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Retarded adult offender in the legal process

John T. Brueggemann

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THE RETARDED ADULT OFFENDER
IN THE LEGAL PROCESS

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by

John T. Brueggemann

A RESEARCH PAPER
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REQUIREMENTS FOR THE DEGREE OF
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CHAPTER I

INTRODUCTION

The retarded citizen living in the community today is a small minority with a unique problem. He lives in a society geared for people different from himself. Laws, morals, and living standards are norms made available to the understanding of the average citizen. However, the retarded person is not an average citizen. He is, by definition, of below average intelligence. These norms of our society are, then, not generally aimed at the retarded citizen. Therefore, he often does not understand them and, in some instances, acts contrary to them.

Problem

It is understandable, then, that a retarded citizen may, indeed, have the tendency to act contrary to a law or accepted standard of behavior as he attempts to operate successfully in an alien society.

When he does break the law, he becomes known as the "mentally retarded offender". This paper will attempt to examine a number of problems facing this mentally retarded offender:

1. When arrested, what happens to him under the law?
2. Does he receive special treatment because he is retarded, and if so, is it better or worse treatment?
3. If he is given preferential treatment, is it fair or discriminative?
4. Why should he or should he not receive special consideration?
5. What is best for him and, ultimately, what is best for society?

Justification

In today's progressive society, much emphasis is being put on the better education and upbringing of the retarded child. Behavioral programs, drugs, parent education, and normalization programs are but a few of the many areas of recent interest and emphasis. Yet when the retarded person becomes an adult, the emphasis and interest seem to wane. When focus is put on a small subgroup of the minority adult retarded population--the retarded offender--interest, research, and progress seem almost to disappear. Even though a retarded adult may be "normalized", it seems there should be help accessible to him when needed, as in the case of a retarded offender. There must be programs, facilities, and philosophies available to assist the retarded offender as a recognized component of society. At present, it appears there is little being done in this direction.

Limitation of Study

This research will deal specifically with the adult retarded offender. Juvenile retarded offenders are dealt with in too many different ways and mixed with regular juvenile delinquents too often to allow a clear understanding of the specific problems and possible solutions that this paper wishes to deal with. Mentally ill, criminally insane--both are entirely different from the retarded lawbreaker and will not be discussed in this paper. Only laws, practices, and traditions pertaining to the retarded offender within the confines of the United States, its legislative, judicial, and enforcement agencies will be discussed or examined.

Definition of Terms

Within the confines of this paper, the term "offender" will refer to a mentally retarded adult who has broken a relatively serious civil law, unless otherwise designated.

Summary

This paper will deal with the retarded adult criminal offender. Focus will be put on the legal processes involved and how adequately they deal with the retarded offender. This paper hopes to illuminate what has been done in the past in dealing with this problem, what is being done now, and what should be done in the future.

CHAPTER II

REVIEW OF LITERATURE

Introduction

For many years, retardation and crime were believed to walk hand in hand, implying that if a retarded person were left to his own devices, he would inevitably commit a crime. Conversely, it was suspected that anyone who would commit a criminal act against society must be, in some degree, retarded or "subnormal". This concept has now evolved full-circle to the reverse, with many sources suggesting that mental retardation bears no causal relationship to crime.¹ As a result, most of the laws used for the retarded citizen are specifically meant for the mentally ill or criminally insane, with no mention of the mentally retarded, per se.

To better examine the problems concerning the retarded adult offender, the issues will be collected under two main categories. The first category will emphasize the identification of an offender as being retarded. This heading will include eventual discussions on (1) competency to stand trial, (2) responsibility for a crime, (3) insanity pleas, and (4) criteria for establishing retardation. The second category will concern itself with the disposition of the offender both on a short term and a long range basis.

¹Richard C. Allen, "The Retarded Offender: Unrecognized in Court and Untreated in Prison," Federal Probation 32 (1968):22.

