

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

WASHINGTON, D.C.

December 2-3, 1986

UNITED STATES SENTENCING COMMISSION

Public Hearing - Washington, D.C.
Ceremonial Courtroom, U.S. Courthouse
December 2-3, 1986

December 2, 1986

10:00 a.m. William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission

10:15 a.m. Stephen S. Trott
Associate Attorney General, U.S. Department of Justice

10:30 a.m. Norman A. Carlson
Director, Bureau of Prisons

10:45 a.m. Bobby Lee Cook
Cook & Palmour, Summerville, GA

11:00 a.m. Henry E. Hudson
U.S. Attorney, Eastern District of Virginia

11:15 a.m. Richard Arcara
National District Attorneys Association

11:30 a.m. Anthony Trivisono
Exec. Director, American Correctional Association

11:45 a.m. Marlene Young
Exec. Director, NOVA (National Organization for Victim Assistance)

12 noon Reuben M. Greenberg
Chief of Police, Charleston, South Carolina

12:15 p.m. Suzan Shown Harjo
Exec. Director, National Congress of American Indians

12:30 a.m. Lunch

2:00 p.m. The Honorable R. Lanier Anderson
11th Circuit Court of Appeals

The Honorable William C. O'Kelley
U.S. District Court, District of Northern Georgia

2:15 p.m. The Honorable Edward R. Becker
3rd Circuit Court of Appeals

The Honorable Maryanne Trump Barry
U.S. District Court, District of New Jersey

- 2:30 p.m. Alan Ellis
 National Association of Criminal Defense Lawyers
- 2:45 p.m. Jack Lipson
 Federal Defenders Advisory Committee
- 3:00 p.m. Cheryl M. Long
 Public Defender, District of Columbia
- 3:15 p.m. Dr. Edward J. Burger, Jr.
 Council for Court Excellence
- 3:30 p.m. James W. Ellis
 Ruth Luckasson
 American Association on Mental Deficiency
- 3:45 p.m. Public Comment

UNITED STATES SENTENCING COMMISSION

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10:00 a.m. Roger C. Spaeder
Zuckerman, Spaeder, Goldstein, Taylor & Kolker
Washington, D.C.

10:15 a.m. Breckinridge L. Willcox
U.S. Attorney, Maryland

10:30 a.m. Joseph E. diGenova
U.S. Attorney, District of Columbia

10:45 a.m. The Honorable Robert M. Hill
5th Circuit Court of Appeals

The Honorable George P. Kazen
U.S. District Court, District of Southern Texas

11:00 a.m. The Honorable Gerald Heaney
8th Circuit Court of Appeals

The Honorable Donald O'Brien
Chief Judge, U.S. District Court, Northern District of Iowa

11:15 a.m. The Honorable Albert Quie
The Honorable Robert F. Utter
Justice Fellowship

11:30 a.m. Charles Sullivan
CURE (Citizens United for Rehabilitation of Errants)

11:45 a.m. John M. Greacen
Criminal Justice Section, American Bar Association

12 noon John B. Jones
Ian M. Comisky
Section on Taxation, American Bar Association

12:15 p.m. Paul D. Kamenar
Executive Legal Director, Washington Legal Foundation

12:30 Lunch

2:00 p.m. The Honorable Abner J. Mikva
District of Columbia Court of Appeals

The Honorable Louis F. Oberdorfer
U.S. District Court, District of Columbia

- 2:15 p.m. **Cornelius J. Behan**
Chief of Police, Baltimore County Police Department
- 2:30 p.m. **Jeffery D. Troutt**
Research Director, Institute for Government and Politics
- Robert B. Kliesmet**
President, International Union of Police Associations
- 2:45 p.m. **Rory McMahon**
Secretary, Federal Probation Officers Association
- 3:00 p.m. **Wayne R. Lapierre**
Executive Director, Institute for Legislative Action
National Rifle Association
- 3:15 p.m. **Pete Shields**
Chairman, Handgun Control, Inc.
- 3:30 p.m. **Daniel J. Freed**
Professor of Law, Yale University Law School
- 3:45 p.m. **Public Comment**

00071
11-26-86

National Association of Criminal Defense Lawyers

STATEMENT OF

ALAN ELLIS

VICE PRESIDENT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

PRELIMINARY DRAFT, SENTENCING GUIDELINES

DECEMBER 2, 1986

WASHINGTON, D.C.

Mr. Chairman and distinguished members of the Commission, I very much appreciate this opportunity to appear on behalf of NACDL present our views on the Commission's Preliminary Draft of the sentencing guidelines.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of almost 5,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. It was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout our history, we have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the proper administration of justice. We have pursued these goals through a variety of educational and public service activities, including national training programs, publications, committee activities, legislative action, and by appearing as amicus curiae in significant criminal justice cases.

My name is Alan Ellis, and I am Chairperson of NACDL's Liaison Committee to the Sentencing Commission. Our committee has met and discussed the Preliminary Draft, and frankly, we are deeply concerned and disturbed by its contents.

Sentence Severity

NACDL is strongly of the view that the proposed guideline ranges for length of imprisonment are excessive. Based on our collective experience with current federal sentencing practices, we perceive that the guideline ranges are quite significantly higher than the average sentence lengths currently considered appropriate by the Federal courts.

In this regard, however, we note that our ability to provide informed comment on the rationality of the relationship between the proposed guidelines and current practice is severely limited by the absence from the Preliminary Draft of the current sentencing data and methodological assumptions upon which the guidelines are based. In order to fully and effectively evaluate the appropriateness of the proposed guideline ranges, both the public and the Congress will require access to any such information relied upon by the Commission to support, justify, and provide an empirical basis for the proposed guideline ranges.

In the interest of an informed discussion on these important issues, we strongly urge the Commission to make this information publicly available forthwith.

We are also deeply concerned that there is inadequate provision in the Preliminary Draft for sentences other than imprisonment. To conclude that Congress intended that imprisonment be imposed in virtually all cases prosecuted in the Federal system is to effectively eliminate probation for all but a few offenders, who probably should not be in the Federal system at all. Yet

under the Commission's authorizing legislation, probation and custody are treated as alternate sanctions, and the question of whether or not to incarcerate is separate from the decision of how long to incarcerate. See 28 U.S.C. 994(a)(1)(A), (B).

One effect of this move toward more rigid and severe incarceration practices will be to drastically reduce the incentive to plead guilty. With fewer guilty pleas, many more cases will go to trial, and an already overburdened Federal court system will become even further congested, perhaps to the point of meritorious cases being dismissed for lack of sufficient resources to prosecute them in a timely manner (as has recently happened with numerous drug cases here in Washington). The losers will be the system itself, and the strong public interest--a guiding principle of NACDL as well as, I am sure, of this Commission--in the prompt and fair administration of justice.

Mr. Chairman, we are particularly concerned about the effect of these dramatically stiffer sentences on overcrowding rates in the Federal prison system. The Congress has mandated, in 28 U.S.C. 994(g), that the Commission must formulate its guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." And yet, nowhere in the Preliminary Draft is the issue of overcrowding addressed. Indeed, Mr. Chairman, you yourself have stated, in an interview in the Fall 1986 issue of Criminal Justice magazine, that the Commission is "not considering overcrowding as a factor in sentencing;" the plan is only "to work with the Bureau of

Prisons," after the Commission issues its final guidelines, "in coming up with a definitive statement about the impact the guidelines will have on our prison system." Id. at 11 (emphasis in the original), 47.

We would respectfully suggest that this approach is not adequate to satisfy the congressional mandate. Congress clearly directed that prison overcrowding must be actively addressed in the guidelines, not passively studied after the fact. In fact, the obvious and inevitable effect of the Preliminary Draft's stiffer sentences can only be to increase the current rate of Federal prison overcrowding. With that rate currently standing at more than 40 percent, and with actual sentence lengths likely to triple under the guidelines, there is no hope--and clearly no intention--of "minimizing the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."

This is a most fundamental question in the formulation of these guidelines. The severity of sentences under the Preliminary Draft is on a collision course with Federal prison overcrowding. At issue is nothing less than the complete breakdown of the Federal Prison System, as well as these guidelines and the effective operation of the entire criminal justice system. If overcrowding soars, as may be expected, to 80 or 100 percent or more, the prisons will explode. It will be an open invitation to Attica-style uprisings, rioting and bloodshed.

Certainly, the courts cannot be expected to stand idly by while the Eighth Amendment is trampled in the dust. Just

as surely as the overcrowding problem has caught up with the states--with some 38 states currently under court order or consent decree to reduce overcrowding--it will put the brakes on Federal incarceration as well, and the result will be widespread court-ordered early releases, and the frustration and short-circuiting of the guidelines.

But the Commission need not abdicate its responsibility regarding overcrowding to the courts in this way. The Commission has brakes of its own--in the form of broader use of probation and a range of sentencing alternatives, as well as through less severe sentence ranges--and the Congress clearly contemplated their use, in a rational and consistent manner, and in appropriate cases (such as non-violent first offenders, under 28 U.S.C. 994(j)), to minimize overcrowding.

Compounding this problem--and a factor which this Commission absolutely cannot ignore--is the Congress's institutional inability to fund the kind of massive prison-building initiative which will be necessary to match prison capacity to demand. Just this Fall, for example, when the Congress acted to broaden Federal drug laws and provide longer sentences, in title I of P.L. 99-570, it emphatically declined to fund enough new prison space to house the influx it was creating. In passing its original drug penalty enhancement provisions, the House authorized almost \$1 billion over a three-year period for new Federal prison construction. But the Senate position, which ultimately prevailed, due to overwhelming budgetary constraints and deficit concerns,

was to provide less than one-tenth of that amount--\$96.5 million.

This is the practical reality that the Commission must deal with. It cannot fashion its vision of justice in a vacuum. There simply may not be enough money to pay for it. The deficit is a reality. Gramm-Rudman is a reality. And it will grow increasingly unappealing for elected representatives to risk violating their deficit-reduction targets for the sake of correctional housing which costs some \$70,000 per prisoner to build, and \$50,000 per year to operate, while equally effective and less costly alternatives exist.

Modified real offense sentencing

NACDL is concerned about the application of "modified real offense sentencing" whereby a judge would be permitted to take into consideration not only all unlawful acts or omissions that were done in furtherance of the crime of conviction, but also any consequent harm, whether threatened, attempted, or completed, which has been proven by a preponderance of the evidence.

We are concerned that the suggested definition of "modified real offense behavior" will punish conduct that was neither intended nor reasonably foreseen, and that the breadth of this approach will, as I have already pointed out with regard to the issue of sentence severity, unnecessarily clog courts' dockets by discouraging guilty pleas. Such an approach will also undoubtedly lead to considerable sentencing litigation (exploring issues comparable to consequential damages issues in a civil trial).

that might take up as much time as a trial itself. We urge instead a charge of conviction offense system under which the sentencing court would be confined to examining the crime of conviction plus any other misconduct "in furtherance" thereof.

On the issue of burden of proof, we are strongly opposed to the imposition of punishment for conduct which has not been proven beyond a reasonable doubt. At the very least, sentencing determinations should be based upon a "clear and convincing evidence" standard. We would also emphasize the importance of applying the procedural protections of the Federal Rules of Evidence at sentencing hearings (the Preliminary Draft seems to contemplate this, by indicating that the judge may admit all evidence that is relevant and reliable except for evidence that is barred by evidentiary rules).

Offender characteristics

NACDL supports the Commission's view that the age and nature of prior convictions should be given varying weight. Unlike the Preliminary Draft, however, we would limit such consideration to prior adult criminal convictions and--at worst--recent serious juvenile adjudications. Under no circumstances should cases which have been "diverted" from the criminal justice system be counted. Practitioners often advise clients to accept "diversions" rather than bear the expense of going to trial in cases where the prosecution's evidence is insufficient to prove guilt beyond a reasonable doubt. These offenders should not now be

penalized for having foregone their day in court due to financial or other practical considerations. To do so would only serve to increase the caseload of already overburdened state and local courts dealing with these minor cases.

We also strongly feel that the Commission should avoid any reference to variables such as drug abuse. The Preliminary Draft would penalize any offender who had been determined to have been a drug abuser within ten years of the current conviction. Quite aside from the questionable logic of this proposal, it would clearly violate the Constitution's ex post facto clause, by punishing behavior (simple drug use) now which was not necessarily criminal when committed. Moreover, such a rule would deter drug abusers from seeking treatment out of a fear that it might be used against them in future brushes with the criminal justice system.

Cooperation and acceptance of responsibility

NACDL has previously gone on record before the Commission as opposing a discount for a guilty plea. We oppose the notion that a defendant should be penalized for exercising his or her right to a jury trial. And the dilution of this vital constitutional right is not significantly lessened by the Preliminary Draft's suggestion that variations from a strict discount-for-plea rule may sometimes be permitted (i.e., that "an offender may qualify for a sentence reduction without regard to whether the offender's conviction is based upon a guilty plea or a finding of guilty

by a court or a jury," and that "an offender who enters a guilty plea is not automatically entitled to a reduction").

We would suggest that if a discount process is to be established, the discount rates proposed for cooperation (ranging from a multiplier of .8 to .6) are inadequate to serve as an incentive for such conduct. We are also concerned that the sentencing judge not be limited to granting cooperation discounts upon the certification of the U.S. Attorney. Indeed, it is well established that an offender's willingness to cooperate with the authorities is a valid consideration in sentencing. Limiting such consideration to instances where the U.S. Attorney requests it may very well be unconstitutional.

Other offender characteristics

The Preliminary Draft enumerates without change the eleven offender characteristics specified in 28 U.S.C. 994(d). It omits, however, the statute's directive that this list is not exclusive.

NACDL recommends that this list be broken down into aggravating and mitigating factors; that--consistent with death penalty caselaw in this area, and in order to afford defendants maximum notice of the factors which a sentencing court is likely to consider--the list of aggravating factors be made exclusive, and the list of mitigating factors be expanded to specify all other foreseeable, relevant factors, and be made non-exclusive; and that the court's finding of aggravating or mitigating factors

be grounds for imposing a sentence below or above the guideline ranges.

Role in the offense

While NACDL is pleased that the Commission has recognized that the U.S. Parole Commission's approach utilizes far too few categories based upon the offender's role and level of relative involvement, we are concerned that the categories proposed in the Preliminary Draft are somewhat confusing, vague, and in some instances, incomplete or inadequate. For example, what is meant by a person who has a "comparable" role in the offense? What if the offender's role is "comparable" to that of a minor participant? In drug offenses, how is a "broker" (i.e., one who brings the buyer and seller together) to be treated? How is a passive participant--someone who allows his property, such as an off-load site or boat, to be used in the offense--to be treated?

Offense conduct

We offer the following comments on specific offender conduct issues addressed in the Preliminary Draft:

Consecutive sentences in RICO cases: The proposed base value for RICO offenses are too high, given the fact that they are to be aggregated with the sentences for the predicate offenses. In making the RICO sentence consecutive to the sentence for the underlying racketeering activity and then adding the offense

value applicable to the underlying racketeering activity to the base offense value of parole for the RICO offense itself, the Draft proposes to punish the offender twice for the same offense.

Drug quantities: In drug cases, two kilos or more of a mixture containing any detectable amount of cocaine would be given the highest base offense value. Quantities below that level are broken down into seven levels, as low as 10 grams or less. In practice, however, few cases prosecuted in the Federal system involve less than the two kilogram amount; most involve significantly higher quantities. Indeed, the Parole Commission recognizes this reality by pegging its highest offense severity rating at a level of 15 kilograms or more. We are concerned that a great many relatively inexperienced and marginal drug defendants are "sucked" into offenses involving two kilograms of highly diluted cocaine. We recommend that the guidelines make a distinction between such defendants and more culpable individuals.

We also recommend that the focus in drug cases be upon the purity of the drug involved rather than upon the gross weight mixture.

Extortion multiplier: It is our view that section E221, which utilizes an arbitrary multiplier of five times the amount of money loaned through an extortionate scheme, is too severe.

Property tables--fraud: It is not clear why the property tables for "fraud" are lower than the property tables for other

"theft" offenses. And how is the "monetary value" in both sets of offenses to be determined? Should it be the gross amount handled by the defendant? The net profit? The loss to the victim? The gain to the defendant? Should there be an offset for amounts repaid?

Attempt: Attempt should be treated less seriously than the completed crime if the actual harm caused is less. (Such a rule could of course incorporate a distinction between criminal efforts which are voluntarily abandoned and those which are thwarted by law enforcement.)

Trespass: We are concerned that the Draft would treat trespass too seriously. Many crimes involving legitimate forms of protest or civil disobedience would be included under this harsh sanction.

Psychological injuries: NACDL opposes the proposed guideline for "psychological injuries." As I have stated, the modified real offense behavior system, if used, should not take into consideration consequential damages, but should be limited to acts done in furtherance of the offense of conviction. Psychological injury to the victim should be counted as a sentencing factor only where it was intended.

Furthermore, the term "psychological injury" intrinsically defies precise definition, and is likely to lead to the "unwarranted sentencing disparity" that the Congress was so eager to avoid. Indeed, the notion of imposing punishment for unintended resultant psychological injury incurred by a victim is unprecedented in

American criminal law. It is not within the Commission's mandate or authority to be legislating criminal behavior.

Unreported income: We oppose the Draft's proposed presumption that all unreported income has been obtained unlawfully. This has never been the law. Indeed, common experience tells us that in the vast majority of cases, unreported income is not obtained unlawfully; rather, it represents simply the "underground economy" of unreported transactions involving ordinary, lawful goods and services--from the waiter who reports no tips, to the home remodeling contractor who asks to be paid in cash. Nor does the Draft put forward any statistical basis for such a presumption. As in the area of psychological injuries, this proposal is a legislative one, inappropriate for inclusion in these guidelines.

Plea negotiations

NACDL has previously gone on record as strongly supporting the continuation of charge bargaining, sentence bargaining, and fact bargaining. (See September 22, 1986 letter from Judy Clarke, Esq., on behalf of NACDL, to the Commission, endorsing the Federal Defender Position Paper on Plea Agreements, Guilty Pleas and Cooperation, September 16, 1986.)

It is also our view that judges should be authorized to involve themselves in plea negotiations. This is currently barred by Rule 11(e)(1), although it often occurs in practice, by agreement of the parties. It is very helpful and conducive

to guilty pleas for a defendant to have some reliable indication of the sentence that will result from a guilty plea. The reason for not permitting sentencing judges to become involved in plea negotiations has historically been to prevent defendants from being coerced into pleading guilty (i.e., the defendant would be reluctant to go to trial out of fear of antagonizing the sentencing judge and receiving a harsher penalty). Practicing lawyers will tell you that this problem seldom arises, and that the system works better when all parties know what can be expected upon a plea of guilty. To the extent that the modified real offense behavior system does not clearly indicate to a pleading defendant what sentence he or she will receive--because of different views held by the prosecutor and the defense lawyer as to what will be considered by the sentencing judge--allowing the judge to be involved in the plea negotiations will make the system more efficient.

Alternatively, if the Commission does decide to retain the modified real offense behavior system, a defendant should not be permitted to plead guilty unless the Government gives written notice as to what it calculates the defendant's guidelines to be.

Fines and restitution

We would suggest that the Draft would impose an impossible burden upon offenders, virtually all of whom will suffer incarceration, by requiring them to pay the increased fines as well

as restitution, while facing the added reality of supporting their families while they are imprisoned.

Alternatives to incarceration

NACDL recommends that an offender with 42 sanction points or less should be eligible for probation. There is no realistic probation option offered at all in the Draft. Even where Congress has specifically mandated that the Commission give consideration to a sentence not involving incarceration for first offenders involved in non-serious, non-violent offenses (in 28 U.S.C. 994(j)), the Draft does not provide for probation.

We strongly suggest an approach whereby sanction units can be converted into a non-imprisonment sentence such as probation and/or community service. Community service should be used to enable an offender to discharge up to 75 percent of his or her sanction units. For example, if an offender has 48 sanction units (calling for 36 to 44 months of imprisonment), why not provide for a sentencing judge to allow the offender to discharge 32-33 months of the sentence by performing appropriate community service, together with 8-11 months of imprisonment?

Miscellaneous matters

NACDL urges the Commission to recommend to Congress that Federal Rule of Criminal Procedure 35(b) be continued in its present form. As proposed, only the Government will be able to move for a reduction of sentence, and then only within one

year following conviction. Thus, offenders who appeal their conviction will be ineligible for reduction of sentence even if they subsequently cooperate and the Government wishes to reward their cooperation by moving for a reduction of their sentence. Such a limited possibility for reduction of sentences will impede effective law enforcement.

More importantly, however, there are numerous cases where circumstances change in an offender's case calling for a reduction in sentence. Judges should be permitted to act accordingly in such cases for reasons other than an offender's cooperation.

Finally, on another matter, it is the experience of many practitioners that in cases in which judges hold pre-sentencing conferences, far less time is taken up over disputed matters at the sentencing hearing itself. In light of the newness of the sentencing guidelines, it will be very helpful to provide for a pre-sentencing conference. The criteria which the judge intends to employ in determining the sentence can be discussed with the parties so that objections can be made and needless errors and subsequent appeals can thus be avoided.

Conclusion

Mr. Chairman, NACDL deeply appreciates the opportunity to be involved in this process. The Commission has a herculean task before it. We will continue to welcome any occasion to assist the Commission in its important efforts.

00083
12-1-86

Testimony before the
United States Sentencing Commission
on Proposed Sentencing Guidelines

by

Dr. Edward J. Burger, Jr.
Member of Board of Directors
Council for Court Excellence
Washington, D.C.

December 2, 1986

Mr. Chairman and members of the United States Sentencing Commission, I appreciate the opportunity to consider with you the Preliminary Draft Sentencing Guidelines prepared by the Commission. My name is Dr. Edward J. Burger and I appear before you as a member of the Board of Directors of the Council for Court Excellence in Washington, D.C. The Council for Court Excellence was founded in 1982 to encourage a fuller public understanding of the workings of the local and federal courts in the District of Columbia, to provide assistance to the courts and, from time to time, to advocate changes in the functioning of those courts in behalf of improving the administration of justice. The Council comprises members of the judiciary, representatives from the legal and business communities and civic members. I am one of the civic members.

Sentencing, including sentencing disparity and sentencing reform, was chosen early in the Council's history as an issue for special attention. The Council for Court Excellence was instrumental in bringing to the attention of the local courts, the prosecutors and defense lawyers and the District's legislative council, in systematic fashion, the fund of experience across the nation concerning sentencing reform efforts and the relationship of sentencing practices to broader matters including parole and prison capacity. I served as chairman of the Sentencing Committee of the Council for Court Excellence. Following closely upon the Council's educational efforts, the Superior Court for the District of Columbia

established its own Sentencing Guidelines Commission whose recommendations are anticipated shortly.

At the outset, let me say that the United States Sentencing Commission is to be congratulated for having developed a very useful and constructive first draft. It goes appropriately far in the direction of providing guidance to replace formerly unfettered judicial discretion. This, in itself, should reduce sentencing disparity and make sentencing more predictable. In addition, and importantly, it will consolidate sentencing authority where it belongs, in the court. This should serve the vitally important role of making the sentence served correspond to the sentence imposed - an absolutely essential ingredient in establishing public confidence in the criminal justice system.

I would like to enumerate for you a short list of items where the Council for Court Excellence believes additional work is needed in order to ensure both a true reform and the public's confidence in that reform.

1. Lack of evidence of reliance on a body of research or existing empirical data.

The Commission's draft report is, in many places, very detailed. Several of the sentencing proposals are highly specific. The value of those proposals would be enormously enhanced by referring the reader to the body of research on past experience with sentencing reform efforts to document the reasoning and expected implications of those

recommendations. The decade of the 1970's saw a wide variety of efforts to modify sentencing practices and establish new sentencing procedures and institutions. Fortunately, much of that experience has been systematically and critically reviewed so that, at this writing, one can have a measure of confidence as to what works or works well and what does not. Although I am certain that the Commission was fully aware of this work, it is not clear how its own recommendations build on this past experience.

Similarly, there is not a clear linkage between the Commission's sentencing guidelines and the existing pattern of sentencing practice. Accordingly, one cannot refer the Commission's particular policy choices and sanction numbers to the present setting. I fully appreciate the importance of evolving "prescriptive" guidelines rather than merely "descriptive" ones, built simply on the basis of past practice. Yet, in order both to justify the proposals and ensure public confidence in them, this linkage should be made explicit.

2.0verly specific recommendations

The present draft appears excessively specific and detailed in some of its recommendations. For example, sanctions proposed for securities offenses, offenses involving drugs and those concerned with tax evasion are in the form of detailed numerical schedules whose

Justification on the basis of empirical or other data is not clear. Public understanding and confidence in this process require that this specificity have some basis in a body of experience and systematically collected empirical data. This aspect of the guidelines seems to be somewhat overly ambitious for a first draft of guidelines and perhaps should await further, well monitored experience in their use. As a recommendation, these detailed schedules might be replaced, in this first version, by a shorter series of categories representing qualitative degrees of infraction.

3. Modified real offense sentencing

The concept adopted by the Commission of modified real offense sentencing appears appropriate. This does have the advantage of making more explicit the sentencing practice used and the body of information relied upon. It preserves the role of the judge in sentencing in relation to that of others who may influence the disposition process. However, as discussed in the Commission's own Overview, it does represent something of a pragmatic compromise. Further refinement may ultimately be desirable. However, the concept should be tested in practice. Most important, in order to determine how well and equitably it provides for sentencing, careful and full monitoring of sentencing experience must be undertaken and the results of that monitoring must be used to guide further changes.

4. Offender Characteristics.

The Commission has specifically invited comment on how or whether a series of "other offender characteristics," such as age, education, family or community ties, should be considered as mitigating or aggravating factors in reaching sentencing judgments. Perhaps the most prominent argument against their use concerns the issue of sentencing disparity. That argument observes that sentencing disparity has been prominent and that it relates to factors of race, education or economic status. That is, so goes the argument, consideration of many of the "other offender characteristics" in practice has generally had the effect of aggravation and has led to unfair sentencing bias. Further, as has been pointed out by others, very limited confidence can be placed in those variables as predictors of future criminal behavior. Yet to circumscribe the information to be considered by the court would appear to fetter its proper functioning. Furthermore, to limit the information to which a judge may refer in sentencing may threaten a rearrangement of other aspects of the disposition process which, in turn, might further compromise the administration of justice. Accordingly, there may be virtue in electing the Commission's own second option of citing these factors explicitly as aggravating or mitigating factors where appropriate. An alternative would be to limit consideration to only prior convictions in

reaching sentencing decisions, but make available all factors for consideration of the conditions of probation. We firmly believe that this important issue deserves additional study and further public discussion.

5. The issue of fines and restitution

Fines occupy a more prominent role in sentencing in federal courts than in other jurisdictions. This is not reflected in the present guidelines which speak essentially only to incarceration. A related point concerns restitution as a part of the criminal court sentence. The Draft Federal Guidelines appear to give little focus to this alternative to incarceration, either from the crime victim's standpoint or from the position that it is the offender's responsibility to make amends for his wrongful action. We would favor the Commission's addressing the restitution issue, at least by way of an advisory footnote.

