U.S. 241, 247 (1949).

44. PA. STAT. ANN. tit. 19, § 1166 (1964).

45. PA. STAT. ANN. tit. 19, § 1173 (1964).

46. Title 19 is the Pennsylvania title on criminal procedure.

47. The enabling act for the Defective Delinquent Act appears at PA. STAT. ANN. tit. 19, § 1161 (1964).

48. PA. STAT. ANN. tit. 61, § 541-3 (1964).

49. A sentence with a maximum and a minimum (5-10 years) is referred to as an indefinite sentence. A sentence that provides for commitment from one day to life, or until the authorities deem it safe to release an inmate is called an indeterminate sentence.

50. Interview with the staff at Dallas, Nov. 10, 1966. The sentencing provision in the Barr-Walker Act reads from one day to life, see accompanying text at note 44 *supra*. If the court does not impose the original sentence for the crime, but simply invokes the Defective Delinquent Act, the result is the same — an indeterminate sentence.

51. *Ibid.*

52. PA. STAT. ANN. tit. 61, § 541-9 (1964).

53. The board at Dallas is composed of the Superintendent, a Deputy Superintendent and Chief Psychological officers.

54. PA. STAT. ANN. tit. 61, § 541-3 (1964).

Furthermore, before an inmate can be released from Dallas, the court must approve a plan for the inmate's return to the community,⁵⁵ which must include a place to live, a job, etc.. The fact that the plan places a considerable obstacle in the path of the inmate committed under an indefinite or indeterminate sentence is quite evident from the fact that there are presently 23 inmates approved for release by the board at Dallas who remain imprisoned while awaiting court approval of their "plans." At times, the number of inmates awaiting release has been as high as 100!⁵⁶ The demoralizing effect of this wait on an inmate may negate any progress he has made at the institution. This situation should certainly alert the courts to the abuses inherent in characterizing loosely drawn legislation which subjects individuals to possible life sentences as civil in nature. Writing for the court in *Gerchman*, Judge Freedman said: "The effort of enlightened penology to alleviate the condition of a convicted defendant by providing some elements of advanced, modern methods of cure and rehabilitation and possible ultimate release on parole cannot be turned about so as to deprive a defendant of the procedure which the due process clause guarantees in a criminal proceeding."⁵⁷

In addition to the *Gerchman* guidelines, a different type of standard is relevant in determining whether the act is civil or penal in nature. The *Daniels* court indicated that a civil commitment for special treatment must provide that *special* treatment if the statute is to be sustained.⁵⁸ Dallas had 579 inmates as of November 10, 1966, and only two psychologists on its staff.⁵⁹ Only 32 of the total prison population receive group psychotherapy.⁶⁰ What "free time" is left to the two psychologists is devoted to individual therapy, general behavioral problems, administrative duties, and receipt of new and release of old prisoners. This means that little, if any, specialized treatment is devoted to rehabilitating prisoners who supposedly need special treatment. The result is that a prison regime of a normal penitentiary scaled down to meet the intellectual deficiencies of those imprisoned is all that exists at Dallas. Such a program cannot justify the extended and in some cases deleterious sentences that result by virtue of this "civil commitment." It follows that if this prison provides no generalized special treatment, sentences to Dallas should not differ from those meted out to Eastern State Penitentiary convicts.

A finding that the Defective Delinquent Act is penal in nature will of course necessitate important procedural reforms,⁶¹ but the act is subject to an additional constitutional challenge based on the recent Supreme Court decision in *Robinson v. California*.⁶² In *Robinson*, the Court held

55. Interview with the staff at Dallas, Nov. 10, 1966.

56. *Ibid.*

57. United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 310 (3d Cir. 1966).

58. *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964); *Commonwealth v. Page*, 339 Mass. 313, 317, 159 N.E.2d 82, 85 (1959).

59. Interview with staff at Dallas, Nov. 10, 1966.

60. *Ibid.*

61. See section IV on commitment and release procedures *infra*.

62. 370 U.S. 660 (1962).

that a California law which made the "status" of narcotic addiction a criminal offense punishable by ninety days imprisonment inflicted a "cruel and unusual punishment" in violation of the eighth and fourteenth amendments. The court distinguished "status" from a normal criminal act on the basis of the fact that a "status" is a continuing condition which differs from most criminal acts in that it is chronic rather than acute, that it continues after it is complete, and that it subjects the offender to arrest at any time before he reforms.⁶³ Mental defectiveness is analogous to narcotic addiction in that it is chronic in nature. It may even be more severe than narcotic addiction since there may be no cure or reform.⁶⁴

Once convicted of a crime or adjudged delinquent and held by a court or imprisoned, a defendant who is a mental defective and has criminal tendencies is subject to an indeterminate commitment at Dallas.⁶⁵ The fact that a defendant may be imprisoned is only prerequisite and subordinate to a new issue which requires an independent finding as to his "status,"⁶⁶ his mental defectiveness and his criminal tendency. This finding can result in life imprisonment. Justice Stewart, speaking for the *Robinson* Court, stated:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human affections be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth amendments. . . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.⁶⁷

There can be no question as to the type of institution Pennsylvania maintains for defective delinquents. The State Correctional Institution at Dallas is, in the strictest sense of the word, a prison.⁶⁸ It is under the Bureau of Correction and is maintained as a maximum security installation. The administrative staff is largely composed of correctional personnel,⁶⁹ the inmates are housed in conventional prison cells and are under round-the-clock surveillance by a trained custodial force, and there is a strict regard for the maintenance of discipline.⁷⁰

63. *Id.* at 662-63.

64. Tizard, *Introduction in MENTAL DEFICIENCY — THE CHANGING OUTLOOK 4* (Clarke & Clarke ed. 1958).

65. PA. STAT. ANN. tit. 61, § 541-3 (1964).

66. United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 310 (3d Cir. 1966).

67. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

68. The Pennsylvania Superior Court has held that Dallas, as its predecessor, Huntingdon, is a state penal institution. *Commonwealth v. Nardi*, 185 Pa. Super. 136, 138 A.2d 140 (1958).

69. There are no psychiatrists or clinical psychologists on the staff at Dallas. Interview with staff at Dallas, Nov. 10, 1966; Nov. 25, 1966.

70. Interview and inspection at Dallas, Nov. 10, 1966; Nov. 25, 1966.

Patuxent, the Maryland institution for defective delinquents, cannot be characterized so easily. Patuxent has been described by the Maryland Court of Appeals as "neither a prison, a hospital nor an insane asylum, but [an institution which] exercises some of the functions of all three."⁷¹ The administration and professional staff at Patuxent are quite different from the staff at Dallas. The director of the institution is a psychiatrist who sets all policies⁷² with the aid of professors of psychiatry from the Johns Hopkins and Maryland University Medical Schools who serve in an advisory capacity.⁷³ The institution's staff consists of three psychiatrists, three psychologists, and a consulting psychiatrist and psychologist who aid the professional staff in the performance of their duties. Thus, Patuxent has a heavy medical and psychiatric emphasis, as contrasted with Dallas' correctional emphasis.⁷⁴ The staff at Dallas feel that whatever difference Dallas possesses from the ordinary penal institution in terms of treatment, it is primarily a maximum security prison.⁷⁵ Conceivably, a court may avoid the issue of cruel and unusual punishment when ruling on an institution such as Patuxent, because it is not an ordinary penal institution. But the Pennsylvania institution at Dallas is quite vulnerable to a *Robinson* attack based on the *Gerchman* decision and the nature of the institution.

III. THE PENNSYLVANIA DEFINITION OF DEFECTIVE DELINQUENCY

It is with the usual legal-medical pitfalls encountered in defining medical conditions in mind, that we examine the problems presented by the definition of defective delinquency contained in the Pennsylvania act. The medical profession's fear of rigid definitions and inflexible statutes is equally matched by the demand of committing courts and the legal profession in general for the formulation of definite diagnostic standards.

The Pennsylvania statute defines a defective delinquent as an individual who, in the opinion of two examining physicians or a psychiatrist and a psychologist, is "mentally defective and has criminal tendencies, whether or not coupled with mental instability . . .,"⁷⁶ but no definition of "mentally defective," "criminal tendencies," or "mental instability" appears in the act. The statute specifically excludes idiots, imbeciles, psychopaths, infirmity cases, and the insane from its coverage, even if they are mentally deficient.⁷⁷ The working concept of the Pennsylvania act

71. *Eggleston v. State*, 209 Md. 504, 513, 121 A.2d 698, 702 (1956).

72. MD. ANN. CODE art. 31B, §§ 2-3 (Supp. 1966).

73. MD. ANN. CODE art. 31B, § 4 (Supp. 1966).

74. Boslow, Rosenthal & Gliedman, *The Maryland Defective Delinquency Law — Psychiatric Implication for the Treatment of Antisocial Disorders Under the Law*, 10 BRIT. J. DELINQUENCY 5, 11-12 (1959-1960).

75. Interview with staff at Dallas, Nov. 10, 1966.

76. PA. STAT. ANN. tit. 61, § 541-3 (1964).

77. *Ibid.* There are no cross-references to the Mental Health Act definitions. PA. STAT. ANN. tit. 50, § 1072 (1954).

was derived from a resolution adopted by the 56th Annual Congress of the American Prison Association:⁷⁸

The defective delinquent is an offender, who, because of mental subnormality *at times coupled with mental instability*, is not amenable to the ordinary custody and training of the average correctional institution and whose presence therein is detrimental to both the type of individual herein described and to the proper development of the methods of rehabilitation of other groups of delinquents. Further, the defective delinquent because of his limited intelligence and suggestibility requires prolonged and careful training, preferably in a special institution to develop habits of industry and obedience.

When the legislature passed the Defective Delinquent Act, they altered the tenor of the Association's resolution by not making a finding of mental instability a condition precedent to commitment. The Massachusetts Supreme Judicial Court, interpreting a similar statute in *Ex Parte Dubois*, found that the term "mentally defective" describes a person whose mentality is less than normal.⁷⁹ Crucial to the court's decision was an equating of mental subnormality with an intellectual deficiency which, for all practical purposes, rests on an I.Q. determination.⁸⁰

The I.Q. classification made upon an individual's commitment to Dallas as a mental defective is not intended as a first step toward a cure, but rather to determine those individuals who, though intellectually retarded, are amenable to the special education and training that will enable them to cope with the problems encountered in community life. The defective delinquent does not have a disease or illness, but a "condition of subnormal mental development, present at birth or in early childhood" that is not curable.⁸¹ When an individual is committed, it is not expected that a certain amount of time and training will increase his I.Q. and permit him to re-enter the community of normal intelligence.⁸² The following classification has been derived from a diagnostic evaluation of defective delinquency⁸³ made by Leonard Mack, the Deputy Superintendent of

78. Mack, *The Defective Delinquent — An Interpretive Analysis of Criteria Basic to Diagnostic Evaluation of Defective Delinquency* 1 (unpublished study of Dallas, rev. ed. 1949). (Emphasis added.) Mr. Mack was the senior psychologist at Huntingdon and is now the Deputy Superintendent of the State Correctional Institution at Dallas, which is the present institution for defective delinquents.

79. 331 Mass. 575, 580, 120 N.E.2d 920, 923 (1954).

80. *Supra* note 78, at 5; If the Pennsylvania statute is interpreted like that of Massachusetts, then a simple I.Q. test measurement will depict an individual's relation on the intelligence curve as far as normalcy is concerned.

81. Tizard, *Introduction in MENTAL DEFICIENCY — THE CHANGING OUTLOOK* 4 (Clarke & Clarke ed. 1958).

82. Doll, *Essentials of an Inclusive Concept of Mental Deficiency*, 46 AM. J. MENTAL DEFICIENCY 214 (1941); Reid & Hinsey, *A Demonstration Project for Defective Delinquents*, 11 CRIME & DELIN. 375 (1965). The author assumed that a Wechsler intelligence score was an estimate of a boy's ability to utilize his cognitive capacities at the time the test is given. An increase or decrease in later test scores was taken to reflect his general state of "well being" rather than a change in his "basic" intellectual ability.

83. *Supra* note 78.

Dallas, and is based on the Wechsler-Bellevue or Binet-Simon Intelligence Quotient ratings:⁸⁴

85				
80	} Lowest Limit of Normalcy	}	} Defective Delinquent Range	
75				} Border Line Defectives
70				
65				
60				
55				
50	} High Grade Imbecile (comparable to mental age of 3-7 years)	}		
40				
40				} Feeble-minded
35	} Low Grade Imbeciles	}		
30				
25				
20	} Idiocy (comparable to mental age of a 2 year old child)	}	} Profound Defectiveness	
↓				

The defective delinquent range of 50-80 includes those who should be able to profit from a rehabilitative program at Dallas and ultimately re-enter society. Those who do not possess the ability to care for themselves, need prolonged care, and are only able to perform the simplest manual operations (40 and below) are excluded from the definition, since it is felt that their needs are best met in a home or institution for the feeble-minded.⁸⁵ Persons falling within this latter group are usually treated on

84. For other I.Q. classifications, see Clarke, A.M., *Criteria and Classification of Mental Deficiency* in *MENTAL DEFICIENCY — THE CHANGING OUTLOOK* 43, 51 (Clarke & Clarke ed. 1958); Gordon & Harris, *An Investigation and Critique of the Defective Delinquent Statute in Massachusetts*, 30 B.U.L. REV. 459, 494 (1950).

85. *Supra* note 78.

a par with insane persons, and are likely to meet the prescribed tests which will absolve them of responsibility for their criminal acts.⁸⁶

Gordon and Harris have reported that the Massachusetts Defective Delinquent Department was often referred to as a "dumping ground";⁸⁷ Dallas, in some respects at least, can also be termed a "dumping ground." The Pennsylvania statute specifically excludes the imbecile and idiot from its coverage, yet there are approximately 35 such cases presently at Dallas.⁸⁸ The needs of these individuals would be best met at an institution for the feeble-minded. Certainly, they do not belong in a maximum security prison. Furthermore, there are at least 10 inmates at Dallas with severe mental problems that a psychologist on the staff described as psychotic. The staff reports that it has been impossible to arrange for the transfer of these inmates to more suitable institutions because of overcrowded conditions and the refusal of other institutions to accept them.⁸⁹

Deputy Superintendent Mack's I.Q. classification presents upper as well as lower limits. The lowest limit of normalcy is designated as 80, and a rating above this figure should preclude commitment.⁹⁰ The I.Q. range at Dallas of 39-87 presents a possible group who are not considered mentally defective and should be placed in a regular penal institution in which they would serve the normal sentence for their crime.⁹¹ Dr. Nicholas J. Frignito, Medical Director of the Philadelphia County Court, estimated that there were four distinct types at Dallas: (1) those possessing mental abnormalities, including psychotics or schizophrenics; (2) mental defectives falling within the Dallas I.Q. range who possess criminal tendencies, and those that do not possess such tendencies; (3) the feeble-minded; and (4) dull normals who are considered discipline problems at other institutions.⁹² When viewed from the standpoint of I.Q. determination and the statutory requirements as to the exclusion of certain groups, 10-20 percent⁹³ of the population of Dallas consists of persons who should not be at the institution at all, and who cannot receive adequate treatment there. For this portion of its population, Dallas is merely providing the age-old function of state institutions — custodial care.

86. TAPPAN, *CRIME, JUSTICE AND CORRECTION* (1960).

87. Gordon & Harris, *supra* note 84, at 497.

88. Interview with staff at Dallas, Nov. 10, 1966. The exact number would have to be determined by a study of each individual case at the Institution. The figures given are an approximation made by the staff.

89. *Ibid.*

90. *Supra* note 78.

91. Interview with staff at Dallas, Nov. 10, 1966.

92. Interview with Dr. Nicholas J. Frignito, Medical Director of Philadelphia County Court, Oct. 25, 1966. Dr. Frignito stated that he considered individuals with I.Q.'s as high as 84, not because he felt that an 80-84 I.Q. range designated a mental defective, but because other applicable state institutions refused to receive individuals possessing an I.Q. below 85. For a similar classification of the types of individuals detained at New York's institution for defective delinquents at the time of the study, see Pappert, *The Classification of Defective Delinquents*, 26 J. CRIM. L., C. & P.S. 421 (1935).