Entry Into the System

Initially upon apprehension, the retarded adult is at an immediate disadvantage, being unfamiliar with common police procedures and expectations. Weihofen describes the retarded adult in custody as a confused person, unsure of himself or his rights under the law. He may be unable to make rational decisions in his own behalf. Weihofen continues:

The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. The retarded person may be hard put to distinguish between the fact and the appearance of friendliness. . . . Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. . . . It is unlikely that a retarded person will see the implication or consequences of his statements in the way a person of normal intelligence will.¹

Unfortunately, this type of confession can and is being used for conviction, as witnessed by Allen's study for the Institute of Law, Psychiatry and Criminology. In a selected sample of fifty-one prison inmates later judged retarded, he found that a confession similar to the conditions described above was obtained from all but one of the inmates who had not pleaded guilty; virtually all were represented by counsel, and yet at only three of the trials was the admissibility of those confessions objected to. He indicates from his findings that evidence of retardation is rarely noted on the issue of admissibility of a confession.²

Ignoring, for the moment, a confession of this sort, the offender can continue in the justice system through one of two routes. His retardation or "mental disability" may go undetected, in which case he will proceed through the normal criminal process and, upon conviction, re-

¹Task Force on Law Report, (1963), p. 33, cited by Richard C. Allen, "Toward an Exceptional Offenders Court," Mental Retardation 4 (February 1966):4.

²Allen, "Offender Unrecognized," p. 26.

ceive whatever sentence is appropriate for the normal offender, be it prison or probation. His mental deficiency may be recognized, however, and used in his defense. He may plead incompetent to stand trial or insanity. A ruling of incompetency to stand trial postpones a trial until that time at which the defendant is judged competent. A ruling of insanity, on the other hand, ends the trial forever. Both decisions would send the defendant to an institution for some period of time. These decisions are arrived at through the results of a variety of mental tests and examinations submitted to the judge.¹ These pleas and their implications will be discussed more thoroughly later.

The Incarcerated Offender

It is difficult to do empirical research on the retarded offender entering the justice system. He is not easily recognizable and is often quickly absorbed back into society without notice. Only if he continues through the system will he perhaps be recognized, and then he is an admittedly biased and selected subgroup of his already small minority.

Prison populations, on the other hand, provide a more tangible subject to study. While being a biased sample limited to those people who are incarcerated, it does provide a genuine view of those criminals who can be judged retarded and who have made it through the criminal justice system undetected or, at least, unaided in their special needs. A number of studies and reports have been made in the recent past, examining the prisons' retarded population. Percentages of prison population ruled retarded have ranged as low as one percent to as high as twenty-four percent

¹Robert L. Marsh, Charles M. Friel, and Victor Eissler, "The Adult MR in the Criminal Justice System," Mental Retardation 13 (April 1975):23

in some states. Special accommodations can range from "none" to "satisfactory".

An inherent danger in the study of a large variety of prison personnel records from around the country is the anticipated disparity in psychometric procedures, local standards, and overall integrity of the institutional records. Allen found, however, that in actuality this danger is not as prevalent as one would expect. In a three year study of the operation of civil and criminal laws which affect the mentally retarded and his family, done for the Institute of Law, Psychiatry and Criminology, six adult correctional institutions in six different states were chosen for examination. Each had reported inmates with IQ's below 70. A random sample of these low-IQ inmates selected and retested by a special team. Allen reports that the new test results concurred quite accurately with the original scores obtained at the prisons through a variety of means. The mean IQ of the retest of the fifty-one inmates sampled was 66.0, compared with a mean IQ of 62.4 on the original institutional testing.¹

Prevalence statistics depend on many contributing factors. Location, accuracy, and integrity of institutions and examiners all affect the figures, with examiners' own standards being perhaps the most dangerous. While an IQ below 70 has generally been the standard workable definition of retarded in recent studies, other standards are also being used which tend to distort comparisons. For example, the Brown and Courtless survey,² using below 70 IQ as their standard, found that the

¹Allen, "Offender Unrecognized," pp. 23-24.