6. Effect on prison use

Prison capacity and prison overcrowding have become prominent national problems. It is essential to consider what any changes in sentencing practices and procedures may imply for prison use. This, indeed, is one of the charges to the U.S. Sentencing Commission. This question is of great importance to the District of Columbia which, as is the case of several other jurisdictions, faces a crisis of prison capacity versus pressures for incarceration. The present guidelines offer no indication that an analysis has been performed estimating what if any the effect these proposed guidelines may have on prison overcrowding. These

analyses should be done. I say this while mindful of the finding of the National Academy of Sciences Panel on Sentencing Research that the substantial increases in prison populations in jurisdictions that have adopted sentencing reforms have not been attributable to the reforms but simply continued long term trends in rates of incarceration.¹

There is a related pragmatic concern of ours as citizens of the District of Columbia. Each year, an average of 1500 "local" offenders, convicted and sentenced in the D.C. Superior Court, serve their time in the U.S. Bureau of Prison facilities. The reason for this is penal space limitation in the D.C. Department of Corrections facilities. This jurisdiction is particularly sensitive to any short-term or transient relationship which might exist between changes in sentencing practices and demand for prison use. Were the U.S. Sentencing Commission to promulgate sentencing guidelines which affected federal prison usage, it is likely that prison capacity available to the District of Columbia would also be affected. Accordingly, it is particularly important to devise a system at the outset to monitor the functioning and effect of these guidelines in practice.

7. Accommodation for departures

Finally, the guidelines appear to be silent on the matter of departures from the guideline prescriptions.

Systematic procedures for occasional departures are essential in the functioning of others' guidelines, such as those in Minnesota. While these departures are unusual, they require on occasion some accommodation coupled with a recognized avenue of explanation and accountability.

1. National Academy of Sciences, Research on Sentencing =
The Search for Reform, Panel on Sentencing Research,
Committee on Research on Law Enforcement and the
Administration of Justice, Washington, D.C., 1982.

TESTIMONY OF AMERICAN ASSOCIATION ON MENTAL
DEFICIENCY and ASSOCIATION FOR RETARDED
CITIZENS OF THE UNITED STATES

United States Sentencing Commission

Public Hearing, December 2, 1986

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING, DECEMBER 2, 1986

TESTIMONY OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY
AND
ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES

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SUMMARY OF TESTIMONY

Mental retardation is a form of disability that is relevant to the sentencing process in several ways. The Commission's Preliminary Draft includes commendable measures to take into account the special vulnerability of mentally disabled victims of crimes. We urge the Commission to consider extending these provisions to similar offenses in which disabled people may be especially vulnerable to victimization.

The disability of offenders with mental retardation also presents important and unique issues to sentencing courts. It has long been universally recognized that mental retardation often reduces the extent of culpability, and therefore should always be considered as a potentially mitigating factor in determining a sentence. It is never appropriate to consider mental retardation as an aggravating factor in the sentencing process. We urge the Commission to adopt guidelines that require the consideration of mental retardation as a mitigating factor.

THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY

The American Association on Mental Deficiency (AAMD) is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, it now has nearly ten thousand professionals as members.

AAMD's members include physicians, educators, psychologists, social workers, nurses, physical and occupational therapists, specialists in communication disorders, administrators, lawyers, and other professionals who serve people with mental retardation. AAMD publishes two leading professional journals in the mental retardation field (Mental Retardation and the American Journal of Mental Deficiency) as well as numerous monographs and the manual on terminology and classification, Classification in Mental Retardation (H. Grossman, ed. 1983).

ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES

The Association for Retarded Citizens of the United States (ARC/US) is the nation's largest voluntary organization devoted to securing the rights of, and effective services for, the approximately six million citizens with mental retardation. Its national membership includes over 160,000 people, more than half of whom are parents of mentally retarded children and adults, and includes people who are mentally retarded themselves. ARC/US has chapters in 49 of the 50 states and 1,300 local chapters in cities, counties, and towns across the country. In recent years, ARC/US has become particularly concerned about the manner in which citizens with mental retardation are treated during the criminal justice process, including the determination of sentence, and has officially adopted policy calling for the fair treatment of these offenders based on complete and accurate understanding of the condition of mental retardation.

RELEVANT FACTS ABOUT MENTAL RETARDATION

The American Association on Mental Deficiency defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."¹ This definition has been universally accepted by professionals, courts, and legislatures. "General intellectual functioning" is a concept measured, and thus defined, by intelligence tests. It is therefore quantifiable in an IQ score. The AAMD definition of "significantly subaverage intellectual functioning" sets the upper boundary of mental retardation as an IQ of approximately 70, which is roughly two standard deviations from the mean score of 100.²

¹ American Association on Mental Deficiency, *Classification in Mental Retardation 1* (H. Grossman, ed. 1983) (hereinafter cited as "AAMD, Classification"). For discussion of related terms such as "developmental disabilities," see Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 *George Washington L. Rev.* 414, 421 n. 38 (1985) (hereinafter cited as "Ellis & Luckasson").

² AAMD, *Classification*, supra at 23. For a discussion of the adaptive behavior and developmental period requirements in the AAMD definition, see Ellis & Luckasson, supra, at 422-23.

This means that an individual must be very substantially disabled to come within the definition of mental retardation. (Previously, persons with IQ scores between 70 and 85 were labeled "borderline retarded." This classification has been abandoned by professionals, and these individuals are no longer within the definition of mental retardation.) The generally accepted estimate is that less than three percent of the population is mentally retarded.

Mental retardation is subdivided into four groups, defined by the severity of disability: mild, moderate, severe, and profound. Nearly 90 percent of mentally retarded people fall within the "mildly mentally retarded" category. As we have noted elsewhere, "[m]ildly retarded people have IQ scores in the range between 50 to 55 and approximately 70, and thus have a substantial disability. Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability."³

Mental retardation is sometimes confused with mental illness by nonprofessionals. The latter is a widely varying array

³ Ellis & Luckasson, *supra*, at 423.

of disabilities of thought and emotions. By contrast, mental retardation is not an illness, but rather a severe limitation on the disabled individual's ability to learn.⁴ For purposes of sentencing and the criminal justice system, there are some similarities between these two forms of disability that warrant similar treatment, but there are also substantial relevant differences.

In the early years of this century, it was widely believed that there was a causal relationship between mental retardation and crime. This view has long since been disproven.⁵ Nevertheless, there are several characteristics that are common to many people with mental retardation which are relevant to their culpability for criminal conduct. These include disabilities in the areas of communication, memory, impulsivity, attention, moral

⁴ For a fuller discussion of the differences between mental illness and mental retardation, see Ellis & Luckasson, *supra*, at 423-25.

⁵ See e.g. Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 *Mental Retardation and Developmental Disabilities* 172 (J. Wortis ed. 1978); Ellis & Luckasson, *supra*, at 425-26.

development, knowledge, experience, and motivation.⁶

A major development in the field of mental retardation in the last two decades is the development of successful community programs of habilitation which allow mentally retarded citizens to live with their families and in community residences such as group homes.⁷ The abandonment of widespread segregation in isolated institutions has probably produced some increase in the number of mentally retarded people who will come into contact with the criminal justice system, both as victims and as defendants.

⁶ See Ellis & Luckasson, *supra*, at 427-44 for fuller discussion of these characteristics and their relationship to criminal responsibility.

⁷ See generally S. Herr, *Rights and Advocacy for Retarded People* (1983). The previous view that some mentally retarded people are so disabled that they cannot live outside institutions has been disproven. See, e.g., J. Conroy & V. Bradley, *Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (1985); Ellis & Luckasson, *supra* at 476-77 nn. 351-52.

MENTALLY RETARDED VICTIMS OF CRIMES

Because of their disability, people with mental retardation may be especially vulnerable to victimization by criminal offenders. Criminals who prey upon extraordinarily vulnerable individuals raise distinctive issues at sentencing, whether the victims' vulnerability results from mental disability, physical handicap, age, or similar factors. Such predatory offenses are especially outrageous, and considering this category of crimes as aggravated offenses at sentencing comports with both a deserts theory of punishment and the need to promote deterrence.⁸

The Commission's preliminary draft of sentencing guidelines admirably recognizes these principles. This recognition takes two forms, one relating to the victim and the other relating to the victim's relationship with the offender. For some offenses, penalties are enhanced when the "victim was vulnerable due to

⁸ Cf. A.B.A. Standards for Criminal Justice 18-3.2(b)(ii)(B) (2d ed. 1980).

⁹ E.g. §A212(a)(2). Commentary to the provisions regarding fraud makes clear that "[t]he offense value reflects the higher degree of moral culpability involved. This factor applies only if the characteristic rendered a victim vulnerable to the

age or mental or physical condition."⁹ For other offenses, punishment is increased if the "victim was in the custody, care, or control of the offender."¹⁰ In this latter group, the draft guidelines recognize that a custodial relationship may create an additional vulnerability in the victim, and involves a form of fiduciary responsibility in the offender. Betrayal of such a trust by subjecting vulnerable individuals to criminal behavior warrants extraordinary punishment.

We agree with the inclusion of enhancement for penalties in each of these categories for each of the offenses the Preliminary Draft has selected. In addition, we request the Commission to consider extending these principles to other comparable situations. For example, the enhancement in custodial relationships could appropriately be applied to offenses involving fraud and deception [§F211(a)], homicide [§§A212(a), A213(a)], and assault and battery [§A221(a)]. It may also be worth considering whether such enhancement is appropriate for interfering with civil rights [§H211(a)] and obstructing correspondence [§H234].

⁸ Cf. A.B.A. Standards for Criminal Justice 18-3.2(b)(ii)(B) (2d ed. 1980).

⁹ E.g. §A212(a)(2). Commentary to the provisions regarding fraud makes clear that "[t]he offense value reflects the higher degree of moral culpability involved. This factor applies only if the characteristic rendered a victim vulnerable to the

In each of these situations, the offender's control over (and responsibility for) the victim renders the criminal conduct even more objectionable, and makes the deterrence of enhanced penalties especially important.

MENTALLY RETARDED OFFENDERS

More difficult sentencing issues arise when it is the offender who is mentally retarded. The Commission has specifically invited public comment on the relationship between mental disability and the sentencing process.¹¹

Mental Retardation as a Mitigating Factor. It has long been recognized that mental disability, including mental retardation, should be considered as a possibly mitigating factor in selecting an appropriate punishment for criminal behavior.¹² The United States Supreme Court has held that mental condition cannot be excluded from consideration as a

¹¹ Preliminary Draft, Chapter 3, Overview at 120; Chapter 6, Part F at 169.

¹² For a fuller discussion of the justifications for treating mental retardation as a mitigating factor, see Ellis & Luckasson, *supra*, at 471-73.

mitigating factor in capital cases.¹³ The drafters of the Model Penal Code took the same position.¹⁴ The American Bar Association's Criminal Justice Mental Health Standards provide that in all cases "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender."¹⁵ Congress has directed the Commission to consider the relevance of "mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant."¹⁶ Even a noted scholar who believes that mental disability should not constitute a separate

¹³ Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

¹⁴ American Law Institute, Model Penal Code §210.6(4)(g) (1980).

¹⁵ ABA Standards for Criminal Justice 7-9.3 (1984 Supp.). This provision elaborates on the earlier provision that included mental impairment as a mitigating consideration. ABA Standard 18-3.2(b)(i)(D) (2d ed. 1980).

¹⁶ 28 U.S.C.A. §994(d)(4). Congress also listed at least two other facts that may be sufficiently related to mental retardation to support the view that mental disability is an appropriate mitigating consideration. One such factor is education,

defense to criminal charges agrees that "[m]ental retardation may well be important in the determination of the suitable punishment."¹⁷

This consensus about the relevance of mental retardation to the sentencing process has a sound theoretical and practical basis. Mental retardation may decrease an offender's appreciation of the wrongfulness of the conduct without rising to the

which suggests that an offender who has limited education (as will generally be true for mentally retarded offenders) may be less culpable in some circumstances than his better-educated counterpart. To the extent that the factor of "age" includes relatively youthful offenders, an analogy (albeit imperfect) can be drawn to mentally retarded individuals with a "mental age" lower than their chronological age. For fuller discussion of the concept of "mental age," see Ellis & Luckasson, *supra* at 434-35.

¹⁷ N. Morris, *Special Doctrinal Treatment in Criminal Law, in The Mentally Retarded Citizen and the Law* 681, 684 (M. Kindred et al. eds. 1976).

level of a successful defense under federal law.¹⁸ Even more significant, in light of the new federal statute's abandonment of the volitional prong of the defense, is the fact that impulsivity and other characteristics that may be associated with mental retardation may substantially impair a defendant's ability to conform his conduct to the law's requirements. Although this factor no longer constitutes a complete defense, it remains relevant to the defendant's degree of culpability, and therefore should be considered carefully as a mitigating factor in selecting an appropriate penalty.

Implementing the Mitigation Factor. The practical implementation of this principle in the context of the proposed sentencing guidelines raises some difficult questions. The

¹⁸ "It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense." 18 U.S.C.A. 20(a). This section clearly makes the "insanity" defense available to people with mental retardation, but the effect of the modifier "severe" to mentally retarded defendants is unclear. See Ellis & Luckasson, *supra* at 473 n. 331.

Commission has invited public comment on the methodology to be employed by the sentencing judge. (Page 137.) Three alternatives were mentioned: allowing consideration within the 25 percent range; citation as a mitigating factor; and applying a multiplier factor.

Several features of mental retardation may help inform this choice. One is that it will arise in the sentencing context only rarely. In Pennsylvania, the equivalent factor ("limited intelligence") was cited less frequently than any other factor in mitigation for departing from the sentencing guidelines (40 citations out of a total of 5,641).¹⁹ The unusual pattern of federal criminal offenses (e.g. the exclusion of most minor property crimes from federal jurisdiction) suggests that it will arise at the federal level even less frequently than it does in state courts. (Mental disability from limited intelligence that is not sufficiently severe to constitute mental retardation might be raised more frequently, but that need not be treated

¹⁹ Pennsylvania Commission on Sentencing, 1985 Annual Report at 22. Minnesota has had similar experience. See N. Morris, *Madness and the Criminal Law* 174 (1982) ("mental impairment," combined with "psychological problem" -- which presumably included mental illness -- accounted for only 6.9 percent of all mitigations).

identically with actual mental retardation.)

It is also noteworthy that mental retardation is not a monolithic disability, with every retarded individual affected identically. The differences between an offender whose disability is classified as "mild" and one whose retardation is "severe" or "profound" are substantial. In addition, within the same degree of mental retardation, the disability may be related to the offender's criminal conduct to a greater or lesser extent, depending upon individual circumstances. These factors militate against the use of a uniform formula such as a multiplier.

Finally, mental retardation is a condition that is measurable by relatively objective standards and does not fluctuate greatly in any individual over time. Therefore it may be distinguishable for these purposes from mental illness.²⁰ As a

²⁰ There is also a definitional difference. As noted above, individuals whose impairment from low intelligence is not substantial are no longer classified as mentally retarded (the previously recognized category of "borderline"). By contrast, the universe of mental illness includes cases in which the disability is relatively minor. We do not mean to suggest that mental illness should not be considered as a mitigating factor; however the details of implementation may differ for the two

result, sentencing courts would not frequently encounter the type of full-fledged "battle of the experts" that often accompanies litigation on issues involving mental illness.

With these considerations in mind, we request that the Commission consider a two-pronged approach to the issue of mitigation resulting from diminished intelligence. Subaverage intelligence that does not constitute mental retardation could be considered by the sentencing court as a factor in mitigation, where demonstrated to be relevant, within the 25 percent range. Mental retardation, by comparison, could warrant mitigation, upon a proper showing of relevance, below the guideline range. This policy could be expressed in a Policy Statement on Special Conditions (roughly parallel to the aggravation factor in C322):

If the offender can establish by a preponderance of the evidence that he was mentally retarded at the time of the offense and that his mental retardation significantly reduced his culpability, mitigation beyond the guideline range shall be warranted. Limited intelligence that does not constitute mental retardation but that is demonstrated

forms of mental disability.

by preponderance of the evidence to have significantly reduced culpability shall be considered in mitigation within the guideline range.

This approach places the burden of persuasion on the offender to demonstrate both his disability and its relevance to the offense. It permits the sentencing judge to weigh the effect of the disability on the offender's culpability, and to mitigate punishment below the guideline range in appropriate cases. Cases in which a factual dispute arises can be resolved in an informal sentencing hearing, with such expert testimony from mental retardation professionals as may be appropriate, as described in the Commentary at pages 17-18 of the Commission's Preliminary Draft.

Punishment Other Than Imprisonment. As Congress noted, the potential relevance of mental disability to the sentencing process extends to questions beyond the duration of the sentence imposed. Mental retardation may also be relevant to the "place of service [and] other incidents of an appropriate sentence."²¹ Two facts about mentally retarded offenders are of particular importance. The first is that they are uniquely vulnerable to predation by their fellow prisoners in integrated correctional

²¹ 28 U.S.C.A. §994(d).

facilities.²² The second is that states that have experimented with community correctional programs for mentally retarded offenders have achieved substantial success.²³ These facts have several implications for the sentencing process.

Mentally retarded offenders should be considered for sentencing to appropriate penalties other than imprisonment. For some individuals, probation or supervised release (§§A412 and A413) will be appropriate. In such cases, judicial imposition of conditions requiring the offender to participate in habilitation programs will frequently be warranted. Community confinement or home detention (§§A414 and A415) will be appropriate in other cases. But the Preliminary Guidelines' limitation of such programs to a period no longer than six months (§§A414(c) and A415(c)) may be inappropriate for mentally retarded offenders. Habilitation of mentally retarded persons frequently takes

²² "Mentally retarded persons meet with unremitting hardships in prison." Ruiz v. Estelle, 503 F.Supp. 1265, 1344 (S.D. Tex. 1980), aff'd in part and rev'd in part on other grounds, 679 F.2d 1115 (5th Cir. 1982), cert. denied 460 U.S. 1042 (1983). The problems of mentally retarded prisoners are discussed in greater detail in Ellis & Luckasson, supra at 479-84.

²³ See Ellis & Luckasson, supra at 477 nn. 353-54.

longer than this, and the sentencing court should have flexibility to order longer periods of community confinement or home detention, especially upon the recommendation of mental retardation professionals who may conclude that a longer course of habilitation is necessary in the case of a particular offender.

Mental Retardation as an Aggravating Factor. There have been some suggestions that in unusual cases, mental illness can be considered as an aggravating factor in selecting an appropriate penalty.²⁴ Whatever the merits of this controversy as it relates to mental illness, there is no support in the empirical literature regarding the dangerousness of individuals with mental retardation that would justify including it as a possibly aggravating factor. Mental retardation should never be considered as an aggravating factor in selecting an appropriate criminal sentence.

²⁴ Compare N. Morris, *Madness and the Criminal Law* 171-72 (1982) ("very few cases indeed" where an increase of punishment can be justified), with A.B.A Criminal Justice Mental Health Standards 7-9.3 Commentary ("should not be considered to be an aggravating factor").

Plea Agreements. Mentally retarded defendants present unique and difficult issues in the process of plea bargaining. Because the Commission's Preliminary Draft contains no detailed discussion concerning plea agreements (page 166), we have no direct comments to offer at this time. However, the Commission may wish to review the discussion of this issue in Ellis & Luckasson, supra, at 460-66, on the subject of competence to enter a plea and the appropriate role of judicial scrutiny of plea bargains involving mentally retarded defendants.

Conclusion. We commend the Commission for the thoughtful and capable Preliminary Draft which it has promulgated. We appreciate the Commission's willingness to consider our views on these matters. We will be glad to offer any further assistance that the Commission or its staff may request.

Mentally Retarded Criminal Defendants

James W. Ellis*
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Defendants who are mentally retarded present difficult doctrinal and practical issues for the criminal justice system. Given the frequency with which these issues arise, it is surprising that they have received so little systematic attention from courts and commentators.¹ At the practical level, mentally retarded defendants often go unrecognized,² and therefore the difficult issues which may be present are overlooked. When the doctrinal issues are dis-

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1. During the eugenics scare in the early decades of this century, retarded defendants received substantial — indeed inordinate — attention. See *infra* Part III. In the last fifty years, however, interest in retarded defendants appears to have subsided dramatically. But see Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365 (1981); Comment, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622 (1975); Person, *The Accused Retardate*, 4 COLUM. HUM. RTS. L. REV. 239 (1972); Pieski, *Subnormal Mentality As a Defense in the Criminal Law*, 15 VAND. L. REV. 769 (1962).

2. See generally Allen, *The Retarded Offender: Unrecognized in Court and Untreated in Prison*, 32 FED. PROBATION 22 (Sept. 1968). See *infra* Part II (discussion of the reasons mentally retarded defendants go unrecognized).

cussed, it is frequently in the context of defendants who are mentally ill, and the differences between mental illness and mental retardation are ignored. The legal rules appropriate for mentally retarded defendants have become, at best, an afterthought to the fervent battles involving criminal defendants who are mentally ill.³

In a sense, the problems posed by mental retardation were also an afterthought in the promulgation of the new *ABA Criminal Justice Mental Health Standards*.⁴ From the beginning they were entitled "Criminal Justice Mental Health Standards."⁵ Although numerous mental health professionals served on the various interdisciplinary task forces from the outset,⁶ mental retardation professionals were appointed only after the first year. Moreover, while the final version of the *Mental Health Standards* explicitly discusses mentally retarded defendants, previous drafts did so inconsistently.⁷

However, the early omission of issues related to mental retardation was remedied and the final *Mental Health Standards* repre-

3. Many of the most authoritative and helpful studies and treatises on mental disability and the criminal law make little or no mention of mental retardation. See, e.g., H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979); R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL (1980); A. GOLDSTEIN, THE INSANITY DEFENSE (1967); S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME (1971); H. FINGARETTE & A. HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979); MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE (J. Monahan & H. Steadman eds. 1983).

4. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1984) [hereinafter cited as MENTAL HEALTH STANDARDS 7-x.y]. The ABA House of Delegates formally adopted the *Mental Health Standards* as chapter seven of the ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) on August 7, 1984. Nevertheless, when considering each chapter of the *ABA Standards for Criminal Justice*, the House of Delegates votes only upon the black letter standards. Therefore, the commentary accompanying the *Mental Health Standards* does not represent ABA policy; its purpose is to assist practitioners by explaining the *Mental Health Standards*' underlying legal and mental health rationales. All citations to the commentary are to the August 1984 edition of the *Mental Health Standards* submitted to the House of Delegates. Some minor changes should be expected in the final commentary, which will appear in the *ABA Standards for Criminal Justice*, because the Standing Committee on Association Standards for Criminal Justice is presently updating the commentary.

5. Emphasis added. See ABA STANDARDS FOR CRIMINAL JUSTICE (1st Tent. Draft 1983) [hereinafter cited as FIRST TENTATIVE DRAFT]. "Mental health" is inappropriate as an umbrella term because people with mental retardation are not ill. See *infra* note 52. A more encompassing and accurate title would be "Mental Disability Standards." The term "disability" is now used to describe both mental illness and mental retardation. See generally THE MENTALLY DISABLED AND THE LAW (S. Brakel & R. Rock eds., rev. ed. 1971). The ABA's own journal in the field is similarly entitled the *Mental and Physical Disability Law Reporter*.

6. Although some psychiatrists and a somewhat larger number of psychologists work with people who are mentally retarded, most members of these professions have no experience and little training in the area of retardation. See *infra* parts VI & VII (discussion of mental retardation professionals).

7. See generally FIRST TENTATIVE DRAFT.

sent one of the first comprehensive, albeit imperfect, attempts to address the problems of retarded defendants.⁸ They provide a useful vehicle for analyzing the current state of the law regarding the impact of mental retardation on both procedural and substantive issues that the criminal courts must address.

This Article attempts to provide a preliminary overview of the issues in the *Mental Health Standards* as they relate to defendants with mental retardation. Part I reviews the history of the treatment of retarded defendants in the criminal justice system. Part II describes the characteristics of people with mental retardation and the consequences of those characteristics. Part III then discusses the extent to which mental retardation should be exculpatory of criminal responsibility. Part IV analyzes the critical importance of competence issues to mentally retarded defendants. Part V elaborates upon dispositional issues including civil commitment and sentencing. Parts VI and VII discuss the role of mental retardation professionals in the criminal justice system. Part VIII concludes with a discussion of specialized training for participants in the criminal justice system in mental retardation.

I. History of Attitudes Toward Mentally Retarded Defendants

The distinction between mental illness and mental retardation has been long recognized, although inconsistently applied, in Anglo-American law. Observations about the difference between "idiots" and "lunatics" can be traced back to at least the thirteenth century, although the legal distinction originally was applied in property law rather than criminal cases.⁹ Three centuries later, Fitzherbert¹⁰ provided a definition and a loosely structured test to determine whether an individual was an "idiot":

[An idiot is] a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be for his profit, or what for his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.¹¹

8. Cf. MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT [hereinafter cited as MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT], reprinted in *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES* 722-79 (B. Sales, D. Powell, R. Van Duzend et al. eds. 1982). This was one of several earlier model statutes prepared for the ABA Commission on the Mentally Disabled. Unlike the *ABA Standards for Criminal Justice*, the model acts were not presented to the ABA House of Delegates and do not represent official ABA policy.

9. Comment, *Lunacy and Idiocy — The Old Law and its Incubus*, 18 U. CHI. L. REV. 361, 362 (1951). A lunatic is "congenitally insane" and thus potentially treatable — unlike an idiot, who is born "mentally deficient or disturbed." *Id.*

10. See 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 544-45 (4th ed. reprinted 1966) (discussing Fitzherbert and his work).

11. S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 128 (1925) (quoting A. FITZHERBERT, *NATURA BREVITUM* (1534)). The test has been described as a "crude but by no means ridiculous form of intelligence test." 1 N. WALKER, *CRIME AND INSANITY*

This test became popularized almost immediately as the "counting-twenty-pence test," and is cited, with some variations, by numerous early authorities.¹²

The early definitions commonly required that idiocy be both congenital and permanent.¹³ In this, and in their focus on both intellectual impairment and its impact on functional ability, the early definitions are not wholly dissimilar from modern definitions of mental retardation.¹⁴

The perceived immutability of idiocy fostered a defense to criminal prosecution which some believed to be superior to the defense available to mentally ill defendants.¹⁵ The relative liberality of the defense of idiocy may also have been related to the accepted analogy between the presumed incapacity of children and mentally retarded adults to form criminal intent.¹⁶ People also may have perceived mentally retarded individuals as less dangerous to others than mentally ill persons.¹⁷

This situation did not survive into the current century. People came to view mentally retarded individuals as a threat to society, and a principal source of criminal and immoral behavior.¹⁸ A

IN ENGLAND: THE HISTORICAL PERSPECTIVE 36 (1968); J. BRYDALL, *NON COMPOS MENTIS: OR, THE LAW RELATING TO NATURAL FOOLS, MAD-FOLKS, AND LUNATICK PERSONS* 8 (1700).

