

HUMAN AND LEGAL RIGHTS OF MENTALLY RETARDED PERSONS

PAUL R. FRIEDMAN

Traditionally, mentally retarded people have been treated as second-class citizens under our legal system. Lawmakers, judges, and most of the public, being poorly informed of the facts, have tended to view retarded persons as somehow less fully human than themselves and therefore not entitled to equal citizenship status.

In the past — and still, to an unfortunate extent — mentally retarded people in our society have suffered denial or infringement of a wide range of basic rights. Those who are confined to institutions necessarily suffer infringements on their fundamental right to liberty and on many other constitutional rights that depend on liberty, such as the right to travel, the right to free association, and the right to privacy. Once committed to an institution, mentally retarded people are often subjected to other deprivations as well, including denial of their right to medical treatment, to habilitation, to education, to autonomy, to privacy, and to sexual expression. Often they are denied even the right to protection from harm.

In the community, mentally retarded persons are also too frequently deprived of fundamental rights enjoyed by "normal" citizens, including the right to education, to enter into a contract (to marry or even to buy a television set "on time"), to be licensed (for such diverse activities as selling real estate or being a beautician), to buy insurance, to vote, and to be free from discrimination in securing suitable employment and housing. Discrimination against mentally retarded people may deprive them of virtually all of their legal rights.

Paul R. Friedman is Managing Attorney, Mental Health Law Project, 1220 Nineteenth St., N.W., Washington, D.C. 20036.

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The plight of mentally retarded persons in the criminal justice system is perhaps even more desperate. Regardless of guilt, mentally retarded suspects often confess to crimes because they are particularly vulnerable both to threats or inducements and to a desire to please. Moreover, a mentally retarded suspect who is charged with a crime often cannot understand the charge, cannot tell his side of the story, and cannot help his lawyer defend him. If, as often happens, no one realizes he is mentally retarded, his chance for a fair trial is gravely hindered. If convicted and confined, the mentally retarded person is often a prey for other inmates and is usually denied the opportunities for education and habilitation that would allow him to conform to socially required norms in the future.

An important step was taken toward recognition that the mentally retarded person is entitled to basic human and constitutional rights when the United Nations General Assembly adopted the Declaration of the rights of mentally retarded persons (1971). Under this declaration, the mentally retarded person is given the same rights as other human beings "to the maximum degree of feasibility." He is also given the rights to "proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential," and "to protection from exploitation, abuse and degrading treatment."

In the years since this declaration, lawyers and other advocates representing mentally retarded and other mentally handicapped persons have made a systematic effort to articulate and implement the statutory and constitutional rights of this historically neglected minority group through litigation, legislation, and administrative reforms. Drawing on precedents from the consumer-rights and the civil-rights movements, advocates have begun to halt abuses of the civil rights of mentally retarded persons and to improve the services available to them.

This article describes the legal-rights movement on behalf of mentally retarded citizens as it has developed over the past five years. The earliest successful test cases attacked the horrifying conditions in large, warehouse-like institutions where mentally retarded children and adults were confined and the equally shocking practice of excluding mentally retarded

children from our public education system. More recently the process of reform has led to a reexamination of the rights of mentally retarded persons in the criminal process, in the civil commitment process, and, perhaps most importantly, as citizens in our communities. Because the legal rights of mentally retarded people are in a state of rapid evolution, it will be possible in these pages only to highlight some of the most important developments and to describe some of the significant trends.

The Right to Fair Classification and
to Due Process Protection in Civil
Commitment and Guardianship Proceedings

The adverse social consequences of being labeled mentally retarded have been documented in numerous studies (see, for example, Roper Research Associates, Inc., 1969). Although a recent Gallup poll conducted for the President's Committee on Mental Retardation showed a marked improvement in willingness of the public to live in the same community and to work in the same office with mildly or moderately retarded persons (Gallup Organization, Inc., 1974), the label "mentally retarded" still stigmatizes its recipient and may be a rationale for denying the retarded person the right to an individualized evaluation of his real assets and limitations.