²Bertram S. Brown and Thomas F. Courtless, "The Mentally Retarded in Penal and Correctional Institutions," American Journal of Psychiatry 124 (March 1968):52.

number of retarded adults present in the prison population was 9.5 percent. A Texas Department of Corrections survey, using the same standard, found a 7 percent retarded population.¹ Yet in 1972, a report to the President apparently quoting Federal Bureau of Prisons statistics, claimed that ". . . the percentage of mentally retarded inmates is less than 1 percent of the total population in the prisons"² Care, obviously, must be taken to examine all data judiciously.

Of the various local and national surveys and studies, the most definitive to date appears to be the previously mentioned Brown and Courtless survey. With study beginning in 1963, questionnaires were sent to all correctional facilities in the fifty states and the District of Columbia, excluding only such facilities as the temporary detention centers, city jails, and workhouses. This amounted to 207 institutions contacted with a combined total population of 189,202 as of December 31, 1963. A wide variety of questions was asked, ranging from IQ distribution to special facilities available. Brown and Courtless cautioned the reader of the already discussed variable of "testing procedures". They found that while seventy-five percent of the institutions responding used the Wechsler Adult Intelligence Scale, there were a total of twenty-three different tests used that were administered by everyone from a trained psychologist to prison inmates themselves.

Partial and complete replies to the questionnaire were received from 174 institutions, representing eighty-four percent of the total. IQ information was returned on 90,477 inmates, or ~~forty~~eight percent of the

¹Michael Kindred et al, eds., The Mentally Retarded Citizen and the Law (New York: The Free Press, 1976), p. 659.

²The President's Committee on Mental Retardation, Report to the President on Federal Programs for the Retarded (Washington, D. C.: Government Printing Office, 1972), p. 139.

total prison population. Field workers were then sent to one institution in each of five states where figures indicated inmates with below 70 IQs. Interviews, examinations, and retests were then conducted with these inmates.

It was found that 9.5 percent of the prison population fell into the below-70 IQ range. 1.6 percent, or 1454 inmates, fell below the 55 IQ level. The percentage of retarded adults in the prisons varied greatly between geographic regions. For example, the Mountain States--the Utah to Montana area--recorded only 2.6 percent of the prison population to be below the 70 IQ level, while the East South Central States--the Kentucky-Tennessee area--reported 24.3 percent to be below that level. Brown and Courtless contend that these variances coincide with similar variances in the intelligence in the general population of these areas.

Concerning the offenses of the retarded inmate, Brown and Courtless made a follow-up study of those in the below-55 IQ group. They found that approximately fifty-seven percent of these people were imprisoned for crimes against the person, including homicide, assault, and sexual offenses. This compares with twenty-seven percent of the non-retarded inmates. Of this below-55 IQ group, more than fifteen percent were committed for homicide alone, opposed to a normal percentage of 5.1.

As far as special help or special facilities available to the retarded offender at these penal institutions, fifty-six percent of those responding had no specialized programs. Only six institutions (4.5 percent) reported to be providing a full program for the retarded. Brown and Courtless point out that perhaps the problem here lies with the lack of mental health manpower available. They report that of 160 institutions housing 146,662 inmates, only fourteen full-time psychiatrists and eighty-two full-time psychologists are employed. Brown and Courtless describe

questionnaire responses concerning this issue: "Administrators indicated that they faced a complex ethical and administrative problem; retarded inmates require constant and individualized staff attention, which is not readily available because staffing is already stretched to the limit."¹

Marsh, Friel, and Eissler suggest a different, more primary approach to the prisons' problems. In reviewing a study done by the National Survey of Corrections, they point out that while the general population has a median education achievement level of 10.6 years, the inmate population has a median of 8.6 years. Further, they found that "the incidence of inmates with no vocational skills was five times as high as the national average . . . ninety percent of the nation's inmates were earning less than five thousand dollars a year as compared with only fifty-six percent of the general population who fell within the same income level."² The implications of these findings to the retarded offender will be discussed more extensively later.