12. Glueck suggested that users of Fitzherbert's formulation improperly focused only on the first part of his definition and ignored the accompanying limitations. See Glueck, *supra* note 11, at 128-29.

13. An early treatise quoted Lord Coke: "An idiot, who from his nativity by a perpetual informity is *non compos* . . ." I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 13 (1st ed. 1838 reprint 1962). Lord Coke elaborated: "Idiocy, imbecility, and senile dementia admit neither of cure nor amelioration . . ." *Id.* at 227.

14. See *infra* text accompanying note 40.

15. The authorities were not unanimous on this point: "Ideocy being a defect from birth is generally to be protected from punishment; but lunacy, which is a partial derangement, the senses returning at uncertain intervals, the offender is only protected from punishment for acts done during the prevalence of the disorder . . ." A. HIGHMORE, *A TREATISE ON THE LAW OF IDIOCY AND LUNACY* 195 (1807). Isaac Ray was of a different view, decrying "[t]he little indulgence shown to imbecility in criminal courts," and observing that "[t]he usual treatment of such offenders, it is to be feared, is prompted more by prejudice and excited feelings than by enlarged views of human nature and of the objects of criminal jurisprudence." I. RAY, *supra* note 13, at 78, 98. See generally N. DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES* 45 (1964) (evidence of great intellectual deficiency seemed to be enough proof of insanity); N. WALKER, *supra* note 11, at 37 (defendant perceived by jury as lacking normal intelligence was acquitted on grounds of insanity).

16. See generally Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 37 U. PA. L. REV. 426 (1939) (discussing the comparison of children and "feeble-minded" persons—mentally retarded persons—in relation to their ability to formulate the intent necessary to be found criminally liable); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 351-53 (1972) (setting forth the common law view of age in relation to criminal responsibility).

17. A. HIGHMORE, *supra* note 15, at vi (1807).

18. This focus upon the supposed criminal propensities of retarded people was

leader in this alarmist movement, Dr. Henry Goddard, declared that mentally retarded people constituted a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."¹⁹ Retarded people were believed to have a congenital deficit in moral sensibility analogous to color-blindness.²⁰ Another influential authority of the era, Walter Fernald, observed that "[e]very imbecile, especially the high-grade imbecile, is a potential criminal, needing only the proper environment and opportunity for the development and expression of his criminal tendencies."²¹ Many authors recounted (or invented) elaborate and lurid genealogical "studies"²² to illustrate the rela-

part of the larger pattern of discrimination that accompanied the eugenics scare of the early twentieth century. For general discussions of the treatment of retarded people during this period, see A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* 332-86 (2d ed. 1949); S. HERR, *RIGHTS AND ADVOCACY FOR RETARDED PEOPLE* 9-36 (1983); R. SCHEER-ENBERGER, *A HISTORY OF MENTAL RETARDATION* 154-75, 189-211 (1983); W. SLOAN & H. STEVENS, *A CENTURY OF CONCERN: A HISTORY OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY 1876-1976* 64-120 (1976); P. TYOR & L. BELL, *CARING FOR THE RETARDED IN AMERICA: A HISTORY* (1984); W. WOLFENBERGER, *THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS* 3, 13, 34-36 (1975). The story of this nation's treatment of mentally retarded people has been described as "grotesque" by five members of the Supreme Court. *City of Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3262 (1985) (Stevens, J., concurring, joined by Burger, C.J.); *id.* at 3266 (Marshall, J., concurring in part and dissenting in part, joined by Brennan and Blackmun, JJ.).

19. Goddard, *The Possibilities of Research as Applied to the Prevention of Feeble-mindedness*, *PROC. OF THE NAT'L CONF. OF CHARITIES AND CORRECTIONS* 307 (1915). Goddard was a prolific writer and a respected authority in the field of mental retardation, serving as President of the American Association on Mental Deficiency. See generally H. GODDARD, *THE CRIMINAL IMBECILE: AN ANALYSIS OF THREE REMARKABLE MURDER CASES* (1915); H. GODDARD, *FEEBLE-MINDEDNESS: ITS CAUSES AND CONSEQUENCES* (1914); H. GODDARD, *THE KALLIKAK FAMILY* (1912). He ultimately renounced his alarmist views. See Goddard, *Feeble-mindedness: A Question of Definition*, 33 *J. PSYCHO-ASTHENICS* 219, 223-27 (1928). For a review of Goddard's work and an evaluation of his influence, see S. GOULD, *THE MISMEASURE OF MAN* 158-74 (1981).

20. Kerlin, *Moral Imbecility*, in *PROCEEDINGS OF THE ASSOCIATION OF MEDICAL OFFICERS OF THE AMERICAN INST. FOR IDIOTIC AND FEEBLE-MINDED PERSONS* 32-37 (1899), reprinted in 1 *THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS* 303-10 (M. Rosen, C. Clark & M. Kivitz eds. 1976). This view was consistent with the then popular, broader theory that criminality was congenital. See S. GOULD, *supra* note 19, at 122-45. See generally C. LOMBROSO, *CRIME: ITS CAUSES AND REMEDIES* 151-74 (H. Horton trans. 1912 reprint 1968).

21. Fernald, *The Imbecile with Criminal Instincts*, 14 *J. PSYCHO-ASTHENICS* 16 (1909), reprinted in 2 *THE HISTORY OF MENTAL RETARDATION: COLLECTED PAPERS*, *supra* note 20, at 165, 180. One of the original developers of intelligence tests believed the tests should be used to identify mentally retarded individuals, whom he considered potential criminals, for lifelong segregation:

The feeble-minded . . . [are] by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feeble-minded is by permanent custodial care.

L. TERMAN, *THE INTELLIGENCE OF SCHOOL CHILDREN* 132-33 (1919).

22. For an account of the methodology in one such work, see S. GOULD, *supra* note 19, at 158-74 (1981). Gould documents the discredited methodology of Goddard in his studies including: failure to test an unbiased sample, over-utilization of visual identification and intuition of testers, and the alteration of photographs to demonstrate physical features supposedly identified with mental retardation. *Id.*

tionship between mental deficiency and crime and immorality, and to demonstrate the genetic origin of the disability.²³

The measures the alarmists thought necessary to prevent the corrosion of society by the presumed criminality of retarded people included the sterilization of all "feeble-minded" people and their permanent segregation from society.²⁴ These efforts achieved remarkable political success.²⁵ The link between sterilization and segregation laws and the perception of retarded people as potential criminals appears in the language of Justice Holmes's decision upholding the Virginia eugenic sterilization statute: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind Three generations of imbeciles are enough."²⁶ Given the nature of the claims made by the alarmists, their recommendations included remarkably few suggestions directed at the criminal law's treatment of the supposedly dangerous and immoral "feeble-minded."²⁷

Many mental retardation professionals came to reject the

23. See, e.g., R. DUGDALE, "THE JUKES": A STUDY IN CRIME, PAUPERISM, DISEASE AND HEREDITY 41-55 (5th ed. 1895); A. ESTABROOK, THE JUKES IN 1915 63-67 (1916); H. GODDARD, THE KALLIKAK FAMILY 18-19 (1912). These accounts were apparently very influential, and citations to them can be found in many discussions of mental retardation from that era. See, e.g., S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 332 (1925). It is noteworthy that some of these very authors employed the same methodology to demonstrate the necessity for miscegenation laws. See, e.g., A. ESTABROOK & I. MCDUGGLE, MONGREL VIRGINIANS: THE WIN TRIBE (1926).

24. P. TYOR & L. BELL, *supra* note 18, at 105-22.

25. Twenty-nine states enacted eugenic sterilization laws between 1907 and 1931. See J. LANDMAN, HUMAN STERILIZATION 302-03 (1932); see generally S. SMITH, M. WILKINSON & L. WAGONER, A SUMMARY OF THE LAWS OF THE SEVERAL STATES GOVERNING: I.-MARRIAGE AND DIVORCE OF THE FEEBLEMINDED, THE EPILEPTIC AND THE INSANE, II.-ASEXUALIZATION, III.-INSTITUTIONAL COMMITMENT AND DISCHARGE OF THE FEEBLEMINDED AND THE EPILEPTIC (1914); cf. Amicus Curiae Brief for the Association for Retarded Citizens et al. at 7-15, *City of Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249 (1985).

26. *Buck v. Bell*, 274 U.S. 200, 207 (1927). Justice Holmes's factual assertions about the disabilities of Carrie Buck and her daughter were in error. See Gould, *Carrie Buck's Daughter*, NAT. HIST., July 1984, at 14, 16-18.

27. Goddard, for example, accepted that many retarded offenders would be entitled to a defense of insanity, concluding that it was

of the highest probability that persons of a mental age under twelve years, like the normal boys or girls of the same age, do not know and cannot be expected to know the quality of their acts. And this is sufficient, because the law requires no more than a reasonable doubt, and there certainly is a very reasonable doubt as to whether such persons know the quality of an act of murder and know that it is wrong.

H. GODDARD, THE CRIMINAL IMBECILE: THE ANALYSIS OF THREE REMARKABLE CRIMINAL CASES 99 (1915). Nevertheless, Goddard believed that retarded defendants, whether convicted or acquitted on grounds of mental disability, should be incarcerated for life, under the theory that an "imbecile" will "never recover; he will never be free from the danger of following the suggestion of some wicked person or of yielding

theories of the alarmists by the 1930s,²⁸ and some of the most influential leaders of the eugenics movement eventually recanted their earlier views.²⁹ By the 1950s, authorities commonly agreed that no significant link existed between mental retardation and criminality.³⁰

The abandonment of the alarmist view led to a period of marked decline in the attention paid to issues presented by mentally retarded criminal defendants. The next significant development was the growing recognition in the 1960s and 1970s that the criminal justice system ill-treated retarded defendants. Sporadic proposals for reform accompanied these observations. President Kennedy's Panel on Mental Retardation noted problems in the areas of the insanity defense, confessions, competence to stand trial, and disposition following conviction and acquittal.³¹ Other authorities proposed a special court for retarded defendants³² and separate treatment following conviction.³³ The Supreme Court declared unconstitutional the system of indefinite commitment of retarded defendants found permanently incompetent to stand trial.³⁴

These events of the last two decades occurred against the backdrop of a more general movement toward fuller recognition of the rights of retarded people in all areas of American law.³⁵ Despite isolated exceptions, criminal justice issues have engendered less activity and movement toward reform than other legal problems facing retarded people.³⁶ The contemporary literature remains sparse and actual improvements in the treatment of mentally retarded defendants are difficult to detect. Although the last ves-

to his own inborn and uncontrolled impulses. It will never be safe for him to be at large." *Id.* at 102.

One statutory response to this kind of fear was the enactment of defective delinquent and sexual psychopath statutes, aimed at both mentally ill and mentally retarded defendants. The *Mental Health Standards* properly call for the repeal of all such statutes. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-8.1 & commentary at 447-53.

28. *But see* Richmond, *The Criminal Feeble-minded*, 21 J. CRIM. L. & CRIMINOLOGY 537, 546-51 (1931) (a strident protest at the abandonment of alarmist views).

29. *See* Fernald, *Thirty Years Progress in the Care of the Feeble-Minded*, 29 J. PSYCHO-ASTHENICS 206, 209 (1924); Goddard, *Feeble-mindedness: A Question of Definition*, 33 J. PSYCHO-ASTHENICS 219, 223-27 (1928).

30. *See* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 385 (1954).

31. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 31-41 (1963).

32. Allen, *Toward an Exceptional Offenders Court*, in MENTAL RETARDATION 3, 5-6 (Feb. 1966).

33. R. Stephens, *Criminal Justice in America: An Overview*, in THE RETARDED OFFENDER 94, 124-30 (M. Santamour & P. Watson eds. 1982).

34. *Jackson v. Indiana*, 406 U.S. 715 (1972).

35. The rights of retarded people were greatly enhanced in education, institutional conditions, and deinstitutionalization and community placement. *See generally* S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE (1983); THE MENTALLY RETARDED CITIZEN AND THE LAW (M. Kindred, J. Cohen, D. Penrod & T. Shaffner eds. 1976); D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS (1984); Turnbull, *Rights for Developmentally Disabled Citizens: A Perspective for the 80s*, 4 U. ARK. LITTLE ROCK L.J. 400 (1981).

36. *See supra* text accompanying notes 31-34.

tiges of alarmist views about the criminality of retarded people have not been eliminated,³⁷ the greater problem today is inattention and failure to identify the unique needs of retarded defendants in the criminal justice system.

II. Characteristics of Mentally Retarded Defendants

A. The AAMD's Definition and its Meaning

There is general agreement about the definition of mental retardation.³⁸ The American Association on Mental Deficiency (AAMD), the principal professional organization in the field of mental retardation,³⁹ has adopted the following definition: "Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period."⁴⁰

37. See, e.g., *United States v. Mather*, 539 F.2d 721, 732 (D.C. Cir. 1976) (Robb, J., dissenting). Judge Roger Robb remarked that the majority's decision to require scrutiny of the adequacy of a retarded defendant's guilty plea "licenses every illiterate moron to violate the law with impunity." *Id.*

38. Terminology in this field is somewhat complex. "Mental retardation" is today the accepted term in modern usage, although the archaic "mental deficiency" has not been completely abandoned. Another common term in current usage is "developmental disabilities," a broader concept encompassing a number of handicapping conditions, including mental retardation. See, e.g., *Developmentally Disabled Assistance and Bill of Rights Act*, 42 U.S.C. §§ 6000-6081 (1982). Previously accepted terminology included "idiots," "imbeciles," "morons," and "feeble-minded," all used to describe different degrees of mental retardation. The terminology was used without precise uniformity: "idiot" corresponded roughly with severe and profound retardation, "imbecile" with moderate retardation, and "moron" and "feeble-minded" with mild retardation. On occasion each term has been used as an umbrella term to include all levels of disability. In common conversation, of course, these terms have become epithets, but they remain on the books in the statutes of a substantial number of states. See, e.g., S.C. CODE ANN. § 44-47-50(a) (Law. Co-op. 1985); IOWA CONST. art. II, § 5. Their continuing use offends mentally retarded people and their families. See A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 119 (1975). Stone remarks that "[p]erhaps there is no other place in the mental health system where labels are more odious and more invidious." *Id.*

39. Founded in 1876 as "The Association of Medical Officers of American Institutions of Idiotic and Feeble-minded Children," the association changed its name in 1906 to "The American Association for the Study of the Feeble-minded," and in 1933 to its current name. The AAMD now has approximately 10,000 members from a variety of disciplines that serve mentally retarded people. See generally W. SLOAN & H. STEVENS, *A CENTURY OF CONCERN: A HISTORY OF THE AMERICAN ASSOCIATION ON MENTAL DEFICIENCY 1876-1976* (1976).

40. AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, *CLASSIFICATION IN MENTAL RETARDATION I* (H. Grossman ed. 1983) [hereinafter cited as AAMD, *CLASSIFICATION IN MENTAL RETARDATION*].

The causes of mental retardation are numerous and complex, including both environmental and genetic factors. See D. MACMILLAN, *MENTAL RETARDATION IN SCHOOL AND SOCIETY* 81-166 (2d ed. 1982); N. ROBINSON & H. ROBINSON, *THE MENTALLY RETARDED CHILD* 51-133 (2d ed. 1974).

Courts,⁴¹ legislatures,⁴² and other professional organizations⁴³ have accepted this definition.

General intellectual functioning is a phenomenon measured, and thus defined, by intelligence tests. It is, therefore, quantifiable as an intelligence quotient (IQ) score. The AAMD's definition sets the upper boundary of mental retardation at an IQ level of 70, which is approximately two standard deviations from the mean score of 100.⁴⁴ For an individual to be classified as mentally retarded, the deficit in intellectual functioning must be accompanied by impairments in adaptive behavior defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."⁴⁵ Thus, adaptive behavior is a term of art, which is not synonymous with maladaptive behavior. The inclusion of adaptive behavior in the definition of mental retardation requires that intellectual impairment, measured by an intelligence test, have some practical impact on the individual's life.⁴⁶

The final requirement of the definition of mental retardation is that the disability must become manifest before the age of eighteen. The origin of this requirement is obscure, and its relevance to criminal justice is limited.⁴⁷ If an individual impaired in both intellectual function and behavior would otherwise be classified as

41. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 105 S. Ct. 3249, 3256 n.9 (1985); *In re Krall*, 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91, 94 (1984); *United States v. Mather*, 539 F.2d 721, 724 n.16 (D.C. Cir. 1976); *In re Grady*, 85 N.J. 235, 240 n.1, 426 A.2d 467, 469 n.1 (1981).

42. See, e.g., OHIO REV. CODE ANN. § 5123.01(k) (Page 1981 & Supp. 1984); FLA. STAT. ANN. § 393.063(23) (West Supp. 1985); OR. REV. STAT. § 427.005(10) (1983).

43. See, e.g., 1 WORLD HEALTH ORGANIZATION, SYSTEM OF INTERNATIONAL CLASSIFICATION OF DISEASES, CLINICAL MODIFICATION (ICD-9-CM) 1098-99; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 36 (3d ed. 1980) [hereinafter cited as DSM-III].

44. AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 23. The authors of the current definition caution that "[t]his upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used." *Id.* at 11.

The immediate predecessor to the current edition of the manual explicitly cast the definition in terms of standard deviations, but this definition was modified because of concern that it might suggest a greater precision than current testing instruments can provide. *Id.* at 23.

From 1959 to 1973 the AAMD definition was substantially broader, including all persons with IQ scores more than one standard deviation from the mean (approximately IQ 85). Persons whose scores fell in the range of 70-85 were labeled "borderline retarded." This approach was abandoned in 1973 because professionals recognized that individuals in the so-called "borderline retarded" group frequently did not function as mentally retarded people. This group is no longer labeled retarded by professionals in the field. *Id.* at 6.

45. *Id.* at 11.

46. See *id.* at 203-16 (illustrations of deficits in adaptive behavior at various levels of mental retardation). The most frequently used scales for measuring adaptive behavior are the AAMD Adaptive Behavior Scale and the Vineland Social Maturity Scale.

Three scholars in the field of mental retardation have recently proposed that the adaptive behavior component be omitted from the definition because "the essence of mental retardation involves inefficient cognitive functioning." Zigler, Balla & Hodapp, *On the Definition and Classification of Mental Retardation*, 89 AM. J. MENTAL DEFICIENCY 215, 227 (1984).

47. See, e.g., *Mental Health Standards*, *supra* note 4, 7-9.1 commentary at 459.

mentally retarded, it matters little whether the onset of the problem occurred when the person was a child or an adult. The criminal law generally will be concerned with the manifestations and consequences of the individual's handicap and not the date of its origin.

Mentally retarded people are classified in a system of four categories: mild, moderate, severe, and profound.⁴⁸ Approximately eighty-nine percent of the people classified as mentally retarded fall within the "mildly retarded" category.⁴⁹ Mildly retarded people have IQ scores in the range between 50 to 55 and approximately 70, and thus have a substantial disability. Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of "mild" and "moderate" to be euphemistic descriptions of individuals at those levels of disability.⁵⁰

B. Mental Retardation Contrasted with Mental Illness

Mental retardation is often confused with mental illness. This confusion can have unfortunate consequences in the criminal justice system.

The American Psychiatric Association defines "mental disorder" as "an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/chemical, or biologic disturbance. The disorder is not limited to relations between the person and society. The illness is characterized by symptoms and/or impairment in functioning."⁵¹ While there may be some points of similarity between this definition and the AAMD's definition of mental retardation, the cardinal difference is that mental retardation is not an illness.⁵²

"Temporal manifestation of retardation is not germane to the issues confronted within Part IX of these standards." *Id.*

48. AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 13.

Somewhat different (and arguably archaic and misleading) terminology is occasionally still employed in the context of special education. Mildly retarded people may be characterized as "educable," and moderately retarded people as "trainable." D. EVANS, THE LIVES OF MENTALLY RETARDED PEOPLE 14 (1983).

49. DSM-III, *supra* note 43, at 40. People who are "mildly retarded" should not be confused with the so-called "borderline retarded," who are no longer considered mentally retarded. See *supra* note 44.

50. See AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 203-16 (illustrative descriptions of adaptive behaviors at each level of retardation). See also *infra* note 286.

51. AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC GLOSSARY 89 (5th ed. 1980). The glossary does not separately define "mental illness," providing only a cross-reference to "mental disorder"; see DSM-III, *supra* note 43, at 363.

52. Syndicated columnist George Will has captured this distinction vividly, noting that retarded people are often described as if they suffered from a disease: "Jonathan Will, 10, fourth-grader and Orioles fan (and the best Wiffle-ball hitter in southern Maryland), has Down's syndrome. He does not 'suffer from' (as the newspapers are wont to say) Down's syndrome. He suffers from nothing, except anxiety about the

Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn.⁵³

Important consequences for the criminal justice system flow from the difference between mental illness and mental retardation. Many forms of mental illness are temporary, cyclical, or episodic. Mental retardation, by contrast, involves a mental impairment that is permanent.⁵⁴ Thus, legal rules which focus upon the prospect of "curing" mentally ill people⁵⁵ may not address the condition of retarded people in an appropriate or useful fashion. Similarly, to discuss "restoration" of competence to stand trial presupposes that the individual was previously competent. Since most mentally retarded people became disabled at birth or as young children,⁵⁶ this formulation is neither accurate nor meaningful. Perhaps the most significant danger of confusing mental illness and mental retardation in the criminal justice system is the failure to understand that psychiatric treatment appropriate for mentally ill people will do nothing to assist a retarded person who is not mentally ill. If the treatment is being provided to influence the mentally retarded defendant's competence to stand trial or to render the individual nondangerous, the failure to provide habilitative services⁵⁷ tailored to the defendant's needs

Orioles' lousy start." Will, *The Killing Will Not Stop*, Wash. Post, Apr. 22, 1982, at A29, col. 1.

The American Psychiatric Association includes mental retardation in its classification system of mental disorders. DSM-III, *supra* note 43, at 36-41. This does not make mental retardation an illness. The purpose of the American Psychiatric Association's nosology in DSM-III is to allow psychiatrists to classify the symptoms presented by patients. Since some mentally retarded people may also suffer from mental illness, see *infra* note 59 and accompanying text, identification of the fact that a mentally ill patient is mentally retarded may have important consequences for diagnosis and treatment.

53. Thus people of any level of intelligence may be mentally ill. However, most mentally retarded people are free of mental illness. See *infra* note 59 and accompanying text.

54. The consequences of the mental impairment, including deficits in adaptive behavior, may be ameliorated through education and habilitation. Therefore, it is not accurate to state categorically that mental retardation is "permanent" or "incurable." See AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 15 ("The AAMD definition carries no connotation of chronicity or irreversibility and, on the contrary, applies only to levels of functioning.") (emphasis omitted); CURATIVE ASPECTS OF MENTAL RETARDATION: BIOMEDICAL AND BEHAVIORAL ADVANCES xiii (F. Menolascino, R. Neman, & J. Stark eds. 1983). *But cf.* Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954) (defining "mental defect" as "a condition which is not considered capable of either improving or deteriorating . . .").

55. See, e.g., State v. Krol, 68 N.J. 236, 255, 344 A.2d 289, 299 (1975) (declaring unconstitutional a statute that required confinement of insanity acquittes until they were restored to reason). *But see* Jones v. United States, 463 U.S. 354, 361-70 (1983) (Constitution permits the government, on the basis of an insanity judgment, to confine an acquittee to a mental institution until he has regained his sanity).

56. See *infra* note 245; R. EDGERTON, MENTAL RETARDATION 3-4 (1979).

57. "Habilitation" is the term used by mental retardation professionals to describe the array and combination of services that mentally retarded people need to address their disabilities. The Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons (AC/MRDD) defines habilitation as "the process by which the staff of an agency assists individuals to acquire and maintain those life skills that enable them to cope more effectively with the demands of their

may result in needlessly protracted, possibly lifelong, confinement.⁵⁸

Mental illness and mental retardation are not mutually exclusive conditions; some mentally retarded people are also mentally ill. Dr. Frank Menolascino has estimated that the incidence of mental illness among retarded people is approximately thirty percent.⁵⁹ Not only is the combined effect of their disabilities a burden,⁶⁰ but our service delivery systems frequently make no allowance for their needs. Mental retardation facilities often refuse to serve persons with the behavioral disorders these individuals may manifest, and mental illness facilities often lack any expertise or programming for the habilitation of mentally retarded persons.⁶¹

C. *The Incidence of Mental Retardation Among Criminal Defendants*

The mental retardation literature has addressed no other subject in criminal law as extensively as the incidence of retardation among criminal defendants and prisoners, and its implications regarding the "criminality" of mentally retarded people.⁶² The pub-

own persons and of their environments and to raise the levels of their physical, mental, and social functioning. Habilitation includes, but is not limited to, programs of formal, structured education and treatment." ACCREDITATION COUNCIL FOR SERVICES FOR MENTALLY RETARDED AND OTHER DEVELOPMENTALLY DISABLED PERSONS, STANDARDS FOR SERVICES FOR DEVELOPMENTALLY DISABLED INDIVIDUALS 21-22 (1984). The term has been used in numerous statutes and at least 150 reported American court cases. LEXIS Count (LEXIS search was designed to minimize the retrieval of all examples of the term outside the context of mental retardation and disability context). Legislatures and courts typically have adopted a definition identical or similar to AC/MRDD's. See, e.g., *Wyatt v. Stickney*, 344 F. Supp. 387, 395 (1972), *aff'd in part and remanded in part on other grounds sub nom. Wyatt v. Aderholt*, 503 F.2d 1305, 1312-13 (5th Cir. 1974); N.M. STAT. ANN. § 43-1-3(K) (1978 & repl. 1984). The Supreme Court used the term interchangeably with "training" in *Youngberg v. Romeo*, 457 U.S. 307, 316-19 (1982), but the words are not synonymous; "training" does not reflect adequately the other components of habilitation (including Nicholas Romeo's) such as physical therapy.

58. See *infra* notes 245-50 and accompanying text.

59. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977).

60. Individuals with both mental illness and mental retardation are often referred to as "dual diagnosis" clients. See, e.g., HANDBOOK OF MENTAL ILLNESS IN THE MENTALLY RETARDED 10, 83-84 (F. Menolascino & J. Stark 1984).