In addition to the negative social consequences of being labeled mentally retarded there are important legal effects, both positive and negative. For example, special educational services may be available to a child certified as mentally retarded, but the school system may use this same label as the basis for excluding a child from the school system. Vocational-rehabilitation services may be extended to mentally retarded persons, but the same label may be used to prohibit them from securing licenses necessary to practice specific occupations such as barbering or driving a taxi. A mentally retarded person may be excused from responsibility in a criminal suit, but the same label may prevent that person from serving as a juror or entering into a legal marriage contract, or may be used by authorities as the justification for taking away his or her child.

Given the serious consequences, people subject to being consid-

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ered mentally retarded have the right to procedural safeguards in the classification process (procedural due process). Furthermore, those who may be classified as mentally retarded have a right to assessment instruments and criteria that are both fair and accurate (substantive due process). Labeling people mentally retarded on the basis of IQ tests alone is notoriously inaccurate, both because IQ is only one of several factors necessary for an accurate diagnosis of mental retardation and because IQ tests themselves have been shown to be biased against cultural and racial minorities.

The 1974 amendments to the Education of the Handicapped Act require states receiving funds under the Act to:

... provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) (i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child; (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child... and (C) procedures to insure the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.

The kinds of substantive and procedural protections required by these amendments are not, of course, limited to education. People are entitled to these same safeguards whenever the possibility that they will be classified as mentally retarded is likely to have adverse consequences.

Because involuntary commitment to any facility involves both deprivation of liberty and other related rights and privileges and stigma and possible physical and emotional harm, it cannot be legally imposed without certain procedural safeguards. In Dixon v. Attorney General (1971), a federal court in Pennsylvania detailed some of the constitutional requirements for involuntary commitment procedures affecting mentally retarded persons. According to the Dixon decision, the mentally retarded person subject to commitment is entitled to notice and a hearing on the issue of commitment, the assistance of counsel, and a mental examination by an

independent expert, to be appointed by the court if the person is indigent. There must be a full hearing at which the allegedly mentally retarded person "shall have the right to present evidence in his own behalf, to subpoena witnesses and documents, and to confront and cross-examine all witnesses against him." A person may be committed only if unequivocal and convincing evidence establishes that he "poses a present threat of serious physical harm to other persons or to himself."

Unfortunately, many current state laws fall far short of providing such procedures and standards. Some state codes are entirely silent on commitment procedures for mentally retarded persons, whereas others explicitly apply the inappropriate rules used in the commitment of the mentally ill. The absence of strict standards and procedures prior to the deprivation of liberty through commitment cannot be justified by benign motives or the fact that the "civil" commitment does not involve punishment for a crime. As noted by a federal court of appeals that considered appropriate standards for the commitment of mentally retarded juveniles:

It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent — which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process.... (Heryford v. Parker [1968])

Of course, admission to habilitation facilities can also be by voluntary application. "Voluntary" admissions approved by a parent or guardian in the name of a mentally retarded person are frequently permitted and are probably the most common way by which mentally retarded people find their way into institutions. They are not sufficient unless accompanied by proof that the person is incompetent to make his own decision about admission and that institutionalization is the most appropriate form of habilitation. Unfortunately, few states require this showing. A related form of "voluntary" application involves the application by parents on behalf of their minor children. Because of potential conflicts of in-

terest between parents and their mentally retarded offspring, "voluntary" commitment of a mentally retarded child by his parent(s) should be subject to review.

Courts have only recently begun to enforce constitutional protections for juveniles subject to such deprivations of liberty. Tennessee, Pennsylvania, and Georgia no longer give parents unreviewed discretion to control the commitment and release of their minor children. Recent court decisions in these three states recognize that, contrary to the usual assumptions about parental motives, there may be a serious conflict of interest between juveniles and parents who seek to confine them (Bartley v. Kremens, 1975; J.L. v. Parham, 1976; and Saville v. Treadway, 1974). As noted by the court in Bartley v. Kremens, "In deciding to institutionalize their children, parents, as well as guardians.. may at times be acting against the interest of their children."