Summary

Finding empirical evidence of the retarded adult offender in the criminal justice system, then, is not an easy task. Upon entering the system his characteristics are so varied that a strict set of identifying standards would become cumbersome and ineffectual. Thus, local interpretations and practices continue to obscure any consistent statistical evidence of his existence. Once in the prisons, of course, the damage to the retarded citizen has been done. In the prisons, however, the retarded offender can be more accurately examined, as can the prison's response to his needs. Such studies are being initiated, but they are

¹Brown and Courtless, pp. 50-53.

²Marsh, Friel, and Eissler, p. 21.

only the first small step in what is presently an elusive yet important subject. Brown and Courtless, in a review of literature prior to their famous study concurred:

. . . there are currently available little or no systematic data about the prevalence of mental retardation in the antisocial population of the United States. There have been few serious attempts to ascertain numbers of retarded in our criminal and delinquent populations or to determine something about the offense patterns and management and treatment problems of the offender group.¹

¹Brown and Courtless, p. 50.

CHAPTER III

EXAMINATION AND DISCUSSION OF THE PROBLEMS

Legal Processes

A hypothetical example will be used to illustrate the problems a retarded offender may encounter in the legal system. Presuming the retarded offender has been apprehended for a crime that is too serious to dismiss, he must stand trial. A number of things may happen. If his mental deficiency goes undetected, he will proceed through the courts as a normal criminal. This can entail a trial about which the offender may have no understanding. The President's Panel on Mental Retardation warns:

The mentally retarded defendant . . . even though telling the truth, may be incapable of giving the impression of doing so because he is easily confused under the pressure of an effective cross-examination. Thus, he might be discredited in the eyes of judge or jury--or worse, be induced to testify untruthfully.¹

A trial is a new and confusing experience for the retarded person. He is unsure of what is expected of him and, most likely, unable to assist in his own defense. Such a state of mind and understanding would lead one to believe that there must be alternatives for this offender, and these alternatives will be discussed later. Too often, though, the retarded offender is not recognized and these alternatives cannot be implemented. There are a number of reasons why this condition may remain undetected or unacted upon. Strange as it may seem, authorities might

¹Allen, "Offenders Court," p. 25.

not recognize the individual as having a mental deficiency. It is also possible that officials show an indifference or insensitivity to the condition, considering it a nuisance. Due to the irregularity of such a case, officials may be unsure of the proper legal procedures involved. Officials also may question the appropriateness of the final disposition of the person if he is judged retarded.¹

Nevertheless, supposing his condition goes undetected, he will be tried and, most likely, convicted. He must then face sentencing, and history assigns him a dim future in this area. Findings report that only one percent of all people arrested are ever remanded to a state correctional institution, and of that one percent there is a disproportionately high percentage of low-intellect people.² The National Survey on Corrections has reported that three out of five convicted criminals receive probation rather than prison.³ Probation is usually offered to a person who has or can find a steady job. The low-intelligence offender is going to be less likely to have a job or marketable skills, and therefore less likely to gain probation.⁴ Chances are the retarded offender will go to jail and make up part of Brown and Courtless' 9.5 percent of the prison population,⁵ which is more than three times that of the estimated retarded minority in the general population.

Returning to the beginning of the hypothetical example, the retarded offender has been apprehended and his mental deficiency has been

¹Allen, "Offender Unrecognized," p. 25.

²Marsh, Friel, and Eissler, p. 22.

³Ibid.

⁴Ibid.

⁵Brown and Courtless, p. 52.

recognized. A number of legal avenues can be taken. (At this point, a short discussion of the legal alternatives available to him seems necessary. Effort will be made to avoid a lengthy examination of the legal implications, philosophies, and accompanying "jargon", all of which are not within the scope of this paper. Rather, a brief overview should adequately assist the reader in a better understanding of the retarded offender's dilemma.) He can plead "not guilty by reason of insanity."