61. F. MENOLASCINO, *supra* note 59, at 190 (1977).

62. See, e.g., H. GODDARD, THE CRIMINAL IMBECILE: AN ANALYSIS OF THREE REMARKABLE MURDER CASES 106 (1915) ("[I]n the neighborhood of fifty percent of all criminals are feeble-minded."); McCarty, *Mental Defective and Criminal Law*, 14 IOWA L. REV. 401, 416 (1929) (25 to 50% of all prisoners were "feeble-minded"). A bibliography listed 210 publications on the subject through 1916. Crafts, *A Bibliography on the Relations of Crime and Feeble-Mindedness*, 7 J. CRIM. L. & CRIMINOLOGY 544 (1916). One researcher has noted that approximately 500 studies have been published since Goddard's work in 1914: "No other single characteristic of the mental retardate has been so thoroughly studied, yet these investigations have failed to pro-

lished studies have produced widely disparate conclusions.⁶³ Many of these disparities can be explained by methodological factors.⁶⁴ The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole.⁶⁵

Although the early alarmist literature which proclaimed that mentally retarded people were naturally destined to become criminals — and in fact that mental retardation caused criminality — has been debunked, the question of a causal relationship has not been fully resolved. Monahan and Steadman, in their study of the epidemiology of crime and mental illness,⁶⁶ suggest an analysis of causation which may be a useful model in considering the parallel subject in mental retardation. They suggest that there are three possible paths that may link mental disorder (illness) to crime: mental disorder and crime may coexist without any causal relationship, mental disorder may predispose individuals toward criminality, or mental disorder may inhibit individuals from criminality.⁶⁷

Applying this model to mental retardation, a striking difference between the two types of disabilities becomes clear. As with mental illness, mental retardation may coexist with criminality. It may also inhibit criminal behavior, as with a person who is profoundly retarded and so physically involved (disabled) that he requires assistance with every movement. But mental retardation

vide conclusive evidence that intelligence level plays a role in delinquent and/or criminal behavior." F. MENOLASCINO, *supra* note 59, at 181.

63. Compare Brown & Courtless, *The Mentally Retarded in Penal and Correctional Institutions*, 124 AM. J. PSYCHIATRY 1164, 1166 (1968) (national average of about 10% with some states lower than 3%) with McCarty, *supra* note 62, at 416 (25 to 50% of all prisoners found to be "feeble-minded").

64. Early in this century, one authority observed that the statistics on retarded offenders were inflated by researchers counting only prisoners, thus failing to account for different rates of apprehension and parole at different levels of intelligence. The author then conducted her own study of the percentage of "feeble-minded" among criminals in Chicago and concluded that it was less than 10%. Bronner, *A Research on the Proportion of Mental Defectives Among Delinquents*, 5 J. CRIM. L. & CRIMINOLOGY 561, 568 (1914).

65. See Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 172 (J. Wortis ed. 1978) (an estimate of retarded persons in prisons may not reflect any greater propensity of the mentally retarded to commit crime than other segments of the general population); MacEachron, *Mentally Retarded Offenders: Prevalence and Characteristics*, 84 AM. J. MENTAL DEFICIENCY 165, 168 (1979) (prevalence rates for retarded offenders in Maine and Massachusetts were only slightly higher than the prevalence rate of mental retardation in the general population). See generally Santamour, *A Functional Discussion of Mental Retardation and Criminal Behavior*, in THE RETARDED OFFENDER, *supra* note 33.

66. Monahan & Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145 (M. Tonry & N. Morris eds. 1983).

67. *Id.* at 182. See generally Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593 (1985); Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794 (1984) (suggesting that mentally ill persons are undergoing criminalization with adverse public policy consequences).

will rarely, if ever, cause criminality. Mental retardation is a learning deficiency rather than a thinking disorder; the irrationality, paranoia, and delusions that can indicate mental illness and which are related to criminality are not indicators of mental retardation.⁶⁸ But while direct causation can be ruled out, there are indirect consequences of mental retardation, including the iatrogenic effects on personality and behavior of living in dehumanizing institutions. These consequences may affect the interaction between the mentally retarded and the criminal justice system.⁶⁹

D. Characteristics of People with Mental Retardation

Mentally retarded people are individuals. Any attempt to describe them as a group risks false stereotyping and therefore demands the greatest caution.⁷⁰ Nevertheless, some characteristics occur with sufficient frequency to warrant certain limited generalizations. Several of these traits have important implications for the

68. However, mental illness and mental retardation can coexist in the same individual, and those mentally retarded people may have symptoms of mental illness associated with criminal behavior. See *supra* note 59 and accompanying text.

69. Two distinguished social scientists recently analyzed the relationship between crime and intelligence. Their review of the data, controlling for socioeconomic status and cultural and family background, suggests that the average IQ of offenders is approximately 92, eight points less than the average of the population (but not within the mental retardation range), and that deficits in verbal ability account for much of that difference. The data also suggest that offenders of lower intelligence commit different types of crimes than other offenders. Crimes such as forgery, embezzlement, and securities fraud are associated with higher IQs; impulsive crimes such as assault, homicide, and rape are associated with lower IQs; and property crimes and drug and alcohol related offenses are associated with offenders of average IQ. The scholars suggest several possible explanations for these relationships: more intelligent criminals are deterred by the risk of arrest and prosecution and thus choose lower risk crimes; less intelligent offenders have fewer internal controls and thus commit impulsive crimes that do not involve preparation, planning, and delayed achievement of the criminal goal; and less intelligent offenders do not usually have the skills or social contacts to enter settings in which crimes such as embezzlement could be committed. J. WILSON & R. HERRNSTEIN, *CRIME AND HUMAN NATURE* 148-72 (1985). See also Hirschi & Hindelang, *Intelligence and Delinquency: A Revisionist Review*, 42 AM. SOCIOLOGICAL REV. 571, 575 (1977) (the link between intelligence and crime is attributable to a person's experience in school); Edgerton, *Crime, Deviance and Normalization: Reconsidered*, in *DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE* 145 (R. Bruninks, C. Meyers, B. Sigford & K. Lakin eds. AAMD Monograph No. 4 1981).

70. One author has commented:

It is a typical observation in behavioral research that there is more variability within a group of mentally retarded persons than between retarded and non-retarded persons Mentally retarded people are not alike, because mental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn.

Haywood, *Reaction Comment*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 677 (1976). See Edgerton, *supra* note 69, at 145 (emphasizing the variation among retarded offenders).

criminal justice system, and therefore merit close attention to determine if they exist in an individual criminal case.

1. *Communication and Memory*

Many mentally retarded people have limited communication skills. The most seriously disabled persons have no expressive language and limited or no receptive language.⁷¹ Therefore, it would not be unusual for a mentally retarded individual to be unresponsive to a police officer or other authority or to be able to provide only garbled or confused responses when questioned. Even when the mentally retarded person's language and communication abilities appear to be normal, the questioner should give extra attention to determining whether the answers are reliable. Several factors can influence the reliability of an answer. For example, many people with mental retardation are predisposed to "biased responding" or answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.⁷² The form of a question can also directly affect the likelihood of receiving a biased response,⁷³ and thus police officers, judges, and lawyers may inadvertently or intentionally cause the susceptible mentally retarded accused person to answer in an inaccurate manner by asking a question in an inappropriate form.

Further, many mentally retarded persons are reluctant to resist questioners by refusing to answer questions that are beyond their ability.⁷⁴ Even when a person with mental retardation can verbalize effectively, memory will often be impaired. This is particularly true of events which the individual had not identified as important.⁷⁵ Because few mentally retarded people are able to de-

71. "Expressive language" refers to an individual's ability to speak or otherwise communicate while "receptive language" refers to the ability to understand the communication of others.

72. See, e.g., Rosen, Floor & Zisfein, *Investigating the Phenomenon of Acquiescence in the Mentally Handicapped: 1 Theoretical Model, Test Development and Normative Data*, 20 BRIT. J. MENTAL SUBNORMALITY 58, 58-68 (1974); see generally Sigdman, Budd, Stankel & Schoenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1980).

73. Question types can be ordered in terms of difficulty along a continuum. An individual's ability to answer a certain type of question is directly related to the individual's intellectual ability. Thus, "yes-no" questions and choosing among pictures are simpler than "either-or" questions or the progressively more difficult multiple choice and open-ended questions. Sigelman, Winer & Schoenrock, *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING MENTALLY RETARDED 120, 123 (1982). Although the "yes-no" questions are easiest for a retarded person to answer, the validity of the answer is so suspect, given the danger of response bias, that it has been suggested that questioners abandon the use of "yes-no" questioning techniques. Budd, Sigelman & Sigelman, *Exploring the Outer Limits of Response Bias*, 14 SOCIOLOGICAL FOCUS 297, 305-06 (1981).

74. In one study mentally retarded persons were asked for directions to their homes. Fifty-five percent of the sample gave directions which, although complete, proved inaccurate in significant ways. Kernan & Sabsay, *Getting There: Directions Given by Mildly Retarded and Nonretarded Adults*, in LIVES IN PROCESS: MILDLY RETARDED ADULTS IN A LARGE CITY (R. Edgerton ed. 1984).

75. See, e.g., Luftig & Johnson, *Identification and Recall of Structurally Impor-*

termine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts.

2. *Impulsivity and Attention*

People with mental retardation are often described as impulsive or as having poor impulse control.⁷⁶ This characteristic appears to be related to problems in attention and thus involves attention span, focus, and selectivity in the attention process.⁷⁷ In the criminal justice system, deficits in attention or impulse control can have important implications in almost all steps from the commission of the offense through sentencing. The mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without weighing the consequences of the act; when stopped by the police he might be unable to focus on the alleged crime or appreciate the gravity of his arrest; in trial preparation the individual would likely be similarly ineffective at focusing on the relevant aspects of the incident or attending to the task of assisting counsel; at trial the individual may appear deviously to steer away from certain lines of testimony or may appear obstinate when in fact his attention disability prevents him from responding appropriately. Similar problems may arise at each step of the judicial process.

3. *Moral Development*

Studies on the moral development of people with mental retardation reveal that some individuals have incomplete or immature concepts of blameworthiness and causation.⁷⁸ Some mentally retarded people will determine or assign guilt even when a situation

tant Units in Prose by Mentally Retarded Learners, 86 AM. J. MENTAL DEFICIENCY 495, 501 (1982); *infra* note 77.

76. See AAMD, CLASSIFICATION IN MENTAL RETARDATION, *supra* note 40, at 16; PSYCHOLOGY OF EXCEPTIONAL CHILDREN AND YOUTH 513 (W. Cruickshank ed. 3d ed. 1971); Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of Issues*, in THE RETARDED OFFENDER, *supra* note 33, at 7, 18.

77. See generally C. MERCER & M. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977).

78. The factors that appear to be related to moral development include intelligence, opportunity for interaction with others, living in an enriching environment, chronological age, and mental age. Boehm, *Moral Judgment: Cultural and Subcultural Comparison with Some Piaget's Research Conclusions*, 1 INT'L J. PSYCHOLOGY 143, 149-50 (1966); Boehm, *The Development of Conscience: A Comparison of American Children of Different Mental and Socioeconomic Levels*, 33 CHILD DEVELOPMENT 575, 590 (1962); Ozbek & Forehand, *Factors Influencing the Moral Judgment of Retardates*, 17 J. MENTAL DEFICIENCY RESEARCH 255, 259-60 (1973); Whiteman & Kosier, *Development of Children's Moralistic Judgments: Age, Sex, IQ, and Certain Personal-Experiential Variables*, 35 CHILD DEVELOPMENT 843, 843-44 (1964). Cf. *supra* note 20 and accompanying text (the earlier belief that mentally retarded people had "moral deficits" analogous to color-blindness).

is the result of an unforeseeable accident. The inability to distinguish between an incident which is the result of blameworthy behavior and an incident which results from a situation beyond the individual's control can have serious consequences. For example, a defendant with retardation may plead guilty to a crime which he did not commit because he believes that blame should be assigned to someone and he is unable to understand the concept of causation and his role in the incident.

Similarly, some people with mental retardation will eagerly assume blame in an attempt to please or curry favor with an accuser. This phenomenon of "cheating to lose" may give rise to unfounded confessions.⁷⁹

4. Denial of Disability

Certain dimensions of self-concept and self-perception are also often affected by mental retardation. It is not uncommon for individuals with mental retardation to overrate their own skills, either out of a genuine misreading of their own abilities⁸⁰ or out of defensiveness about their handicap.⁸¹ This tendency is evident in estimates by retarded people of their academic achievement, physical skill, and intellectual level.⁸² It is therefore not surprising when a mentally retarded person brags about how tough he is or how he outsmarted a victim, when in fact, he accomplished neither feat. Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mentally retarded individuals expend considerable energy attempting to avoid this stigma.⁸³ In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom.⁸⁴

Given these characteristics, it should not be surprising that few

79. See, e.g., PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1967); Person, *The Accused Retardate*, 4 COLUM. HUM. RTS. L. REV. 239, 254 (1972). See generally Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365 (1981).

80. See, e.g., Ringness, *Self-concept of Children of Low, Average, and High Intelligence*, 65 AM. J. MENTAL DEFICIENCY 453, 453 (1961).

81. Cf. Cleland, Patton & Seltz, *The Use of Insult as an Index of Negative Reference Groups*, 72 AM. J. MENTAL DEFICIENCY 30, 33 (1967) (the most common insults used by people with mental retardation relate to intelligence, indicating that denial of their intellectual limitations is a nearly universal defense).

82. See, e.g., Bialer, *Emotional Disturbance and Mental Retardation: Etiologic and Conceptual Relationships*, in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 68, 79 (F. Menolascino ed. 1970).

83. For example, in one study individuals institutionalized for mental retardation attempted to conceal the reason for institutionalization with "tales" of "mental illness," "nerves," and even "criminal offenses." R. EDGERTON, *THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED* 148 (1967). See generally J. DUDLEY, *LIVING WITH STIGMA: THE PLIGHT OF THE PEOPLE WHO WE LABEL MENTALLY RETARDED* (1983).

84. See, e.g., *Tyars v. Finner*, 709 F.2d 1274, 1277 (9th Cir. 1983). During involuntary commitment proceedings the retarded respondent began to punch the air and yell "pow, pow" when he heard the incriminating testimony on his alleged aggressiveness. *Id.*

people with mental retardation identify themselves as disabled when arrested or at any other point in the criminal justice system. In fact, many of these individuals will go to great lengths to hide their disability.⁸⁵

5. *Lack of Knowledge of Basic Facts*

The very nature of the cognitive deficits inherent in the classification of a person as mentally retarded means that most individuals with mental retardation will know less than most people without mental retardation.⁸⁶ This knowledge deficit is often aggravated by the special education curriculum for mentally retarded children, which is less informative than the regular curriculum. Special education students will often be excluded from certain classes and activities that teach general knowledge about the world, in order to focus more time and attention on learning basic skills or participating in vocational training.⁸⁷ For example, while other students are learning the concepts and vocabulary of civics and social studies, students with mental retardation may instead receive extended instruction in reading or engine assembly. Although special curricula are necessary for most mentally retarded students, their exclusion from certain courses is not without cost.

6. *Motivation*

Many people with mental retardation appear to be less motivated toward the mastery of problems than people of normal intelligence. The general desire to be effective at life's tasks, a strong motivator for mentally typical people, fails to motivate most mentally retarded people in the same way.⁸⁸

However, the desire to please authority figures does appear to be a powerful motivator. Many persons with mental retardation, especially those who have experienced institutionalization, have a particular susceptibility to perceived authority figures and will

85. Incarcerated mentally retarded offenders have been described as "clever in masking their limitations." Santamour & West, *supra* note 76, at 18.

86. At least four of the twelve subtests found in the commonly used Wechsler Intelligence Scale-Revised are designed to assess vocabulary, information, similarities, and comprehension. Thus, an IQ score indicating mental retardation will almost always mean that the person has deficits in each of these areas. D. WECHSLER, *WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE* (5th ed. 1972).

87. See, e.g., Brown, Branston-McClean, Baumgart, Vincent, Falvey & Schroeder, *Using the Characteristics of Current and Subsequent Least Restrictive Environments in the Development of Curricular Content for Severely Handicapped Students*, 4 AM. ASS'N FOR THE EDUC. OF THE SEVERELY AND PROFOUNDLY HANDICAPPED REV. 407, 408-09 (1979).

88. See, e.g., Harter & Zigler, *The Assessment of Effectance Motivation in Normal and Retarded Children*, 10 DEVELOPMENTAL PSYCHOLOGY 169, 178-80 (1974).

seek the approval of these individuals even when it requires giving an incorrect answer.⁸⁹ Such "outer-directed" behavior suggests that many people with mental retardation will be particularly vulnerable to suggestion, whether intentional or unintentional, by authority figures or high-status peers.

The phenomenon of "learned helplessness," or "fatalistic passivity," has also been reported in people with mental retardation.⁹⁰ This characteristic resignation has been attributed to the experiencing of repeated failures and the tendency among mentally retarded people to attribute their failures to uncontrollable factors.

III. Criminal Responsibility of Retarded Defendants

A. The Defense of Mental Nonresponsibility⁹¹

The relevance of mental retardation to criminal responsibility has been debated for centuries.⁹² Established authorities have long accepted that an "idiot" cannot be convicted of a criminal offense.⁹³ The principal points of contention have centered around the definition of the level of disability sufficient to constitute "idiocy,"⁹⁴ and the legal relevance of lesser degrees of disability.

Courts have consistently held that mental retardation must be almost totally disabling to constitute a defense to accusations of crime.⁹⁵ In the famous early eighteenth century case of *Rex v.*

89. See, e.g., Harter, *Mental Age, IQ and Motivational Factors in the Discrimination Learning Set Performance of Normal and Retarded Children*, 5 J. EXPERIMENTAL CHILD PSYCHOLOGY 123, 137-38 (1967).

90. See, e.g., DeVellis, *Learned Helplessness in Institutions*, 15 MENTAL RETARDATION 10 (Oct. 1977); Weisz, *Learned Helplessness and the Retarded Child*, in MENTAL RETARDATION: THE DEVELOPMENTAL-DIFFERENCE CONTROVERSY 27 (E. Zigler & D. Balla eds. 1982).

91. Mental nonresponsibility is commonly referred to as "insanity." See *infra* text accompanying notes 138-40.

92. See *supra* notes 9-30 and accompanying text.

93. See, e.g., 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *24: "The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is that "*furiosus furor solum punitur*." In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." *Id.* Accord M. DALTON, THE COUNTRY JUSTICE 223 (1619) ("If one that is *non compos mentis*, or an idiot, kill a man, this is no felony; for they have no knowledge of good and evil, nor can have a felonius intent, nor a will or mind to doe harm . . .").

94. "[Imbecility] differs from idiocy in the circumstance that while in the latter there is an utter destitution of every thing like reason, the subjects of the former possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind." I. RAY, *supra* note 13, at 65. The exculpation of severely and profoundly retarded persons never engendered much controversy. "The general principles that determine the legal relations of idiocy are so obvious, and the fact of its existence so easily established that little occasion has been afforded for doubt or diversity of opinion." *Id.* at 78.

95. Cf. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. BAR FOUND. RESEARCH J. 1079, 1092-96 (discussing mental disability in the context of the defense of contributory negligence).

Arnold,⁹⁶ the English court of Common Pleas formulated what came to be known as the "wild beast" test: "it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."⁹⁷

More than a century later, the House of Lords created the most famous and long-lasting definition of those mentally disabled people who are entitled to exculpation. The *M'Naghten* test⁹⁸ was phrased in terms of "a defect of reason, from disease of the mind."⁹⁹ There remained some uncertainty as to whether it was meant to include defendants whose incapacity resulted from mental deficiency.¹⁰⁰ However, since "idiocy" and "imbecility" were at that time universally viewed as forms of insanity, there is little doubt they were both understood to be within the formulation.¹⁰¹ Almost immediately, courts incorporated the "right from wrong" test into jury instructions where the claim was that the defendant "was of very weak intellect."¹⁰²

96. 16 How. St. Tr. 695 (1724). See 1 N. WALKER, *supra* note 11, at 52-57 (1968) (discussing the case in historical context).

97. 16 How. St. Tr. at 765. It should be noted that the *Arnold* case involved a defendant who claimed to be mentally ill rather than mentally retarded. "[T]hey admit he was a lunatic, and not an idiot. A man that is an idiot, that is born so, never recovers, but a lunatic may, and hath his intervals; and they admit he was a lunatic." *Id.*

98. *Daniel M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). On the antecedents of M'Naghten using the right from wrong distinction, see Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966).

99. *Id.* at 722. See R. MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTON (1981) (an investigation into the political nature of the crime and the verdict); DANIEL MCNAUGHTON: HIS TRIAL AND THE AFTERMATH (D. West & A. Walk eds. 1977) (a compilation of commentaries on the historical, medical, and legal consequences of the decision); 1 N. WALKER, *supra* note 11, at 84-103, see also Diamond, *On the Spelling of Daniel M'Naghten's Name*, 25 OHIO ST. L.J. 84 (1964).

100. See, e.g., *State v. Palmer*, 161 Mo. 152, 172, 61 S.W. 651, 657 (1901) ("Mental disorders cannot be regarded as evidence of insanity which will confer legal irresponsibility for crime, however, unless they are caused by or result from disease or lesion of the brain. . . . Thus, mere weakness of mind does not excuse crime, nor will bad education or bad habits, nor the fact that a person is of a low order of intellect. . . .").

101. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 447 (2d ed. 1961).

102. *R. v. Higginson*, 174 Eng. Rep. 743 (1843); cf. R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 93 (1981) (suggesting that the execution of Higginson despite evidence of his "imbecility" may have represented an attempt to tighten the defense in the wake of *M'Naghten*, and thus reduce public criticism).

A similar result had been reached earlier in this country by Justice Story, sitting as Circuit Judge, in *United States v. Cornell*:

There is no pretence to say, that the prisoner is in any legal or accurate sense, deficient in understanding. It was proved by all the witnesses, by his own witnesses, it was admitted by his counsel, that he was compos mentis, having intelligence to discern what was right and what was wrong. All that was suggested was, that he was more ignorant and somewhat

Subsequent litigation focused on whether a defendant was sufficiently retarded to be held unable to distinguish right from wrong. Numerous courts have held evidence of mental retardation¹⁰³ insufficient to justify an acquittal, or in some cases, even to warrant a jury instruction on insanity.¹⁰⁴ The only point of disagreement involved claims that a retarded adult defendant had a "mental age"¹⁰⁵ equivalent to that of a child incapable of committing a crime.¹⁰⁶

Surprisingly, the debate about the analogy between mental deficiency and the criminal law's treatment of children began before the development of intelligence tests and the subsequent popularity of the notion of "mental age." Justice Seymour's charge to the jury in *State v. Richards*¹⁰⁷ relied upon the comparison drawn by Lord Hale between infants and "imbeciles:" "[I]nasmuch as children under fourteen years of age are prima facie incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to that of ordinary children of that age."¹⁰⁸

more stupid than common men, of bad education, and bad passions, and bad habits. Now these are precisely the common causes of crimes; but certainly they form no legal excuse or justification for the commission of them.

25 F. Cas. 650, 657 (D.R.I. 1820) (No. 14,868).

103. Mental retardation appears to have been often described by the phrase "weak minded." Ambiguities in 19th century terminology of mental disability make it impossible to be certain whether all such cases involved mental retardation. At least in England, it was not uncommon for persons whose behavior was viewed as eccentric and morally unacceptable to be labelled as "weak minded," or even as "idiots" or "imbeciles," without a suggestion that the person was mentally deficient. R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 116 (1981).

104. *E.g.*, *State v. Pinski*, 163 S.W.2d 785, 788 (Mo. 1942); *Wartena v. State*, 105 Ind. 443, 450, 5 N.E. 20, 23 (1886); *State v. Johnson*, 233 Wis. 668, 674, 290 N.W. 159; 162 (1940); *Craven v. State*, 93 Tex. Crim. 328, 247 S.W. 515, 517 (1923). See H. WEIHOFEN, *supra* note 30, at 120 n.4 (1954) (listing cases); Annot., 44 A.L.R. 584 (1926).

Some states had statutes which provided that "idiots" were incapable of committing crimes. H. WEIHOFEN, *supra* note 30, at 50 n.1. But courts uniformly held that this did not create a defense broader than that provided by the locally adopted test for insanity. See, *e.g.*, *Singleton v. State*, 90 Nev. 216, 522 P.2d 1221, 1223 (1974) (even when there was expert testimony that defendant's IQ fell within the professionally accepted definition of an "idiot," the appropriate test was still *M'Naghten*).

105. "Mental age" is a means of describing the severity of a mentally retarded person's disability. The concept was invented by Alfred Binet, one of the creators of the earliest intelligence tests. The concept of mental age represents an attempt to compare the intellectual functioning of the individual being tested with the performance of mentally typical (nonretarded) people. Thus, a child with a chronological age of 12 may receive a similar score on an IQ test to a nonretarded child who is six years old, and therefore be said to have a mental age of 6. This is accomplished by identifying for each question or item on an IQ test the age level at which most children typically can answer the question successfully. See N. ROBINSON & H. ROBINSON, THE MENTALLY RETARDED CHILD 340-42 (2d ed. 1976).

106. See Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 438-53 (1939).

107. 39 Conn. 591 (1873).

108. *Id.* at 594. Defendant, described as "considerably below par in intellect" but "not a mere idiot," was charged with burning a barn. *Id.* at 592. The prosecution's witnesses are said to have described him as "inferior in intellect to children ten years of age," while defense witnesses stated that "they are acquainted with many children of six years who are his superiors in mental capacity." *Id.* at 594. In applying the analogy, Justice Seymour charged the jury to be careful of the imperfection of the comparison "between the healthy and properly balanced, though immature, mind of a

The *Richards* case has been severely criticized¹⁰⁹ and its approach has not been followed in subsequent cases.¹¹⁰ Following the popularization of intelligence tests early in this century, defendants frequently sought to use the "mental age" component of test results to seek exculpation based on analogy to the legal rules governing children whose chronological age compared with the defendant's mental age. These attempts were universally unsuccessful.¹¹¹ The courts held that there was not full equivalence between a child and a mentally disabled adult, and resisted a doctrine which might have resulted in successful defenses for substantial numbers of defendants.¹¹²

child, and the unhealthy, abnormal and shrivelled intellect of an imbecile." *Id.* The instruction also asserted the relevance of the defendant's life-long confinement in alms-houses, suggesting that this constraining background had an impact on his ability to control his own impulses: "He has, it appears, been seldom left to the free guidance of his own judgment." *Id.* at 595. Justice Seymour concluded by instructing the jury to specify if their acquittal was

on the ground of want of mental capacity . . . in order that the prisoner may in that event have the benefit under our statute of a home where he will be kindly cared for, but kept under such restraints as to prevent his doing injury to the persons or property of others.

Id.

109. *E.g.*, H. WEIHOFEN, *supra* note 30, at 193 n.77. *But see* S. GLUECK, MENTAL DISORDER AND CRIMINAL LAW 196-97 (1925) (feeble-minded adults with a mental age of seven to fourteen should enjoy a rebuttable presumption of innocence when pleading not guilty by reason of insanity).

110. *See* H. WEIHOFEN, *supra* note 30, at 39, 193 n.78.

111. A typical case was *State v. Schilling*, 95 N.J.L. 145, 148, 112 A. 400, 402 (1920), in which a 28-year-old man was said to have a mental age of 11:

There is a vast difference between a child at the age of 11 years and that of a man of 28, and while perhaps there is a presumption that an infant of tender years is incapable of committing a crime, that presumption does not extend to one of advanced years, requiring the state to rebut it The presumption of the lack of power of thought and capacity in favor of a child is due more to the number of years he has lived than to the character of the development of his mind, . . . but that reason does not apply when he comes to manhood.