Strong pressures lead parents to institutionalize mentally retarded children, e.g., the financial demands on a family with a mentally retarded child, the tremendous difficulty of securing the varied resources required to care for a severely, multiply handicapped child at home, the social and/or psychological pressures on parents to avoid the guilt and stigma frequently associated with having a mentally retarded child. These factors make necessary the intervention of a neutral party to determine whether the child's commitment can in fact be justified by institutionalized habilitation possibilities or whether commitment is in only the parents' interests. The Bartley court ruled that "in the absence of evidence that the child's interests have been fully considered, parents may not effectively waive personal constitutional rights of their children."

If anything, a child's inherently limited ability to defend his own interests argues for even stricter protections in the commitment process than adults should enjoy. According to the Bartley court, mentally retarded children may not be civilly committed without the following minimum constitutional safeguards: (1) a probable-cause hearing within 72 hours of the child's initial detention; (2) a postcommitment hearing to be held not more than two weeks after initial detention; (3) written notice, including the date, time and place of the commitment hearing and a statement of grounds for the proposed commitment; (4) counsel at all significant stages

of the commitment process (to be appointed by the court if the child is indigent); (5) presence of the child at all hearings concerning his proposed commitment; (6) a finding by clear and convincing proof that the child is in need of institutionalization; and (7) the right of the child and his lawyer to confront and cross-examine witnesses against him, to offer evidence in his own behalf, and to offer testimony of witnesses. At the time of this writing, the Bartley case is on appeal to the United States Supreme Court. The Supreme Court's decision in this case will no doubt have a profound influence on laws affecting the commitment of all mentally retarded people, both children and adults.

Rights in Institutions The Right

to Habilitation and to Protection from Harm

On March 12, 1971, the United States District Court, in Wyatt v. Stickney, made history by ruling for the first time that mentally handicapped persons involuntarily confined to a state institution have a constitutional right to habilitation. (This case originally pertained only to the mentally ill; but by motion to amend, granted August 12, 1972, plaintiffs expanded their class to include the mentally retarded.) Specifically, the court held that involuntarily committed residents at Partlow State School in Alabama had a constitutional right to "such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society."

A final order and opinion was handed down on April 13, 1972, setting standards for minimum constitutionally and medically adequate habilitation and establishing a detailed procedure for implementation. These standards include a provision against institutional peonage; a number of protections to ensure a humane psychological environment; minimum staffing requirements; detailed physical-care standards; minimum nutritional requirements; provisions for individualized evaluations, habilitation plans, and education programs; a provision to ensure that residents released from Partlow will be provided with appropriate transitional care; and a requirement that every mentally retarded person has a right to the least restrictive setting necessary for habilitation.

The court also appointed a seven-member human rights committee for Partlow and included a resident on this committee. The human rights committee "will have review of all research proposals and all rehabilitation programs, to insure that the dignity and human rights of [residents] are preserved."

By affirming the Wyatt decision, the Fifth Circuit Court of Appeals became the first United States appellate court to recognize the constitutional right to habilitation for the mentally retarded. The state of Alabama decided against appealing the Fifth Circuit's decision to the United States Supreme Court, thus bringing to a close litigation of the constitutional-right issue (if not all of the issues involved in effectively implementing the court's order).

Since Wyatt, similar decisions have been obtained in Minnesota, Massachusetts, Nebraska, Tennessee, and New York.

In addition to a right to habilitation, mentally retarded persons, whether voluntarily admitted or involuntarily confined, have a right to protection from harm. This right was the theory under which the New York State Association for Retarded Children, Inc. v. Carey (1975) — "the Willowbrook case" — was recently decided.

During the Willowbrook trial, noted physicians, researchers, professors, and parents appeared as witnesses and told stories of bruised and beaten children, maggot-infested wounds, assembly-line bathing, inadequate medical care, cruel and inappropriate use of restraints, and insufficient clothing. The conclusion forced by this testimony was that the mentally retarded residents confined to Willowbrook had deteriorated physically, mentally, and emotionally during their stay.