This is in accordance with the "M'Naghten Rule of 1843" which lists certain criteria to be met:

. . . it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹

Basically what must be judged is the defendant's ability to distinguish between right and wrong and to be able to realize what he was doing at the time. While this is more specifically for the mentally ill, it is often applied to the mentally retarded. Such judgment of insanity must be decided by various psychiatric test reports submitted to the judge. If a defendant is ruled insane, he is remanded for treatment to a mental health institution and the case is closed.

The retarded offender can also be judged "incompetent to stand trial". This concerns the defendant's state of mind at the moment. The defendant must be competent at the time of his trial to assist his lawyer in preparing the case and in his own defense.² Again, psychiatric testing will decide his competence. If ruled incompetent, the

¹M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718, cited by Philip L. Browning, ed., Rehabilitation and the Retarded Offender (Springfield: Charles C. Thomas, 1976), p. 55.

²Ibid., p. 56.

accused is remanded for treatment to a mental health institution until that time when he is again competent to stand trial. The trial is suspended until that time.

The danger in these two pleas is apparent. Both result in disposition to a mental health institution for an indeterminate amount of time. The retarded offender may languish here forever. Too often this type of commitment resembles a "passing of the buck" attitude. Authorities do not know what to do with the unique retarded offender, so they send him away. The doctrine of incompetency may excuse the retarded offender from the ordeal of a trial and the possible stigma of a conviction, but it may also release him to a long journey of anonymity.¹ Often, commitments become well longer than any prison term the defendant would have been required to serve. Allen points out that these retarded offenders are not remanded to a special facility designed for the retarded, equipped with special personnel and specific programs for the retarded. Rather, they are put into facilities designed for the mentally ill, and these are too often merely custodial. Allen continues:

Under some laws, lengthy commitments--indeed commitments for life--may follow the commission of minor offenses, without the necessity of a finding of potential dangerousness. Some combine psychopaths with retardates--which, since the former are, perhaps, the most exploitative, and the latter the most easily subject to exploitation in our society, makes about as much sense as grouping rabbits with weasels on the grounds that both are small furry animals. And finally, few provide for significant differential treatment.²

¹Bruce J. Ennis and Paul R. Friedman, eds., Legal Rights of the Mentally Handicapped, 3 vols. (Practising Law Institute, 1973), 2:1109.

²Allen, "Offenders Court," p. 5.

Dilemma of the Institutions

Society provides various facilities to serve exclusively the mentally ill, the mentally retarded, and the normal criminal. But to overlap these fields, as the retarded criminal does, leaves one without adequate accommodations. Brown and Courtless succinctly state the problem:

Mental hospitals claim such an offender [the mentally retarded offender] is not mentally ill; the traditional institutions for the retarded complain that they do not have appropriate facilities for the offender . . . correctional institutions would like to remove such persons from their populations on the grounds that programs available in the correctional setting are totally inadequate and in many cases inappropriate for application to retarded persons.¹

Mental health institutions, then, feel the retarded offender is an unnecessary imposition on their facilities. Retarded institutions likewise do not want the criminal offender for fear of the consequences. They feel that they are not equipped to handle the retarded criminal. Davies quotes an institution superintendent:

[He] compared the difficulties of housing defective delinquents with average patients, to introducing gangsters into a kindergarten. A few of these difficult ones can terrorize a whole ward, disrupt routine, and exhaust the staff. State schools are not organized for dealing with this type, being planned for large numbers of relatively mild defectives, more amenable to socialization.²

The correctional institutions, as mentioned earlier, usually have no special facilities or accommodations for the retarded offender. Brown and Courtless refer to the retarded offender as now being "doubly disadvantaged". Initially, due to his mental deficiency, the person was disadvantaged in adapting to a normal society and then, once an offender, he is disadvantaged by his rejection from the various institutions and

¹The Mentally Retarded Offender, 1967, cited by Frank J. Menolascino, Challenges in Mental Retardation: Progressive Ideology and Services (New York: Human Sciences Press, 1977), p. 190.