Id. at 402. *See also* *Chriswell v. State*, 171 Ark. 255, 258, 283 S.W. 981, 983 (1926) ("where an adult person has the intelligence of a child from 7 to 9 years of age, that fact alone cannot be made the test [of insanity]"); *People v. Marquis*, 344 Ill. 261, 176 N.E. 314 (1931) (subnormal mentality is not a defense to a crime unless it renders the accused unable to distinguish right from wrong). *Cf.* *Commonwealth v. Stewart*, 255 Mass. 9, 151 N.E. 74 (1926) (defendant unsuccessfully objected to testimony that a person with a mental age of 13 could be capable of first degree murder); *State v. Kelsie*, 93 Vt. 450, 452, 108 A. 391, 392 (1919) (defense counsel's attempt to ask expert witness whether 33-year-old defendant would qualify as an imbecile was rejected because the expert had already testified that "the accused was mentally and morally an 8-year old boy"); *Annot.*, 44 A.L.R. 584, 586 (1926) (a comparison of chronological with mental age when defining subnormal mentality is not, without more, a defense to a crime).

112. *E.g.*, *In re Ramon M.*, 22 Cal. 3d 419, 429-30, 584 P.2d 524, 531, 149 Cal. Rptr. 387, 394 (1978) ("Approximately 16% of the adult population and a much higher percentage of adolescents between ages 14 and 18 have mental ages below 14 years. Under defendant's proposed interpretation . . . all such persons would be presumed incapable of committing crimes."). *Cf.* *Commonwealth v. Szachewicz*, 303 Pa. 410, 154

In the last three decades, the few reported judicial opinions addressing the criminal responsibility of mentally retarded individuals have focused on the relationship between modern formulations of the test for insanity and the disabilities of the defendants. In *Durham v. United States*,¹¹³ dissatisfaction with the perceived harshness of the *M'Naghten* test led the United States Court of Appeals for the District of Columbia to formulate a new test that created a defense for acts which were the "product of mental disease or defect."¹¹⁴ The definition of the disabilities entitling a defendant to this defense was extremely significant. Recognition of a retarded defendant's mental condition as a "mental defect" would be outcome-determinative under this test where that condition was held to have "produced" the criminal behavior. In *Durham*, the court used "disease" to signify a condition capable of improving or deteriorating. "Defect" signified a permanent condition, either congenital, the result of an injury, or the residual effect of mental or physical disease.¹¹⁵

Eight years later, the same court warned that this passage in *Durham* had not been intended to define the terms, but rather to differentiate between the two kinds of disabilities. In *McDonald v. United States*,¹¹⁶ the court ruled that the definitions were to come from the judiciary; factfinders were not bound by ad hoc definitions formulated by experts.¹¹⁷ Therefore, the court ruled, juries should be instructed that "a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."¹¹⁸ This meant that definitions by mental disability professionals, such as the AAMD's definition of mental retardation, would not be dispositive on the issue of criminal responsibility. The court retained the authority to define "mental defect" more narrowly (or more broadly) than mental retardation professionals, basing the choice on jurisprudential rather than clinical considerations.¹¹⁹

A. 483, 484-85 (1931) (related doctrine of partial responsibility "would turn loose on society a class of dangerous citizens, who, because of their legalized immunity, would prey on other members of society without much restraint.") Similarly, an early adherent of more lenient doctrinal treatment of retarded defendants insisted that those acquitted receive "absolutely indeterminate incarceration" in a special institution or colony. S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 385 (1925) (emphasis in original).

113. 214 F.2d 862 (D.C. Cir. 1954).

114. *Id.* at 874-75.

115. *Id.* at 875.

116. 312 F.2d 847 (D.C. Cir. 1962).

117. *Id.* at 851. "A psychiatrist's determination of 'a mental disease or defect' for clinical purposes . . . may or may not be the same as the jury's purpose in determining criminal responsibility." *Id.*

118. *Id.*

119. *Id.* In the *McDonald* decision, the court required more than the results of intelligence testing to warrant sending the issue of insanity to the jury. *Id.* at 850. An IQ score of 68 standing alone was not evidence of a mental defect sufficient to invoke the *Durham* charge. The court concluded that where "other evidence of mental abnormality appears, in addition to the IQ rating, . . . the instruction should be given."

The *Durham* test was not adopted by any other jurisdiction and after two decades even the Court of Appeals for the District of Columbia replaced it because its reliance on expert testimony regarding causation of criminal behavior was perceived to be unworkable.¹²⁰ The abandonment of the *Durham* rule shifted the debate to the meaning and relative merits of the *M'Naghten* test and that of the American Law Institute's [ALI] Model Penal Code. The latter test provides: "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 requirements of law."¹²¹

Courts employing the ALI's test have held that the term "mental defect" includes mental retardation.¹²² The precise contours of the definition of "mental defect" are less significant under the ALI's test than under *Durham*; under the ALI's test, a finding of mental defect is only a prerequisite to determining whether the defendant could appreciate criminality or conform his conduct.

The American Bar Association's *Mental Health Standards* reject the ALI's test and recommend a modified version of the *M'Naghten* test: "[A] person is not responsible for criminal conduct if at the time of such conduct, and as a result of a mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct."¹²³ Mental defect is defined to include

Id. Thus a score within the upper range of the professional definition of mental retardation required corroborative evidence (in this case involving only conclusory testimony) to warrant jury consideration of an insanity defense.

120. *United States v. Brawner*, 471 F.2d 969, 973, 980 (D.C. Cir. 1972). For a relatively recent compilation of the insanity defense tests used by the various states, see Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 247, 257-69 (J. Monahan & H. Steadman eds. 1983) [hereinafter cited as Favole].

121. MODEL PENAL CODE § 4.01 (1985).

122. *E.g.*, *In re Ramon M.*, 22 Cal. 3d 419, 427-28, 584 P.2d 524, 529-30, 149 Cal. Rptr. 387, 394 (1978); *United States v. Shorter*, 343 A.2d 569, 572 (D.C. 1975).

123. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1(a). The test contained in this standard is similar to the new federal test for insanity enacted by Congress in 1984:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Act of Oct. 12, 1984, Pub. L. No. 98-473, § 402(a), 98 STAT. 2057 (1984) (to be codified at 18 U.S.C. § 20). The principal difference between the ABA's standard and the new federal test is the latter's inclusion of the adjective "severe" to modify mental disease or defect. The legislative history indicates that the drafters were concerned with the severity of mental illness, rather than mental retardation:

The concept of severity was added to emphasize that non-psychotic behavior disorders or neuroses such as an "inadequate personality," "immature

mental retardation "which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense."¹²⁴

The principal difference between the ALI's test, which had previously been endorsed by the ABA,¹²⁵ and the new standard is the omission of the so-called "volitional prong." Thus, under the *Mental Health Standards*, a defendant would not be exculpated if a mental disease or defect prevented him from conforming his conduct to the law's requirements. The ABA committee's argument for this change exclusively involves mental illness, suggesting that in practice the volitional test is often combined with vague or broad definitions of "mental illness." The mixture of "these two imprecise notions results in expert opinions regarding the psychological causes of criminal behavior which strain the public's credulity and offend moral sentiments, especially in cases involving defendants with personality disorders, impulse disorders, or some other diagnosable abnormality short of a clinically recognized psychosis."¹²⁶

There are two separate contentions in this rationale. The first is that mental illness constitutes an "imprecise notion," fraught with definitional and diagnostic fuzziness. This is somewhat less true of mental retardation, for which a uniform definition is more generally accepted and for which the methodologies of diagnosis and

personality," or a pattern of "antisocial tendencies" do not constitute the defense.

S. REP. NO. 225, 98th Cong., 2d Sess. 229, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 341.

124. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1(b). The commentary to this standard notes:

it is not possible to state, in the abstract, that a certain level of retardation (e.g., severe, as opposed to moderate or mild) would or would not cross the threshold [to warrant exculpation]. To impose such limitations would take insufficient account of both the continuing imprecision of the diagnostic process and the unique features of each individual's disorder.

Id. commentary at 334. The drafters clearly did not intend that a defendant should be entitled to a finding that he had a "mental defect" merely by proving that he was mentally retarded under the AAMD's definition; rather, the standard contemplates those with "mental defect" as a smaller subclass. Nevertheless, it is difficult to imagine a retarded defendant whose retardation did not "substantially affect [his] mental or emotional process . . . at the time of the offense." *Id.* 7-6.1(b). The AAMD's definition requires "significantly subaverage intellectual functioning" and "deficits in adaptive behavior." AAMD, CLASSIFICATION AND MENTAL RETARDATION, *supra* note 40, at 1. It is not clear what purpose is served by requiring courts to determine whether such an individual's thought processes were "substantially affected" at the time of the offense. The requirement may represent an inappropriate attempt to treat mental retardation in strict parallel with mental illness, where a threshold of severity is warranted. A preferable approach would provide that all mentally retarded defendants have a "mental defect" for purposes of the insanity defense. The only remaining step to determine responsibility would inquire whether the retardation rendered the defendant unable to appreciate the wrongfulness of his conduct.

125. See MENTAL HEALTH STANDARDS, *supra* note 4, Part VI introduction at 318.

126. *Id.* 7-6.1 commentary at 327-36. A leading advocate for the ABA's omission of the volitional prong has asserted that "[t]he volitional inquiry probably would be manageable if the insanity defense were permitted only in cases involving psychotic disorders." Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983). Cf. *supra* note 123.

testing are somewhat more objective. The second component of the committee's explanation is that the general public finds the notion of "irresistible impulse" implausible in those defendants capable of appreciating the wrongfulness of their conduct. This contention may be equally true for mentally ill and mentally retarded defendants. Popular tolerance may not be much greater for claims that retardation impaired impulse control than for assertions that mental illness did so.

While the public credulity about irresistible impulses may be the same for both kinds of disability, the omission of the volitional prong of the insanity defense may have a particular impact on retarded defendants. As discussed previously, a common characteristic of many mentally retarded people is a reduced ability to control impulses.¹²⁷ This trait may have its roots in the cognitive impairment that leads to reduced intellectual functioning. The ability to control impulsive behavior is related to the ability to understand both the nature of behavior and the social circumstances that make an action appropriate or inappropriate to a particular occasion. Thus, to some extent, impulsivity may reflect an educational deficit, because proper teaching can equip most retarded persons to tailor their actions to social expectations. This deficit is particularly common in people who have been institutionalized.¹²⁸ There should be considerable discomfort with the prospect of punishing retarded individuals whose ability to control their impulses is underdeveloped or atrophied, in part, as an iatrogenic consequence of state action.¹²⁹

Other features of the *Mental Health Standards'* formulation of the insanity defense are also noteworthy. By explicitly including mental retardation within the definition of mental defect, the *Mental Health Standards* reject the argument that the insanity defense should be unavailable to mentally retarded people who are

127. See *supra* notes 76-77 and accompanying text.

128. This phenomenon has long been observed:

The history of the prisoner's life is somewhat significant. From early childhood it has been spent in alms-houses, subjected to constant constraint. In the most ordinary acts of his life he has been governed by the superior will of others to whose care he has been committed. He has, it appears, been seldom left to the free guidance of his own judgment. When so left, he seems to have acted without forecast, under the pressure of immediate wants and impulses.

State v. Richards, 39 Conn. 591, 595 (1873).

129. It is not our contention that the existence of retarded individuals with impairments in their ability to control their behavior should dictate the choice between the ALI's test and that of the *Mental Health Standards*. However, the appropriate treatment of these defendants should be one factor in deciding to abandon the volitional component of the insanity defense. In those jurisdictions that retain the volitional component, courts should be aware of these factors in deciding the individual cases of retarded defendants who assert the defense.

not also mentally ill. The ABA Commission on the Mentally Disabled recently published a proposed model statute which took this approach.¹³⁰ This statute provides that "[d]efendants who have a developmental disability but who do not also have a mental illness are not entitled to assert a defense that they are not guilty by reason of insanity. . . ."¹³¹ The comment to this section of the model statute argues that developmental disabilities (including mental retardation) present issues of criminal responsibility which are more appropriately addressed in the context of the doctrine of "diminished capacity."¹³² Subsequent sections of the statute provide for a verdict of acquittal by reason of diminished capacity, and an accompanying set of procedures for evaluation and commitment¹³³ of those so acquitted. The approach taken by the *Mental Health Standards* is preferable to that of the model statute. Arguments can be made for abolishing the insanity defense entirely, and relying, instead, solely upon the requirement of mens rea for exculpation of the mentally disabled.¹³⁴ Nevertheless, abolishing the insanity defense for mentally retarded defendants and leaving it in place for mentally ill defendants would create a serious inequity; the inability to appreciate the wrongfulness of criminal conduct would exculpate a person who was mentally ill, but would not exculpate a mentally retarded person. No principled reason has been advanced for the differential treatment of these two similarly situated groups of defendants, each of whom is equally "innocent" of responsibility for his conduct.¹³⁵

Another feature of the *Mental Health Standards* is the use of the term "appreciate" instead of "know" in the formulation of the defense. The commentary states that this choice parallels that of the drafters of the ALI's test for the cognitive component of their formulation, and reflects the view that a responsibility test should go beyond a defendant's "superficial intellectual awareness;" the

130. MODEL DEVELOPMENTALLY DISABLED OFFENDERS ACT, *supra* note 8, §§ 1-4.

131. *Id.* § 10(1).

132. *Id.* § 10(2), (3). It should be noted that the *Mental Health Standards* provide for the admissibility of evidence of mental condition relevant to the issue of mens rea. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.2 commentary at 341.

133. MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 10(1)-(4). The act avoids the use of the term "commitment" and opts for the euphemism of "provision of habilitation services on an involuntary basis." *Id.* § 10(6)(b).

134. See, e.g., Idaho Code § 18-207 (1982). But see MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1 commentary at 334; *Limiting The Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 255, 269-75 (1982)* (statement of Professor Richard Bonnie); MODEL PENAL CODE, § 4.01 commentary at 180-86 (1985).

135. Other commentators also have suggested that the insanity defense is inappropriate for retarded defendants, but these suggestions appear to be based, in part, on practical considerations concerning subsequent confinement. S. HAYES & R. HAYES, SIMPLY CRIMINAL 165 (1984) (the authors suggest that under the Australian system, because a retarded person will not "recover" from his retardation, the insanity defense is inappropriate); see also S. HAYES & R. HAYES, MENTAL RETARDATION: LAW, POLICY AND ADMINISTRATION 406 (1982) (arguing that the principle of normalization requires that mentally retarded people should receive no special doctrinal treatment on the basis of their disability).

focus of the inquiry into criminal responsibility should not be limited, as the term "know" might suggest, to a defendant's limited understanding of the law or prevailing morality. Instead, the test for criminal responsibility should take into account all aspects of the defendant's mental and emotional functioning which relate to the ability to recognize and understand the significance of one's actions.¹³⁶

Although this shift in terminology is relevant to the mental condition of some mentally ill defendants, it is particularly important in cases involving mental retardation. When a retarded defendant's understanding of the wrongfulness of his conduct is in question, it is often a "lack of appreciation for the subtleties of social interaction and abstract concepts of right and wrong that impair his behavior."¹³⁷ Identifying the issue as the retarded defendant's ability to "appreciate" the wrongfulness of his conduct allows the trier of fact to focus more realistically on the defendant's actual understanding than does the more ambiguous "knowledge" formulation.

Finally, it should be noted that the label which the *Mental Health Standards* assign to the defense, "mental nonresponsibility" rather than "insanity," is a felicitous choice for cases involving mental retardation. The commentary argues that the newer term is preferable because " 'insanity' carries with it too much stigmatizing baggage and . . . conjures up visions from an earlier era."¹³⁸ In addition to "conjur[ing] up visions of beastlike derangement,"¹³⁹ "insanity" also connotes a mental illness or disease, which is inapplicable to mental retardation.¹⁴⁰ Therefore, the term "mental nonresponsibility" has the additional virtue of eliminating the confusion as to whether retarded defendants who are not mentally ill are entitled to assert the defense.

136. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.1 commentary at 330-35; see also MODEL PENAL CODE § 4.01 commentary at 178-80 (1985) (stating that the inquiry should focus on "whether the defendant was without capacity to conform his conduct to the requirements of law").

137. Tupin & Goolishian, *Mental Retardation and Legal Responsibility*, 18 DE PAUL L. REV. 673, 677 (1969); see *Empirical Study: The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 646 (1975) (arguing that, although mentally retarded persons may be able to distinguish right from wrong in the abstract, they have difficulty applying the abstract concepts to specific factual settings). See generally Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 573 (1972) (discussing Piaget's theories of abstract thinking and moral development).

138. MENTAL HEALTH STANDARDS, *supra* note 4, ch.7 introduction at 5.

139. *Id.* part VI introduction at 316.

140. The stigmatizing aspects of the label "insane" may be felt in a particularly acute manner by mentally retarded people and their families. Cf. S. HAYES & R. HAYES, SIMPLY CRIMINAL 69 (1984) ("The aims of the criminal process . . . [cannot] be fulfilled adequately or appropriately while mentally retarded offenders remain categorised as 'insane'").

B. *Guilty But Mentally Ill*

Dissatisfaction with the perceived leniency of the insanity defense has led a number of states to adopt statutes providing an alternative verdict of "guilty but mentally ill."¹⁴¹ The momentum for adoption of these laws appears to have increased following the insanity acquittal of John Hinckley, Jr.¹⁴² The guilty-but-mentally-ill statutes typically provide for the alternative verdict to be offered in jury instructions in cases in which the defendant has raised the defense of insanity.¹⁴³ The *Mental Health Standards* unequivocally recommend that states refuse to adopt this verdict.¹⁴⁴

The ABA's criticism of these statutes is based on the belief that they may prove confusing to juries and thus result in compromise verdicts or otherwise deny an acquittal to a mentally nonresponsible defendant with meritorious defenses.¹⁴⁵ The commentary does not discuss the extent to which these statutes affect mentally retarded defendants or the meaning and impact of the alternative verdict in mental retardation cases.

Initially, it appears that the very formulation of the "guilty but mentally ill" verdict would make it inapplicable to mentally retarded defendants who were not also mentally ill. Although "insanity" has become a legal term whose meaning is sufficiently flexible to encompass defendants who are mentally retarded,¹⁴⁶ "mental illness" appears unambiguously to exclude those who are not mentally ill. But some of the guilty-but-mentally-ill statutes are not so clear.

Michigan's law, the first to be enacted, is typical in its confusing treatment of mentally retarded defendants. It provides that a defendant can be found guilty but mentally ill if he raises the defense of insanity, which can be based on mental retardation,¹⁴⁷ and

141. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.10(b) commentary at 386-88. For a general discussion of the guilty-but-mentally-ill verdict, see also Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittes*, 1983 B.Y.U. L. REV. 499; Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico*, 13 N.M.L. REV. 99 (1983); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471 (1976). See generally Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985).

142. See George, *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338, 345-46 (1985).

143. In New Mexico the court delivers the guilty-but-mentally-ill instruction upon the defendant's claim that he lacked the mens rea necessary for the offense, even if the defendant's request for an insanity instruction is denied by the trial court. *State v. Page*, 100 N.M. 788, 791, 676 P.2d 1353, 1356 (Ct. App. 1984).

144. MENTAL HEALTH STANDARDS, *supra* note 4, 7-6.10(b).

145. *Id.* commentary at 386-88. Michigan's experience suggests that the introduction of the verdict does not reduce insanity acquittals, and that the majority of guilty-but-mentally-ill verdicts result from defendants' pleas. Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 100-04 (1982).

146. See *supra* note 122 and accompanying text.

147. *People v. Gasco*, 119 Mich. App. 143, 144, 326 N.W.2d 397, 398 (1982).

the trier of fact finds he "was mentally ill at the time of the commission of that offense."¹⁴⁸ This would appear to make the verdict unavailable when the defendant's insanity defense was based solely on evidence of mental retardation. However, a subsequent section provides that a defendant found guilty but mentally ill shall be evaluated by the department of corrections "and be given such treatment as is psychiatrically indicated for his mental illness or retardation."¹⁴⁹ Other states define "mental illness" for purposes of the guilty-but-mentally-ill defense to include mental retardation.¹⁵⁰ Another approach has been to define mental illness in terms similar to the state's mental illness civil commitment statute. This presumably excludes mentally retarded people, as they do not fall within the scope of that statute.¹⁵¹ Certainly the most confusing of the guilty-but-mentally-ill laws are those that define "mentally ill" in terms similar to those employed in the formulation of the insanity defense itself.¹⁵²

148. MICH. COMP. LAWS ANN. § 768.36(1) (West 1982).

149. *Id.* § 768.36(3) (emphasis added). The confusion between mental illness and mental retardation is exacerbated by the reference to "psychiatrically indicated." Although some psychiatrists work with mentally retarded individuals, they are not the principal experts on mental retardation. See *infra* notes 392-402 and accompanying text.

150. *E.g.*, IND. CODE ANN. § 35-1-36-1 (Burns Supp. 1984). " 'Mentally ill' means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function; 'mentally ill' also includes having any mental retardation." *Id.* Georgia includes within the definition of "mentally ill" the AAMD definition of mental retardation. GA. CODE ANN. § 17-7-131(a)(2) (Michie Supp. 1985). Indiana also provides that a convict shall be treated in a manner "psychiatrically indicated for his illness" upon determining a disposition after a guilty-but-mentally-ill verdict. IND. CODE ANN. § 35-2-36-5 (Burns Supp. 1984). See also GA. CODE ANN. § 17-7-131(d), (e) (1984).

151. Compare N.M. STAT. ANN. 31-9-3(A) (1978 & repl. 1984) ("mentally ill means a substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment . . .") with N.M. STAT. ANN. 43-1-3(N) (1978 & repl. 1984) ("mental disorder means the substantial disorder of the person's emotional processes, thought or cognition which grossly impairs judgment, behavior or capacity to recognize reality").

152. Pennsylvania defines "mentally ill" for guilty-but-mentally-ill purposes as "one who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law," and defines "legal insanity" as "laboring 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." 18 PA. CONS. STAT. ANN. § 314(c) (Purdon 1982). Similarly, Alaska defines the insanity defense in terms of the defendant being "unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct." ALASKA STAT. § 12.47.010 (1984), and defines guilty-but-mentally-ill in terms of "the defendant lack[ing], as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law." *Id.* § 12.47.030. Under these statutes, jurors could probably tell that mentally retarded defendants were included in the scope of both the insanity and guilty-but-mentally-ill instructions, but the jurors' ability to disentangle the definitions for other purposes is open to serious doubt.

In one sense, where mentally retarded defendants are within the scope of the statutes, they are no more disadvantaged by guilty-but-mentally-ill instructions than are mentally ill defendants. Each group is subjected to the risk of jury confusion and compromise verdicts, although the risk for retarded defendants may be somewhat higher because of ambiguous terminology. In another sense, however, mentally retarded defendants are at greater risk. Typically, guilty-but-mentally-ill statutes do not guarantee treatment for defendants who are convicted under this verdict.¹⁵³ But the likelihood that mentally retarded individuals will receive necessary and individualized habilitation may be even smaller where the focus of the statute is on "psychiatrically indicated treatment."¹⁵⁴ For a convict whose need is special education, mental health treatment, particularly if it is of marginal quality, will do little to alleviate that need. The availability of the guilty-but-mentally-ill verdict may persuade some juries and some defendants that there is an increased opportunity for appropriate treatment, but this is unlikely to be true for mentally retarded people.¹⁵⁵

IV. Competence Issues for Mentally Retarded Defendants

For a mentally retarded defendant, many of the most important issues in the criminal justice system turn on the question of "competence." This term eludes precise definition, but the issues within its scope help explain its basic meaning. These issues involve the individual's ability to understand certain important and relevant concepts and to act on the basis of that understanding at a minimally acceptable level of skill. While the term "competence" is not ordinarily employed in discussions of the insanity defense, the questions of a retarded person's ability to appreciate the wrongfulness of his conduct (and perhaps to conform his actions to the requirements of the law) invoke the same principles and thus constitute a parallel inquiry.

This section will analyze three competence issues to which mental retardation is particularly relevant: competence to waive constitutional rights in the context of confessions, competence to stand trial, and competence to enter a plea of guilty.¹⁵⁶

153. See Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico*, 13 N.M.L. REV. 99, 115 (1983). The study of the operation of Michigan's statute found that guilty-but-mentally-ill convicts were no more likely to receive treatment than other prisoners. Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J. L. REFORM 77, 104-05 (1982).

154. See *supra* note 150.

155. For a discussion of habilitation in prisons, see *supra* notes 363-91 and accompanying text.

156. There are, of course, numerous other contexts in which the competence of a retarded defendant may come into question, including competence to testify and competence to waive other constitutional rights, such as assistance of counsel, jury trial, and appeals.

A. Confessions

American courts have long recognized that confessions by mentally retarded persons are somewhat suspect, although they have not always been successful in articulating the reasons for their skepticism.¹⁵⁷ Long before *Miranda v. Arizona*¹⁵⁸ and its detractors made criminal confessions a long-playing national controversy,¹⁵⁹ courts occasionally overturned convictions because they believed questionable confessions should not have been admitted into evidence. Some such cases have involved mentally retarded defendants.

The confession of a boy "of crude and feeble mind and irresolute will" was held to be inadmissible when it was shown that the confession was made as an angry crowd threatened to hang the boy (and had already hanged another person for the crime).¹⁶⁰ In another case, the Supreme Court of Mississippi threw out the confession of an individual who was described as "not bright" and whose employer testified that "[h]e is going to give you the answer you desire. If you want a 'yes,' he will give it to you; and if you want a 'no,' he will give you that."¹⁶¹ The Alabama Supreme Court found inadmissible the confession of a "colored" servant "of weak mental capacity, and humble, docile disposition" to her employer, who had locked the servant in a smoke-house until she confessed.¹⁶² The Supreme Court of Arkansas threw out a confession by a "stupid and weak-minded" teenager who had not been told of the possible consequences of such a confession and who had been promised that if he confessed he would not be harmed.¹⁶³

It certainly would be inaccurate to suggest that American courts readily excluded criminal confessions on grounds of mental deficiency in the nineteenth and early twentieth centuries. For exam-

157. For a modern statement of the law in this area, see W. LAFAYE & J. ISRAEL, 1 CRIMINAL PROCEDURE 525-27 (1984); see also Annot., 8 A.L.R.4th 16 (1981) (mental subnormality is one factor identified in the totality of the circumstances to be considered in determining voluntariness). For a discussion of Canadian cases addressing the same problem, see Henderson, *Mental Incapacity and the Admissibility of Statements*, 23 CRIM. L. Q. 62, 71-73 (1980).

158. 384 U.S. 436 (1966).

159. See generally L. BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983) (analyzing the evolution of the *Miranda* doctrine).

160. *Butler v. Commonwealth*, 63 Ky. (2 Duv.) 435, 435-36 (1865).

161. *Ford v. State*, 75 Miss. 101, 103-04, 21 So. 524, 535 (1887).