93. The total population of Dallas at the time of the writing of this Comment is 601.

If we accept the *Dubois* decision,⁹⁴ and a mental defective is merely someone below general normal intelligence, the definition of a defective delinquent would not be too vague or indefinite when applied to an individual of subnormal intelligence who has committed a crime or has exhibited dangerous tendencies.⁹⁵ A reasonable man, upon reading the Pennsylvania statute, would have fair warning⁹⁶ that if he were below the normal level of intelligence and had committed a crime, he would be subject to the statutory penalties. The act, if construed solely on an I.Q. basis, would be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . ."⁹⁷

Extensive research, however, has not revealed a single source that supports the definition of a mental defective contained in *Dubois*. In fact, it is almost universally agreed that subnormal intelligence alone, plus the commission of a crime, should not be the sole basis for a determination of defective delinquency. Deputy Superintendent Mack's diagnostic analysis of defective delinquency has been accorded great weight in this study and is accepted by the authors as an institutional standard for Dallas. Mr. Mack places great emphasis on mental instability in his diagnostic definition of a defective delinquent, thus giving primary weight to a factor which the legislature has seen fit to render useless by making it optional.⁹⁸ He defines the type of individual who should be committed to Dallas as an individual who is intellectually subnormal and of rather marked self and social mal-adjustment. Classification of these individuals necessitates the formulation of a complete case history, which includes a consideration of such features as home life and school record, and comprehensive diagnostic interviewing. The necessity for a comprehensive set of standards and a definitive and exhaustive clinical evaluation is especially acute when the "Borderline Mentally Defective Category" within the I.Q. range of 70-80⁹⁹ is considered since this type of offender often need not be committed under an indeterminate sentence, but can be adequately provided for in the normal penal institution. Furthermore, given the fact that a great proportion of our population would perform at a defective level psychometrically, and that many of this group are able to

94. 331 Mass. 575, 120 N.E.2d 920 (1954).

95. If the statute is civil in nature, void for vagueness would not be a problem. It is when a statute is penal that an individual may complain of his having to speculate at the cost of his life or liberty on what is expected of him. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

96. A statute must be sufficiently certain and definite in its form and interpretation so as to give notice to the persons affected of what will be punished. *Commonwealth v. Randall*, 183 Pa. Super. 603, 133 A.2d 276 (1957). In *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), the Court stated that, "All are entitled to be informed as to what the State commands or forbids."

97. *Whitney v. California*, 274 U.S. 357, 368 (1927). For a discussion of the "void-for-vagueness" doctrine, see Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

98. Mack, *The Defective Delinquent — An Interpretive Analysis of Criteria Basic to Diagnostic Evaluation of Defective Delinquency* (An unpublished study at Dallas, rev. ed. 1949).

99. *Id.* at 6.

live fruitful and happy lives, Mr. Mack is of the opinion that the defective delinquent must also possess the "irresponsible, incorrigible actions of typical behavior problems."¹⁰⁰ In addition to these requirements, Mr. Mack would set an age limit of 15-30 years in order to preserve the youthful nature of the institution and secure the effectuation of the type of program anticipated. The staff at Dallas also feel that if an individual has been able to avoid confrontation with the law up to age twenty-five or thirty, he does not show the mental instability necessary for an adequate diagnosis even if he is intellectually subnormal.¹⁰¹

To further complicate the definitional problems, Mr. Mack distinguishes between two types of incorrigible behavior patterns. Although they are seldom mutually exclusive, one pattern can be said to stem from acute emotional disturbances while the other arises chiefly out of undesirable life situations or weighty social pressures.¹⁰² Mr. Mack would place those individuals whose delinquency is directly attributable to social pressure or a trying life situation on probation or in foster homes; commitment may not be warranted for such individuals, despite their mental defectiveness and delinquency. The importance of a broad clinical appraisal in this situation cannot be overemphasized for the diagnosis of an individual's condition will determine whether he will be subject to the freedom of a foster home, short incarceration, or a possible life sentence. Needless to say, the statutory standards are appalling considering the subtleties of the problem and the serious consequences that occur on a finding of mental defectiveness.

Mr. Mack concludes, as do Gordon and Harris¹⁰³ in their study of the Massachusetts law, by setting a maximum cut-off for definitional purposes based on an I.Q. determination. A score above 80 on the Binet-Simon and Wechsler tests¹⁰⁴ would preclude a diagnosis of defective delinquency, while a score under 80 would be the basis for further examination. It is interesting to note that five years prior to the *Dubois* decision, the Massachusetts Supreme Judicial Court specifically stated that a psychometric rating was not the only element to be considered in determining a variance from normal mentality.¹⁰⁵

Mr. Mack's report has been relied upon to depict the wide divergence between the statutory definition and the institutional standard. A difference of opinion as to diagnostic criteria also exists between examining court psychiatrists. In a recent Philadelphia County Court case, the court psychiatrist, Dr. Martin H. Robinson, indicated that there was a difference between functional and intellectual mental deficiency without clearly defining that difference or explaining its significance in terms of the statu-

100. *Id.* at 4.

101. Interview with staff at Dallas, Nov. 10, 1966.

102. Mack, *supra* note 98, at 5.

103. Gordon & Harris, *supra* note 84, at 497.

104. For a discussion of intelligence tests, see FREEMAN, THEORY AND PRACTICE OF PSYCHOLOGICAL TESTING (3d ed. 1962).

105. Petition of Commissioner of Correction, 324 Mass. 535, 87 N.E.2d 207 (1949).

tory definition. He indicated that a person could be classified as mentally deficient if he did not have the average ability to abstract, sustain concentration, retain materials, and learn and retain learning, in conjunction with a limited ability for judgment. According to Dr. Robinson, an individual with an I.Q. score of less than 90 would fall within his definition of a mental defective.¹⁰⁶ Doctors Stickler and Andrews, court psychologists, stated that an I.Q. of 89 definitely negated a finding of mental deficiency.¹⁰⁷ At the same time, Dr. Wouters, another court psychiatrist, does not consider I.Q. determinative, but attempts to determine whether the person being examined can function in society. He would classify a person as mentally *defective* under this standard even if his scores showed an I.Q. of 120, although he would not consider such a person mentally *deficient*.¹⁰⁸

Up to this point in our study, we have been considering a definition of defective delinquency which necessarily includes a finding of mental deficiency, *mental instability*, and the commission of a crime or an adjudication of delinquency. We conclude, on the basis of information obtained as a result of field studies conducted with the cooperation of trained personnel who have been working with defective delinquents for many years,¹⁰⁹ that the conclusion that the mental instability segment of the definition negated by the legislature is of primary importance in effecting a valid diagnosis is inescapable. At the same time, we accept the view that a mentally defective classification describes a person of a subnormal intelligence which can be adequately measured by an I.Q. determination. That is, the *Dubois* decision and the Pennsylvania statute are under-inclusive definitions. Neither encompass the many attributes which are necessary for a finding of defective delinquency, while both create the variation in standards that medical authorities attached to committing courts are trying to use. The acceptance of an I.Q. determination as a basis of mental deficiency even when coupled with a clinical evaluation leading to a conclusion of mental instability may not be a wholly tenable position.¹¹⁰

A complete analysis of the validity of the I.Q. and other testing devices is beyond the scope of this paper, but a surface knowledge is neces-

106. Brief for Juveniles, p. 15, In the Matter of Ardry Jones and John Williams, County Court of Philadelphia, Juvenile Division, October, 1966.

107. *Id.* at 16.

108. *Ibid.*

109. Interview with Superintendent and staff at Dallas, Nov. 25, 1966, plus the aforementioned report of Mack, *supra* note 98. Interview with Dr. Nicholas J. Frignito, Medical Director of the Philadelphia County Court, Oct. 25, 1966.

110. Mental deficiency may include the characteristics inherent in a finding of mental instability. For example, Edgar A. Doll, a leading authority in the field, includes social incompetence as part of a definition of mentally deficient. Doll, *Essentials of an Inclusive Concept of Mental Deficiency*, 46 AM. J. MENTAL DEFICIENCY 214 (1941). The result of this type of analysis is to make a finding of mental deficiency equal to a finding of defective delinquency. The authors are of the opinion that in view of the statute and the *Dubois* decision, "mentally defective" represents subnormal intelligence, and the inclusion of "mental instability" in the statute, PA. STAT. ANN. tit. 61, § 541-3 (1964), though optional, supports this view. For all practical purposes, this is an I.Q. determination. *Supra* note 98, at 5.

sary to an understanding of commitment procedures and the quality of the examinations conducted by court connected authorities. The dangers in the use of I.Q. as the *sole* criterion of mental deficiency inhere in a lack of a perfect relationship between I.Q. and social behavior,¹¹¹ incorrect testing by persons inadequately qualified in psychometrics,¹¹² language and cultural barriers,¹¹³ physical problems, mental disorders,¹¹⁴ and psychological "blocking."¹¹⁵ Another group of tests known as projective studies have been used to discover patterns of overt behavior. These tests are thought to be determinant of personality characteristics such as aggressiveness, neurotic and psychotic aberration, homosexuality, and egocentricity.¹¹⁶ The Rorschach test,¹¹⁷ and the HTP¹¹⁸ and DAPS (drawing of a house, tree, person, and the make-a-person test) are tests of personality structure which are considered to be invaluable aids in checking I.Q. determinations and confirming clinical observations of mental deficiency.¹¹⁹ In addition, the Thematic Apperception Test¹²⁰ may serve as a useful tool in the hands of a skilled psychologist.

We found, as did Gordon and Harris in their study of the defective delinquent in Massachusetts,¹²¹ that the psychiatrist and the psychologists employed by the State consider the tests mentioned useless in examining suspected defective delinquents, despite their general widespread acceptance. Examining psychiatrists and psychologists feel that these tests require an imagination which the mentally deficient individual does not possess. This determination necessarily assumes a finding that an individual is already mentally defective, and that conclusion must be based solely on I.Q.. The use of other tests to check the results of an I.Q. test is practically nonexistent. At the Philadelphia County Court, only about twenty per cent of suspected defective delinquents are given Rorschachs. The Wechsler-Bellevue for either adult or children and a one to two hour interview with a psychiatrist, together with a scrutinization of probation, police and school reports is deemed adequate to achieve a proper diagnosis of defective delinquency.¹²² It is interesting to note that the Dallas

111. Clarke, A.M., *Criteria and Classification of Mental Deficiency* in MENTAL DEFICIENCY — THE CHANGING OUTLOOK 54 (Clarke & Clarke ed. 1958).

112. Clarke, A.D.B., *The Measurement of Intelligence: Its Validity and Reliability* in *id.* at 76-77.

113. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 179 (1952).

114. *Ibid.*

115. "Psychological blocking" refers to a state of mind created by apprehension, fear and surroundings at the time the tests are administered, which tends to make the individual being tested perform below his true intelligence level. Interview with staff at Dallas, Nov. 10, 1966.

116. Gunzburg, *Psychological Assessment in Mental Deficiency* in MENTAL DEFICIENCY — THE CHANGING OUTLOOK 272-87 (Clarke & Clarke ed. 1958).

117. See SCHNEIDMAN, THEMATIC TEST ANALYSIS (1951).

118. See Buck, HTP Technique (mono. Supp. — Univ. of Vt. 1954).

119. *Supra* note 116, at 277-78; GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 178 (1952).

120. *Op. cit. supra* note 117.

121. Gordon & Harris, *An Investigation and Critique of the Defective Delinquent Statute in Massachusetts*, 30 B.U.L. Rev. 459, 496 (1950).

122. Interview with Dr. Nicholas J. Frignito, Medical Director of Philadelphia County Court, Oct. 25, 1966.

staff feels that Philadelphia County does a superior job insofar as commitment examinations and pre-sentence reports are concerned. Evidently, there are many counties in the state that do not even meet the Philadelphia procedures. The only test administered at Dallas is the Minnesota Mechanical, which measures hand-eye correlation and is used to determine work placement.

Guttmacher and Weihofen agree with the general view of psychiatrists that at no time does an I.Q. test or other psychological test alone establish the diagnosis of mental deficiency.¹²³ The I.Q. should represent the *sine qua non* of a diagnosis, but sufficient checks through other devices should be utilized before such a consequential judgment is made. The failure to use all of the available diagnostic methods necessary to a valid diagnosis presents another example of the problems engendered by a vague and broadly drawn statute. The lack of standards to guide the psychiatrist in his examination concerning mental defectiveness and mental instability have resulted in an unjust and unrealistic law. The statute as it stands represents a threat to any individual falling below the normal intelligence level, and is especially dangerous to those who fall within the Borderline Defective Range of 70 to 80, where an overly exacting examination is necessary. "The importance of over-all clinical appraisal of each case cannot be overemphasized. Judgments on criminality, intelligence level, trainability, and instability are vital for accurate diagnosis. All four characteristics *must* obtain for each case under consideration before diagnosis as a defective delinquent may be warranted."¹²⁴

The one statutory requirement not discussed thus far is that of "criminal tendencies." To be subject to the statute, an individual must be mentally defective *and have criminal tendencies*.¹²⁵ In view of the fact that the statute does not provide a definition, this requirement could be the vaguest segment of an already loosely drawn statute, and one that the courts can easily gloss over in examining the definition. To be subject to the act, an individual must be convicted of a crime, or if a juvenile, be adjudged delinquent.¹²⁶ A court could possibly reason that this prerequisite is sufficient to satisfy the criminal tendency requirement. The *Dubois* decision followed this superficial type of analysis in interpreting "dangerous or tendency to become such" in the similar Massachusetts statute.¹²⁷ The court defined "dangerous" by stating that "the term dangerous is commonly understood, when applied to a person, as meaning one likely to cause or create danger."¹²⁸ Obviously, the court decided to avoid major definitional problems by entrusting this part of the definition to the trial judge's discretion. This is a grossly unrealistic approach. Mr. Mack sug-

123. GUTTMACHER & WEIHOFEN, *op. cit. supra* note 119, at 179.

124. Mack, *supra* note 99, at 5.

125. PA. STAT. ANN. tit. 61, § 541-3 (1964).

126. *Ibid.*

127. MASS. ANN. LAWS ch. 123, § 113 (1965).

128. *Ex Parte Dubois*, 331 Mass. 575, 580, 120 N.E.2d 920, 923 (1954).

gests that a qualitative investigation should disclose *habitual* delinquent tendencies on the individual's part, and that a first offender should be subjected to careful study before being designated a defective delinquent.¹²⁹ Whereas the two psychologists on the staff at Dallas feel that first offenders should be completely excluded from the definition.¹³⁰ While the Defective Delinquent Act does not provide a cross reference to the Mental Health Act, a look at the definition of criminal tendency as it appears in that act is helpful in this regard.¹³¹ That definition states that a criminal tendency is a: "[T]endency to repeat offenses against the law or to perpetuate new offenses, *as shown by repeated convictions* for such offenses or a tendency to habitual delinquency."

As yet we do not have sufficient diagnostic tools to predict the actions of an individual in a particular situation,¹³² or to effectively measure his criminal tendencies. Our knowledge of the motivational factors and the interplay of environmental and personality forces which continually create unique situations is inadequate. Both psychologists at Dallas agreed that at this time they could not adequately determine whether an individual would be a danger to society or possess criminal tendencies of a higher degree than those possessed by a normal individual.¹³³

IV. EQUAL PROTECTION

Mr. Justice Holmes has characterized the equal protection challenge as "the usual last resort of constitutional arguments."¹³⁴ One would expect that a determination of the rationality of a legislative classification would precede any procedural challenges, since a procedural attack would be unnecessary if the classification were found to be unreasonable, but the courts have been reluctant to invade the legislative sphere. It is a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, and courts are reluctant to hold that a legislature has transcended its power.¹³⁵ Furthermore, an individual assailing a classification has the burden of showing that the legislation attacked is arbitrary.¹³⁶ "In short, the selection in order to become obnoxious to the fourteenth amendment, must be arbitrary and unreasonable; not merely possibly, but clearly and actually so."¹³⁷ But at the same time, the United States Supreme Court has established its right to examine disputed legislation and discover the fairness of its actual enforcement in terms of

129. *Supra* note 99, at 1.

130. Interview with Charles Pagana and Harry E. Russ, Jr., the two psychologists at Dallas, Nov. 10, 1966.

131. PA. STAT. ANN. tit. 50, § 1172 (1964).

132. *Op. cit. supra* note 116, at 291.

133. *Supra* note 130.

134. *Buck v. Bell*, 274 U.S. 200 (1927).

135. *Salsburg v. Maryland*, 346 U.S. 545 (1954); *Atchison, T. & S.F. R.R. v. Matthews*, 174 U.S. 96, 104 (1899).

136. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

137. *Bachtel v. Wilson*, 204 U.S. 36, 41 (1907).

the equal protection clause of the fourteenth amendment.¹³⁸ The Court has also exercised this right in evaluating legislative classifications to determine whether they are so unreasonable as to become discriminatory in nature.¹³⁹ Mr. Justice Matthews' classic formulation that, "The equal protection of the laws is a pledge of the protection of equal laws,"¹⁴⁰ has never been disturbed, but laws may classify, and classification in itself is characteristic of inequality. The doctrine has therefore developed that a statute must effect an unreasonable classification before it will be struck down.¹⁴¹

Special legislation aimed at sex offenders, insane persons, the feeble-minded, and in the instant situation, defective delinquents, stems from the right of legislatures to classify certain groups and subject them to the operation of a particular statute. Mr. Justice Field, speaking for the Supreme Court in *Barbier v. Connolly* stated:¹⁴²

[N]either the [14th] amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people. . . . From the very necessities of society, legislation of a special character, having these objects in view, must often be had. . . .