²Stanley P. Davies, The Mentally Retarded in Society (New York: Columbia University Press, 1959), p. 72.

the lack of proper facilities for him.¹

Summary

The retarded offender, at present, has virtually no where to go. He seems to be trespassing on everyone else's property. He has no special facilities to speak of, and no special programs. A number of reasons have been suggested as to why special consideration and special facilities have not been established. These include lack of specialized manpower, lack of alternative community resources, lack of coordination among agencies and, perhaps most delaying of all, the professional disagreement on the best methods for the rehabilitation of the retarded offender.² What changes can and are being made will be discussed in the next chapter.

¹Brown and Courtless, p. 54.

²Kindred et al, p. 673.

CHAPTER IV

COMMENT IN CONCLUSION

The identification and disposition of the retarded offender has long been a neglected facet of criminal justice and it promises to continue as an inept aspect of the system for some years to come. Nevertheless, the doors to change are finally opening. With the new awareness of the mentally retarded as a contributing citizen, public pressure is precipitating new programs, new facilities, and new philosophies.

Prevention deliberately has not been mentioned in this paper because it involves too many areas beyond the scope of this research. Special mention must be made here, however, to include an additional prevention concept. Special education must purposefully inform the retarded student about law enforcement, the justice system, and options and assistance available to him in the event he is arrested. Identification of the retarded offender as such will continue to be a difficult task, and any information or assistance the accused can volunteer in his behalf will be helpful to all involved. His better understanding of the procedures involved and their possible implications can only increase the effectiveness of the law.

While a universal standard of criteria to identify an offender as retarded would be convenient, it is, practically, very unwise. Too many varieties of symptoms combined with too many causes of deficiency make

labeling a precarious task in any aspect of retardation.¹ To label capriciously is itself criminal in that it may be consigning someone to a long and unjust commitment. Perhaps the best the system can do at this point is be more alert to the problem. Law enforcement personnel must receive special training to aid them in recognizing and identifying the retarded offender. Caution must be exerted at all levels of the system to ensure proper identification and subsequent disposition. IQ scores will not be the standard for judgment as it has in the past. Rather, comprehensive study and examination of each individual case on its own merits should be the practice.²

Perhaps the most provocative and debated concept for dispensing justice to the retarded offender has been offered by Allen. He suggests a special court, an "exceptional offenders court", in somewhat a similar vein as our present juvenile court system. The arguments on both sides of this concept are too numerous to mention here. The concept itself, however, is interesting and unique enough to warrant a brief description here. Allen suggests that, just like the juvenile court, the exceptional offenders court would be concerned with persons who are inadequately equipped to meet certain responsibilities of adulthood. The court would emphasize the welfare of the retarded person, rather than establish punitive sentences. He contends that, despite these similarities, the retarded offender should not be absorbed within the juvenile court since the retarded adult has different needs from the juvenile. This court, he feels, should have complete power to assume wardship over the offender if need be. Proper disposition should be made after all factors have

¹Menolascino, p. 191.

²The President's Task Force on the Mentally Handicapped, Action Against Mental Disability (Washington, D. C.: Government Printing Office, 1970), p. 11.

been considered in a setting less formal than a regular courtroom. Rather than being restricted to certain judgments and sentences, the judge would have the autonomy to rule in the best interests of each individual. While this system, like most others, has its weaknesses, it must be entertained as a positive move in the right direction.¹