The Willowbrook lawsuit was resolved when the plaintiffs and defendants signed an extensive and detailed consent decree, which was ratified by Federal District Court Judge Orrin Judd on May 5, 1975. The decree absolutely forbids seclusion, corporal punishment, degradation, medical experimentation, and the routine use of restraints. It sets as the primary goal of Willowbrook the preparation of each resident for development and for life in the community at large. To this end, the decree mandates individual plans for the education, therapy, care, and development of each resident.

A very important feature of the consent decree is the creation of a seven-member consumer advisory board, composed of parents and relatives of residents, community leaders, residents, and for-

mer residents, to evaluate alleged dehumanizing practices and violations of individual and legal rights.

While consent decrees ordinarily have only the status of a contractual agreement between the parties, the precedential value of the Willowbrook consent decree was substantially enhanced when the court issued a formal order ratifying the consent decree and an additional memorandum of its own discussing the constitutional basis for the decree. In his memorandum Judge Judd noted:

During the three-year course of this litigation, the fate of the mentally impaired members of our society has passed from an arcane concern to a major issue both of constitutional rights and social policy. The proposed consent judgment resolving this litigation is partly a fruit of that process.

The consent judgment reflects the fact that protection from harm requires relief more extensive than this court originally contemplated, because harm can result not only from neglect but from conditions which cause regression or which prevent development of an individual's capabilities.

In addition to the Constitution, a federal statute now provides a right to habilitation and a right to protection from harm for mentally retarded persons. The Developmentally Disabled Assistance and Bill of Rights Act states, "Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities." The Act provides further that "the Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that.. .does not provide treatment, services, and habilitation which is appropriate to the needs of such persons," or that does not meet specified minimum standards. Sections of the Act further require the states to put into effect habilitation plans and to protect and advocate the rights of persons with mental disabilities in order to receive federal funds.

Legal Limitations on Unusual or Hazardous Procedures
and Experiments (Including the Right to Refuse)

Again, the Wyatt case in Alabama contained the seeds for what

undoubtedly will be substantial further developments in this area. The Wyatt court has promulgated a special standard regulating the use of electroconvulsive therapy, aversive conditioning, and other hazardous or unusual procedures for the mentally retarded residents of Partlow State School. Abuses of behavior-modification procedures have been reported around the country. But because the appropriate use of behavioral procedures can effectively contribute to the personal growth and development of retarded persons, concerns about abuses require guidelines for proper use rather than blanket prohibitions.

Regulations for experimentation involving mentally retarded persons are currently being developed both by the U.S. Department of Health, Education, and Welfare and by the congressionally established National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.

The Right to Liberty

Mentally retarded people also have a constitutional right to liberty, at least under some circumstances. The leading case on this issue is the United States Supreme Court's historic 1975 decision in O'Connor v. Donaldson. Although this case involved an allegedly mentally ill plaintiff, it is discussed here because it strongly suggests that the mentally retarded also have a constitutional right to liberty.

The narrow legal holding of Donaldson is that "a state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends."

Writing for the unanimous court, Justice Stewart rejected the notion that mental patients might be exiled by a community that finds their presence upsetting:

May the state fence in the harmlessly mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the state, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of... physical liberty.... That the state has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.

The Donaldson decision is directly relevant to retarded persons who are not dangerous and are able to function in society but whom the state wishes to commit. But whereas Donaldson was confined over his objections, many retarded people enter institutions in the hope of receiving meaningful habilitation and training. Thus, the main focus of concern is not liberty per se, but (1) whether the Constitution provides some basic right to habilitation and training (an issue expressly left undecided in the Donaldson opinion) and (2) if so, whether retarded people have a right to receive such habilitation and training in more normal, community-based facilities rather than in remote institutions. These issues have been, and continue to be, before the lower courts in the right-to-habilitation, right-to-protection-from-harm, and right-to-education cases discussed elsewhere in this article.