In *Ex Parte Dubois* the Supreme Judicial Court of Massachusetts upheld the designation of mental defectives as a class over which the legislature had not only the right, but also the duty to exercise supervision.¹⁴³ In basing its decision on the state's responsibility to make provision for the insane and the feeble-minded, the court stated that, "The general power of the Legislature, in its capacity as *parens patriae*, to make suitable provision for incompetent persons who are unable to take care of themselves cannot be controverted."¹⁴⁴ The *Dubois* court cited cases such as *Sporza v. German Savings Bank*,¹⁴⁵ which further defines the traditional type of individual who has been subject to this type of special legislation, as authority. In *Sporza* the New York Court of Appeals stated that:¹⁴⁶

Jurisdiction is inherent in the state over unfortunate persons within its limits who are *idiots*, or have been deprived of the use of their mental facilities. It is its duty to protect the community from the acts of those persons *who are not under the guidance of reason*, and also to protect them, their persons, and property from their own disordered and insane acts.

138. See *Norris v. Alabama*, 294 U.S. 587 (1935); *Reagan v. Farmers' Loan and Trust Co.*, 154 U.S. 420 (1894); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Neal v. Delaware*, 103 U.S. 370 (1881); *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

139. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

140. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

141. See Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

142. 113 U.S. 27, 31 (1885).

143. 331 Mass. 575, 120 N.E.2d 930 (1954).

144. *Id.* at 579-80, 120 N.E.2d at 922.

145. 92 N.Y. 8, 84 N.E. 406 (1908).

146. *Id.* at 408. (Emphasis added.)

The *Dubois* court failed to note any difference between the feebleminded and insane individuals referred to in *Sporza* and the mentally defective individual, despite the fact that the Massachusetts, as well as the Pennsylvania defective delinquent statute, specifically excludes the feebleminded and the insane from its coverage,¹⁴⁷ and treats the mental defective quite differently from the insane and feebleminded. The law usually excuses feebleminded and insane persons from responsibility for their criminal acts, whereas the defective delinquent is not so excused.¹⁴⁸ In fact, under the Pennsylvania statute, an individual must be convicted of a crime or adjudged a delinquent before he is subject to the sanctions of the act. The *Sporza* definition is therefore of little utility when applied to the classification of mental defectives under the Pennsylvania Act. The mental defective is not thought to need the prolonged custodial care required for proper treatment of the feebleminded, but is institutionalized with the goal of returning him to society as quickly as possible.¹⁴⁹ The defective delinquent, although retarded, is in most instances much closer to the normal intelligence level than the feebleminded individual. He is capable of acquiring basic skills and supporting himself in the community if he receives adequate training and is able to achieve basic emotional security.¹⁵⁰ Since the opening of the new institution for defective delinquents at Dallas in 1960, the average stay has been 2.8 years.

In view of the fact that the defective delinquent is treated quite differently medically and legally than the insane and feebleminded offender, a separate evaluation of the reasons for this special legislative classification is a necessity. The equal protection clause requires that the legislature find a mentally deficient person who commits a crime more dangerous to the health and welfare of society than the normal individual who commits a crime¹⁵¹ before it can subject him to a possible life sentence. The Maryland Court of Appeals conducted this type of an examination with regard to Maryland's defective delinquent statute in *Director of Patuxent Institution v. Daniels*, and specifically found that the group of persons falling within the definition did in fact constitute a danger to the health and safety of the people.¹⁵² As indicated in the first section of this paper, the Maryland statute covers both the mentally deficient and the emotionally unbalanced.¹⁵³ The Pennsylvania statute, however, is limited

147. MASS. ANN. LAWS ch. 123, § 113 (1965); PA. STAT. ANN. tit. 61, § 541-3 (1964).

148. See Andriola, *Some Suggestions for Treating the Defective Delinquent*, 31 J. CRIM. L., C. & P.S. 297 (1940); TAPPAN, CRIME, JUSTICE AND CORRECTION 145 (1960).

149. Interview with staff at Dallas, Nov. 10, 1966.

150. *Ibid.*

151. See *Eggleston v. State*, 209 Md. 504, 121 A.2d 698 (1956), relied on by the *Daniels* court, where the court stated that it had been a long established principle that the State has the power to restrain the liberty of persons found dangerous to the health and safety of the people.

152. — Md. —, —, 221 A.2d 397, 407 (1966).

153. See Robinson, *Institutions for Defective Delinquents*, 24 J. CRIM. L., C. & P.S. 352 (1934), for a comparable New York law. For a discussion of the Maryland law, see Boslow, Rosenthal & Gliedman, *supra* note 74.

in application to the mentally deficient, and the staff at Dallas insists that the group they are dealing with does not portray the symptoms of medically recognized psychiatric disorders that would necessitate the type of care that a psychiatrically oriented institution such as Patuxent can provide.¹⁵⁴ The *Daniels* court based its decision solely on the emotional imbalance segment of the definition; the language that it employed in defining that group that was found to be dangerous clearly demonstrates the wide divergence between the Pennsylvania and Maryland statutes:

[E]motional unbalance . . . [which] clearly constitute[s] an actual danger to society . . . is generally understood . . . to refer to a definite type of medically recognized psychiatric disorder manifested by deep-seated emotional conflicts which distort the individual's attitude toward society, and of society's attitude toward him, resulting in an uncontrollable desire and need to create hostile acts against society — this distortion or "characterological crippling" having repetitive characteristics which the individual is incapable of controlling and which, through mental mechanisms, impels him to carry out such antisocial acts. . . .¹⁵⁵

Without expressing our opinion of the definition, it is sufficient to note that the finding of mental disorder in *Daniels* places Maryland law in a category with the law which resulted from decisions dealing with the insane, the feeble-minded and the sex-offender.¹⁵⁶

The Pennsylvania Defective Delinquent Act, viewed on its face, subjects individuals who are mentally deficient and have committed a crime or been adjudged delinquent to a possible life sentence, whereas the normal offender who commits the same offense is subject to the regular statutory sentence. Some positive correlation must therefore exist between mental deficiency and criminality to justify this great disparity in treatment. Early concepts of the retarded or feeble-minded individual characterized him as depraved and inherently inclined toward criminalistic activities,¹⁵⁷ and the classical study of *The Kallikak Family*¹⁵⁸ depicted the retarded individual in a constant state of degeneracy which was inherited and irreversible. But these theories have been discarded, and the assumptions that mental deficiency is prevalent among the criminal population, and that it creates a special correctional problem have also encountered opposition.¹⁵⁹ Blatt, points out that the most recent reports relating delinquency and intelligence show low relationships. He feels that lower I.Q. *per se* does not play an important role unless combined with other factors such as continued school failures and poor homes, and

154. *Supra* note 149.

155. — Md. —, —, 221 A.2d 397, 421 (1966).

156. Authority for *Daniels* in the sexual offender area was primarily derived from State of Minnesota *ex rel.* Pearson v. Probate Ct., 309 U.S. 270 (1940), and in the other areas, Buck v. Bell, 274 U.S. 200 (1927); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

157. FERNALD, *THE BURDEN OF FEEBLEMINDEDNESS* (1918).

158. GODDARD, *THE KALLIKAK FAMILY* (1912).

159. See Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 B.U.L. REV. 1 (1962).

that delinquency cannot be explained as a manifestation of subnormality.¹⁶⁰ Tappan, in reviewing the latest literature, stated that: "The official data indicate not only that defectives are a small minority among offenders but also that their prison disciplinary records, their parole violation rates, and their recidivism are very similar to those of offenders with normal intelligence."¹⁶¹ Guttmacher and Weihofen present a slightly different point of view. They recognize that studies have not shown an unusual degree of recidivism among the intellectually defective, but it is Dr. Guttmacher's clinical impression that both good and bad patterns of behavior become more set and stereotyped among defectives.¹⁶² Shulman, however, reaffirms the view that the notion that mental deficient must necessarily be behavior risks has been discarded.¹⁶³ McCorkle adds that even if it could be shown that there was some statistical correlation between low intelligence and crime, it has not been demonstrated that there is any causal relationship, or that both are not due to other factors.¹⁶⁴ Tizard concludes that any difference between the I.Q.'s of delinquents and non-delinquents can be attributed to cultural factors that adversely affect test scores.¹⁶⁵

It is clear from the foregoing data that it is quite unreasonable to draw a line between persons of low and normal intelligence when attempting to determine the proper treatment of those convicted of a crime. In the opinion of the authors, the Pennsylvania defective delinquent statute represents what Tussman and tenBroek have termed an "under-inclusive" classification.¹⁶⁶ That is, accepting their interpretation of the doctrine of reasonable classification as one which includes all persons who are similarly situated with respect to the purpose of the law,¹⁶⁷ a classification which includes only a segment of the population tainted with the evil the legislature is trying to combat would be under-inclusive and violative of the equal protection clause of the fourteenth amendment.

In applying this interpretation to the enactment of Pennsylvania's statute, one would suppose that the state legislature concluded that many of our offenders are recidivists, and that the mentally deficient offender is more likely to repeat and presents a greater danger to society than the normal offender. Thus, following the teachings of *Truax v. Raich*,¹⁶⁸

160. Blatt, *Some Persistent Recurring Assumptions Concerning the Mentally Subnormal*, 57 TRAINING SCHOOL BULL. 48, 49 (1960).

161. TAPPAN, CRIME, JUSTICE AND CORRECTION 147-48 (1960). See MENTAL DEFICIENCY — THE CHANGING OUTLOOK 173 (Clarke & Clarke ed. 1958).

162. GUTTMACHER & WEIHOFFEN, PSYCHIATRY AND THE LAW 180-81 (1952).

163. Shulman, *Intelligence and Delinquency*, 41 J. CRIM. L., C. & P.S. 763 (1951).

164. McCORKLE, CRIMINOLOGY AND PENOLOGY 265 (1959).

165. Tizard, *Individual Differences in the Mentally Deficient in MENTAL DEFICIENCY — THE CHANGING OUTLOOK* 173 (Clarke & Clarke ed. 1958).

166. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348 (1949).

167. *Id.* at 344.

168. 239 U.S. 33 (1915).

which held that the equal protection clause does not prevent the legislature from recognizing "degrees of evil," and *Atchison, Topeka & Sante Fe R.R. v. Matthews*,¹⁶⁹ in which the Supreme Court ruled that a classification will be upheld "whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished," the legislature passed a statute which subjects mental defectives who have criminal tendencies to a much longer sentence than the normal offender who commits the same offense. The difference between offenders is the presence of a mental deficiency which, as we have seen, is an illusory difference.¹⁷⁰ Since the normal offender is not included within the classification, the statute does not include all who are similarly situated with respect to the purpose of the law. Thus, there is a prima facie violation of the equal protection requirement of reasonable classification.

The Supreme Court accepted this same type of reasoning in overturning Oklahoma's Habitual Criminal Sterilization Act in *Skinner v. Oklahoma* stating: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."¹⁷¹ The "strict scrutiny" that Mr. Justice Douglas calls for with regard to the classification which a state makes in a sterilization law¹⁷² is no less applicable to the classification a state makes when it commits an individual as a defective delinquent under an indeterminate sentence.¹⁷³

Our equal protection analysis has thus far been concerned with the Defective Delinquent Act as viewed on its face. If the criteria presented as part of the mental instability segment¹⁷⁴ are read into the definition of mental defective (though in our opinion a fair reading of the statute prevents this), the equal protection challenge will be less effective. But even though the courts might be able to find a reasonable classification in an individual case based on a history of social maladjustment and delinquency, this approach would not dispel all problems. While many offenders who come from low economic areas might be classified as mentally unstable on the basis of a history of delinquency, incorrigibility, and social maladjustment, the chief factor differentiating them from the defective delinquent would continue to be mental subnormality, and the equal protection clause would still present a classification problem.

169. 174 U.S. 96 (1899).

170. See notes 162-67 *supra* and accompanying text. A classification will not be upheld if it rests on illusory differences, or if classificatory distinctions have little relevance to the purpose for which the classifications are made. *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954).

171. 316 U.S. 535, 541 (1942).

172. *Ibid.*

173. Another possible equal protection challenge to the statute may arise from the fact that the statute applies only to males, and not to females.

174. See notes 96-100 *supra* and accompanying text.

V. PROCEDURAL ASPECTS OF THE PENNSYLVANIA
DEFECTIVE DELINQUENT ACT

A. Adult

1. *The Commitment Procedure.* — Under the Defective Delinquent Act,¹⁷⁵ any male convicted of a crime or detained in any penal or correctional institution under sentence may be committed to the State Correctional Institution at Dallas.¹⁷⁶ The prerequisite to a finding of mental deficiency with “criminal tendencies” is a conviction.¹⁷⁷ The attention of the court may be drawn to the potential mental defect of an individual while he is before that court, by the warden, superintendent or the jail physician of the correctional institution to which a convict has been sentenced, or by any of the interested persons listed below.¹⁷⁸ The court may order an examination of the defendant’s condition on its own motion, or on the motion of the district attorney, the defendant, his counsel, or any “other person acting for the defendant.”¹⁷⁹ While the court has the discretion to raise the issue of a mental defect on its own motion, it must order the statutory inquiry where other qualified parties have filed the appropriate petition.

The type of examination that is to be conducted is not described in detail at any point in the statute, nor are the qualifications of the medical personnel who are to conduct the inquiry defined nor the proper areas of investigation indicated by the statute. The medical examiners are required, however, to submit written findings, and are ordered to state their conclusions as to whether or not the subject of their examination is “so mentally defective and has criminal tendencies, whether or not coupled with mental instability. . . .”¹⁸⁰ No time period is specified for the length or speed with which the examination should be conducted other than the word “immediately.”¹⁸¹ The court is free, once this pre-sentence report is submitted, to summon other witnesses and hear additional evidence at its discretion.¹⁸² The net effect of this procedure is a sentencing, and in some cases, a resentencing proceeding that is purely discretionary. No hearing need be held, nor is notice of the procedure with an opportunity to be heard required by the statute. Under this procedure, it would be perfectly possible for a defendant who is under sentence and already committed to one institution, to be re-examined and transferred to Dallas without ever knowing why or how, and without having an opportunity to challenge any of the evidence against him. Where someone had been convicted and

175. PA. STAT. ANN. tit. 61, § 541-1 (1964).

176. PA. STAT. ANN. tit. 61, § 541-3 (1964).

177. *Ibid.*

178. *Ibid.*

179. *Ibid.*

180. *Ibid.*

181. *Ibid.*

182. *Ibid.*

was awaiting sentence, defense counsel would not be able to force a sentencing hearing, and the court might possibly commit an individual for an examination and order his commitment to Dallas directly after the report of the doctors was submitted. There is no right to a hearing under the statute, and unless there was a clear abuse of discretion, it would be difficult to imagine an appellate court ordering one. Thus, it is possible, at least theoretically, that a convict will be sentenced in secret, without ever coming before a judge again.

2. *Procedural Safeguards.* — *Commonwealth ex rel. Remeriez v. Maroney*¹⁸³ requires that a lawyer be available to the defendant during his sentencing hearing, since it is the last critical stage of the proceeding where counsel may be of real assistance to both the defendant and the court. But if a sentencing hearing is not required or even provided for, what role can counsel have? There is no provision in the Defective Delinquent Act that permits the examination of the report of the medical examiner by defense counsel, or even the District Attorney nor is there any adequate way of checking or contradicting the medical diagnosis, since the statute provides no guidelines or definitions of mental defectiveness or criminal tendency. Yet, as has been shown earlier in this paper,¹⁸⁴ the finding of mental defect coupled with criminal tendency is a new issue of fact. In *Commonwealth ex rel. Lewis v. Keenan*,¹⁸⁵ a case involving a second offender under the Drug Act, the Supreme Court of Pennsylvania declared that: "The trial court may not rely upon its own record to come to its own conclusion on the fact of recidivism without the convict's knowledge of what is taking place."¹⁸⁶ The court had held in an earlier case involving the Pennsylvania Habitual Criminal Act, that an increase in a sentence because of repeated offenses may not be made until the defendant has had an opportunity to be heard after appropriate notice.¹⁸⁷ Thus, the determination of the new issue of recidivism or, in the case of the defective delinquent, mental defect coupled with criminal tendencies, requires a separate judicial determination with notice to the defendant and an opportunity to be heard. The present Defective Delinquent Act is seriously lacking in this regard. Unless the courts are willing to "read in" this provision as a necessary part of the statutory proceeding, the law patently offends Pennsylvania as well as federal notions of due process. This determination does not turn on whether the statute is civil or penal in nature, since the United States Supreme Court has held that these procedural safeguards are basic to the fourteenth amendment guarantee of due process, regardless of the nature of the proceeding.¹⁸⁸

183. 415 Pa. 534, 204 A.2d 450 (1964).