The disposition of a retarded offender offers the next field of progress. As has been previously mentioned, existing facilities are inadequate and inappropriate for the retarded offender.² Davies suggests a special segregated facility in each state to accommodate the retarded offender.² A report from the President's Committee on Mental Retardation cautions that such specialized facilities might be impractical due to the relative scarcity of retarded offenders to regular offenders.³ Menolascino suggests early intervention with halfway houses for the young offenders, to aid in identification and subsequent treatment and supervision.⁴ Ferrell et al point to improved conditions and treatment within existing institutions as a possible "therapeutic" way to rehabilitation.⁵ Duncan, Pennsylvania Deputy Commissioner for Mental Health, emphasizes the inevitable shortcomings of the institution:

The institution has limited capabilities for providing intensive care and treatment. Its major function has been and still remains a custodial one. Where comprehensive community-based systems exist, the courts should become aware that these are available for their

¹Allen, "Offenders Court," pp. 5-6.

²Davies, pp. 79-80.

³President's Committee on Retardation, p. 139.

⁴Menolascino, pp. 191-192.

⁵C. Richard Ferrell et al., "Influence of a Therapeutic Community on Behavior and Adjustment of Defective Delinquents," Mental Retardation 7 (1969):6-9.

use and provide a more effective means of helping people in times of difficulty.¹

While all of the above suggestions obviously contain some degree of merit, it can be inferred that no one program is the answer. Rather, a combination of these and other suggestions might better meet the needs of the diverse retarded offender. The President's Committee on Mental Retardation has, in its recommendations, perhaps the most intelligent, all-encompassing statement concerning the disposition of the retarded offender:

There has been too little scientific study done to permit decisions on what types of programs will be most effective in habilitating retarded offenders. Some individuals may best respond to correctional or penal handling; others will require some form of mental hospitalization; still others may be appropriately handled in training schools for the mentally retarded. Institutional programs for the retarded, especially in the areas of special education and vocational training, require considerable attention. A wider range of alternative programs should be available, including group therapy and counseling services, and qualified educational personnel must be attracted to correctional work so that needed programs can be offered.²

The questions remain then: In whose best interests are any special considerations that may be arranged for the retarded offender? And why should the retarded offender be exempted from the law?

It has been proposed in this paper that the retarded offender is not "exempted from the law" but rather "accommodated under the law". It can be argued that the mentally retarded offender is not receiving equal treatment under the law due to his mental disability. Therefore, adjustments need to be made to ensure fair and equal treatment. Also, such mental deficiency might limit the jurisdiction of a criminal law that requires establishment of intent to commit a criminal act and subsequent punishment as a deterrent to further crime. It can be argued that a

¹Ennis and Friedman, 3:1327.

²Kindred et al, p. 674.

mentally retarded person may be incapable of forming a "rational" intent to commit a crime. The value of incarceration of the offender as a deterrent can also be questioned in light of the retarded offender's apparent indifference to such a threat. Brakel and Rock concur:

The traditional rationale of the criminal justice system further recognizes that punishment of a mentally ill (and thus nondeterrable) offender does not help to deter other persons in the community from behaving similarly . . . In addition, rehabilitation of the mentally disabled offender cannot generally be accomplished merely through long term incarceration.¹

In whose best interests? Like everything else in this world, these proposed special considerations can and will be abused, both by the offender and the authorities. In such cases, only narrow, personal interests are being served. If, however, these special considerations are implemented intelligently and honestly, in the spirit in which they are devised, they will be in everyone's best interest. Proceedings and placements can be administered more humanely and rehabilitation can progress more effectively. Allen underlines the long range benefits:

To follow such a course is both humane and an effectuation of the legal concept of 'equal justice'. But it is more than that. While the retarded prisoner is perhaps more easily apprehended and convicted, and is certainly confined for longer periods than offenders of normal intellectual capacity, he is eventually released. Thus it is no less than the enlightened self-interest of society that should demand that the mentally retarded prisoner be recognized as such, and that his confinement be rehabilitative rather than merely custodial.²

Society is the ultimate winner.

¹Samuel J. Brakel and Ronald S. Rock, eds., The Mentally Disabled and the Law (Chicago: University of Chicago Press, 1971), p. 377.

²Allen, "Offender Unrecognized," p. 27.

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