Rights in the Community

The Right to Equal Educational Opportunity

The opinion and order in Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, decided on October 7, 1971, marked another major legal breakthrough in the vindication of the rights of the mentally retarded. The plaintiffs in this class action were the Pennsylvania Association for Retarded Children, 14 named retarded children who were denied an appropriate education at public expense in Pennsylvania, and all other children similarly situated.

A stipulation by the parties, approved and ordered into effect by the court on June 18, 1971, requires that due process rights be provided to children alleged to be mentally retarded. The court's order specifically states that no such child may be denied admission to a public-school program or have his educational status changed without first being accorded notice and the opportunity for a due process hearing.

The parties' consent agreement stated:

Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education

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and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently the mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.... It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity.

A second leading right-to-education case, Mills v. Board of Education of the District of Columbia (1972), was brought as a class action before the Federal District Court in the District of Columbia on behalf of school-age children who had been denied placement in a publicly supported educational program for substantial periods of time because of alleged mental, behavioral, physical, or emotional handicaps or deficiencies. The District of Columbia government and school system conceded that it had the legal "duty to provide a publicly supported education to each resident of the District of Columbia who is capable of benefiting from such instruction." The defendants' excuse for failing to provide such an education was the lack of necessary fiscal resources.

On August 1, 1972, the court held that the defendants' failure to fulfill their clear duty could not be excused by the claim of insufficient funds.

If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

A recent federal law, the Education for All Handicapped Children Act of 1975, requires all states receiving federal aid to their schools to provide an appropriate education for all the handicapped children in the state. No child who needs a special program to enable him to have a free public education can be denied that program. The law applies to handicapped children who are out of school and not receiving educational services and to handicapped children who are enrolled in school but who are receiving education and services that are inadequate to meet their needs.

Under this law, states are required to develop plans with the following components: provision of "full educational opportunities" to all; due process safeguards to aid parents in challenging many decisions regarding the education of their children; a guarantee that handicapped children will be educated in the mainstream to the fullest possible extent; procedures to assure that tests and other materials used to evaluate a child's special needs are not culturally or racially biased; and a plan to identify and evaluate all of the state's children with special needs.

Employment Rights

"Institutional peonage" describes the formerly widespread practice of employing residents in institutions for the mentally handicapped to perform productive labor associated with the maintenance of the institution without adequate compensation. An important step toward the abolition of institutional peonage took place when the U.S. District Court for the District of Columbia ruled that the 1966 amendments to the Fair Labor Standards Act, which extended the minimum-wage and overtime provisions to all nonprofessional employees of "hospitals, institutions and schools for the mentally handicapped," applied to working residents, and that the U.S. Department of Labor must undertake reasonable enforcement activities on behalf of this covered group of employees. Addressing the defense of the Department of Labor that it is very difficult to distinguish between work and work therapy or vocational training, the court, in Souder v. Brennan (1973), noted:

... economic reality is the test of employment and the reality is that many of the patient workers perform work for which they are in no way compensated and from which the institution derives full economic benefit. So long as the institution derives any consequential benefit the economic reality test would indicate an employment relationship rather than mere therapeutic exercise.

Unfortunately, the U.S. Supreme Court's decision in National League of Cities v. Usery (1976) invalidated the extension of the Fair Labor Standards Act's minimum-wage provisions to employees of state hospitals, institutions, and schools. Under this decision, working residents, as well as other employees, will no longer be guaranteed the federal minimum wage if they work in state-run facilities.

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Although institutional peonage was perhaps the most obvious area of abuse affecting employment of the mentally retarded, the more prevalent problem is in the community at large, where mentally retarded persons are subjected, like other minority groups, to various forms of job discrimination. Acting to address this larger issue, Congress passed the Rehabilitation Act of 1973. The Act grants a statutory right to the handicapped to be free from employment discrimination and requires certain employers to take affirmative action to employ qualified persons.