184. See notes 36-43 *supra* and accompanying text.

185. 195 Pa. Super. 188, 171 A.2d 895 (1961).

186. *Id.* at 190, 171 A.2d at 897.

187. See *Commonwealth ex rel. Deremendzin v. Myers*, 397 Pa. 596, 156 A.2d 804 (1959). See also U.S. *ex rel. Collins v. Claudy*, 204 F.2d 624, 628 (3d Cir. 1953).

188. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950); *Pennoyer v. Neff*, 95 U.S. 714 (1878).

In September 1966, Judge Stanley Greenberg of the Philadelphia Court of Common Pleas held that a commitment to Farview under the Mental Health Act, albeit civil, nevertheless required the appointment of counsel for the defendant if he was unable to afford it.¹⁸⁹

It would be less than fair to hold that an accused is entitled to counsel at a trial, but not at a hearing where the results and consequences to him could be much more serious. This is especially true when the hearing concerns his mental capacity. In such a proceeding it is obvious that a man is even less able to cope with the so-called intricacies and technicalities than in the ordinary situation, and, thus, requires the assistance of counsel even more.

The new Mental Health Act which became effective January 1, 1967 provides for the presence of counsel at the sanity hearing and at the competency hearing prior to commitment. Thus, it would seem that Judge Greenberg's position has been recognized by the legislature in enacting the new law. In view of the general treatment of the mentally defective criminal as someone between the normal and the insane offender, it would appear that the same rationale should apply in the case of a commitment to Dallas. The right to counsel at a judicial determination of mental defect is as critical as an appearance before a Lunacy Commission, and the long-range effects may well be the same, since both may result in indeterminate commitments. Furthermore, if the analysis made earlier in this paper with regard to the penal nature of the defective delinquent statute is accepted as valid, the sixth and fourteenth amendments *require* that counsel be made available to the defendant as a matter of right.¹⁹⁰

Should notice to the defendant, an opportunity to be heard and a right to counsel be provided under any of the several theories which might be relevant, it is difficult to determine what role counsel can play. The pre-sentence report of the medical examiners need only contain conclusions. Assuming that I.Q., as the outer limit of mental deficiency, is definable and subject to accurate scientific measurement, the lawyer's role simply consists of presenting another set of psychometric tests to challenge the findings of the doctors. Of course, this presumes that the report of the medical examiners would be made available to the defendant's counsel. There is at present a continuing controversy over the confidentiality of the pre-sentence report. *Williams v. New York*,¹⁹¹ a case involving the imposition of the death penalty in the face of a jury's recommendation of life imprisonment, held that the court had not violated due process by failing to disclose the contents of the pre-sentence report to defense counsel. Psychiatrists urging the non-disclosure of the reports have asserted that revelation of conditions or findings may be harmful to the morale of the

189. Commonwealth *ex rel.* Miller v. Shovlin, ____ Pa. D.&C.2d ____ (C.P. Phila., opinion unpublished, filed Sept. 8, 1966).

190. Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

191. 337 U.S. 241 (1949).

patient and retard any improvement in his condition.¹⁹² They assert that a pre-sentence report is generally made with the sole purpose of informing the conscience of the judge, and that it is not necessary that it meet the ordinary rules of evidence regarding hearsay and testimony under oath.¹⁹³ It is also feared that revelation of the sources of information will dry up the sources and create a reluctance on the part of informers to give information. But it would seem that, in the area of psychometric testing, the availability of defense counsel and his ability to bring other evidence to light to challenge the findings of the medical report would only increase the capacity of the court to arrive at a proper determination. In the final analysis, it is the judge who must determine whether a mental deficiency and a criminal tendency exists. In addition, the court must be "satisfied that person thought to be mentally defective is not insane, nor can be classified as an idiot or imbecile by recognized psychological tests nor a psychopath or an infirm case. . . ."¹⁹⁴ A judge will certainly be better able to discharge this weighty responsibility if all relevant data and information is available for his scrutiny.

The argument that disclosure of the doctors' findings will harm the morale of the defendant can be disposed of easily. Should the report be made available to defense counsel, as an officer of the court as well as an advocate for the defendant, he would be able to assist both parties. There is no need to disclose the complete contents, or even a part, of the testing record to the defendant. No potential doctor-patient relationship would be impaired, since the doctors who make the examination are not the same men who will be treating the defendant if he is in fact found to be a defective delinquent and sent to Dallas. Moreover, since the staff at Dallas report that one of the most difficult tasks they face with each new commitment is explaining to a prisoner why he is called a "defective delinquent,"¹⁹⁵ it might be desirable not to disclose the contents of the report to the defendant. The prisoners understand the delinquency aspect if they have committed a crime, but they do not understand, and are in fact upset, by the appellation "defective."¹⁹⁶ There is, in the minds of these people, as well as in the rest of the population, a stigma attached to the word "defective" which is not associated with the words "mentally retarded." Yet, the staff at Dallas state that mental defect and mental retardation are basically similar and, in fact, could not distinguish between the two.¹⁹⁷

Another aspect of the medical report which is of grave concern is the finding of a criminal tendency by the examiners. There are no statutory definitions or guidelines which indicate what is meant by criminal tendency. A reliable prediction of the criminal activity of a normal offender is

192. KEEVE, *THE PROBATION OFFICER INVESTIGATES* 10 (1960).

193. *Williams v. New York*, 337 U.S. 241 (1949).

194. PA. STAT. ANN. tit. 61, § 541-3 (1964).

195. Interview with staff at Dallas, Nov. 10, 1966.

196. *Ibid.*

197. *Ibid.*

extremely difficult, and this task becomes practically impossible where a mentally retarded individual is involved because of the inadequacy of projective tests in treating these offenders.¹⁹⁸ Conviction of one crime does not necessarily prove a criminal tendency. If it did, there would be no need to make an additional finding on the issue; conviction of a crime would be sufficient in itself to justify a commitment to Dallas. But, if a mental deficiency and a criminal conviction will not suffice, what standards are doctors to use in determining whether a criminal tendency exists? The critical and necessarily vague finding of a criminal tendency by the medical examiners must be open to challenge and scrutiny by opposing counsel. For this reason also, the pre-sentence examination made by the appointed doctors must be made available to counsel. At present the doctors need only state their conclusion; the sources or diagnostic bases they used to arrive at their findings need not appear in their report. The weight which was given to any number of factors and their relevancy to the entire consideration will never be known, and a judge has no way of checking the examiners' results. He may call in other witnesses and ask for more evidence, but even he is without a guide as to what the statute means by "criminal tendencies."

In view of the statutory weakness of the Defective Delinquent Act on definitional grounds and the penal nature of proceedings under it,¹⁹⁹ it becomes apparent that the procedural safeguards required by the Third Circuit in Barr-Walker proceedings are equally requisite to proceedings under the Defective Delinquent Act. In *Gerchman*, the court held that the assistance of counsel and the right to confront and cross-examine the doctors who made the findings of sexual psychopathy, as well as others who participated in the drafting of the pre-sentence report, was necessary if due process was to be afforded to a convict under examination.²⁰⁰ The Third Circuit did not decide whether a jury trial was required on the issue of sexual psychopathy, although the issue was raised. Both the Maryland Defective Delinquent Act,²⁰¹ and the Massachusetts Act provide for such a right on the issue of defective delinquency.²⁰²

3. *Maryland and Massachusetts Practice.* — Having considered what the Pennsylvania Defective Delinquent Act actually provides in the way of procedural safeguards, and proposing what appears to be required constitutionally, we turn to a brief consideration of Maryland and Massachusetts laws on this subject. Maryland defines a defective delinquent much more specifically than Pennsylvania,²⁰³ and limits the definition by enumer-

198. See notes 129-33 *supra* and accompanying text.

199. See *supra*, section II.

200. United States *ex rel.* Gerchman v. Maroney, 335 F.2d 302 (3d Cir. 1966).

201. MD. ANN. CODE art. 31B, § 8(c) (Supp. 1966).

202. MASS. ANN. LAWS ch. 123, § 113 (1965).

203. MD. ANN. CODE art. 31B, § 5 (Supp. 1966) which states that:

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both,

ating the category of convicted offenses which must have been committed before a request for an examination may be made.²⁰⁴ The request may only be made if there has been conviction and sentence for:

- (1) a felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State.²⁰⁵

The court may request the examination of its own motion, or upon a written petition of the prosecuting State's attorney, the defendant, his counsel, or the Department of Correction which states the reasons for suspicion of defective delinquency.²⁰⁶ The court is not required to issue an order for an examination, but may do so at its discretion.²⁰⁷ This procedure differs significantly from the Pennsylvania procedure, which provides that the judge *shall* order the inquiry upon petition without any reasons being alleged.²⁰⁸ Under the Maryland statute requests for examination may be made any time after conviction and sentence to a penal institution, so long as the person involved is then serving or will begin to serve that sentence.²⁰⁹

In Massachusetts, the district attorney may petition for commitment at "any time prior to the final disposition of a case in which a defendant . . . is charged with a crime, other than murder, the commission of which creates a danger to life or limb. . . ."²¹⁰ The definition of defective delinquent is not specifically set forth in any one section, but in reading several pertinent sections together, it becomes clear that the statute requires a charge of a violent crime against a person, a finding of mental deficiency based on psychometric and psychological tests, and a finding of present or potential dangerousness to the public.²¹¹ The statute imposes no requirement of conviction and sentence. Pennsylvania requires at least a conviction. Once a petition for commitment has been filed, the court *must* order the examination; the reasons for the request need not be stated.²¹² There is no provision which permits the court to cause this examination to be made upon its own motion.

The Maryland statute empowers the court to order an examinee to be transferred from the Department of Correction to Patuxent (the insti-

as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

204. MD. ANN. CODE art. 31B, § 6(a) (Supp. 1966).

205. *Ibid.*

206. MD. ANN. CODE art. 31B, §§ 6(b), 6(d) (Supp. 1966).

207. MD. ANN. CODE art. 31B, § 6(b) (Supp. 1966). (The original statute made such a hearing mandatory.)

208. PA. STAT. ANN. tit. 61, § 541-3 (1964).

209. MD. ANN. CODE art. 31B, § 6(c) (Supp. 1966).

210. MASS. ANN. LAWS ch. 123, § 113 (1965).

211. MASS. ANN. LAWS ch. 123, §§ 113, 115 (1965).

212. MASS. ANN. LAWS ch. 123, § 113 (1965).

tution for the defective delinquent) until a diagnosis is completed, even though his original sentence might expire during that time,²¹³ while Massachusetts limits the examination period to thirty-five days in a defective delinquent department.²¹⁴ The Pennsylvania statute, on the other hand, gives no indication as to which department the examinee should be committed or where he is to be examined, nor does it impose a time limitation, other than the requirement that the examination is to be conducted "immediately."²¹⁵ Maryland requires that a psychiatrist, a psychologist and a medical physician examine the convict, but requires only a majority opinion to diagnose mental deficiency.²¹⁶ The time limit for the Maryland examination is unusual — the diagnosis must be completed no later than six months following the examinee's entry into Patuxent or before the expiration of his sentence, whichever *last* occurs.²¹⁷ Thus, if a convict had two years to serve before his sentence were up, he might be confined to Patuxent for two years in order to *diagnose* the presence or absence of mental deficiency. During that time, he would not have been committed as a defective delinquent, since the court would not have made a finding on that issue, nor would the procedure provided by statute have been exhausted. This could work great inequity on the examinee and might result in an abuse of his constitutional rights if it should turn out that he was not in fact a mental defective.²¹⁸

The Maryland statute provides that notice be given to the person to be examined.²¹⁹ If anyone other than the convict or his attorney has requested the examination, the examinee is entitled to be examined by his own psychiatrist at state expense.²²⁰ A copy of that psychiatrist's report is submitted to the court.²²¹ If the report of the Institution indicates defective delinquency, the court notifies the defendant, tells him of the substance of the report, advises him of his right to counsel, and apprises him that a hearing on the issue of defective delinquency will be held.²²² If the defendant cannot provide his own counsel, the court must appoint counsel for him.²²³ Counsel for both sides have access "to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court, bearing upon the person's case, including a copy of the report of the institution."²²⁴ The hearing must take place no less than thirty days after the appointment of counsel unless defense counsel requests acceleration of the hearing date.²²⁵ Either side

213. MD. ANN. CODE art. 31B, § 6(e) (Supp. 1966).

214. MASS. ANN. LAWS ch. 123, § 113 (1965).

215. PA. STAT. ANN. tit. 61, § 541-3 (1964).

216. MD. ANN. CODE art. 31B, § 7(a) (Supp. 1966).

217. *Ibid.*

218. *Dennison v. State*, 49 Misc. 2d 933, 267 N.Y.S.2d 920 (Ct. Cl. 1966); *People ex rel. Cirrone v. Hoffman*, 255 App. Div. 404, 8 N.Y.S.2d 83 (1938).

219. MD. ANN. CODE art. 31B, § 6(b) (Supp. 1966).

220. MD. ANN. CODE art. 31B, § 7(b) (Supp. 1966).

221. *Ibid.*

222. MD. ANN. CODE art. 31B, § 8(a) (Supp. 1966).

223. MD. ANN. CODE art. 31B, §§ 8(a)-(b) (Supp. 1966).

224. MD. ANN. CODE art. 31B, § 8(b) (Supp. 1966).

225. MD. ANN. CODE art. 31B, § 8(c) (Supp. 1966).

may request a jury trial, at which the jury will be directed to reach a special verdict on the issue of defective delinquency.²²⁶

In Massachusetts, two psychiatrists appointed by the Commissioner of Mental Health conduct the examination.²²⁷ If these experts find that commitment is necessary, they must issue a certificate stating that, based upon their diagnosis the examinee is mentally defective.²²⁸ This report is to be filed with the court clerk within thirty-five days and is available to the probation officer, the district attorney, defense counsel and the defendant himself.²²⁹ Upon the submission of a certification of mental defectiveness, the court must issue a written notice to the examinee informing him that a hearing will be held on his possible commitment to a defective delinquent department.²³⁰ There is no provision for a trial by jury in the hearing procedure. The court must also examine the record, "character and personality of such person," look for indications of his dangerousness to the public, either extant or potential, with a view toward determining whether he is feebleminded or insane.²³¹ If the requisite dangerous characteristics are felt to be present, and the examinee is not found to be feebleminded or insane, the court *must* report him to be a defective delinquent and commit him to the appropriate defective delinquent department. Such a commitment constitutes a final disposition of the crime for which he was charged, and he cannot be tried again for that crime.²³² The order of commitment is a final appealable order.

It is apparent from the outset, that both Maryland and Massachusetts differ markedly from Pennsylvania in the procedural safeguards they provide for the defective delinquent. Pennsylvania does not require a hearing, does not require notice of possible commitment or an opportunity to be heard, does not provide a measurable definition, does not provide for counsel, either appointed or voluntary, and does make the report of the medical examiners available to anyone but the court. And the procedural steps that are laid down so carefully in both Maryland and Massachusetts are totally lacking in the Pennsylvania Defective Delinquent Act. It is easy to see why the procedural challenges hurled at the Maryland and Massachusetts statutes were dismissed as being without foundation in *Sas v. Maryland*²³³ and *Ex Parte DuBois*.²³⁴ Yet both of these statutes present certain difficulties.

One of the great difficulties with the Maryland statute lies in the potential for abuse found in administrative transfers and indeterminate sentences. The Maryland Constitution specifically provides for the im-

226. *Ibid.*

227. MASS. ANN. LAWS ch. 123, § 113 (1965).

228. MASS. ANN. LAWS ch. 123, § 115 (1965).

229. MASS. ANN. LAWS ch. 123, § 113 (1965).

230. *Ibid.*

231. *Ibid.*

232. *Ibid.*

233. 334 F.2d 506 (4th Cir. 1964). See also *Director of Patuxent Institution v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966).