162. *Hooper v. State*, 81 Ala. 51, 52, 1 So. 574, 575 (1886).

163. *Williams v. State*, 69 Ark. 599, 600, 65 S.W. 103, 104 (1901). See also *State v. Mason*, 4 Idaho 543, 548, 43 P. 63, 64 (1895) (holding a confession coerced from a "half-witted" boy by the armed emissary of an insurance company inadmissible); *Hamilton v. State*, 77 Miss. 675, 678, 27 So. 606, 608 (1900) (holding confessions of a "dull" defendant in response to the repeated urging of his employer involuntary and thus inadmissible); *Peck v. State*, 147 Ala. 100, 102, 41 So. 759, 760 (1906) (holding confession of a "weak minded" defendant, evoked by a question that assumed the defendant's guilt, inadmissible).

ple, the Georgia Supreme Court rejected a challenge to a confession by a "man of weak mind" who was not an "idiot," declaring that persons who knew the difference between right and wrong and were capable of committing the crime were "liable to be convicted upon their own confession."¹⁶⁴ The court was unpersuaded by claims that such confessions were unreliable, and observed that: "[E]xperience teaches that, in point of fact, the cunning and crafty are much more likely to conceal and misrepresent the truth, than those who are less gifted."¹⁶⁵ Nevertheless, courts did widely accept some degree of mental disability as sufficient to call into question the validity of a confession.¹⁶⁶

As these early cases suggest, the relevance of mental retardation to the validity of a confession has more than one component. One consideration is the increased likelihood that the retarded person may be abnormally susceptible to coercion and pressure, and therefore more likely to give a confession that is not truly voluntary.¹⁶⁷ Another consideration is the possibility that the suspect will make a false confession out of a desire to please someone perceived to be an authority figure.¹⁶⁸ There is also reason for concern that the retarded suspect does not understand, and may be incapable of understanding, the ramifications of a confession, and his right not to confess.¹⁶⁹

These considerations mirror the factors involved in obtaining legally adequate consent from retarded people in other areas, such as medical care and admission to residential facilities and institutions.¹⁷⁰ Confessions involve waivers of constitutional rights, and

164. *Studstill v. State*, 7 Ga. 2, 12 (1849).

165. *Id.* The court buttressed its conclusion by declaring: "It is the trite observation of all travelers that if you wish to learn the truth with respect to the health of a country, you must interrogate the children and servants about the matter." *Id.*

166. The Texas Court of Criminal Appeals, in a case involving minority rather than mental deficiency, declared: "[I]f the party against whom the confessions are introduced is shown not to possess sufficient intelligence . . . to understand the nature and obligation of an oath, . . . the statement or confession of such witness ought not to be received in evidence." *Grayson v. State*, 40 Tex. Crim. 573, 574, 51 S.W. 246, 246 (1899).

It is noteworthy that the analogy between children and mentally retarded adults, which encounters strenuous resistance in the area of the insanity defense, *see supra* notes 105-12 and accompanying text, finds more acceptance in the courts in cases involving the admissibility of confessions. Courts in confession cases frequently state, and appear to place some reliance on, the mental age of defendants. *See, e.g., Culombe v. Connecticut*, 367 U.S. 568, 620 (1961) (court did not admit the confession of a thirty-three year old man with a mental age of nine and a half); *United States v. Hull*, 441 F.2d 308, 312 (7th Cir. 1971) (court did not admit the confession of an illiterate thirty-four year old man with a mental age of eight or nine); *Hines v. State*, 384 So. 2d 1171, 1177 (Ala. Crim. App.) (court did not admit the confession of a defendant who had a mental age of a six-year old), *cert. denied*, 384 So. 2d 1184 (1980).

167. *See, e.g., Williams v. State*, 69 Ark. 599, 602, 65 S.W. 103, 105 (1901) (promise of protection induced confession); *Hoover v. State*, 81 Ala. 51, 53, 1 So. 574, 575-76 (1887) (prosecutor led defendant to believe that she could go free only if she confessed).

168. *See, e.g., Ford v. State*, 75 Miss. 101, 102-04, 21 So. 524, 525-26 (1887); *see also supra* note 79 and accompanying text (discussing the concept of "cheating to lose").

169. *See Grayson v. State*, 40 Tex. Crim. 573, 574, 51 S.W. 246, 246 (1899) (confession admissible only if defendant possessed "sufficient intelligence").

170. *See Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977); AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CONSENT

thus require careful judicial scrutiny to ensure their validity.¹⁷¹ Considerations affecting the validity of such a waiver parallel those involved in other forms of consent.¹⁷² The three necessary elements of a legally valid consent or waiver are capacity, information, and voluntariness.¹⁷³ Each of these elements presents particular problems in confession cases involving mentally retarded people.¹⁷⁴

Whether a waiver is "intelligent" (and therefore valid) depends on the circumstances of the particular case, "including the background, experience, and conduct of the accused," according to *Johnson v. Zerbst*.¹⁷⁵ This description is surely broad enough to encompass a suspect's mental retardation as a relevant factor. An intelligent waiver¹⁷⁶ requires that the individual make "a rational choice based upon some appreciation of the consequences of the decision,"¹⁷⁷ and a retarded person's limited intelligence may diminish his ability to appreciate these consequences, just as it may limit his ability to appreciate the wrongfulness of his conduct.¹⁷⁸ Courts have recognized that a person's mental retardation does not, by itself, render him automatically incapable of the waiver inherent in a voluntary confession.¹⁷⁹ Mental retardation, how-

HANDBOOK 11 (H.R. Turnbull ed. 1977) [hereinafter cited as CONSENT HANDBOOK]; Price & Burt, *Nonconsensual Medical Procedures and the Right to Privacy*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 93-112 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976).

171. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

172. Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 71 (1975).

173. CONSENT HANDBOOK, *supra* note 170, at 6-13; Friedman, *supra* note 172, at 52; see Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, 630-46 (1970).

174. Courts have recognized, for example, that mental retardation may be relevant to the issue of voluntariness even where it has been determined that an individual's capacity and information were acceptable. See, e.g., *State v. Cheshire*, 313 S.E.2d 61, 65 (W.Va. 1984).

175. 304 U.S. 458, 464.

176. An intelligent waiver by a mentally retarded person is, of course, an oxymoron. The Third Circuit discussed the intelligent waiver of a defendant's *Miranda* rights as follows:

[I]ndeed it may be argued forcefully that a choice by a defendant to forego the presence of counsel at a police interrogation is almost invariably an unintelligent course of action. It is not in the sense of shrewdness that *Miranda* speaks of "intelligent" waiver but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom.

Collins v. Briery, 492 F.2d 735, 738-39 (3d Cir.), *cert. denied*, 419 U.S. 877 (1974).

177. *Cooper v. Griffin*, 455 F.2d 1142, 1146 (5th Cir. 1972).

178. See *supra* note 137 and accompanying text.

179. See *Commonwealth v. White*, 362 Mass. 193, 196, 285 N.E.2d 110, 113 (1972) (the court admitted the otherwise valid confession of a feeble-minded and illiterate defendant); *State v. Anderson*, 379 So. 2d 735, 736-37 (La. 1980) (in considering whether a mentally retarded defendant knowingly and intelligently waived his rights,

ever, raises serious questions about the suspect's understanding of the situation. Moreover, the Supreme Court has placed the burden of persuasion to establish the validity of the waiver on the state.¹⁸⁰ Therefore, it is in the interest of prosecutors and law enforcement officials to document that each confession by a retarded suspect was within his capacity.

The capacity issue is likely to focus on the retarded person's ability to understand the warning which *Miranda* requires the police give to all suspects.¹⁸¹ The first issue is whether the retarded suspect understands the concepts which constitute the warning.¹⁸² The concepts of what "rights" are, what it means to give them up voluntarily, the notion of the ability to refuse to answer questions asked by a person of great authority, the concepts of the subsequent use of incriminating statements, the right to counsel and the right to have the state pay for that counsel, and the idea that the suspect can delay answering questions until a lawyer arrives are all of some abstraction and difficulty.¹⁸³ A substantial number of retarded people will not know what one or more of these ideas means.¹⁸⁴ A related difficulty is that the vocabulary of many retarded people is so limited; they may not be able to understand the warning even if they are familiar with its component concepts.¹⁸⁵

Several courts have held a confession inadmissible where it was

court considered additional factors including expert testimony and the arresting officer's ambivalent testimony questioning whether the defendant ever understood the rights explained to him); accord THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963).

180. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

181. The *Miranda* Court required that police warn each suspect "prior to any questioning that he has the right to remain silent, that anything he says can and will be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479 (1966).

182. It has been suggested that the anxiety some retarded defendants will experience upon being arrested may reduce their ability to understand the warning statement. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 185 (1977).

183. See *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972). The *Cooper* court found

substantial uncontroverted testimony that neither boy was capable of meaningfully comprehending the *Miranda* warning. The special education teachers testified that the boys would not have understood the gravity of the charges against them, the consequences of a conviction, any defenses which might be available to them, or any circumstances which might mitigate the charges.

Id. See also *Henry v. Dees*, 658 F.2d 406, 411 (5th Cir. 1981) (mentally retarded defendant did not "separately and independently" name his constitutional rights because it was unlikely that he understood the complex waivers and their consequences).

184. See *People v. Bruce*, 62 A.D.2d 1073, 1073-74, 403 N.Y.S.2d 587, 589 (N.Y. App. Div. 1978). Indeed, the *Bruce* court found it necessary to explain the meaning of voluntary to the defendant, a 17-year-old boy with an IQ of 59, before accepting his guilty plea. *Id.*

185. See *id.*, 403 N.Y.S.2d at 588-89 (A special education teacher testified that the defendant who had an IQ of 59 "had a vocabulary of the approximate level of a 10 year old, and would have difficulty understanding the entire warning form, unless it were read at a slow pace with emphasis on certain words The officer . . . did not attempt to explain the meaning of the warning to defendant.").

shown that the defendant was unlikely to have understood the warning and where it was read to them "in a summary fashion, without elaboration."¹⁸⁶ One state court has turned this holding into a more general rule: "When expert testimony indicates that a defendant could have intelligently understood the waiver of his constitutional rights only if they were simply and clearly explained, the record must expressly and specifically establish that such an explanation was given."¹⁸⁷ These concerns arise even with defendants classified as mildly retarded.¹⁸⁸

A substantial problem develops when the difficulties with a mentally retarded defendant's capacity are not identified at the time his confession is sought.¹⁸⁹ Capacity problems may work to the serious disadvantage of the defendant if they result in an invalid confession being used against him at trial. They may also create serious problems for the prosecution if the disability is later identified and the confession proves to be inadmissible. A number of indicators might provide early warning of a capacity problem. One would be to identify whether the suspect is literate.¹⁹⁰ An-

186. *E.g.*, *Toliver v. Gathright*, 501 F. Supp. 148, 150 (E.D. Va. 1980); see *infra* note 193.

187. *Hines v. State*, 384 So. 2d 1171, 1181 (Ala. Crim. App. 1980). Although such elaboration and explanation may require a deviation from the usual wording of the *Miranda* test, this deviation should not create a difficulty as long as the explanation is clear and complete. The Supreme Court has held that the "precise formulation of the warning" is not required as a "talismanic incantation." *California v. Prysock*, 453 U.S. 355, 359 (1981).

188. The defendants in *Toliver*, *Cooper*, and *Bruce* were all mildly retarded. See *supra* notes 183-86. In *Cooper*, the court characterized the defendants as having "extreme mental deficiency." 455 F.2d 1142, 1145 (5th Cir. 1972). Although the defendant's IQ scores fell within the "mild" range, the court's characterization is understandable, because the level of handicap, especially for verbal tasks like those involved in a *Miranda* waiver, was substantial. See *id.*

Unlike these cases *Hines* involved a defendant with an IQ of 39, which is on the border between severe and moderate retardation. *Hines* misspelled his last name two different ways in signing the waiver form, and there was expert testimony that at his level of functioning "tying a shoe would be a complex task." 384 So. 2d at 1175-76.

189. See, *e.g.*, *People v. Redmon*, 127 Ill. App. 3d 342, 468 N.E.2d 1310, 1313 (1984) (16 year-old defendant had an IQ between 70 and 73). In *Redmon*, the defendant's confession, obtained after 19 hours of interrogation, was suppressed for lack of capacity to waive his right to counsel. *Id.* at 1316. During the interrogation, police officers repeatedly read *Redmon* the *Miranda* warning, but he understood it only later, when the prosecutor explained the warning in greater detail. *Id.* at 1315.

190. *Morrow, A Legal Framework: An Insider's Perspective*, in REHABILITATION AND THE RETARDED OFFENDER 60-61 (P. Browning ed. 1976). The author notes that "[a]pparently the question, 'Can you read?' is rarely asked." *Id.* The mechanisms that a retarded person has used all his life to minimize the stigma that accompanies his disability may make identification of this problem a little more difficult. *Morrow* depicts a scene in which the defendant, in his desire to please the police officer, makes a statement. The police officer normally writes down the statement, reads it back, says "something to the effect of 'read this over . . . is it right?,' and requests the accused's signature. Sometimes the retarded person will appear to read the document to himself, but in fact, will not read it at all." *Id.*

Other approach is to ask about the suspect's educational background.¹⁹¹ Observing the ease with which he signs his name would also provide some clue.¹⁹² Indications of confusion and inconsistency may also indicate a lack of capacity.¹⁹³ The scope of the accused person's apparent vocabulary may also provide some guidance. Ultimately, the most useful approach is to ensure that the warning itself is given in a clear and unhurried fashion. Whenever a doubt arises, explanations should be offered and inquiries made to determine if the accused has really understood.

The inquiry about the capacity of an individual to consent is closely related to the issue of whether he has sufficient information upon which to base a choice.¹⁹⁴ The information component of legally adequate consent for a retarded suspect may turn on whether he understands the concepts contained in the waiver. But retarded individuals, particularly if they have led a life isolated from the community, may also lack basic information about the workings of the criminal justice system. Failure to understand the adversarial nature of prosecutions and the concepts of trials and their consequences should invalidate a confession.¹⁹⁵

The third element of legally adequate consent is that the act must be voluntary. This component has engendered a great deal of litigation concerning the confessions of mentally retarded suspects. The concern with this element is not that the suspect did not understand what was being asked of him, but rather that his action, either a confession or a waiver of the right to counsel, was the product of coercion. In evaluating voluntariness, the Supreme Court has warned of the importance of "the unusual susceptibility of a defendant to a particular form of persuasion."¹⁹⁶ An individual with mental retardation may be particularly susceptible to nonphysical coercion.¹⁹⁷ Lower courts have identified special

191. See *People v. Varecha*, 353 Ill. 52, 57-58, 186 N.E. 607, 608-09 (1933) (court must look to defendant's ability to be taught in determining his mental competence).

192. *Id.*; see *supra* note 188.

193. See *Toliver v. Gathright*, 501 F. Supp. 148, 151 (E.D. Va. 1980). The court observed: "The fact that Toliver said he would not make a statement, just moments after he signed the waiver form, evinces confusion rather than comprehension." *Id.*

194. This element of the "consent triad" has been the focus of much litigation in the area of medical care for mentally typical people. See, e.g., *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 11, 104 Cal. Rptr. 505, 515 (1972). It is the concentrated focus on information in this context that leads to the somewhat misleading label "informed consent." See CONSENT HANDBOOK, *supra* note 170, at 6.

195. The Supreme Court has recently observed: "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Oregon v. Elstad*, 105 S. Ct. 1285, 1297 (1985). But *Elstad* and the decisions it cites involved marginal misunderstandings by defendants who were mentally typical. The "ignorance of the full consequences" of a mentally retarded defendant may be different in kind, not just degree, from those envisioned by the *Elstad* majority.

196. *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980).

197. See *Sims v. Georgia*, 389 U.S. 404, 407 (1967); *Wreck v. Pate*, 367 U.S. 433, 442 (1961); *Culombe v. Connecticut*, 367 U.S. 568, 625, 633 (1961); *Fikes v. Alabama*, 352 U.S. 191, 196-97 (1957); see also *Jurek v. Estelle*, 623 F.2d 929, 938 (5th Cir. 1980) (*en banc*) (accused was functionally isolated from all but his interrogators), *cert. denied*, 450 U.S. 1001 (1981). The *Jurek* court stated:

problems with retarded defendants in cases involving prolonged questioning,¹⁹⁸ threats and promises of leniency,¹⁹⁹ a strip search,²⁰⁰ and a polygraph test.²⁰¹ Another court noted that a retarded defendant, confronted with an accomplice's statement implicating him, "was particularly likely to have an exaggerated perception of the dangers of remaining silent."²⁰²

Some courts have suggested that mental deficiency alone, without a showing of threats, deprivation of food, or some similarly extreme circumstance will not render the voluntariness of a confession suspect,²⁰³ but intimidation and coercion may take on subtle forms with a mentally retarded suspect. More than twenty years ago, the President's Panel on Mental Retardation observed:

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. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force because their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. "Cheating to lose," allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications of consequences of his statements in the way a person of normal intelligence will.²⁰⁴

In considering the voluntariness of a confession, this court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will The concern in a case involving a defendant of subnormal intelligence is one of suggestibility.

623 F.2d at 937-38.

198. *United States v. Hull*, 441 F.2d 308, 312 (7th Cir. 1971).

199. *United States v. Blocker*, 354 F. Supp. 1195, 1201 (D.D.C. 1973), *aff'd*, 509 F.2d 538 (D.C. Cir. 1975).

200. *Id.*

201. *Henry v. Dees*, 658 F.2d 406, 411 (5th Cir. 1981).

202. *Toliver v. Gathright*, 501 F. Supp. 148, 154 (E.D. Va. 1980).

203. *United States v. Barnes*, 520 F. Supp. 946, 957 (D.D.C. 1981). Other courts have suggested that the significance of mental retardation may be less where the defendant has had extensive experience with the criminal justice system. *E.g.*, *United States v. Young*, 355 F. Supp. 103, 111 (E.D. Pa. 1973). Still other courts have suggested that whether the retarded suspect is employed may be relevant. *E.g.*, *People v. Bruce*, 62 A.D.2d 1073, 403 N.Y.S.2d 587, 589 (1978). It is not clear from these opinions whether employment is thought relevant to the suspect's capacity to understand the waiver or to his susceptibility to coercion. *E.g.*, *State v. Anderson*, 379 So. 2d 735, 737 (La. 1980).

204. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE

These factors should induce great caution in law enforcement officials seeking confessions and in courts reviewing their legal adequacy.²⁰⁵

Part II of the new *Mental Health Standards*²⁰⁶ addresses "Police and Custodial Roles," but does not directly treat the waiver and confession problems. It does, however, recommend that law enforcement personnel receive specialized training to help them identify mental health and mental retardation problems.²⁰⁷ Further, in a different context, the *Mental Health Standards* recognize the problem with involving mental retardation professionals in the interrogation process in the absence of counsel; *Miranda*-type warnings are insufficient where the defendant is unaware of the precise nature of the interview and the adversarial role of the interviewer.²⁰⁸

B. Competence to Stand Trial

The competence of mentally retarded defendants to stand trial is a crucial issue.²⁰⁹ While the doctrine in this area is well settled, practical problems with its implementation loom large, and the nature of mental retardation exacerbates those problems.

The courts have long accepted that it is impermissible to try a defendant who lacks the ability to understand the proceedings or to present a defense. Blackstone declared that such persons could not be tried.²¹⁰ This view has been fully supported by other com-

ON LAW 33 (1963); see also Morrow, *supra* note 190, at 60 (the retarded individual's desire to assimilate may also make it very difficult to identify him as retarded); CONSENT HANDBOOK, *supra* note 170, at 11 (mentally retarded persons are more likely to acquiesce to requests from authority figures).

205. One appellate court stated with admirable candor: "We do not know enough about intelligence quotients (IQ) and mental retardation to rule conclusively on this question. Yet we do know enough to believe the matter needs further analysis." Commonwealth v. Daniels, 366 Mass. 601, 608, 321 N.E.2d 822, 828 (1975). The court went on to suggest that expert testimony on mental retardation might be necessary at suppression hearings. *Id.*, 321 N.E.2d at 828.

206. MENTAL HEALTH STANDARDS, *supra* note 4, 7-2.1 - 7-2.9.

207. *Id.* 7-2.8.

208. See *id.* 7-3.1 commentary at 75-76. The *Mental Health Standards* point out the potentially ironic result of a mental health professional's presence at the interrogation. The contrast between antagonistic police interviewers and the compassionate mental health or mental retardation professional interviewer may induce the defendant to make legally damaging statements he might not otherwise make. This is particularly true in light of the professional's sophisticated interviewing techniques. Questions that require seemingly innocuous answers may be intended to evoke, and may result in, legally damaging responses. *Id.*

209. See generally Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375 (1985).

210. Blackstone elaborated:

Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried, for how can he make his defense?

4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *24. Hale reached the same conclusion:

If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be ar-

mentators and courts in England and America.²¹¹ The United States Supreme Court has observed that trying an incompetent defendant violates due process.²¹² And although the public has fixed its attention on the insanity defense,²¹³ Dr. Alan Stone is certainly correct in calling competence to stand trial "the most significant mental health inquiry pursued in the system of criminal law."²¹⁴

The theoretical applicability of the competence doctrine to mentally retarded defendants has never been seriously questioned. The early pronouncements of the doctrine used the term "insane," which was then broad enough to encompass people labeled "idiots."²¹⁵ The fact that a functional measure, rather than one limited by clinical etiology, determined incompetence is demonstrated by the early English cases which discussed the competence of deaf mutes.²¹⁶ These cases were followed by the North Carolina Supreme Court in *State v. Harris*.²¹⁷ *Harris* held that a deaf and dumb prisoner who, despite efforts to educate him, was unable to understand the significance of a trial ought not be compelled to participate; "[w]hether arising from physical defect or mental disorder, he must, under such circumstances, be deemed "not sane,"

raigned during such his phrenzy; but he remitted to prison until that incapacity be removed; The reason is, because he cannot advisedly plead to the indictment And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried

1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34-35 (London 1736).

211. See *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899) (discussion of early authorities); 1 N. WALKER, *supra* note 11, at 219-41 (detailed discussion of the British experience); *United States v. Chisolm*, 149 F. 284, 285-86 (S.D. Ala. 1906) (announcing a test for competence that was similar to the modern formulation because it measured competence by a person's ability to aid counsel and testify at trial); *Commonwealth v. Braley*, 1 Mass. 103, 104 (1804); *State v. Peacock*, 50 N.J.L. 653, 654-55, 14 A. 893, 894 (1888) (court held proof of insanity was improperly excluded by the lower court and was injurious to the defendant); *Freeman v. People*, 4 Denio 9, 20 (N.Y. 1847) ("The true reason why an insane person should not be tried, is, that he is disabled by an act of God to make a just defence if he have one.").

212. *Drope v. Missouri*, 420 U.S. 162, 172 (1974); *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

213. See generally L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984); C. ROSENBERG, THE TRIAL OF THE ASSASSIN GUTTEAU: PSYCHIATRY AND LAW IN THE GILDED AGE (1968) (an account of the insanity trial of President Garfield's assassin).

214. See A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 200 (1975). Competence issues involve vastly larger numbers of defendants than does the insanity defense. See *id.* at 203; Steadman & Hartstone, *Defendants Incompetent to Stand Trial*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE, *supra* note 3, at 39-42; see generally H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979).

215. 1 N. WALKER, *supra* note 11, at 225.

216. *Id.*

217. 53 N.C. (8 Jones) 136 (1860).

and . . . he ought not to be tried."²¹⁸

Another nineteenth-century American case²¹⁹ acknowledged that mental retardation could constitute the basis for incompetence, but required that the degree of disability be substantial.²²⁰ The same concerns that retardation could cause incompetence,²²¹ but that the retardation had to be truly disabling, continued well into this century.²²²

The new *Mental Health Standards* recognize that mental retardation may be the source of incompetence to stand trial. Standard 7-4.1 identifies the test for competence as "whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings."²²³ The same standard explicitly recognizes that incompetence "may arise from . . . mental retardation or other developmental disability . . . so long as it results in a defendant's inability to consult with defense

218. *Id.* at 143. Even at that early date, the court explicitly recognized that the provision of counsel was insufficient to cure the problems of incompetence. *Id.*

219. *State v. Arnold*, 12 Iowa 479 (1861).

220. *Id.* at 484. The court noted that testimony had indicated that defendant's "manner occasionally indicated mental imbecility," but ruled that he had failed to rebut the presumption of sanity:

To do this, evidence of mere incapacity to fully understand and comprehend all his legal rights; and to make known in the most succinct and intelligent manner to his counsel all the facts material to his defense, is not sufficient. A doubt must be raised whether at the time there is such mental impairment, either under the form of idiocy, intellectual or moral imbecility, or the like, as to render it probable that the prisoner cannot, as far as may devolve upon him, have a full, fair and impartial trial.

Id.

A substantial degree of disability was also generally required to successfully invoke the insanity defense. See *supra* note 94.

221. See *State v. Brotherton*, 131 Kan. 295, 300, 291 P. 954, 960 (1930) (observing that the court below "showed a proper concern that no person of feeble mind should be put to trial on a serious charge"); Act of 1919, ch. 299, § 2, 1919 Kan. Sess. Laws, 490, 490 (codified at KAN. STAT. ANN. 39-237 (1923)) (repealed 1939). The act stated: "That whenever in a court of record, during the hearing of any person charged with a misdemeanor or crime, it shall be made to appear to the court that the person is feeble-minded the court shall summarily remand such person to the probate court of the county for examination . . . [for possible civil commitment]." *Id.* See also H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 434 n.21 (1954) (similar statutes recognizing retardation as a cause of incompetence to stand trial).

222. See *State v. Lammers*, 171 Kan. 668, 669, 237 P.2d 410, 411 (1951). In *Lammers*, the trial court's charge to the examining commissioners stated:

You have been appointed . . . to ascertain, after a thorough examination, . . . whether he be insane, an idiot or an imbecile and unable to comprehend his position and make his defense. A person may be illiterate, have a low degree of competency and a low I.Q. rating as relates to scholastic matters but he may have a normal or high degree of competency through native or natural ability.

Id.

223. *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-4.1(b). This standard is similar to the test announced by the Supreme Court in *Dusky v. United States*, 362 U.S. 402, 402 (1960) ("whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceeding against him."). *Id.* See Favole, *supra* note 120, at 247-57 (a compilation of tests employed by the various states for competence to stand trial).

counsel or to understand the proceedings."²²⁴

One issue that remains unresolved in the modern era is the degree of retardation necessary for finding a defendant incompetent to stand trial. Courts often rely upon IQ scores²²⁵ and estimates of "mental age"²²⁶ to determine whether a defendant is competent. Many appellate courts conclude that even a relatively low level of intellectual functioning is sufficient to establish competence.²²⁷ The approach taken by the *Mental Health Standards* is preferable. The commentary observes that "[c]ompetence is functional in nature, context dependent and pragmatic in orientation. If a defendant is capable of meeting the articulated requirements for competence, the presence or absence of mental illness is irrelevant."²²⁸ The same is true for mental retardation. While the presence or absence or degree of mental illness or mental retardation "may certainly be significant in evaluating the defendant's competence,"²²⁹ the ultimate question is the actual ability of the individual defendant to perform tasks required at trial.