The Right to Live in Community Neighborhoods

As increasing numbers of mentally retarded persons receive necessary habilitation and are released from institutions or receive special education that allows them to remain in the community, new issues such as zoning receive increasing attention. Zoning restricts the ways in which an owner can use his property, and can also serve to exclude certain groups of people from residential areas — usually the poor and ethnic minorities but also the mentally retarded. Exclusionary zoning ordinances have been challenged on a number of legal grounds, including both state legislative policy and the constitutional theory that such ordinances violate Fourteenth Amendment due process and/or equal protection. For example, in *Anderson v. City of Shoreview* (1975), in upholding the granting of a special-use permit for construction of institutional housing over the objections of homeowners in the neighborhood, the district court observed: "Our legislature has established as the policy of this State that mentally retarded... persons should not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings."

Perhaps the most important result of the zoning exclusion cases to date has been to draw attention to the need for state legislation to facilitate establishment of group homes for the mentally retarded in residential areas.

The Right to a Barrier-free Environment

As is well known, a high percentage of retarded children suffer from additional physical handicaps, and this percentage increases

with age and the severity of retardation. The mentally retarded have recently joined with other physically handicapped people in an effort to remove architectural barriers under constitutional theories that public policies permitting such barriers violate the equal protection clause or the First Amendment right to travel or to petition the government. In seeking barrier-free transportation and public buildings, the mentally retarded may also rely on the Architectural Barriers Act (1970), which provides that any building built by the federal government for its own use or financed in whole or in part by federal funds (except for private residences) must meet federal standards to ensure that it is accessible to people who are physically handicapped. They may also look to a variety of existing state legislation to eliminate architectural barriers. In Urban League v. Washington Metropolitan Area Transit Authority, decided October 9, 1973, a coalition of handicapped persons claimed that Washington's "Metro" was being constructed without taking into account the needs of physically handicapped citizens who might want to use the subway system. They succeeded in obtaining an order from the federal district court declaring that the transit authority had a legal obligation to design the subway system for use by physically handicapped persons.

Sexual and Marital Rights

Because there are varying degrees of mental retardation, which involve a broad range of abilities and capacities, a single, undifferentiated classification of all mentally retarded persons as incompetent to enter into a marriage contract or to raise children is recognized by mental-retardation professionals as lacking a rational basis. Discriminatory laws to this effect are beginning to be challenged.

Although involuntary-sterilization statutes are still on the books in many states, such laws would appear to be unconstitutional. Recent empirical studies have brought into question the factual assumptions on which such involuntary-sterilization statutes rest, and such laws have therefore come under legal attack. For example, in Alabama, as a subsequent part of the Wyatt right-to-habilitation litigation described above, a three-judge district court

declared Alabama's compulsory sterilization statute unconstitutional. The federal district court hearing the Wyatt case then issued a detailed order containing substantive and procedural standards governing "voluntary" sterilizations.

The Right to Vote, to Drive, and to
Exercise Other Rights and Privileges of Citizens

Mentally retarded citizens should have the same presumptive right to vote, to drive, and to exercise other basic rights and privileges of citizens. Courts are beginning to recognize that a flat prohibition of the right to vote or to drive would violate the due-process and equal protection clauses of the Constitution for the same reasons that a blanket prohibition on education or marriage or employment would violate these constitutional provisions.

In the voting area, for example, a group of adult mentally retarded residents of a state school in New Jersey recently sued the clerk of their county board of elections, claiming that they were denied their right to vote in violation of the Constitution and statutes of both the United States and New Jersey. The denial was based solely on their status as residents of the school, even though each of them had been determined competent to vote by qualified representatives of the state's department of institutions and agencies. The court in Carroll v. Cobb (1974) held that the refusal of the clerk to register the plaintiffs was unlawful. Subsequently each of the residents registered, and many voted in the next election. This case was recently affirmed on appeal. Similarly, in Boyd v. Board of Registrars of Voters (1975), the Supreme Judicial Court of Massachusetts recently struck down a town's attempt to declare the residents of a state school for the mentally retarded as being under the guardianship of the state and therefore ineligible to vote. Since many retarded residents of state institutions are finally having their right to vote recognized, the claim of the right to vote is all the more compelling for other mentally retarded persons who are currently living and functioning in the community.