234. 331 Mass. 575, 130 N.E.2d 920 (1954).

sition of indeterminate sentences on persons convicted of crimes.²³⁵ Furthermore, Patuxent is so hybridized that it is not easily characterized as a prison, but may fall into the traditional category of a civil institution which can properly receive persons for indeterminate terms. The rationale for the indeterminate term in a civil situation is that commitment is for the protection and possible cure of the insane or feebleminded person, and the stigma is not the same as that involved when an individual is penalized by being incarcerated in a penitentiary for a given number of years. If a person is insane, he is not being sent to jail forever, but is being hospitalized for his own good and for the good of the community. Maryland specifically requires that an indeterminate sentence to Patuxent be imposed once a finding of defective delinquency has been made.²³⁶ If the person is committed to Patuxent while under a definite sentence, credit must be given for time served in Patuxent.²³⁷ No original commitment may be made to Patuxent if the criminal sentence has expired. But if a petition for commitment as a defective delinquent is filed before termination of the sentence, the fact that the sentence has expired will not void the Patuxent commitment if defective delinquency is found. The possibility of administrative transfers appears in this context, since a "problem" case in one prison could be transferred to Patuxent on the eve of release. Once a convict is found to be a defective delinquent, his original sentence is suspended, and he is no longer confined for any of the original sentence.²³⁸ In view of the great number of procedural safeguards available to the defendant under the Maryland statute, it would appear that *Baxstrom v. Herold*²³⁹ would not vitiate this aspect of the commitment, since that case was concerned with a finding of defectiveness after sentence has expired, a finding which Maryland law clearly prohibits.

The Massachusetts statute provides that institutions for defective delinquents are a part of the state's penal system or state farm schools.²⁴⁰ The statute makes no specific provision for indeterminate sentences, but it would appear to permit them, since once committed to a defective delinquent department, an individual remains committed until he is no longer deemed to be a defective delinquent.²⁴¹ If a convict recovers during the pendency of his original sentence, he may be returned to the penal institution from which he was committed and given credit for the time spent in the defective delinquent department.²⁴²

235. MD. CONST. art. III, § 60.

236. MD. ANN. CODE art. 31B, § 9(b) (Supp. 1966).

237. *Ibid.*

238. *Ibid.*

239. 383 U.S. 107 (1966). The Court held that permitting the civil commitment of a convict at the end of his penal sentence without providing the jury trial available to all other persons civilly committed violated the equal protection clause. In addition, the Court required that a full determination of criminal insanity be made before committing a person to a mental institution maintained by the Department of Correction.

240. MASS. ANN. LAWS ch. 123, §§ 117, 117A (1965).

241. MASS. ANN. LAWS ch. 123, §§ 117A, 115 (1965).

242. MASS. ANN. LAWS ch. 123, § 117A (1965).

Pennsylvania transferred the control of the defective delinquent from the Department of Welfare to the Department of Justice in 1953,²⁴³ and the Department of Justice was given complete power to make transfers to and from all institutions under its control in furtherance of the purposes of the defective delinquent statute.²⁴⁴ We have already seen that the wardens or medical personnel of any of the industrial schools, jails or penal institutions of the state may request an inquiry into a given inmate's possible mental defectiveness. By the simple device of a written petition and two friendly doctors who are willing to find mental deficiency and criminal tendencies, the various prisons and state correctional institutions can rid themselves of troublemakers or other misfits by dumping them at Dallas. Since the power to make transfers and retransfers is specifically granted to the Department of Justice, commitment could be accomplished at the administrative level and the court might never enter into the proceeding at all. The potential for abuse inherent in this procedure is obvious, and can only be corrected by writing appropriate procedural safeguards into the statute.

5. *Review and Release Procedures.* — The Pennsylvania statute indicates that if a convict is transferred to Dallas from another institution in the correctional system, he will be given credit for time served at Dallas once he has recovered from his defective delinquency.²⁴⁵ In the event commitment to Dallas occurs before a sentence has been imposed, the time served at Dallas will be deemed to be in lieu of sentence, and the inmate will remain in Dallas pending further "order of the court."²⁴⁶ These provisions taken in toto result in an indeterminate sentence, since release from Dallas may only occur when there is evidence that the inmate's mental condition has improved, that his release would be "beneficial and not incompatible with the welfare of society . . .,"²⁴⁷ and that an appropriate plan has been worked out and approved for him.²⁴⁸ If a convict is sentenced for a specific term in another institution and later transferred to Dallas, he may be detained until he recovers even if his sentence should expire before that time.²⁴⁹ The validity of this particular provision seems highly questionable today in light of *Baxstrom v. Herold*,²⁵⁰ since no provision is made for a new judicial determination of a convict's mental defectiveness. The responsibility for determining whether a convict has recovered is not detailed in the statute, and no procedure is laid down for periodic review of his case to determine if he has or has not

243. PA. STAT. ANN. tit. 61, § 542.2 (1964).

244. PA. STAT. ANN. tit. 61, § 542.3 (1964).

245. PA. STAT. ANN. tit. 61, § 541-3 (1964).

246. *Ibid.*

247. PA. STAT. ANN. tit. 61, § 541-9 (1964).

248. *Commonwealth v. Johnson*, 80 Pa. D.&C. 379 (Fay County Juv. Ct. 1951). A mental defective who was convicted of rape and engaged in acts of sodomy while at Huntingdon would not be released on petition where supervisory arrangements have not been made and medical opinion advises supervision.

249. PA. STAT. ANN. tit. 61, § 541-6 (1964).

250. 383 U.S. 107 (1966). See 12 VILL. L. REV. 178 (1966).

recovered. No specific type of re-examination is required; no tests need be administered; and no one appears to be required to keep the court posted as to why a convict has not recovered, or why it has been determined that he has not recovered. The potential for abuse is overwhelming, and there are currently inmates at Dallas whose continued commitment is due to the failure of the statute to provide procedures for the periodic review of their mental condition, as well as adequate release procedures.²⁵¹

In addition to the inadequacies mentioned above, it should be noted that there is no mandatory judicial or administrative review, nor any right of appeal from a finding of mental defectiveness provided for in the Pennsylvania statute. This situation is in marked contrast to that which obtains in Maryland and Massachusetts. Maryland provides that after a two year confinement in Patuxent, which must be at least equal to two-thirds of his original sentence a convict may petition for review of his status as a defective delinquent.²⁵² The review procedure provides for a right to counsel, a jury trial, and the use of process to compel the appearance of witnesses.²⁵³ If this hearing results in a finding that he is no longer defective, an inmate may be released or recommitted for the balance of his original sentence, with a credit being given for time spent at Patuxent.²⁵⁴ Once this right to a review has been exercised, a convict is not entitled to a review again for three years²⁵⁵ (if he is still a defective delinquent.) The statute makes specific provision for the right to habeas corpus,²⁵⁶ and also provides for a right of appeal from the original commitment and the review proceeding.²⁵⁷

Massachusetts permits an appeal from the original commitment to the superior criminal court and provides for a trial by jury at the appellant's request.²⁵⁸ Within one year after commitment as a defective delinquent, and at least once every three years thereafter, every person committed as a defective delinquent must be examined by two psychiatrists appointed by the commissioner of mental health, and their written report turned over to the commissioner of correction.²⁵⁹ If an inmate is found not to be mentally defective, he must be taken before the probate court "for discharge from defective delinquent status."²⁶⁰ When a person who has been transferred into a defective delinquent department from another penal institution improves to such an extent as to permit his return to that institution, he may be transferred back and given a credit against his sentence for the time served in the institution for defective delinquents.²⁶¹

251. Interview with staff at Dallas, Nov. 25, 1966.

252. MD. ANN. CODE art. 31B, § 10(a) (Supp. 1966). This means that on a six year sentence, review can only be had after four years at Patuxent.

253. *Ibid.*

254. *Ibid.*

255. MD. ANN. CODE art. 31B, § 10(b) (Supp. 1966).

256. MD. ANN. CODE art. 31B, § 10(c) (Supp. 1966).

257. MD. ANN. CODE art. 31B, §§ 11, 11(a) (Supp. 1966).

258. MASS. ANN. LAWS ch. 123, § 113 (1965).

259. MASS. ANN. LAWS ch. 123, § 118 (1965).

260. *Ibid.*

261. MASS. ANN. LAWS ch. 123, § 117A (1965).

Thus far, we have examined many of the aspects of commitment, transfer, review, and appeal involved in defective delinquent statutes of Pennsylvania, Maryland and Massachusetts. The final consideration under this section will be concerned with release procedures. Under the Pennsylvania law, release occurs only when the Board is of the opinion that there has been improvement in the mental condition of the inmate to the extent that his "release will be beneficial and not incompatible with the welfare of society. . . ." ²⁶² If the Board at Dallas feels that release is warranted, it must notify the Department of Welfare ²⁶³ which *may* recommend discharge to the committing court. If discharge is recommended, the case record, along with the case history compiled at Dallas, and the opinion of the superintendent and physician or psychiatrist as to the inmate's mental condition is to be forwarded to the court. ²⁶⁴ At this stage, the court has the discretion after hearing "all persons desirous of being heard," ²⁶⁵ to issue an order releasing the defendant or returning him to court for probation or parole. ²⁶⁶ It should be noted that a hearing must be held before the inmate may be released, although no such "requirement" exists for his commitment.

Commonwealth v. Johnson ²⁶⁷ indicates that no release may be ordered unless a plan which meets the recommendations of the Dallas staff is formulated, particularly with reference to sexual offenders. The Dallas staff are particularly sensitive to homosexual tendencies in their inmates and have held up release proceedings where any evidence of homosexual conduct appears. ²⁶⁸ In some cases, the plan can never be approved because there is no state or private agency or family able or willing to take on the job of supervision. Thus, some potential release cases are detained in Dallas indefinitely for want of an adequate plan. Fifteen inmates were released from Dallas in June and July, 1966, by President Judge Adrian Bonnelly of the Philadelphia County Court. They had been detained there far in excess of the legally permissible time, but were not released because it was felt that they would be unable to function in the community on their own. ²⁶⁹ These inmates are currently in custody at the Philadelphia House of Detention; action has just been taken to have them committed to a state mental hospital under the new Mental Health Act. ²⁷⁰ The "plan" aspect of the release procedure is greatly dependent upon existing community facilities, which appear to be sorely lacking. The Staff at Dallas has spoken

262. PA. STAT. ANN. tit. 61, § 541-9 (1964).

263. Although the institution is under the Department of Justice, the release procedure still refers to the Department of Welfare. Since the Department of Justice took over in 1953, it is probably the appropriate place to which Board recommendations should go.

264. PA. STAT. ANN. tit. 61, § 541-9 (1964).

265. *Ibid.*

266. *Ibid.*

267. 80 Pa. D.&C. 379 (Fay County Juv. Ct. 1951).

268. Interview with staff at Dallas, Nov. 25, 1966.

269. Records of inmates on file at the office of the American Civil Liberties Union in Philadelphia.

270. The Philadelphia Inquirer, Jan. 7, 1967, p. 17, col. 20.

highly of the Jason School in Philadelphia, which will take inmates recommended for release by the Dallas staff.²⁷¹ Those who were released from Dallas last June because of legal technicalities would probably not be candidates for the Jason School.

In view of the fact that the section of the statute dealing with indeterminate commitment provides for release upon "further order of the court,"²⁷² one would assume that the court, in exercising its continuing jurisdiction over a case, might want to review the mental condition of an inmate periodically and consider releasing him without the recommendation of the Board at Dallas. This is indeed possible, but it has not worked out this way in practice. The responsibility for the "forgotten men" must be borne as much by the courts as the legislature and the community at large. The families of many of these inmates are eager to rid themselves of difficult and often embarrassing problems, and the courts are satisfied to have them off the streets. Until the recent furor generated by the activities of the Philadelphia Chapter of the American Civil Liberties Union, no one gave much thought as to how long or why these men were in Dallas. Still, in preparing plans for release, the Staff at Dallas are largely left to their own devices in setting up employment situations and guardian programs, since the Parole Board has no jurisdiction over Dallas inmates.²⁷³ The lack of access to the already perfected contacts and channels for community services which the Parole Board has built up through years of practice is a crippling blow to the already meager forces at Dallas engaged in the job of replacement. Great credit must be given to the Bureau of Vocational Rehabilitation for its tremendous efforts in behalf of inmates at Dallas.²⁷⁴ Bearing in mind that it is difficult enough to place a skilled normal convict in employment in the community, how much greater is the difficulty where a minimally skilled, mentally retarded offender is involved?

As previously noted, release procedures under the Pennsylvania statute do provide for a hearing. Thus, an attorney should be able to effectively provide information and assistance to the court and Dallas staff in working out an appropriate plan for the inmate. The availability of community services and the willingness of the attorney to serve his client in this area can only serve to strengthen the entire basis for the specialized defective delinquent commitment. But if no attorney may be present to fight for his client's release and assist in the preparation of a meaningful and workable plan, Dallas becomes nothing more than a dumping ground. It then becomes simply a matter of luck as to who makes it to the outside world again — a fact of life which can have very demoralizing effects even on the mentally retarded.

271. Interview with staff at Dallas, Nov. 10, 1966.

272. PA. STAT. ANN. tit. 61, § 541-3 (1964).

273. Interview with staff at Dallas, Nov. 25, 1966.

274. *Ibid.*

No provision is made in the Pennsylvania Defective Delinquent Act for the utilization of the work-release program or of weekend paroles or probations. The Maryland statute, on the other hand, specifically provides for a release on parole, or "a leave of absence," not to exceed one year, which may or may not be coupled with employment conditions and which may be revoked at any time.²⁷⁵ This parole may result in a full discharge or serve as the basis for a convict's return to his original sentence, depending upon the court's order.²⁷⁶ The release period may be amended or revoked at any time.²⁷⁷ Under the Massachusetts statute, once the two psychiatrists find that the inmate is no longer mentally defective, and he has been discharged from his delinquency status by the probate court, he is free.²⁷⁸ There is no provision for work release or probation during the period of confinement. The only situation in which a defective delinquent is not freed when his status is changed occurs when he has been committed during sentence from another institution and must be returned to that institution to serve the balance of his time there.²⁷⁹

In summing up the treatment of adult offenders under the defective delinquent acts, we must conclude that the Pennsylvania Defective Delinquent Act contains almost no procedural safeguards and is open to the greatest abuse. The inadequacies of the Pennsylvania statute in this area are so pronounced that they offend all notions of due process and fair play, regardless of whether the statute is viewed as being civil or penal in nature. The Maryland statute, by contrast, provides the needed procedural safeguards and a highly flexible and progressive program which is closer to hospitalization than incarceration. If one were to sum up the Maryland and Pennsylvania approaches, one could say that the approach at Patuxent is largely directed toward rehabilitation, while Dallas is primarily a custodial institution which deemphasizes treatment of the defective delinquent at every turn.

B. Juvenile

1. *Jurisdiction over the Juvenile.* — The treatment of the juvenile offender under the Pennsylvania Defective Delinquent Act, which covers males from the age of fifteen and upward,²⁸⁰ raises problems of a much different nature than some of those considered under the section on adults. Responsibility for the commitment of juvenile delinquents to Dallas rests in Juvenile Courts of the various counties by virtue of the Juvenile Court Act, which gives those courts jurisdiction over children under eighteen years of age.²⁸¹ That Act specifically provides that children who are under

275. MD. ANN. CODE art. 31B, §§ 13(d)-(e) (Supp. 1966).

276. MD. ANN. CODE art. 31B, § 13(f) (Supp. 1966).

277. MD. ANN. CODE art. 31B, § 13(d) (Supp. 1966).

278. MASS. ANN. LAWS ch. 123, § 118 (1965).

279. MASS. ANN. LAWS ch. 123, § 117A (1965).

280. PA. STAT. ANN. tit. 61, § 541-3 (1964).

281. PA. STAT. ANN. tit. 11, § 243(2) (1964).

the jurisdiction of the Juvenile Court are not to acquire civil disabilities imposed by virtue of the criminal law, nor are they to "be deemed convicted of crime."²⁸² Chief Justice Stern of the Pennsylvania Supreme Court stated the underlying rationale for the Juvenile Court in *Holmes' Appeal*.²⁸³

The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective, — aimed to check juvenile delinquency and to throw around a child, just starting perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as *parens patriae*. The State is not seeking to punish an offender but to salvage a boy who may be in danger of becoming one, and to safeguard his adolescent life. Even though the child's delinquency may result from the commission of a criminal act the State extends to such a child the same care and training as to one merely neglected, destitute or physically handicapped. No suggestion or taint of criminality attaches to any finding of delinquency by a Juvenile Court.

In keeping with this approach to the juvenile delinquent, the statute provides that children under the age of sixteen are not to be housed in any jail or other penal institution in which adults are also confined before or after a hearing on their delinquency.²⁸⁴ Special accommodations, separate and apart, must be established for the detention of juveniles. Yet Dallas may receive people from the age of fifteen years and up, and there is no provision in that institution for clear separation between juveniles and adults. Thus, there is potential conflict between the concept of a Juvenile Court that is on guard to provide special facilities for the treatment and rehabilitation of the juvenile offender, and the State Correctional Institution at Dallas which is a maximum security prison²⁸⁵ that places greater emphasis on custody than treatment. Chief Justice Stern's analysis of the Juvenile Court rests on the notion that certain procedural safeguards apply only in criminal proceedings, and that since the Juvenile Court hearing is civil in nature, the safeguards are unnecessary. To the Chief Justice the juvenile proceeding is *in* the interest of the child, and *not against* his welfare. While this rationale is certainly valid when applied to a civil institution that is geared to rehabilitation and retraining, it is clearly invalid where the institution involved is a prison which is run for the purpose of keeping criminals off the street for as long as their peculiar mental condition exists.