Mental retardation may affect an individual's functioning in ways that make him incompetent to stand trial.²³⁰ A defendant's receptive and expressive language skills, vocabulary, conceptual

224. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1(c).

225. A surprisingly large number of reported cases involve expert testimony in which the witness ascribes an IQ score or range of IQ scores to the defendant without administering any standardized intelligence tests. See, e.g., *State v. Rogers*, 419 So. 2d 840, 842 (La. 1982). In the *Rogers* case, a psychiatrist who had not conducted any intelligence tests testified that the defendant's IQ was between 60 and 70, and concluded that he was competent to stand trial because of "[his] ability to recall the phone number and city block number at his mother's house where he resided, [and] his place of employment . . . [and because of] defendant's statement that he had dropped out of school in the eighth grade." *Id.* Dr. Mauroner did not determine whether the defendant had been socially promoted in school, and none of the doctors inquired as to whether he could read or write. Although this same witness "conceded that a psychological test would be the most accurate means of determining the level of defendant's retardation, he insisted that a test result showing even severe mental retardation would not cause him to change his opinion that the defendant could assist counsel at trial." *Id.* See also *State v. Bennett*, 345 So. 2d 1129, 1137 (La. 1977) (the "guesses" by expert witnesses, none of whom had tested the defendant, ranged from IQ scores of 35 to 90). This sort of guesswork, of course, does not fall within the proper scope of expert testimony. See *infra* note 397. It may also violate the ethical code of the witness's profession. *Id.*

226. Cf. *supra* notes 105-12 and accompanying text.

227. For a compendium of decisions organized by levels of intellectual functioning, see Annot., 23 A.L.R.4th 493 (1983).

228. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1 commentary at 187.

229. *Id.*

230. The court in *State v. Williams*, 381 So. 2d 439, 440 (La. 1980), stated that: "Being mentally retarded or of subnormal intelligence is not in itself proof of incapacity However, when substandard mental ability combines with other problems to prevent a defendant from rationally assisting his counsel, a fair trial cannot proceed." (footnotes omitted). The first sentence in this statement is certainly true, but the second suggests that factors unrelated to mental retardation produce the effect of incompetence. This may be misleading because the effects of the mental retardation

ability, and low level of general knowledge may all impair his ability to participate in his defense. Even at the higher levels of mild mental retardation, a defendant may be unable to understand a concept like "waiver" or the elements of the crime with which he is charged unless special efforts are made to explain them and assist him in understanding them.²³¹ Therefore, courts err when they suggest that it is only the accompanying presence of a mental illness that makes a mentally retarded person incompetent to stand trial.²³²

Similarly, courts should not accept expert testimony from an evaluator who merely tells the court that a retarded defendant is not psychotic, and therefore is competent to stand trial.²³³ Such testimony is even less helpful than that of an expert who tells the court the defendant's IQ score or estimates his mental age and

may themselves be the indicia of incompetence. This is demonstrated by the *Williams* case itself in which there was testimony that the defendant was:

moderately retarded, suffering from a severe speech disorder and hampered by an extremely primitive ability to cope. Williams cannot read or write, remember his address or his attorney's name . . . His judgmental capacity is impaired by an inability to concentrate and a limited education . . . [He] does not know the name of the President of the United States.

Id. With the possible exception of the speech impediment, each of these factors is almost certainly a direct consequence of defendant's "mild to moderate" mental retardation.

231. In *United States v. Glover*, 596 F.2d 857, 865 (9th Cir.), cert. denied, 444 U.S. 857 (1979), a defendant with an IQ of 67 and a first to second-grade reading level, was so described by an expert witness for the defense. The prosecution's expert witness basically agreed but stated that the defendant would be competent if questions, terms, and proceedings were explained to him in simple words and simple sentences, using concrete examples. *Id.* The court held that the defendant could be competent if properly assisted, asserting that the extra burden upon counsel of assisting the defendant "certainly does not establish that the defendant is incompetent to stand trial." *Id.* at 867.

232. See *State v. Edwards*, 257 La. 707, 711-12, 243 So. 2d 806, 808 (1971) (distinguishing a case which found defendant incompetent to stand trial at roughly the same level of retardation, IQ 59, because the defendant involved was psychotic).

233. *E.g.*, *State v. Bennett*, 345 So. 2d 1129 (La. 1977). The *Bennett* court found "[i]t was insufficient [to show competence] for the court to find that defendant was not psychotic, was oriented as to time and place and was aware of his surroundings." *Id.* at 1137. The factors listed by the court are traditional diagnostic indicia for the lack of psychosis. The witness in *Bennett* revealed a lack of understanding of both mental retardation and the criteria for competence to stand trial by stating "that a severely retarded individual with an IQ of 10 might be aware of his surroundings, and thus he could presumably assist counsel and understand the proceedings against him 'within his capabilities.'" *Id.* The Supreme Court of Louisiana correctly rejected this contention, noting that "[d]ue process, however, requires a level of effective participation by an accused in criminal proceedings against him." *Id.*

This sort of misleading testimony may result from the court's appointment of mental health professionals as evaluators who lack any knowledge or experience in the field of mental retardation. Standard 7-4.4(a)(iii) requires that evaluators have appropriate training and experience. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.4(a)(iii); see also *id.* 7-3.10. Knowledge about mental illness is not a sufficient qualification for evaluating a retarded defendant unless the mental health professional also happens to have expertise in the area of mental retardation. See text accompanying notes 51-61. Testimony by such an unqualified witness may go unchallenged at the hearing because the witness's qualifications in the area of mental illness are known and accepted by counsel and the court, but this illusory expertise ill serves the court and may result in substantial injustice to both the defendant and the prosecution.

then makes a conclusory statement about his competence to stand trial.²³⁴ Courts should not only insist on testimony which evaluates the defendant's degree of mental retardation, but also should require descriptions of its effects in some detail, and explanations of how these effects would affect the individual's ability to participate in a trial.²³⁵ Only this kind of detailed, nonconclusory testimony will allow the court itself to retain the ultimate decision on competence rather than merely deferring the decision to evaluators whose expertise does not extend to the nature of the trial process.²³⁶

An even greater concern than the possibility of misleading testimony on competence is the likelihood that the failure to detect the defendant's disability will result in no competence evaluation at

234. *State v. Bennett*, 345 So. 2d 1129, 1137 (La. 1977). The court noted that "[t]he . . . hearing redounded with statements by the two examining physicians that defendant was able to assist counsel, but there was scant testimony to support this conclusion." *Id.*

235. Such testimony can be provided by a qualified mental retardation professional who has personally interviewed and evaluated the defendant without resort to any diagnostic instruments beyond the adaptive behavior scales and the generally accepted intelligence tests. Cf. notes 400-09 and accompanying text. Some evaluators, however, make use of a check list for estimating a defendant's competence to stand trial. LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 106-13 (1973) [hereinafter cited as LABORATORY OF COMMUNITY PSYCHIATRY]; see also Lipsitt, Lelos & McGarry, *Competency for Trial: A Screening Instrument*, 128 AM. J. PSYCHIATRY 105 (1971) (competency screening questions and test results discussed). The Harvard Laboratory's work was published as a monograph by the National Institute of Mental Health, and some evaluators have apparently asserted that a score derived from this check list represents "competency to stand trial according to National Institute of Mental Health Standards." *State v. Young*, 291 N.C. 562, 566, 231 S.E.2d 577, 580 (1977); *State v. Willard*, 292 N.C. 567, 575, 234 S.E.2d 587, 592 (1977). This checklist has received substantial criticism. See, e.g., Brakel, *Presumption, Bias and Incompetency in the Criminal Process*, 1974 WIS. L. REV. 1105, 1107-08; see also MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1 commentary at 184-85 (check lists of specific criteria fail to fully resolve the issue of the defendant's competence). The check list is useful in directing the attention of evaluators to the relevant issues affecting competence to stand trial, but the suggested "scores" given to mentally retarded defendants in some of the published clinical examples are highly questionable. The defendant's second, and improved, explanation of the concepts in question may not represent a true increase in understanding of the trial process. The improved response may merely represent mimicking of an answer supplied by the evaluator. See LABORATORY OF COMMUNITY PSYCHIATRY, *supra*, at 106-13.

236. *Bennett*, 345 So. 2d at 1137. Although the *Bennett* court agreed that "it may be impossible in a pretrial competency hearing to avoid reliance upon psychiatric prediction concerning the accused's capabilities, the trial court may not rely so extensively upon medical testimony as to commit the ultimate decision of competency to the physician." *Id.* See also MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.8(c)(ii) (court is to decide on the issue of competence "by the greater weight of the evidence."); *id.* 7-3.9(a) ("[T]he expert witness should not express, or be permitted to express, an opinion on any question requiring a conclusion of law . . . properly reserved to the court or the jury."). Of course the same principle applies where the expert witness is a mental retardation professional other than a psychiatrist or other physician.

all.²³⁷ The efforts that many mentally retarded people typically expend in trying to prevent any discovery of their handicap²³⁸ may render the existence or the magnitude of their disability invisible to criminal justice system personnel. These attempts to "pass" as a mentally typical person may be as "successful" in the context of a trial as they often are in the setting of confessions and *Miranda* warnings.²³⁹ This may account for what prominent observers have identified as the relative "paucity [of case law and commentary on competence] which cite mental retardation." These observers conclude "[i]t is our impression that the competency issue is raised too often for the mentally ill and too infrequently for the mentally retarded."²⁴⁰ The *Mental Health Standards* place responsibility on the prosecutor, defense counsel, and the court itself to raise the issue of competence whenever any of those individuals "has a good faith doubt as to the defendant's competence."²⁴¹ Nevertheless, experience teaches that without extraordinary diligence, these persons are most likely to raise the issue of competence only when the defendant is acting in a bizarre or disruptive fashion.²⁴² This extra diligence is warranted²⁴³ because the prospect of an undetected mentally retarded defendant sitting through a trial he does not understand is exactly the evil the doctrine of competence was

237. See Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365, 367 (1981) (contending that most retarded defendants are never examined for competence to stand trial).

238. See *supra* notes 80-85.

239. See *supra* text accompanying notes 189-93.

240. LABORATORY OF COMMUNITY PSYCHIATRY, *supra* note 235, at 6. The authors of the Harvard study view this result as paradoxical because

[t]here are good grounds to speculate that retardates are a good deal less able to cope adequately with criminal trial than the mentally ill. This speculation is based both on the cognitive deficits of the retarded and their characteristic dependency and malleability which permits them to be easily manipulated by investigatory and prosecutory personnel.

Id. at 14.

241. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.2(a); see also *Drope v. Missouri*, 420 U.S. 162, 177 (1975) (trial court should have ordered a competency exam, as motion for continuance alleged that defendant was not "of sound mind" and requested a psychiatric examination).

242. Many of the reported cases in which a retarded defendant was found incompetent to stand trial involved individuals who also manifested obvious symptoms of mental illness. See, e.g., *People v. Samuel*, 29 Cal. 3d 489, 499-500, 629 P.2d 485, 489-90, 174 Cal. Rptr. 684, 688-89 (1981) (regressed behavior including eating feces); see also *Sessoms v. United States*, 359 F.2d 268, 270 n.3 (D.C. Cir. 1966) (defendant was "narcistic" and "schizoid").

243. The need for great caution in preventing incompetent defendants from being tried extends to the appellate courts, which have traditionally given substantial deference to trial courts on the issue of competence. See, e.g., *People v. Murphy*, 72 Ill. 2d 421, 431, 381 N.E.2d 677, 682 (1978) (trial court in a position to observe defendant and his conduct). However, judges are not experts on mental retardation and its manifestations and consequences. Where the record below indicates that the trial judge received only conclusory, inconsistent, or incompetent testimony from evaluators, or relied solely on the court's own observation of the defendant's docility and apparent attentiveness, an appellate court can appropriately scrutinize whether there was an adequate basis for the finding that a retarded defendant was competent to stand trial. See, e.g., *State v. Bennett*, 345 So. 2d 1129, 1137-38 (La. 1977) (psychiatric reports were conclusory and without support).

originally designed to prevent.²⁴⁴

Finally, it is worth noting that mentally retarded defendants present unique issues regarding attempts to effect²⁴⁵ competence once they have been found incompetent. It was previously believed that the incompetence of retarded defendants was almost always permanent. "Treatment" with the hope of eventually rendering the defendant able to stand trial was thus futile.²⁴⁶ Modern developments in the field of habilitation²⁴⁷ and special education²⁴⁸ have greatly increased our ability to teach retarded individuals particular concepts and skills. The disability which makes some retarded defendants incompetent will be so substantial that no teaching or habilitation can effect competence. For many others, however, a carefully designed and individualized program of habilitation may make it possible for the defendant to receive a fair trial.²⁴⁹ It is clear, however, that this can only be accom-

244. See *supra* note 210.

245. The term "effect" is more appropriate for retarded defendants than the more common "restore" because most mentally retarded defendants who are incompetent will not have been competent at any previous time. *Testimony Presented to the ABA Standing Comm. on Assoc. Standards for Criminal Justice 2* (1983) (testimony of Thomas E. Coval and Dr. Sheldon R. Gelman on behalf of the AAMD). See also MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.10 (stating that a defendant determined to be incompetent to stand trial has a right to treatment to "effect" competence).

246. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 35 (1963). The task force concluded that

[i]n the case of the mentally retarded defendant, unlike the mentally ill, there is often little point in finding inability to stand trial at the moment, but requiring that a trial must follow 'recovery.' Limited, though valuable, gains may be possible if the patient receives treatment and training, but for the majority of the retarded, the likelihood of great change remains slight.

Id.

247. See *supra* note 57.

248. See B. BLATT, D. BILKEN & R. BOGDAN, AN ALTERNATIVE TEXTBOOK IN SPECIAL EDUCATION (1977); D. EVANS, THE LIVES OF MENTALLY RETARDED PEOPLE 57-113 (1983); D. MACMILLAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY 453-536 (2d ed. 1982); E. POLLOWAY, J. PAYNE, J. PATTON & R. PAYNE, STRATEGIES FOR TEACHING RETARDED AND SPECIAL NEEDS LEARNERS 152-294 (3d ed. 1985); W. SAILOR & D. GUESS, SEVERELY HANDICAPPED STUDENTS: AN INSTRUCTIONAL DESIGN 51-203 (1983). See generally SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED (M. Snell 2d ed. 1983) (a collection of articles on teaching concepts and skills).

249. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.10 (provides for the right to habilitation pursuant to an individualized plan designed to effect the defendant's competence). For example, when the nature of the incompetence is the individual's general inability to understand concepts of the complexity required for trial, habilitation is unlikely to be successful. On the other hand, when a defendant's incompetence results from the lack of general knowledge about the role of the various participants in criminal trials, or from correctible gaps in vocabulary and communications skills, a trial may be possible within the time framework allowable under law. See generally *Jackson v. Indiana*, 406 U.S. 715 (1972); MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.14 (trial of defendant rendered competent by habilitation).

plished by qualified mental retardation professionals experienced in the arts of habilitation. It is cruelly futile to send such defendants to state hospitals for the mentally ill that have no programs to habilitate retarded individuals, and this happens far too frequently.²⁵⁰

C. Competence to Plead Guilty

Guilty pleas by mentally retarded defendants present one of the most difficult doctrinal and practical problems faced by the criminal justice system in the mental disability area. Courts are sharply divided on the appropriate standard for competence to plead, and the practical consequences of the choice between the competing formulations are substantial.

Historically, acceptance of the idea that some retarded defendants are incompetent to enter a plea has paralleled the awareness that some defendants are incompetent to stand trial.²⁵¹ Pleas had special significance for medieval courts, and the failure, or refusal, of a defendant to enter a plea made it impossible to convict or punish him.²⁵² Therefore it was of the greatest importance to know whether the failure to plead was a conscious decision, or, in the alternative, "by visitation of God," a category which included "idiots."²⁵³

Of course, today guilty pleas have an entirely different significance.²⁵⁴ The operation of the criminal justice system depends on a predictable quantity of plea bargaining, and for many defendants, a plea bargain appears to be their only substantial hope of reducing their sentence.²⁵⁵ Therefore, the modern criminal justice

250. Cf. *People v. Lang*, 76 Ill. 2d 311, 326-28, 331-32, 391 N.E.2d 350, 356-59, cert. denied, 444 U.S. 954 (1979) (involving a deaf defendant).

251. See *supra* notes 209-250.

252. The most common difficulty with which medieval and Tudor judges had to contend at the outset of a trial for felony or treason was the man who simply refused to plead "guilty" or "not guilty." Unless he uttered the necessary words, reverence to the ritual of the law made it unthinkable to proceed with the trial, with the result that he could not be convicted and executed. More important still for the Exchequer, his property would not be forfeit. But to take this course for the sake of one's dependents called for great fortitude, since the courts' remedy was to order the man who refused to plead to be subjected to the *peine forte et dure*, which consisted of slowly pressing him to death under an increasing weight, unless his endurance gave out in the process and he consented to plead. 1 N. WALKER, *supra* note 11, at 220. Therefore, if a prisoner refused to plead, as was quite likely if he was a madman or deaf-mute, the first question for the court was: "Is he mute of malice, or by visitation of God?" *Id.*

253. *Id.*

254. See generally ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, ch. 14 introduction at 14-5 (reflecting the widespread acceptance of plea bargaining in the criminal process); J. BOND, PLEA BARGAINING AND GUILTY PLEAS (2d ed. 1982); A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE (1976) (critical analysis of plea bargaining in a number of jurisdictions); Alschuler, *The Changing Plea-Bargaining Debate*, 69 CALIF. L. REV. 652 (1981) (critical review of the plea bargaining process).

255. Recent research suggests, however, that at least for common law crimes, the defendant has less to gain from a plea bargain than any other participant in the trial. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY — (in press 1985).

system provides numerous incentives for all parties to attempt to negotiate a plea of guilty to avoid trial.²⁵⁶ At the same time, a guilty plea has the effect of waiving all of the defendant's constitutional rights in the adjudicative process and is the full equivalent of a conviction.²⁵⁷ The prospect of a mentally retarded defendant entering a guilty plea without fully understanding its consequences is most alarming, because those consequences are uniquely momentous for that defendant.²⁵⁸

While it is generally recognized that the standard for competence to plead guilty is higher than for other kinds of consent or waivers,²⁵⁹ the key issue today is whether the standard to plead guilty is higher than, or otherwise different from, the standard for competence to stand trial. It appears that most courts view the tests as identical, and thus apply the *Dusky* test²⁶⁰ for competence to stand trial to the issue of the adequacy of a guilty plea.²⁶¹ There is, however, a substantial and persuasive minority view. The Ninth Circuit has rejected the identity of the two tests in a case involving mental illness,²⁶² and the District of Columbia Circuit has rejected their identity in a case involving the issue of mental retardation.²⁶³

The reason for establishing a different test for competence to plead is the imperfect match between the test for competence to stand trial and the issues involved in assessing the adequacy of a plea. The ABA's trial standard requires the court to inquire "whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational un-

256. *But see supra* note 255 (incentives offered by the criminal justice system to entice defendants to plead guilty do not work to defendants' best advantage); Brereton & Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 64 (1981-1982).

257. The Supreme Court noted long ago that "[a] plea of guilty . . . is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

258. See CONSENT HANDBOOK, *supra* note 170, at 22-23 (suggesting that the formality of checking the adequacy of a retarded person's consent should vary with the importance of the consequences of his decision); see also *Monroe v. United States*, 463 F.2d 1032, 1036 (5th Cir. 1972) (noting the significant consequences of a guilty plea to include the waiver of several constitutional rights, including the privilege against self incrimination, trial by jury, and confrontation).

259. See, e.g., *United States v. Young*, 355 F. Supp. 103, 111 (E.D. Pa. 1973) ("[T]he procedures for taking a guilty plea are more stringent than those for waiving Miranda rights.").

260. See *supra* note 223 and accompanying text.

261. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-5.1; Note, *Competence to Plead Guilty: A New Standard*, 1974 DUKE L.J. 149, 155; cf. *Sharp v. Scully*, 509 F. Supp. 493, 495 (S.D.N.Y. 1981) (a petitioner found competent to stand trial on serious charges is competent to strike a favorable sentencing bargain and plead guilty).

262. *Sieling v. Eyman*, 478 F.2d 211, 214-15 (9th Cir. 1973).

263. *United States v. Mathers*, 539 F.2d 721, 726 n.30 (D.C. Cir. 1976).

derstanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings."²⁶⁴ A court using this standard to assess the adequacy of a guilty plea will inquire into the defendant's memory of relevant events and his ability to communicate,²⁶⁵ rather than address his appreciation of the consequences of a guilty plea and his ability to assess its desirability in his case. The alternative selected by the United States Court of Appeals for the Ninth Circuit in *Seiling v. Eyman* is a separate test which focuses more directly on the issues involved in the plea bargaining process: "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea."²⁶⁶ The Ninth Circuit defends this choice on the grounds that it "requires a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced."²⁶⁷

The D.C. Circuit found the Ninth Circuit's approach particularly helpful in reviewing the guilty plea of a mentally retarded defendant in *United States v. Masthers*.²⁶⁸ The trial court had accepted a guilty plea from a mildly retarded defendant with a reported IQ of 57. The court of appeals, concerned that the plea may have been incompetent, held that the trial court's observations of the defendant's demeanor and the colloquy in accepting the plea²⁶⁹ were not sufficient to justify a finding that the plea was competent and voluntary.²⁷⁰ Judge Bazelon, writing for the court, noted that the defendant's answers in the colloquy almost never went beyond a simple affirmation. This apparently disguised the defendant's disability from both the trial judge and from his own counsel.²⁷¹ Judge Hastie's concurring opinion observed that

264. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.1; cf. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (stating the test for competence to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable understanding and whether he has a rational as well as factual understanding of the proceedings against him").

265. See, e.g., *State v. Cheshire*, 313 S.E.2d 61, 64 (W. Va. 1984).

266. *Seiling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973) (quoting *Schoeller v. Dunbar*, 423 F.2d 1183, 1194 (9th Cir.) (Hufstедler, J., dissenting), cert. denied, 400 U.S. 834 (1970)); see also *United States v. Webb*, 433 F.2d 400, 404 n.3 (1st Cir. 1970) (citing *In re Williams*, 165 F. Supp. 879 (D.D.C. 1958)) ("Courts have recognized that the conclusion that a defendant is competent to stand trial does not necessarily mean he has the mental capacity needed for an intelligent decision to plead guilty.").

267. *Seiling*, 478 F.2d at 215.

268. 539 F.2d 721, 726 (D.C. Cir. 1976).

269. See FED R. CRIM. P. 11.

270. *Masthers*, 539 F.2d at 723-25. The court of appeals sought to explore the issue as it related to mentally retarded defendants by inviting the Mental Health Law Project to participate as an *amicus curiae*.

271. *Id.* at 723-25 (Defendant *Masthers* acquiesced with simple responses of "Yes Ma'am" or "No Ma'm" to all but one question asked during the colloquy. At sentencing, the defendant explained his pending marriage: "[W]e haven't been together for about three years and we were getting married this month or last month, like she is expecting a kid." When the trial judge replied, "Not yours, I take it," defendant responded: "I don't know."); see R. EDGERTON, *THE CLOAK OF COMPETENCE: STIGMA IN*

as special efforts are made to improve the understanding of the deaf litigant and the litigant who little comprehends English, "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."²⁷² *Masthers* accurately reflects what we know about common characteristics of mentally retarded people, and correctly analyzes the effect of both the disability and the individual's attempt to disguise it in criminal proceedings.²⁷³

The *Mental Health Standards* take a somewhat ambiguous position on the applicability of the trial competence test to the adequacy of guilty pleas. The commentary notes that there may be defendants who are competent to stand trial but whose mental illness makes it impossible for them to plead at an acceptable level of competence.²⁷⁴ But the standard itself states that "[o]rdinarily, absent additional information bearing on defendant's competence, a finding made that the defendant is competent to stand trial should be sufficient to establish the defendant's competence to plead guilty."²⁷⁵ This appears to establish a rebuttable presumption that a defendant who meets the test for standing trial will also be competent to plead. To the extent that it merely suggests that the two groups will substantially overlap, and that defendants competent to stand trial will most frequently be competent to plead, the statement is certainly accurate. However, it would be misleading for courts to use the standard to justify a refusal to inquire into competence to plead where there may be reason to doubt that the defendant's guilty plea was knowing and voluntary.²⁷⁶

THE LIVES OF THE MENTALLY RETARDED 144-71 (1967) (discussing the attempts of some mentally retarded people to hide and deny their disabilities and to "pass" as normal).

272. *Masthers*, 539 F.2d at 730; see *supra* note 37 (discussion of Judge Robb's dissenting opinion).

273. See Note, *Competence to Plead and the Retarded Defendant: United States v. Masthers*, 9 CONN. L. REV. 176 (1976) (discussion of the case, including the guilty-plea hearing on remand).

274. MENTAL HEALTH STANDARDS, *supra* note 4, 7-5.1 commentary at 291-95. The commentary uses the example of a defendant so overwhelmed by guilt caused by the mental illness that the guilty plea seems necessary to expiate the guilt. *Id.* Guilty pleas prompted by mental illness, and not actual guilt, should not be accepted. *Id.*

275. MENTAL HEALTH STANDARDS, *supra* note 4, 7-5.1(a)(i).

276. This refusal to inquire into competence to plead probably also misreads the standard. The commentary accompanying the standard explicitly anticipates cases in which additional information suggests a difference in the competence to perform the two different tasks involved in trials and pleas: "[T]he test should not be equated to that of competence to stand trial testing whether the defendant has the mental capacity to assist his attorney to make the plea decision, but instead should directly address the defendant's ability to make that decision in light of all the attendant factors" *Id.* 7-5.1 commentary at 292.

The approach taken in *Seiling* and *Masthers* is particularly attractive for cases involving mental retardation. There are likely to be a significant number of retarded defendants who remember the events of the incident at issue, can communicate with counsel, and understand the proceedings of trial, but nevertheless are incapable of weighing the choices necessary to make a competent plea of guilty. But the very existence of this presumed subset of retarded defendants is the reason that different tests are troubling. If a defendant is so retarded that he is incompetent to plead but not incompetent to stand trial, he is denied the opportunity to reduce his sentence through effective plea bargaining — an opportunity available to all other defendants.