Rights in the Criminal Justice System

Mentally retarded people are disproportionately represented in

our country's prison population (Brown & Courtless, 1968), but there is no firm evidence to support the assumption that they are more likely to commit criminal acts than others. Courts in a number of jurisdictions have questioned whether the tests used to measure mental retardation may not be culturally or racially biased. Further, mentally retarded persons who commit criminal acts are more easily apprehended, more prone to confess, more likely to be convicted, and will probably be incarcerated longer than nonretarded offenders (Allen, 1968). Moreover, it may well be that both mental retardation and crime are symptoms of socioeconomic factors rather than causally related to each other (President's Panel on Mental Retardation, 1963).

The most serious special problems faced by mentally retarded persons in the criminal process stem from lack of knowledge about and sensitivity to the problems of mental retardation by police, lawyers, and judges and their inability to identify accused criminals who are mentally retarded. Failure to identify mental retardation in an accused criminal means that a number of important legal issues that must be raised by a defendant go unconsidered. As will be discussed briefly below, mental retardation is an important factor that must be weighed in determining competency to stand trial, the admissibility of confessions and guilty pleas, and criminal responsibility (the insanity defense).

Confessions

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

In holding certain confessions involuntary — and hence inadmissible in evidence — the Supreme Court has recognized mental retardation as a factor diminishing the ability of an accused person to resist police pressure (Culombe v. Connecticut, 1961; Reck v. Pate, 1961). This concern is certainly warranted, for, as noted by the Task Force on Law of the President's Panel on Mental Retardation (1963), a mentally retarded person, even when not co-

erced in the usual sense, may be unable to understand police procedures and their consequences, and may therefore be unable to make a genuine decision in relation to them. The mentally retarded accused criminal is more likely than the nonretarded person to be unaware of his constitutional right to refuse to answer police questions and of his right to consult with an attorney. Even when the interrogator advises him of these rights, he may be unable to appreciate their significance. Because of his mental retardation, he is particularly vulnerable to both an atmosphere of threats and one of friendliness designed by police to induce cooperation.

These issues were addressed by the Massachusetts Supreme Judicial Court in its recent decision in Commonwealth v. Daniels (1975). In Daniels, the defendant was a mentally retarded young man with a second-grade reading ability and an IQ of 53. He was found guilty of murder in the second degree solely on the basis of his confession to the Springfield police. In reviewing the admissibility of Daniels's confession, the supreme judicial court agreed that an adult with a diminished or subnormal mental capacity may make an effective waiver of his rights and render a voluntary, knowing, and admissible confession. The court remanded the case for a hearing on the voluntariness of the confession, however, because the "circumstances and techniques of custodial interrogation which pass constitutional muster when applied to a normal adult may not be constitutionally tolerable as applied to one who is immature or mentally deficient."

Guilty Pleas

In United States v. Masters (1976), a recent decision concerning guilty pleas, a federal appellate court noted the "basic failure of our criminal justice system to recognize that special provisions must sometimes be made for the mentally retarded." In this case the U.S. Court of Appeals for the District of Columbia overruled a trial court's denial without a hearing of an allegedly mentally retarded criminal defendant's motions to vacate and withdraw his guilty plea to charges stemming from robbery of a gas station.

Noting that a defendant who enters a guilty plea waives his privilege against compulsory self-incrimination, his right to trial by

jury, and his right to confront his accusers, the court held that if a plea is not both voluntary and competent, it has been obtained in violation of due process and is therefore void.

Finding that "the interest of the appellant [Masthers] and the administration of criminal justice would best be served by a hearing to properly examine and assess the nature and extent of [Masthers's] disabilities," the appeals court remanded the case to the trial court. As noted by a concurring member of the three-judge panel:

We make special effort and provisions to the end that the deaf litigant or the litigant whose comprehension of the English language is poor shall understand what is transpiring in court and act knowingly. It seems neither fair nor humane to refuse to make an analogous appropriate special effort when it appears that an accused person's comprehension is substantially impaired because of mental retardation.