2. *Procedural Safeguards*. — In 1966, the Supreme Court shed new light on the need for procedural safeguards in the Juvenile Courts. *Kent v. United States*²⁸⁶ involved the certification of a boy from the jurisdic-

282. PA. STAT. ANN. tit. 11, § 261 (1964).

283. 379 Pa. 599, 603-04, 190 A.2d 523, 525 (1954).

284. PA. STAT. ANN. tit. 11, § 249 (1964).

285. *Commonwealth v. Nardi*, 185 Pa. Super. 136, 138 A.2d 140 (1958).

286. 383 U.S. 541 (1966).

tion of the juvenile court to the criminal courts of the District of Columbia; no hearing on the issue of the Juvenile Court's waiver of jurisdiction was held. In finding that a requirement for a hearing on the issue of waiver could be read into the statute the Court said:

In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing. . . .²⁸⁷

A comparison of the possible consequences to the juvenile that may result from a finding of defective delinquency, with the possible harm that might result from his certification over to a criminal court, reveals that the former is potentially the more damaging. If a juvenile were properly certifiable to a criminal court on criminal charges, the proof and procedure employed in that court would have to be in accord with the constitutional guarantees of the fourth, fifth, sixth and eighth amendments as applied to the states through the fourteenth amendment. If found guilty, he would be sentenced to the specified statutory term just as if he were an adult. On the other hand, if a juvenile were adjudged a delinquent under the Juvenile Court Act and examined by the appropriate medical committee to detect mental defectiveness, he would run the risk of being thrown into prison for an indeterminate term, or at least until he was twenty-one, without any process to protect or assist him. This radical change in status results not only from the fact that he would be incarcerated in a penal institution with adult convicts in violation of the Juvenile Court Act, but also from the fact that he would no longer be under the rehabilitative supervision of the Juvenile Court. With the exception of the discretion in the Juvenile Court to certify juveniles who have allegedly committed murder or who are between the ages of sixteen and eighteen to the criminal courts, the Juvenile Court's jurisdiction over the juvenile offender is exclusive,²⁸⁸ and continues until a juvenile reaches the age of twenty-one if the court rendered any orders concerning him while he was under eighteen.²⁸⁹ We have already seen that a hearing is not a prerequisite to a commitment to Dallas under the Pennsylvania statute. Applying the rationale of *Kent v. United States*,²⁹⁰ which requires a hearing when the exclusive jurisdiction of the Juvenile Court may be thrust away by waiver, it would appear to be even more necessary that a juvenile be afforded a hearing under the Pennsylvania Defective Delinquent Act with regard to the radical change in status that he may undergo. When a juvenile is committed to Dallas the approach toward him changes from a rehabilitative one to one that is penal and punitive

287. *Id.* at 557.

288. PA. STAT. ANN. tit. 11, § 244 (1964).

289. PA. STAT. ANN. tit. 11, § 254 (1964).

290. 383 U.S. 541 (1966).

in nature. While imprisoned at Dallas, he will be treated no differently than a criminal, even though the Juvenile Court Act specifically states that he may not be regarded as a criminal. He will be committed to a maximum security prison, not a trade school or a home for mentally retarded children, and will receive what Justice Fortas has called "the worst of both worlds."²⁹¹ One could argue that this change from protected juvenile offender to punished juvenile criminal is a new finding of fact which requires a separate judicial determination. *Kent v. United States*,²⁹² *United States ex rel. Gerchman v. Maroney*,²⁹³ *Douglas v. Alabama*,²⁹⁴ and *Pointer v. Texas*²⁹⁵ indicate that notice, an opportunity to be heard, the right to counsel, and the right to cross-examine and confront witnesses may be rights which every juvenile must acquire when he loses, or is about to lose, the protection of the Juvenile Court.

3. *The Treatment of Juvenile Offenders.* — The Juvenile Court Act defines a delinquent as a child who has violated any state or municipal law or ordinance, has been habitually disobedient so as to be uncontrollable by his parents or other legal custodian, has been habitually truant from school or home, or has habitually behaved in a way injurious to the morals or health of himself or others.²⁹⁶ The Pennsylvania Defective Delinquent Act permits the commitment of persons presently held before the court as juvenile delinquents.²⁹⁷ Consequently, a child who is a runaway, a truant or an incorrigible with respect to his parents or any welfare institution in which he may be housed is a potential candidate for Dallas. This is so even though he may never have committed a crime, and were it not for a low I.Q. which may be the cause of his truancy or misbehavior, would never be considered a potential defective delinquent. Thus begins the vicious circle which results from the lack of community and state agencies to deal with the underprivileged child who is poor and culturally or intellectually deprived. An underprivileged child may speak poorly and, therefore, record a low score on an I.Q. test that is geared to a certain verbal ability. His cultural experiences and horizons are narrow, so that his imagination has never been tapped. If he does poorly in school and fails to adjust, he starts running away or failing to appear for class. He winds up adjudicated a delinquent because of truancy, and by virtue of his low performance on I.Q. tests (a critical index for defectiveness) and his apparent attitude of restlessness and possible rebellion, he is subjected to testing to determine defective delinquency. This child is not necessarily a criminal, nor need he ever become one. If he were a well-to-do mentally retarded child, proper environmental care and guidance would have been provided for him, and he would have been professionally aided in his

291. *Id.* at 556.

292. 383 U.S. 541 (1966).

293. 355 F.2d 302 (3d Cir. 1966).

294. 380 U.S. 415 (1965).

295. 380 U.S. 400 (1965).

296. PA. STAT. ANN. tit. 11, §§ 243(a)-(d) (1964).

297. PA. STAT. ANN. tit. 61, § 541-3 (1964).

development. The frustrations that he feels would have been moderated to a certain extent by training and encouragement. But the impoverished child for whom there is no adequate state or private facility available, is on his own and cannot make the needed adjustment. The result may well be trouble with the juvenile authorities and commitment to Dallas. The staff at Dallas has recommended that young juveniles (fifteen-sixteen) and other young first offenders not be committed as defective delinquents.²⁹⁸ They are agreed that these young people are not in need of a maximum security prison, and this is especially true if their delinquency is attributable to truancy or a failure to adjust at Pennypack House. The staff feels that specialized instruction in community schools can do more to rehabilitate these youngsters than can possibly be done in a penal institution such as Dallas.

When the administration of Dallas was transferred from the Department of Welfare to the Department of Justice in 1953, a section was added to the code of criminal procedure: "[f]or the more convenient punishment of criminals"²⁹⁹ which provided for the commitment of males "convicted in any court of this Commonwealth of any crime or crimes, . . . who would be sentenced by the court to an indefinite sentence in a penitentiary, or to a general sentence in an industrial school. . . ."³⁰⁰ The State Industrial School at Camp Hill³⁰¹ is the only industrial school under the jurisdiction of the Department of Justice to which juveniles may be sentenced. The preamble to the act creating Camp Hill is interesting for the light it sheds on the physical and psychological atmosphere of the former industrial school at Huntingdon Prison:³⁰²

Whereas, The present Pennsylvania Industrial School at Huntingdon, originally intended as a Middle State Penitentiary, with its high walls and towers has all the aspects of a State Penitentiary and the addition of a medium security bloc has detracted little from its forbidding appearance, and

Whereas, The internal arrangement of the cell blocks with barred windows and double locked switches contradicts the idea that this institution is a school devoted to rehabilitation. . . .

With the erection of a new industrial school at Camp Hill, the forbidding penitentiary at Huntingdon became the institution for the detention, care and treatment of the defective delinquent, and until 1960, children from the age of fifteen and up were imprisoned there under the conditions described above. This hardly seems consistent with the notion that juveniles are not to acquire the disabilities of the criminal law and are to be protected and rehabilitated. Furthermore, the criminal procedure addition

298. Interview with staff at Dallas, Nov. 25, 1966.

299. PA. STAT. ANN. tit. 19, § 1161 (1964).

300. *Ibid.*

301. PA. STAT. ANN. tit. 11, § 250(e) (1964); PA. STAT. ANN. tit. 61, § 545-1 (1964).

302. PA. STAT. ANN. tit. 61, § 545-1 (1964).

of 1953 specifically speaks of the *criminals* who are to be committed to Dallas.³⁰³ We have already seen that children in the Juvenile Court are not to be deemed criminals or convicted of crimes.³⁰⁴ To allow a Juvenile Court to find a child delinquent and then commit him to Dallas as a criminal is to completely obliterate and emasculate the theory underlying the Juvenile Court Act. Even assuming that the condition of the present institution differs markedly from that which obtained at Huntingdon in 1937, Dallas is still a maximum security prison. In *Commonwealth v. Robinette*,³⁰⁵ the Superior Court held that a juvenile who had attempted to escape from the Pennsylvania Institution for Defective Delinquents was subject to indictment and conviction for the criminal offense of prison breach; his presence at Dallas rendered him no different than any other criminal who had been convicted and sentenced as a defective delinquent. When the Department of Justice acquired jurisdiction over defective delinquents in 1953, power was granted to that department to "prevent the escape of inmates at all hazards."³⁰⁶

In returning for a moment to the power of the Juvenile Court to commit juveniles to Dallas, it is worth noting the possible alternatives available to a committing judge. After a hearing to inquire into the facts and record of the juvenile, and a determination by the court that the mutual best interests of the child and the state "require the care, guidance and control of such child . . .,"³⁰⁷ the court may issue any one of five orders: The parents of the child may take him back on probation,³⁰⁸ or he may be placed on probation with a good citizen,³⁰⁹ committed to a suitable institution or society for the care of dependent, delinquent or neglected children,³¹⁰ or placed in an appropriate industrial or training school or county institution.³¹¹ If he is over sixteen, he may be committed to any state industrial school designed to treat children of his age.³¹² This last power was added in 1939, two years after the establishment of the State Industrial School at Camp Hill for children between the ages of sixteen and twenty-five³¹³ and it is important because it gives the Juvenile Court power to commit a juvenile to a "home for the reformation and correction of youths above the age of sixteen."³¹⁴ We have already established that Dallas, as Huntingdon before it, is in no way a "home," but is a prison that is not oriented toward the treatment of youths.

In reviewing the powers of the Juvenile Court with respect to commitments to Dallas the following is apparent: Juvenile offenders under

303. PA. STAT. ANN. tit. 19, § 1161 (1964).

304. PA. STAT. ANN. tit. 11, § 261(e) (1964).

305. 182 Pa. Super. 346, 126 A.2d 495 (1956).

306. PA. STAT. ANN. tit. 61, § 542.3 (1964).

307. PA. STAT. ANN. tit. 11, § 250 (1964).

308. PA. STAT. ANN. tit. 11, § 250(a) (1964).

309. PA. STAT. ANN. tit. 11, § 250(b) (1964).

310. PA. STAT. ANN. tit. 11, § 250(c) (1964).

311. PA. STAT. ANN. tit. 11, § 250(d) (1964).

312. PA. STAT. ANN. tit. 11, § 250(e) (1964).

313. *Ibid.*

314. *Ibid.*

sixteen years of age may not be placed with adults.³¹⁵ The only state institution to which the Juvenile Court may commit juveniles is Camp Hill, and the court may not commit a child to that institution unless he is over sixteen.³¹⁶ If the child is under sixteen, he may be sent to a private institution which may be state aided, *i.e.* Glen Mills, or he may be sent to a county training school.³¹⁷ The Dallas enabling act is contained in the code of criminal procedure, and provides that only those who have been convicted of crimes and have been sentenced to a penitentiary or an industrial school may be sent to Dallas.³¹⁸ Juveniles are not deemed convicted and, therefore, are not sentenced. Although Dallas is empowered to receive males from the age of fifteen and up, it seems clear that the Juvenile Court may not commit anyone to Dallas who is less than sixteen. The Defective Delinquent Act does not give the Juvenile Court any authority; only the Juvenile Court Act may increase or decrease the authority of the Juvenile Court. The increase in 1939 which provided for added state industrial schools and homes for children over sixteen,³¹⁹ did not mention Dallas, either specifically or by cross-reference. Furthermore, the 1953 transfer of Huntingdon from the Department of Welfare to the Department of Justice clearly eliminates any possibility of the institution for defective delinquents fitting into the category of a school or home for youths.³²⁰ In retrospect, it is clear from both the rationale and the specific statutory language of the Juvenile Court Act that Dallas is not one of the appropriate institutions to which children before the Juvenile Court may be committed. Such commitments are in excess of the statutory authority of the Juvenile Court and violative of the spirit of reformation and rehabilitation without punishment that are the cornerstones of the Juvenile Court Act. Reality, however, has not conformed to the law.

4. *Release Procedures.* — According to the staff at Dallas, there are about 300 juveniles who have been committed and are currently being housed there.³²¹ What recourse have they for release? In the Spring of 1966, Deputy Attorney General Frank Lawley advised the courts of the Commonwealth that inmates who had been committed to Dallas by order of a Juvenile Court could not be detained beyond their twenty-first birthday,³²² since the Juvenile Court Act continues jurisdiction over the juvenile only until he reaches his majority.³²³ The maximum amount of time, then, that a juvenile may spend at Dallas is six years — from the time he is

315. PA. STAT. ANN. tit. 11, § 249 (1964).

316. PA. STAT. ANN. tit. 11, § 250(e) (1964).

317. PA. STAT. ANN. tit. 11, § 250(d) (1964).

318. PA. STAT. ANN. tit. 19, § 1161 (1964).

319. PA. STAT. ANN. tit. 11, § 250(e) (1964).

320. PA. STAT. ANN. tit. 61, § 542.3 (1964).

321. Interview with staff at Dallas, Nov. 10, 1966.

322. Brief for Appellee, p. 2, *In re Miller*, ____ Pa. Super. ____, ____ A.2d ____ (1966). Based on this recommendation, more than ninety inmates were released from Dallas by President Judge Adrian Bonnelly of the Philadelphia County Court.

323. PA. STAT. ANN. tit. 11, § 254 (1964).

fifteen until he reaches twenty-one years of age. Thus, the section of the Act which permits the continuous detention of an inmate who has not recovered by the time his sentence has expired,³²⁴ is inapplicable to the juvenile, and is unconstitutional under *Baxstrom v. Herold*.³²⁵

Since the juvenile is not deemed convicted or sentenced under the Juvenile Court Act, he may not avail himself of the Post Conviction Hearing Act of 1966.³²⁶ His only remedy for an illegal confinement appears to lie in a writ of coram nobis, a writ of habeas corpus, or a petition for rehearing before the Juvenile Court which committed him.³²⁷ No right to counsel is provided in the Act for a juvenile appearing before a county court, although provision for the representation of juveniles has been made in Philadelphia County through a voluntary program. An attorney or some other person in interest should be available to bring the order of the Deputy Attorney General to the court's attention, as well as the statutory provisions which grant power to the Juvenile Court. If the juvenile is twenty-one or more, he must be released if he was committed as a juvenile. If he is under the age of sixteen, he must also be released according to our reading of the Juvenile Court Act, since the court had no power to make the commitment initially. Furthermore, if our reading of the Juvenile Court Act and its underlying rationale is accurate, no juvenile may be sent to a prison to be treated as a criminal. All commitments from juvenile courts to Dallas are, therefore, illegal and must be terminated.

The section of the Defective Delinquent Act which requires that a recommendation be made by the Board of Dallas with regard to an inmate's recovery cannot properly be applied to a commitment made by a Juvenile Court. To do so would render the section of the Juvenile Court Act which permits a Juvenile Court to make amendments in its orders by virtue of its continuing jurisdiction over the juvenile³²⁸ void. There has been no repeal of that section by the Juvenile Court Act amendments, or by the 1953 amendments to the Defective Delinquent Act. The court, therefore, retains this power and, since it exercises exclusive jurisdiction over juveniles, it can neither give it up, nor have it taken away by an administrative board of the correctional system.

5. *Maryland and Massachusetts Practice.* — In turning briefly to the Maryland and Massachusetts statutes considered earlier in this comment, it is of note that Maryland solves the problem of the juvenile by specifically prohibiting his commitment to Patuxent. The only juveniles who may

324. PA. STAT. ANN. tit. 61, § 541-6 (1964).

325. 383 U.S. 107 (1966); See also *People ex rel. Morriale v. Branham*, 291 N.Y. 312, 52 N.E.2d 881 (1943).

326. PA. STAT. ANN. tit. 19, §§ 1180-1-14 (Supp. 1966). The statute became effective March 1, 1966. Section 1180-3(a) requires that petitioner must have been convicted of a crime.

327. PA. STAT. ANN. tit. 11, §§ 257-58 (1964). The Juvenile Court may always amend its orders concerning juveniles under its jurisdiction.

328. PA. STAT. ANN. tit. 11, § 254 (1964).

be committed are those to whom the full panoply of procedural rights have been afforded in a regular criminal prosecution. The statute specifically states that: "Nothing in this article shall be construed to extend to or affect any case in a juvenile court or in the court of a magistrate for juvenile causes, . . . unless the juvenile court judge shall have waived jurisdiction in the case so that it may be heard and adjudicated in a regular criminal court."³²⁹ The procedural due process provided for by statute for commitment to Patuxent is so great as to nullify any arguments that secret "Star Chamber" proceedings may occur.

Massachusetts sets the minimum age for commitment to its department for defective delinquents at fifteen,³³⁰ and requires that notice of a possible hearing on mental defectiveness be given to the parents or guardians of persons under age seventeen.³³¹ In view of the fact that an individual must have been *charged* with the commission of one of several enumerated crimes before he can be committed as a defective delinquent³³² it is clear that truants or runaways could not be committed under the Massachusetts law. Thus, once again, the only juveniles who appear eligible for commitment under the relevant state statute are those who have been *charged* with a crime in regular court proceedings. If children are not *charged* with crimes in proceedings before the juvenile court, they are ineligible for commitment as defective delinquents.³³³

A brief look at the treatment of the juvenile under the various defective delinquent statutes indicates that only the Pennsylvania statute has serious deficiencies. The young mental defective in Pennsylvania receives little protection from the Juvenile Court, and may literally be committed to Dallas without ever appearing before the judge, since no hearing is required. Furthermore, he is not sent to a school or to a hospital, but to a maximum security prison in the company of adult male prisoners who have committed, in some cases, crimes of violence or serious sexual offenses. The Patuxent Institution, by contrast, is more of a hospital-treatment-oriented institution than a prison, so that even if juveniles do reach Patuxent, it is arguable that their chances of getting treatment and care are much better than they would ever be in Dallas. We are convinced that, in view of the procedural and rehabilitative inadequacies noted above, the present institutionalization of juveniles at the State Correctional Institution at Dallas is unconstitutional, violative of the state statutes, and totally without correctional justification.

329. MD. ANN. CODE art. 31B, § 14 (Supp. 1966).

330. MASS. ANN. LAWS ch. 123, § 113 (1965).

331. *Ibid.*

332. *Ibid.*

333. In New York, commitment to Napanoch, the state institution for defective delinquent males, can only occur if the person is over sixteen and has been convicted of a crime. Juvenile Court authority ends at age sixteen; therefore, no person eligible for the specialized care and treatment of the Juvenile Court may be committed. Robinson, *Institutions for Defective Delinquents*, 24 J. CRIM. L., C. & P.S. 352, 353-54 (1934).

VI. THE NATURE OF THE INSTITUTION

In order to appreciate more fully the constitutional and penological inadequacies of the Pennsylvania State Institution for Defective Delinquents, it is necessary to examine the actual operation of Dallas. The obvious problems inherent in institutionalizing and treating an offender with a physical or mental handicap become all too obvious when one considers Dallas.

The State Correctional Institution is located on a 1,250 acre site six miles south of Dallas in Luzerne County, and is 110 miles from Philadelphia. The institution, which was opened in 1960³³⁴ at a cost of 12 million dollars, is composed of a complex of twenty buildings which have a capacity of 952 inmates. Dallas replaced the old institution at Huntingdon, which had been designated as the institution for the "reception, care, maintenance, detention, employment, and training of defective delinquents" in 1937.³³⁵ As of November 10, 1966, there were 601 inmates — 268 juveniles and 333 adults. Of these inmates, 196 of the juveniles were Negro and 72 were Caucasian,³³⁶ while 250 of the adult population were Caucasian, and 83 Negro.³³⁷ About 239 of the total population came from Philadelphia.³³⁸ The institution is operated by a staff of 297, all of whom are Caucasian.³³⁹ The professional staff includes 2 psychologists, 2 social workers, 1 Classification and Treatment Supervisor, 1 Vocational Adviser, 1 records officer, 1 medical director, a Catholic and a Protestant chaplain, 4 teachers, 1 institutional school principal, and 17 tradesmen instructors.³⁴⁰ The remainder of the staff perform custodial functions. There are no full-time, part-time or consulting psychiatrists on the staff, and there are no clinical psychologists. All personnel at Dallas are civil service employees, except for the Superintendent. The average per annum salaries are 6,900 dollars for teachers,³⁴¹ 9,000 dollars for master's degree psychologists,³⁴² 5,500 dollars for tradesmen instructors,³⁴³ and 5,007 dollars for guards.³⁴⁴

Upon his commitment to Dallas, an inmate is classified for the purposes of housing and work assignment. The aggressiveness of an inmate appears to be the determining factor in making an assignment, although a mechanical aptitude is necessary for certain assignments. Classification for most assignments falls within "light," "medium," and "heavy" categories, depending upon the degree of the aggressiveness of an inmate;

334. PA. STAT. ANN. tit. 61, § 542.2 (1964).

335. PA. STAT. ANN. tit. 61, § 541-1 (1964).

336. Interview with staff at Dallas, Nov. 10, 1966.

337. *Ibid.*

338. *Ibid.*

339. *Ibid.*

340. *Ibid.*

341. *Ibid.*

342. *Ibid.*

343. *Ibid.*

344. *Ibid.*

the mixing of adults and juveniles is not considered harmful. The assignments are divided into six basic skill categories: construction and maintenance skills, agriculture, animal husbandry and forestry skills, mechanical skills, service skills, food service skills, and manufacturing and processing skills. In general, inmates work a five-day week in shops that in many cases are quite ambitious and well run. The inmates in these areas maintain the entire prison and appear to be working to the capacity of their manual and mental skills.³⁴⁵ Schooling is provided for one and one-half hours each day. At one time one-half of the day was allocated for school, but the staff found that the attention span of the inmates made this arrangement unworkable.³⁴⁶

But while the work assignments are an integral part of the institution's program, acquiring a skill is not considered a primary purpose of the program. The aim of the program is to develop an inmate's internal controls and ability to cope with his problems so that he may re-enter society.³⁴⁷ An individual's "attitude" is the main criterion used by the institution to determine his progress and readiness for release. Every eight months each inmate appears before the entire staff for evaluation. No psychological tests are administered, but the individual's overall conduct and his school record are considered. His block behavior, and his relationship with his peers, and the group he works with determine his progress. Regular block reports, which consist of custodians' answers to multiple choice questions, are made to evaluate an inmate's work, general behavior and attitudes. They are filed by all custodial personnel. Each inmate must attain a "Bond of Honor," an award given for proper conduct over a period of time, before he can be considered for release. The release procedure employed is quite analogous to that used in determining eligibility for parole in the normal penal institution. The major difference is one of orientation, since the defective delinquent's problem is that he has not been able to relate to his peers and members of his own group on the outside, whereas the normal offender can easily choose to follow the rules, play the game, and take advantage of "time off for good behavior." The minimum time within which an inmate might achieve Bond of Honor status would be about three months,³⁴⁸ and it is very easy to lose that status for any latent or overt homosexual act. Much of the responsibility for recognizing homosexual tendencies is placed with the custodial force, and there is a place on each block or work report for the evaluation of an inmate's sexual behavior. The staff states that the guards and tradesmen instructors are trained to look for certain types of behavior indicative of homosexual tendencies.³⁴⁹ The Bond of Honor award, and the

345. *Ibid.*

346. *Ibid.*

347. See TEETERS & REINEMANN, *THE CHALLENGE OF DELINQUENCY* 568-73 (1950); Gunzburg, *Vocational and Social Rehabilitation of the Feebleminded in MENTAL DEFICIENCY — THE CHANGING OUTLOOK* 334 (Clarke & Clarke ed. 1958).

348. *Ibid.*

349. *Ibid.*

degree of the Bond awarded, will also govern the wages the inmate is to receive for his work. An inmate who has non-bond of honor status may earn 15 cents an hour, while a #1 class bond holder gets 20 cents per hour, a #2 class holder gets 25 cents per hour, and a #3 class holder gets 50 cents per hour.³⁵⁰

The religious practices at Dallas are purely optional. A chaplain is always on duty and services are held on Sundays for the inmates,³⁵¹ but no one is required to attend religious services, and it is not viewed as a setback to release if an inmate does not attend.³⁵² Frequently, however, release plans provide for contact with some religious authority. The Black Muslims are not permitted to perform their rituals, since the religion is not recognized by the Commonwealth,³⁵³ and several riots have occurred at Dallas in the last few years in which Black Muslim involvement has been suspected.

The physical plant at Dallas consists in part of a maximum security cell block constructed in tiers; solitary confinement is in barred cells, but each cell has an outside window. The upper tier of this block houses the active homosexuals,³⁵⁴ while the lower tier houses persons who were brought before the Behavior Clinic and placed in Administrative Segregation.³⁵⁵ The cells are steel-gray and contain a bed and mattress, a chest of drawers, a sink, a toilet, and occasionally, some shelves. They are very poorly lit and very depressing in atmosphere. There is a leisure area at the end of the block which consists of long wooden benches arranged in a gray cement and cinder-block room. The walls are completely barren, and except for a television that is locked into the wall, one certainly does not experience any feeling of leisure about this room. Dallas also has a medium security block, with cells laid out in the same manner as in the maximum security area, except for the fact that the rooms and corridors have been decorated in some respect. The layout of cells is also the same in the minimum security area and pre-release section, but the leisure room in these areas is larger and contains pingpong tables, as well as television. The inmates in these blocks are less confined, but are still locked into and out of their individual cells. All prisoners eat in the same dining room and are marched to all activities from their respective cell blocks. The officers and staff eat in a separate dining room, but are served the same food as the inmates, which is nutritious and appetizing. The service in the dining room is by the inmates, and the food is prepared by them under the supervision of several outside cooking instructors. General recreational facilities consist of a library, hobby rooms, leisure rooms, movies and a gym for certain sports. Basketball, softball and football are played on an intramural basis, and handball and horseshoes are also available.

350. *Ibid.*

351. *Ibid.*

352. *Ibid.*

353. *Ibid.*

354. *Ibid.*

355. *Ibid.*

The gym is convertible into a movie theatre and movies are shown regularly and on holidays. Dallas also has a well-staffed hospital, but part of the hospital wing has just been converted for the reception of non-defective tubercular patients from other state prisons.³⁵⁶

Visitation by family and people who correspond with the inmates is permissible once every fifteen days, Monday through Saturday, from 12:45–3:45 p.m. and up to four people are permitted to visit at one time. No Sunday visitation is allowed except with written permission of the Superintendent, and then only once every three months. No visitation is permitted at all on Christmas, Easter or July 4 because of the crowding that might result. Visitation by family is very small since Dallas is inconvenient and expensive to reach by public transportation, and also because the families, in many cases, are eager to forget their "Dallas relatives."

The major problem at Dallas appears to be one of orientation. Dallas is correctionally oriented as compared to Patuxent (the Maryland defective delinquent institution) and Napanoch (the similar New York institution), which are psychiatrically oriented. The Dallas concept of the defective delinquent is that he is a criminal offender with an intelligence handicap, and devoid of the type of psychiatric disorders which would require a medical orientation and a staff psychiatrist. One of the outstanding characteristics of the mentally deficient is his inability to verbalize the interpersonal nature of his problems. In view of this fact, the staff at Dallas feel that the intense psychotherapy or analysis a psychiatrist offers is useless, since its effectiveness is dependent upon an ability to communicate.³⁵⁷ It is generally agreed that, at the present time, intense psychotherapy is of little value in treating the defective delinquent. Rather, group therapy is generally considered by experts to be the most effective form of treatment.³⁵⁸ Presently, eighty-six per cent of Patuxent's population are receiving this type of treatment,³⁵⁹ while only 32 out of 601 inmates at Dallas are involved in this type of therapy.³⁶⁰

Patuxent's psychiatric orientation may be attributed to the definition of defective delinquency contained in the Maryland statute. Maryland includes the abnormal as well as the subnormal offender under its statute, while excluding the psychotic individual whose needs would best be met in a mental institution.³⁶¹ Thus, Maryland's view of the defective delinquent tends to associate mental subnormality and mental abnormality. "Up to August of 1965, out of a total of 379 committed patients, 274 had demonstrated emotional unbalance and the remaining 105, . . . exhibited a combination of intellectual deficiency and emotional unbalance."³⁶² No

356. Interview with staff at Dallas, Nov. 25, 1966.

357. *Ibid.*

358. See Gunzburg, *Psychotherapy with the Feebleminded* in MENTAL DEFICIENCY — THE CHANGING OUTLOOK 367 (Clarke & Clarke ed. 1958).

359. Director of Patuxent Institution v. Daniels, ___ Md. ___, ___, 221 A.2d 397, 424 (1966).

360. Interview with staff at Dallas, Nov. 10, 1966.

361. MD. ANN. CODE art. 31B, § 5 (Supp. 1966).

362. Director of Patuxent Institution v. Daniels, ___ Md. ___, ___, 221 A.2d 397, 420 n.11.

inmate was classified strictly as a mental defective. A study of New York's institution for defective delinquents in 1933 revealed that a large proportion of the true defective delinquents were psychopathic as well as defective — abnormal as well as subnormal.³⁶³ Finally, Gunzburg states that "nowadays the existence of neurotic problems in mental deficiency cannot be denied, though they may be overlooked or suppressed."³⁶⁴ The need for further study in this area is certainly of primary importance.

Aside from a proper diagnosis of the problems inherent in mental deficiency, the need for a medical orientation at Dallas is evident in other areas. The search for effective methods of treating the defective delinquent should be a never-ending process. The institution itself is a fairly modern experiment, and yet in many respects the correctional attitude pervades the atmosphere of the institution to such a degree that innovation and experimentation are rare. One of the administrators of the institution informed the authors that "psychiatry has produced nothing new in the past 30 years." When questioned about the possibility of a "half-way house" to assist the inmate in his return to the community, the same administrator candidly informed us that "these men are criminals and we don't lead them by the hand."³⁶⁵

Finally, the composition of Dallas itself speaks of the need for a medical orientation. The staff at Dallas informed us that they consider a certain percentage of the inmates psychotic or mentally disturbed to such a degree that the institution could only tender custodial care for them. In view of the fact that a segment of the population has been committed as a result of sex offenses, the probability of mental problems requiring psychiatric attention increases.³⁶⁶ The Maryland Defective Delinquent Act has been characterized as a law which "represents the growing body of legislation which has arisen to enable the psychiatrist to implement the responsibility of dealing with persons not judged legally insane but recidivists."³⁶⁷ The difference between the Maryland and Pennsylvania statutes is not great enough to justify the great disparity in orientation, treatment, and approach that exists between Dallas and Patuxent.

VII. SPECIFIC RECOMMENDATIONS

A. *A Need for Dallas?*

Having completed our study of the Pennsylvania Defective Delinquent Act, we are convinced that there is a definite need for a specialized institution for the defective delinquent in Pennsylvania. However, it is

363. Robinson, *Institutions for Defective Delinquents*, 24 J. CRIM. L., C. & P.S. 352, 355 (1934).

364. *Op. cit. supra* note 358.

365. Interview with staff at Dallas, Nov. 25, 1966.

366. See, e.g., PA. STAT. ANN. tit. 19, §§ 1166-74 (1964), providing for the specialized commitment of sexual psychopaths under the Barr-Walker Act.

367. Boslow, Rosenthal & Gliedman, *The Maryland Defective Delinquency Law — Implication for the Treatment of Antisocial Disorders Under the Law*, 10 BRIT. J. OF DELINQUENCY 5 (1960).

believed that such an institution should be selective so as to exclude those who can best be dealt with in other surroundings. It should be understood prior to our discussion of the ideal institution that such an institution as we shall propose can only be useful if there are a variety of sentencing alternatives available to committing judges. A judge's choice should not be limited to probation, prison or Dallas, but there should be a flexibility in sentencing alternatives so that individualization of treatment and confinement can be accomplished in the most effective way possible. Dallas should not become a dumping ground merely because there is no other place to send persons who technically fit into the statutory category of defective delinquent. In order to implement any of the recommendations in this paper, it would be necessary to revise the entire penal and correctional scheme of the Commonwealth. The coordination of all state and private agencies with their years of experience and skill in dealing with these difficult and highly specialized problems is a prerequisite to any effective correctional program.