Competency to Stand Trial

The law does not proceed against a criminal defendant who is not able to understand the nature and object of the proceedings against him or to make a rational defense. Ordinarily, when mentally handicapped persons are found incompetent to stand trial, they are committed to civil facilities with the understanding that a trial will take place after their "recovery." Unlike the mentally ill, however, mentally retarded persons who are found incompetent to stand trial and committed to civil institutions will probably remain incompetent. This precise situation — involving an accused mentally retarded defendant who was incompetent to stand trial and who nearly disappeared in the crack between the civil commitment and criminal commitment systems — was the focus of the Supreme Court's historic decision in Jackson v. Indiana (1972). The petitioner in Jackson was a 27-year-old deaf-mute with the mental age of a preschool child and no communicative ability other than through limited sign language. He had been charged with two counts of larceny — essentially purse-snatching that involved property worth \$9 — and was committed to the Indiana Department of Mental Health as incompetent to stand trial. Even though the maximum sentence for these misdemeanors if he had been convicted would have been six months, he had already

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been involuntarily confined in Indiana Mental Hospital for almost three years, and might well have remained there for the rest of his life had his case not been heard by the Supreme Court. The Supreme Court decided:

... a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Criminal Responsibility

Although the standard for insanity varies among jurisdictions, the most generally accepted test is that recommended by the American Law Institute (1962): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of law." When the insanity defense is claimed by a mentally retarded person, the jury should consider testimony concerning his development, adaptation, and the functioning of his mental or emotional processes and behavior controls.

In United States v. Brawner (1972), the U.S. Court of Appeals for the District of Columbia adopted this test of criminal responsibility, which also includes the rule of "diminished responsibility" under which mental impairment, though insufficient to exonerate, may nevertheless serve to reduce the degree of the offense. The court held: "Our rule permits the introduction of expert testimony as to abnormal condition if it is relevant to negative [sic], or establish, the specific mental condition that is an element of the crime." Obviously, this new rule affords a basis for introducing evidence of mental retardation to show that the defendant, by virtue of his mental retardation, lacks the specific mental intent that is an element of the crime.

The Right to Habilitation in Prisons

While the right to habilitation for mentally retarded prisoners has by no means been generally accepted, at least some courts are beginning to require that the criminal justice system provide necessary services either under a due process or an Eighth Amendment rationale.

In Newman v. Alabama (1972), for example, state prisoners claimed that they were deprived of adequate medical treatment in violation of their rights guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution. The court agreed and held that the failure of the board of corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate medical care constituted willful and intentional violation of prisoners' constitutional rights. On the issue of whether mental health standards were also an appropriate topic for court examination, the court ruled that the adequacy of care was to include both physical medical services and mental health services. As the court specifically noted:

The fate of those many prisoners who are mentally ill or retarded deserves special mention. Mental illness and mental retardation are the most prevalent medical problems in the Alabama prison system To diagnose and treat these almost 2400 inmates, the Board of Corrections employs one clinical psychologist, who works one afternoon each week... There are no psychiatrists, social workers, or counselors on the staff __ The large majority of mentally disturbed prisoners receive no treatment whatsoever. It is tautological that such care is constitutionally inadequate.

The Newman case could have a major impact on correctional systems in this country. A major survey (Brown & Courtless, 1968) indicated that 160 correctional institutions, housing almost 150,000 inmates, employed only 14 full-time psychiatrists and 82 full-time psychologists; only 6 of these facilities provided a full range of programs. These statistics dramatize the overwhelming inadequacy of diagnostic and treatment facilities within correctional institutions. The right to habilitation and treatment for mentally retarded prisoners articulated in Newman is obviously denied to all but a handful at present. It remains to be seen how quickly other courts will act to enforce this right.

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