Penology in its most enlightened form seeks to rehabilitate persons who have gotten into trouble with the law and return them to society as useful and productive law abiding citizens. The fact that penal institutions have been ineffective in achieving this objective is evidenced by the average recidivism rate for the "normal" offender of about fifty per cent.³⁶⁸ The percentage of returnees to Dallas is between six and eight per cent.³⁶⁹ Of course, there is no way of knowing what percentage of discharged persons wind up in institutions in other states, or in other correctional institutions in the Commonwealth. Theoretically, a defective delinquent must not remain a defective delinquent, since release is predicated upon his recovery. But recovery, according to the staff, simply means that one has a better than average chance of staying out of trouble because he can now cope with his frustrations;³⁷⁰ it does not mean that he will never again be in trouble with the law.

The factors which contribute to the need for special segregation of the defective delinquent are: (1) the regular probation officer already has too great a case load and cannot provide the extra supervision this individual requires; (2) regular homes for the mentally retarded cannot handle the defective delinquent because they are so overcrowded that, in the interval between request and actual entry, the defective delinquent may get into more trouble, and once admitted, may "contaminate" the non-delinquent inmates; and (3) a regular institution for juvenile delinquents cannot be employed to treat the juvenile who is a defective delinquent because he will be exploited by the brighter children and get into continuous trouble.³⁷¹ In 1930 the federal prison authorities established

368. Interview with staff at Dallas, Nov. 25, 1966.

369. *Ibid.*

370. *Ibid.*

371. Andriola, *Some Suggestions for Treating the Defective Delinquent*, 31 J. CRIM. L., C. & P.S. 297, 299-300 (1940).

a special institution in Springfield, Missouri for mental defectives, as well as psychopaths, psychotics, sexual perverts, and tubercular and other chronic medical cases.³⁷² It was felt that they should be siphoned off from the larger federal prison population because they created problems in the larger institution and were in need of specialized care and treatment. The orientation of this particular installation was medical, and it was staffed almost entirely by Public Health Officers.³⁷³ This attempt, and the attempts in Maryland, Massachusetts and New York which have already been discussed briefly, indicate that there is a place in a state correctional system for a specialized institution. Although it may not be necessary that it be quite as specialized as Dallas, the institution should resemble Patuxent more in the type of inmate which it seeks to treat. In addition, it may well be undesirable to treat some of the people presently committed to Dallas as problems of the correctional system at all. It is hoped that no revisions would occur in this field without a close look at the way the new Mental Health Act³⁷⁴ may facilitate a new approach to the treatment of some of the persons presently incarcerated in the State Correctional Institution at Dallas.

B. Drafting a Constitutional Law

Assuming a new and flexible approach to sentencing existed in the Commonwealth, and various institutional and non-institutional approaches were available to the sentencing judge, what should the statute provide? Without getting down to specific language, there are some things that should be carefully set out to avoid any constitutional attacks:

The definition of a defective delinquent should be drawn in such a way that the age limit for commitment would be between sixteen and twenty-five. It is the feeling of the staff at Dallas that a first-offender who is over twenty-five will receive adequate treatment in a regular penal institution.³⁷⁵ Juveniles who have been adjudicated defective delinquents because of truancy, running away or incorrigibility should be dealt with close to their homes, and not in a large institutional complex.³⁷⁶ This would place offenders who have been convicted of more than one crime of a violent nature against the person into the category ripe for treatment at this new institutional complex.³⁷⁷ The definition of mental deficiency should require the commission of one of several specifically enumerated crimes as a condition precedent to commitment.³⁷⁸ The defini-

372. *Id.* at 301.

373. *Ibid.*

374. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Supp. 1966) (effective Jan. 1, 1967).

375. Interview with staff at Dallas, Nov. 25, 1966.

376. *Ibid.*

377. Tenney, *Sex, Sanity and Stupidity in Massachusetts*, 42 B.U.L. REV. 1, 28 (1962).

378. MD. ANN. CODE art. 31B, § 6(a) (Supp. 1966); MASS. ANN. LAWS ch. 123, § 113 (1965).

tion should also include a ceiling on I.Q. which would serve as a cut-off point. This ceiling should be approximately eighty on the Wechsler-Bellevue scale. However, since intellectual deficiency alone is not a sufficient ground for commitment to such a specialized institution,³⁷⁹ evidence of mental instability should also be required. Thus, a sexual psychopath with an I.Q. of eighty or less who had committed several sexual offenses would be a candidate for commitment to the institution. At the same time, a bottom level of an I.Q. of fifty would eliminate those people from sentence to this institution who are not generally considered responsible in the legal sense and, who would be more suitably cared for in a mental institution that did not have a correctional orientation.

The definition eventually arrived at should not be inflexibly set down in the statute, since literature and experience in the field of psychiatry change rapidly, and the law is traditionally slow in keeping up with definitional changes. It is recommended that the specific crimes be defined by statute, as well as the I.Q. ranges. However, the types of mental instability which will bring a person within the statute should be defined broadly, with a mandate to the Department of Health or Welfare to provide a working definition and the guidelines within which the statute should be applied. Terms such as psychopath and sociopath have little meaning today. Consequently, rather than using catch-all but elusive phrases, it is desirable that administrative guidelines be formulated which would be periodically reviewed by an administrator and serve as mandatory standards for the enforcement of the statute. These definitional aids will assist the examiners in finding the necessary mental instability, and will give the courts and lawyers something against which to check the findings of the examiners. The guidelines should contain not only definitions, but also the tests employed to discover the presence or absence of mental instability. Testing procedures should be uniform throughout the state and in conformity with these standards. There should also be a standing committee of the legislature which would be empowered to periodically review the administration of the defective delinquent statute, as well as other statutes concerned with the operation of the correctional system of the state. Implicit in such a review would be an analysis of the validity of standards set forth by the administrator. This total review procedure should prevent the lodging of too great a discretion in the administrator and, at the same time, allow for flexibility and currency in the use of terms and testing materials in the execution of the statute.

Procedurally, the statute should require that written notice of the pending proceeding be given to the defendant or his guardian, if he is under twenty-one, and that the defendant be afforded a right to counsel, a hearing at which time evidence to challenge the findings of the examining committee may be presented, a right to a jury trial, an opportunity to appeal the finding of defective delinquency, and a right to proceed

379. See notes 94-100 *supra* and accompanying text.

in forma pauperis. This last requirement is essential not only with regard to transcripts and records, but also as an aid in obtaining court-appointed counsel, and a court paid psychiatrist or other medical examiner for the defense. Furthermore, the contents of pre-sentence report should be disclosed to counsel for the State, as well as to defense counsel and the court, and the defendant should be afforded an opportunity to compel the appearance of witnesses, and to confront and cross-examine the doctors who prepared the report. The request to commit the defendant as a defective delinquent should be permitted to come from the state, the court, defense counsel, the defendant, or from the diagnostic and classification center which first receives the convicted defendant for placement in the correctional system. No petition should be accepted, however, unless it states with some degree of particularity the reasons for suspicion of defective delinquency. This will avoid unnecessary delaying and stigmatizing tactics by the state or the classification center.

The examination should be conducted at the institution for defective delinquents, or at another mental health institution, by at least two psychiatrists, or one psychiatrist and one psychologist, and should include psychological testing, a psychiatric interview, a family interview, an examination of the court record, physical testing, including an electroencephalogram, and any other type of inquiry that would aid the administrative staff setting reliable standards. Patuxent has found that a fairly comprehensive examination can be made in ninety days,³⁸⁰ while Massachusetts limits confinement for examination to thirty-five days.³⁸¹ We recommend a ninety day commitment for examination purposes, with a possible extension of thirty days upon request to the court. The initial commitment for examination could occur only if the court were satisfied that a possibility of mental deficiency existed after reviewing the particulars set forth in the petition. If at the end of the ninety day period, the examiners (whose statutory qualification and fees should be clearly established) agreed that no mental instability existed, the defendant would be returned to the court for other disposition of his case. If a finding of mental instability were made within the requisite I.Q. range, the report of the examiners, together with their reasons and conclusions, would be returned to the court, and a hearing convened at which time the report would be presented and subject to challenge. A jury would be convened to hear the evidence, and the members of the jury would be instructed to find a special verdict on the issue of defective delinquency within the statutory standards. There would be a right of appeal from a finding of defective delinquency.

Once a finding of defective delinquency had been made final, the judge would commit the defendant to the specialized institution. The

380. *Director of Patuxent Institution v. Daniels*, _____ Md. _____, _____, 221 A.2d 397, 421 (1966).

381. MASS. ANN. LAWS ch. 123, § 113 (1965).

term of commitment to such institution would be no greater than the maximum provided by law for the specific offense charged. The finding of defective delinquency should guide the committing judge in his imposition of sentence, so that a longer sentence than normal for the crime committed might be fixed within the allowable maximum in order to assure an adequate time for treatment. During the period of confinement in the institution, there should be mandatory review of the defendant's condition every six to eight months, and a written report on his progress should be submitted to the committing court once every twelve months. At least once every year during the period of confinement, there should be a complete retesting of the inmate in order to determine if the status of defective delinquent is still warranted, and at the end of two years, a petition for review of his commitment should lie to the committing court. In no event should the right of habeas corpus be denied if the annual testing indicates that the defendant is no longer appropriately termed a defective delinquent. The release proceeding should be capable of being initiated by the defendant, members of his family or other interested persons, or by the committing court on its own motion, or on the recommendation of the institution itself. The right to counsel and an appropriate hearing should be granted during the release proceeding as well, and the State should be adequately represented.

At the end of a five year period, the institution should be required to consider whether it has done all that it can for the inmate. If it is found that another institution should now take over, assuming release into society is inappropriate, or impossible by virtue of the inmate's unexpired sentence, a recommendation should be made to the court and another disposition made of the inmate's case. Apart from release directly into the community, the alternatives of parole, work-release, half-way houses in the community, and week-end leaves should exist. All of these are designed to test the staying power of the treatment and care which the institutional framework has provided the defendant. A gradual relinquishment of confinement should be attempted in an effort to return the inmate to society on a permanent basis.

The institution for defective delinquents should be under the jurisdiction of the Department of Welfare rather than the Department of Justice. At present, the outlook of the Department of Justice is largely correctional, and not rehabilitative. Progress in adapting techniques and developing programs for this specialized type of offender have therefore been very slow. There is an office of Mental Retardation in the Department of Welfare, and its skill and resources would be critical to the development of adequate treatment facilities and the training of personnel. The Department of Public Instruction could also make a definite contribution to the program, since most of the work in the field of mental retardation has been done in the educational area. Experimentation with new and imaginative forms of treatment, from group therapy to drugs and hypnosis, should be encouraged, since there are no pat answers to

the treatment of the mentally defective. Vocational rehabilitation services throughout the state could be utilized in working out vocational programs which would be meaningful to the mentally retarded or emotionally unstable defendant, and the Parole Board could apply its contacts and know-how with regard to the placement of ex-convicts to aid the defective delinquent. Private agencies should be called upon to create small pilot projects in treatment and rehabilitation. The state should be willing to experiment at all levels to try to solve the problem of the recidivistic offender, normal, abnormal or subnormal. Institutions that have met with success should be coaxed to cooperate in assisting the state in setting up its planning programs. Coordination of all relevant agencies to work on this problem should be the keynote of the approach. Duplication of process should be avoided, but at the same time the expertise of all the appropriate groups should be culled for solutions.

The physical plant and treatment program is left for the experts to develop since we do not pretend to have any adequate answers. Our concern in this paper has been largely that of a lawyer looking at a very poor statute and trying to achieve the underlying purposes of the law within constitutional limits. Within the realm of our capabilities, we have offered some suggestions for change in both the statute and the institution. However, it is the larger aspect of the total correctional system of the state that must be exposed and reviewed if any progress is to be made. Hit or miss approaches to these immense problems are not appropriate. An increase in the rape penalty without some specialized approach in the institution does not solve the problem of recidivism, since eventually the defendant is released. If all that has been done for him in fifteen years is locking him up, the probability that he will soon be in front of a judge again is great, and imposing a sentence of from one day to life will not rehabilitate this prisoner if he is still treated no differently than the normal offender. Borrowing statutes from other states without reference to what is practicable in our own, as was the case with the Barr-Walker Act, is dangerous, since another penal system may operate under a totally different approach. Much can be gained, however, from the study of the approach taken to these problems in other states, and even other countries.

The Office of the District Attorney of Philadelphia has submitted several proposals for the revision of Pennsylvania's Defective Delinquent Act, which we have examined, in their preliminary stage. The District Attorney's proposals parallel our own recommendations in several respects, but there are also several areas in which we are in disagreement. The District Attorney's report speaks of a chronic criminal who is "dangerous to society,"³⁸² and requires the conviction of a crime against the person and a finding of mental defectiveness as a prerequisite to commitment. The problem arises with the use of the word "dangerous," since it is very

382. PHILADELPHIA DISTRICT ATTORNEY, PRELIMINARY REPORT ON PROCEDURES FOR DEFECTIVES 4 (Oct. 17, 1966).

difficult to define or to measure a person's dangerousness in advance. Conviction of a crime may indicate that an individual was dangerous on the day when the crime was committed, but it is virtually impossible to make a determination that he is going to be dangerous for a potential period in the future. There are a few projective tests that can adequately predict the future aggressive behavior of "normal" offenders,³⁸³ but they are meaningless when applied to the mental defective, since they generally require that the subject of the test be able to think abstractly.³⁸⁴ Thus, this requirement of dangerousness would make the statute vague, not subject to proper measurement, and possibly void under constitutional guidelines. The same problem arises under the release procedure contemplated by the District Attorney's Preliminary Report,³⁸⁵ since release can only be had upon a recommendation of the institution that "the inmate is no longer a chronic criminal dangerous to society . . ."³⁸⁶ or upon such a recommendation made by the court after complete psychiatric testing in either case.³⁸⁷

Another problem with the Report arises from the fact that it distinguishes between mental defectiveness coupled with dangerousness and mutual defectiveness without dangerousness. A dangerous mental defective who is convicted of a serious crime would be sentenced from one day to life, while a non-dangerous mental defective would be committed as a normal offender unless the committing judge were of the opinion that his particular defect required a longer institutionalization.³⁸⁸ In addition, release of a non-dangerous mental defective would be conditioned on his passing a battery of psychological tests sixty days before his sentence is up. If the tests show that he will not be able to function on his own in the community, he may be committed to the Department of Welfare under the Mental Health Act.³⁸⁹ Consequently, a non-dangerous mental defective gets a possible life commitment to a mental institution after he has served his term, while another inmate who is not mentally defective cannot be examined at the expiration of his sentence for commitment to a mental health institution, even though he may be potentially more dangerous. This proposal appears to work the same inequality of treatment which is subject to constitutional attack.³⁹⁰ Patuxent specifically excludes commitment to its institution once a sentence has expired,³⁹¹ and *People ex rel. Morriale v. Branham*,³⁹² casts serious doubt on the validity of the

383. See notes 116-22 *supra* and accompanying text.

384. See section III *supra*.

385. *Supra* note 382, at 5.

386. *Ibid.*

387. *Ibid.*

388. *Supra* note 382, at 6.

389. *Ibid.*

390. See, e.g., *Baxstrom v. Herold*, 383 U.S. 107 (1966), 12 VILL. L. REV. 178 (1966).

391. MD. ANN. CODE art. 31B, § 6(c) (Supp. 1966).

392. 291 N.Y. 312, 52 N.E.2d 881 (1943).

proposed procedure. Furthermore, it is questionable that once the sentence is ended, there is any continuing crime which can form the basis of an involuntary commitment to a mental health institution. Of course, our analysis of this proposal is with the knowledge that it is a preliminary one. What has been said above is a reaction to the possible difficulties that arise from the proposal in its initial stages. The final draft may eliminate what are deemed the undesirable features.

In summation, one should be mindful of the dangers to society resulting from mentally disturbed or mentally defective offenders, and aware that an attempt must be made to reduce the recidivism rate of all offenders and to make our correctional system the most effective possible. At the same time, constitutional guarantees must not be ignored. Having dealt extensively with the pre-conviction area of criminal prosecution, the Supreme Court is now faced with a number of post-conviction challenges. In drafting any future legislation, there should be an attempt to achieve that measure of procedural due process at all stages of the proceedings which will make the statutory scheme invulnerable to constitutional attack. It is by doing what is fair, and not merely providing for minimum safeguards that such invulnerability will be insured. The Maryland statute granted procedural due process from the outset, was tested many times, and is still being tested in the state and federal courts. The Pennsylvania statute has provided no procedural protections and met little attack before the recent furor over the "forgotten men." The Maryland statute has been upheld several times in recent years; if and when the Pennsylvania statute is subjected to a proper constitutional attack in the courts, it should be struck down. Hopefully, the legislature will have seen the handwriting on the wall, and will move soon to correct the inequities which are rife throughout this statutory scheme.

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