Therefore, defendants who are incompetent to plead guilty but are competent to stand trial will, at least theoretically, face the prospect of a harsher sentence than a similarly situated nonretarded defendant who can avail himself of the opportunity to plea bargain.²⁷⁷ Denying this opportunity to the first defendant solely because of his disability offends basic notions of fairness and equal protection. An artificial identity between the standards for trial and pleading avoids the creation, or recognition, of this anomalous class. This artificial identity can be created only by accepting guilty pleas from some defendants who cannot understand the nature and consequences of their agreement, or by refusing to try some defendants who can understand the nature of trial proceedings and assist counsel.²⁷⁸

The better approach would be to accept, as the *Mental Health Standards* implicitly do, the fact that a realistic inquiry into the defendant's competence to enter a guilty plea will produce a small group of defendants who are denied access to the advantages of plea bargaining.²⁷⁹ Fair implementation of this approach requires that the sentencing judge be informed of the defendant's incompetence to enter a guilty plea. The judge should then take the defendant's incompetence to plead into account and reduce the sentence to approximate that which the defendant might have received had he been able to engage in effective plea bargaining.²⁸⁰

277. *But see supra* note 255.

278. The model statute suggested by the ABA Commission on the Mentally Disabled argues that another, more satisfactory, resolution of the dilemma is available. Section nine of that act provides for a more thorough and detailed explanation of the nature of the guilty plea that the defendant must make. The commentary to this section suggests that this approach is preferable to the Ninth Circuit's test in *Seiling* because it "appear[s] to provide the same protection without the ambiguities and complications introduced by a having [sic] dual standards of competence." MODEL DEVELOPMENTALLY DISABLED OFFENDERS ACT, *supra* note 8, commentary at 746. As desirable and appropriate as the Model Act's more detailed explanation is, it can only reduce the size of the group of retarded defendants competent to stand trial but incompetent to plead guilty. This reduction is a valuable mitigation of the problem, but appearances to the contrary notwithstanding, it is not a complete solution because it does not offer a comparable guarantee of the adequacy of pleas to that afforded by the *Seiling* test.

279. *See supra* note 274 and accompanying text.

280. This reduction is not the same as, and should not be viewed as a substitute for,

This imprecise substitute for the availability of the plea bargaining process²⁸¹ would reduce the unfairness to those defendants denied effective plea bargaining, recognizing that different tasks are involved in trials and pleas, and that the competence required for one is not identical to that required for the other.

Finally, it should be noted that the number of defendants incompetent to plead guilty because of mental retardation can be reduced substantially through modern special education.²⁸² It is true that some defendants are so substantially disabled that no educational efforts will allow them to attain the competence required to meet the *Sieling* test. For example, some retarded defendants, even with skilled teaching, will still be incapable of grasping the abstract concepts involved in a plea agreement. Others, however, would be incompetent to plead only because they do not know the meaning of key words²⁸³ or because, unaided, they cannot understand the bargaining process or the conceptual foundation for a particular proposed agreement. Many individuals in this latter group are able to learn the necessary in-

the mitigating impact of mental disability recognized in standard 7-9.3. See *infra* note 320.

281. The plan is a necessarily imprecise substitute for plea bargaining because the judge cannot replicate with complete accuracy the process and product of plea negotiations. Plea negotiations typically depend on factors such as the strength of the prosecution's case and the expense of bringing it to trial. It does not seem impractical or inappropriate to ask the sentencing judge to approximate the likely result of hypothetical negotiations by taking these factors into account. Of course plea bargaining also depends on the defendant's willingness to forego a trial by pleading guilty, and there is no practical way for a court to replicate the defendant's decision-making process if the defendant lacks the ability to comprehend the terms of the proposed agreement. Establishing the unavailability of the plea bargaining process as a mitigating factor in sentencing thus gives a few defendants the benefit of a bargain to which they would not have agreed if they were competent. It also gives defendants the theoretical benefits of both pleading to a lesser offense (reduced sentence) and pleading not guilty (the possibility of acquittal). At the same time, it requires the state to give up that portion of the full sentence it would have lost in a plea bargain without the plea's concomitant benefits to the prosecution (certainty of conviction and avoiding the expense of trial). Nevertheless, these factors merely evidence the unavoidable imprecision of attempting to replicate a negotiating process when one party is incapable of negotiating. Further, because the number of defendants who are triable but incompetent to plead will be very small, the imprecision and awkwardness of this approximation will be outweighed by the advantages of realistic evaluations of the defendant's competencies and more equitable treatment of disabled defendants.

282. As Judge Hastie observed in *Masthers*, if the defendant "should be permitted to withdraw his plea, it should not be too difficult to find someone skilled in working and communicating with the mentally retarded who could and would communicate effectively with him, so that his participation in any further proceeding would be knowing and meaningful." *Masthers*, 539 F.2d at 730 (Hastie, J., concurring).

283. For example, on remand in the *Masthers* case, the trial judge substituted the simple question "Did anyone scare you into this?" for the more inaccessible and unfamiliar "coerced" in conducting the colloquy on a new proposed guilty plea. It appears that the defendant clearly understood the judge's question when phrased in this manner. See Note, *supra* note 273, at 178 n.9 (quoting a telephone interview with observers at *Masthers*'s trial).

formation and skills from a competent special education teacher.²⁸⁴ Of course, the ability to effect competence in these defendants requires referral to professionals with skills and training which match the nature of the particular handicap involved.²⁸⁵ The availability of this professional expertise offers the realistic prospect that a substantial number of retarded defendants can be made competent to decide whether or not to plead guilty.²⁸⁶

V. Dispositional Issues

A. Civil Commitment

The civil commitment of defendants found not guilty by reason of insanity has fostered a great deal of controversy,²⁸⁷ although very little has focused on mentally retarded defendants.²⁸⁸ The commitment of defendants found permanently incompetent to stand trial has received less public attention,²⁸⁹ but presents issues acknowledged to be of particular importance to retarded defend-

284. See *supra* note 248 (discussing the training and capabilities of modern special educators).

285. The typical order committing the retarded incompetent defendant to the state mental hospital, or other psychiatric facility or agency, to "restore" competence usually fails because those facilities typically lack expertise in special education. Today, however, the implementation of the Education for Handicapped Act, 20 U.S.C. §§ 1400-61 (1982), has produced a substantial pool of special education talent in communities throughout the nation. Courts and other agencies involved in the criminal justice system should have little difficulty in enlisting the assistance of qualified mental retardation professionals with these skills.

286. For example, one of the authors, Professor Luckasson, recently served as an expert witness in the case of a mentally retarded convict whose earlier plea of guilty was being challenged in state court as incompetent. Evaluation of the prisoner's intelligence revealed him to be mildly mentally retarded with an extremely limited vocabulary and understanding of the criminal justice system. For example, when he was asked the meaning of the operative terms of the plea bargain he had "approved," he could only define "rights" as the opposite of "lefts" and identify "waive" as a physical gesture. His understanding of these terms had not been explored at the time of his original plea. It also became clear during the evaluation that the defendant had thought a guilty plea appropriate because he felt bad that he had not prevented the commission of the crime by another person and not because he himself had committed it (as he apparently had not). The trial judge agreed to a withdrawal of the original guilty plea. Subsequently, it became clear that the defendant's best interest would be served by an *Alford* plea, resulting in a sentence of time already served, rather than a new trial. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). However, this would be possible only if the defendant became competent to agree to the even more conceptually complex *Alford* plea. Using standard special education methodology, it was possible to teach the defendant the necessary vocabulary and concepts in four sessions over a period of one week. The trial judge then conducted a thorough inquiry into the defendant's current competence and accepted the plea.

287. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-7 introduction at 392-93; *Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess.* 1-395 (1982); L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 122-24 (1984); Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 528-32 (1985).

288. Courts have held, apparently without exception, that statutes providing for subsequent commitment of insanity acquittees apply to acquittees who are mentally retarded. See, e.g., *United States v. Shorter*, 343 A.2d 569, 571-72 (D.C. 1975).

289. *But see* H. STEADMAN, *BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* 1-10 (1979).

ants.²⁹⁰ For both groups of defendants, the key issue is whether commitment must be according to procedures established for all civil patients, or in the alternative, by a special system of commitment designed for individuals in the criminal justice system.²⁹¹ The *Mental Health Standards* provide a system of special commitment for mentally ill and mentally retarded defendants found permanently incompetent and not guilty by reason of mental nonresponsibility.²⁹² The proposed provisions of this special commitment system are particularly important for mentally retarded defendants.

The *Mental Health Standards* establish as the criteria for special commitment²⁹³ that the individual be "currently mentally ill or mentally retarded: and, as a result [pose] a substantial risk of serious bodily harm to others."²⁹⁴ This requirement precludes commitment when the sole ground is the mere continuation of mental disability. Some state statutes still provide that an insanity acquittee cannot be released until he is free from mental disability.²⁹⁵

290. See, e.g., *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (criminal commitment of a mentally retarded deaf-mute until he became sane held unconstitutional, given the lack of a substantial probability that he could ever fully participate in a trial).

291. The Supreme Court held in *Jackson* that permanently incompetent defendants could not be held indefinitely without a general commitment hearing on their current mental condition. *Id.* In *Jones v. United States*, 463 U.S. 354, 366-68 (1983), the Court declined to require that acquittees who had established their own insanity at criminal trial receive a commitment hearing at which the state bore the burden of persuasion. Cf. *Addington v. Texas*, 441 U.S. 418, 431-32 (1979) (requiring that the state bear the burden of persuasion by clear and convincing evidence at general commitment hearings). The Supreme Court in *Jones* distinguished *Jackson* on the ground that the insanity acquittee had been found by the criminal trial jury to have committed the criminal act. 463 U.S. at 364 n.12. It is this distinction that appears to support the constitutionality of using special commitment procedures in seeking the confinement of permanently incompetent defendants whose "factual guilt" has been determined by a trial court. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.13(b).

292. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.13, 7-7.3.

293. The criteria for commitment and the procedures for adjudicating commitment cases are identical for acquitted and incompetent defendants. See *id.* 7-4.13(b)(ii).

294. *Id.* 7-7.4(b).

295. See, e.g., VA. CODE § 19.2-181 (Supp. 1985) (requiring that an acquittee be committed as long as he or she "is insane or mentally retarded or . . . his discharge would be dangerous to the public peace and safety"). A 1984 amendment substituted the term "mentally retarded" for "feeble-minded." Act of April 9, 1984, ch. 703, 1984 Va. Acts 1527, 1543.

For a listing of states' statutory grounds for commitment of insanity acquittees see Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 606 n.6 (1981). See generally *Yankulov v. Bushong*, 80 Ohio App. 497, 504, 77 N.E.2d 88, 92-93 (1945) (court ordered a mentally retarded acquittee released on habeas corpus because he could not be found dangerous as a result of continuing insanity). The court reasoned:

While it is established that Steve Yankulov is a moron and therefore easily subject to influence, whether for good or bad, he is apparently no different than any other moron, and the mere fact that a person is a moron does not subject him to incarceration in a hospital for criminal insane persons.

Id. at 504, 77 N.E.2d at 93.

Such provisions are unreasonable and arguably unconstitutional²⁹⁶ for both mentally ill and mentally retarded defendants because the state lacks a distinctive interest in confining insanity acquittees who lack a relevant characteristic that differentiates them from general civil patients. The only such trait that has been asserted is their dangerousness.²⁹⁷ The mere continuation of mental disability, in the absence of a showing of dangerousness, cannot justify the commitment of an acquittee. This is particularly true when the disability results from mental retardation because, unlike individuals with an episodic or cyclical or curable mental illness, few acquittees who are mentally retarded will be able to shed their retardation during commitment.²⁹⁸ Thus, for most retarded acquittees, a provision requiring their confinement until they persuade a court that they are no longer retarded or "insane" constitutes a life sentence — even when it is demonstrable that the individual is not dangerous to anyone.

The procedures for special commitment are also of particular interest in cases involving mentally retarded individuals. The *Mental Health Standards* establish procedural protections that grant the basic rights enjoyed by proposed patients under most mental health civil commitment statutes.²⁹⁹ However, these procedures may be substantially more rigorous than those usually employed for the civil commitment of mentally retarded persons.³⁰⁰ Paradoxically, mentally retarded acquittees and defendants found permanently incompetent to stand trial may receive greater procedural protection under these *Mental Health Stan-*

296. See *State v. Krol*, 8 N.J. 236, 246-49, 344 A.2d 289, 295-96 (1975) (holding that due process and equal protection require that the standard for commitment of a person who has been acquitted by reason of insanity be cast in terms of continuing mental illness and dangerousness to self and others, and not in terms of insanity alone). Although the United States Supreme Court did not directly hold that a statute would be unconstitutional if it provided for release of an insanity acquittee only if he showed that he was no longer insane and no longer dangerous, the formulation of its holding in *Jones* approved confinement "until such time as he has regained his sanity or is no longer a danger to himself or society." 463 U.S. at 370 (emphasis added).

297. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.4 commentary at 413-16.

298. See *supra* note 54.

299. See, e.g., MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.5, 7-7.8 commentary at 430-33. The procedural protections do differ from the usual commitment procedures in some respects. Acquittees are entitled to representation by counsel, confrontation and cross-examination of adverse witnesses, independent expert witnesses, the privilege against self-incrimination, and an expedited appeal. *Id.* 7-7.5. The rules of evidence, including the prohibition on hearsay testimony, apply. *Id.* 7-7.5(d). But, in contrast to many civil commitment statutes, periodic review is less frequent and acquittees cannot be released without a court order. Special acquittees may petition for a rehearing one year after commitment and every two years thereafter. And unlike regular commitment review, the burden of initiating review rests with the special acquittee. *Id.* 7-7.8 & commentary at 430-33. For a general discussion of state law, see Van Duizend, McGraw & Keilitz, *An Overview of State Involuntary Commitment Statutes*, 8 MENTAL & PHYSICAL L. REP. 328 (1984).

300. See DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES, *supra* note 8, at 416-21 (1982) (discussing the general procedures and criteria for voluntary admission in various jurisdictions); see generally Dybwad & Herr, *Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 STAN. L. REV. 753 (1979).

dards than they would receive if subjected to their state's general civil commitment laws.³⁰¹ The resolution of this paradox lies in reform of those general commitment laws which fail to provide basic procedural protections.³⁰² The fact that the American Bar Association has identified these protections as necessary for the commitment of acquttees suggests that no fewer protections can be afforded to individuals who have not been accused of any wrongdoing, but whose commitment is sought on civil grounds.³⁰³

Perhaps the most important of these procedures for retarded acquttees and incompetent defendants are the requirements for periodic review. The *Mental Health Standards* provide that one year after the initial commitment hearing and every two years thereafter, the state has the burden of persuading the court by clear and convincing evidence that the acquttee or incompetent defendant still meets the commitment criteria.³⁰⁴ This is likely to be especially important for retarded individuals, who may stand a greater than average chance of getting lost in the system and thus remain in confinement long after its necessity has ended. But unless the superintendent of the facility petitions for their release,³⁰⁵ acquttees and incompetent defendants must initiate the periodic review hearings.³⁰⁶ Because of their limited ability to understand their rights, the procedures for implementing them, and their acquiescence to authority,³⁰⁷ mentally retarded individuals will often lack the ability to trigger periodic review of their continued confinement. Thus, for retarded persons, the requirement of regularly available legal counsel is particularly crucial,³⁰⁸ and a heavy responsibility falls upon the attorney to both ascertain carefully whether the retarded person understands his or her rights and to contest continued confinement whenever the client has not com-

301. This is particularly true of incompetent defendants, who will have received a hearing on both whether they committed the criminal act and a commitment hearing. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.13, 7-7.5.

302. Indeed, standard 7-7.3(b) provides for the use of general commitment procedures, rather than those designed for violent insanity acquttees, for those acquttees whose cases do not involve dangerous felonies, but requires that those procedures satisfy due process. This requirement is directed at those states whose mental retardation civil commitment statutes lack basic procedural protections. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.3 commentary at 405-10.

303. In particular, the procedural protections provided at the special commitment hearing described in standard 7-7.5 and at periodic reviews described in standard 7-7.8 constitute a floor for implementing the requirement of fundamental fairness in the general civil commitment of mentally retarded persons.

304. MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.8.

305. See *id.* 7-7.9.

306. See *id.* 7-7.8(a).

307. See *supra* notes 88-90 and accompanying text.

308. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.8(c) commentary at 431.

petently waived such a hearing.³⁰⁹

Finally, it is noteworthy that the *Mental Health Standards* acknowledge that specially committed mentally retarded persons have rights during their confinement equivalent to those enjoyed by civilly committed individuals.³¹⁰ Among the most important of these is the right to habilitation.³¹¹ By casting the rights of acquittees in terms equivalent to those found in the civil commitment system, the *Mental Health Standards* avoid limiting the right to habilitation to the rather parsimonious formulation recognized by the Supreme Court in *Youngberg v. Romeo*.³¹² In *Romeo*, the Court held that substantive due process required that civilly committed mentally retarded persons receive habilitation sufficient to ensure their physical safety and freedom from unnecessary physical restraint. Though the Court did not suggest that its ruling constituted the entirety of a retarded person's constitutional right to habilitation,³¹³ the habilitation specially committed retarded persons are entitled to receive under the *Mental Health Standards* is not limited to whatever the Court ultimately concludes to be the minimum requirement of due process. State statutes,³¹⁴ and possibly state constitutions,³¹⁵ typically provide a more explicit and expansive right to habilitation, including the right to an individualized habilitation plan.³¹⁶ The *Mental Health Standards* requirement of equivalent habilitation rights to those enjoyed by civilly committed persons also protects specially committed retarded individuals from a lack of appropriate mental retardation services at state mental hospitals that do not otherwise serve retarded people.³¹⁷

309. See Luckasson & Ellis, *Representing Institutionalized Mentally Retarded Persons*, 7 MENTAL DISABILITY L. REP. 49, 50 (1983).

310. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-7.6.

311. See *supra* note 57.

312. 457 U.S. 307, 322-23 (1982).

313. See *Romeo*, 457 U.S. at 326-29 (Blackmun, J., concurring); see also Ellis, *The Supreme Court and Institutions: A Comment on Youngberg v. Romeo*, 20 MENTAL RETARDATION 197, 198 (1982) ("[B]y tying Mr. Romeo's right to habilitation to his right to freedom from undue restraint within the institution, the court left open the possibility that the right to habilitation includes the training needed to acquire community living skills for those individuals whose release from the institution is feasible.").

314. See DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES, *supra* note 8, at 849-64 (compilation of relevant state statutes).

315. See generally Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7 (Summer 1982).

316. See, e.g., N.M. STAT. ANN. § 43-1-9 (1978 & Repl. 1984); see also MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 6 (providing model rules for "Preparation of Individualized Program Plans"); Bennett, *Reviewing an Individual Habilitation Plan: A Lawyer's Guide*, 4 U. ARK. LITTLE ROCK L.J. 467, 474-84 (1981).

317. The appropriate comparison group for determining an acquittee's or an incompetent defendant's right to habilitation would clearly be mentally retarded people in residential confinement in that state, whether they were located in the same facility or in another. The *Mental Health Standards* would not be satisfied if a state claimed that specially committed persons were entitled only to those services offered to other committed persons confined at the same facility, if other mentally retarded people were receiving more appropriate habilitation in other facilities.

B. Sentencing

Mentally retarded defendants who are convicted or who plead guilty present the issue of the possible relevance of their disability in the determination of an appropriate sentence.³¹⁸ Disagreeing with those courts that have held that mental retardation has no relevance in setting a criminal sentence,³¹⁹ the *Mental Health Standards* provide that "[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender."³²⁰ The commentary to this section justifies its provision by reference to the appropriateness of "individualized justice"³²¹ and apparently is premised on the notion that a defendant's mental retardation is extremely likely to have influenced his or her criminal actions in a way that reduces the degree of culpability.³²² H. L. A. Hart has argued that mitiga-

318. In addition to the usual ways in which many defendants do not reach the sentencing stage, including incompetence and acquittal, a substantial number of retarded defendants are "diverted" from the criminal justice system before going to trial. Some of this process occurs through formal referrals to community retardation agencies from personnel in the criminal justice system. See, e.g., Schwartz, *A Diversionary System of Services for the Mentally Retarded Offender*, in *THE RETARDED OFFENDER* 298, 298-302 (M. Santamour & P. Watson eds. 1982); Note, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 *CREIGHTON L. REV.* 622, 649-57 (1975). Other retarded persons accused of being lawbreakers are diverted informally through a decision by service providers in the community that invoking a criminal sanction would be undesirable. See Edgerton, *Crime, Deviance and Normalization*, in *DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE*, *supra* note 69, at 145, 162. For a proposed statutory structure for the diversion of retarded defendants, see *MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT*, *supra* note 8, § 7.

319. *McCune v. State*, 56 Tex. Crim. 207, 212, 240 S.W.2d 305, 309 (1951) ("We have been cited to no decision requiring or permitting the trial judge to instruct the jury in his charge that they might consider feeble-mindedness of the accused in mitigation of the punishment to be assessed in the event of conviction."); see H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 206-11 (1954); S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 412-18 (1925). *But cf.* *May v. State*, 398 So. 2d 1331 (Miss. 1981) (remanding for resentencing a mildly retarded fourteen-year-old, who had been tried as an adult, on the issue of mitigation because special education opportunities were not available at the state penitentiary).

320. *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-9.3. Although some of the provisions of the *Standards* relating to sentencing are limited to the more seriously disabled mentally retarded defendants, see *infra* notes 326-62 and accompanying text, this provision applies unambiguously to all individuals who have mental retardation.

321. *Id.* 7-9.3 commentary at 463; *cf.* Morris, *Sentencing the Mentally Ill*, in *REFORM AND PUNISHMENT: ESSAYS ON CRIMINAL SENTENCING* 125 (M. Tonry & F. Zimring eds. 1983) (arguing that a defendant's mental illness should normally reduce the severity of the punishment imposed but that occasionally it should be a factor that prolongs punishment).

322. *Cf.* *ABA STANDARDS FOR CRIMINAL JUSTICE*, *supra* note 4, 18-3.2(b)(i)(D) (2d ed. 1981) (suggesting mitigation of criminal sentences when "the offender because of youthful age or any physical or mental impairment lacked substantial capacity for judgment when the offense was committed"). The commentary refers to this provision as "a 'diminished responsibility' criterion." *Id.* 18-3.2(b)(i)(D) commentary at 18.229.

In contrast the Model Developmentally Disabled Offender Act provides: "In sen-

tion is particularly appropriate where a convicted criminal's "ability to control his actions is thought to have been impaired or weakened . . . , so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed."³²³ The United States Supreme Court has held that mental condition may not be constitutionally excluded from consideration in capital sentencing.³²⁴ The *Mental Health Standards* extend the principle of allowing consideration of mental condition to sentencing in noncapital cases. This broader requirement of mitigation may prove imprecise in its im-

tencing a defendant who is developmentally disabled, the court shall impose the least restrictive alternative consistent with the needs of the defendant, and of public safety." MODEL DEVELOPMENTALLY DISABLED OFFENDER ACT, *supra* note 8, § 11(3). This approach to sentencing incorporates a modified mandate to employ no greater restriction than individual circumstances require — a requirement that is absent in the sentencing of mentally typical convicts. The Model Act's commentary argues that this

simply legitimizes consideration of developmental disability in determining the degree and duration of the restraints on liberty to be imposed, and establishes a presumption in favor of selecting a sentence or conditions of probation which are no more harsh, hazardous or intrusive and involve no more restrictions on the defendant's physical freedom or social interaction than are absolutely essential.

Id. commentary at 760; *cf.* AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE LEAST RESTRICTIVE ALTERNATIVE: PRINCIPLES AND PRACTICES, 51-52 (H.R. Turnbull ed. 1981).

The Model Act thus incorporates into sentencing a principle designed to reduce unnecessary deprivation of liberty in the civil commitment process. This is a much more substantial departure from traditional theories of sentencing than is the *Mental Health Standards'* requirement of mitigation. But it should be recalled that the Model Act also provides that a developmental disability cannot constitute the basis for a defense of nonresponsibility, and thus retarded convicts under its provisions include some who would have been acquitted under standard 7-6.1. See *supra* notes 130-35.

323. H. HART, PUNISHMENT AND RESPONSIBILITY 15 (1968). Of course this justification for mitigation sounds remarkably like the volitional prong of the insanity defense, which was rejected in standard 7-6.1. See *supra* note 125-29. The *Mental Health Standards'* call for mitigation can thus be read as a partial substitute for the full exculpation some mentally disabled defendants would have received under a broader definition of the insanity defense. *Cf.* B. WOOTTON, CRIME AND THE CRIMINAL LAW 77 (1963) (arguing that mental disability should not form a defense to criminal charges, but instead should be considered as a factor at sentencing, relevant "to the choice of treatment most likely to be effective in discouraging [the defendant] from offending again"). But see R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 81 (1979). Singer argues against mitigation for provocation or duress: "To attempt to alter the substantive criminal law in the sentencing criteria . . . is both duplicitous and undesirable." Singer accepts the relevance of diminished capacity, but believes its determination by the jury should not be displaced by the sentencing judge. *Id.*

324. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982), held that the sentencing judge in a capital case could not decline to consider the possibly mitigating circumstances of a defendant's mental state arising from a troubled family background. *Id.* The *Eddings* majority relied on the plurality opinion in *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion by Burger, C.J.), which declared that, while individualization of sentencing was not constitutionally required in noncapital cases, a statute precluding consideration of any possible mitigating circumstances in a death penalty case constituted cruel and unusual punishment. One of the limited mitigating circumstances recognized by the statute in *Lockett* was that the "offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." *Id.* at 607, 612-13. One of *Lockett's* accomplices "received a lesser penalty because it was determined that his offense was 'primarily the product of mental deficiency' . . ." *Id.* at 591.

plementation, but it may also reduce the problems caused by inappropriate imprisonment of vulnerable retarded convicts.³²⁵

The *Mental Health Standards* also propose a system of commitment³²⁶ at sentencing for those defendants with particularly severe disabilities. This system provides for habilitation of less disabled mentally retarded convicts in correctional facilities,³²⁷ and for more substantially handicapped offenders in mental retardation facilities "preferably under the supervision of the jurisdiction's department of mental health or mental retardation."³²⁸ The more seriously disabled convicts may be committed upon the petition of either the prosecutor or the offender³²⁹ if a court, by clear and convincing evidence, finds that the defendant "requires treatment or habilitation in a . . . mental retardation facility rather than an adult correctional facility."³³⁰ This dichotomous system for the habilitation of retarded convicts parallels the proposed system for treating mentally ill offenders, but raises substantially different issues as applied to persons with mental retardation.

The first issue involves the separation of two groups of retarded offenders on the basis of the severity of their disability.³³¹ Mentally ill convicts deemed severely disabled enough to qualify for post-conviction commitments are those "who suffer a substantial disorder of thought, mood, perception, orientation or memory

325. We have also suggested reducing of sentences to diminish potential injustice arising from the trial and conviction of defendants found incompetent to enter a plea of guilty. See *supra* notes 280-281 and accompanying text. This adjustment should be separately considered from any reduction due to mitigating circumstances.

326. The approach bears some resemblance to the diversion of mentally disabled offenders. See *supra* note 318. It differs from diversion in that it follows a criminal trial and conviction and because it results in a formal criminal sentence. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.10(a).

327. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7(a).

328. *Id.* 7-9.7(b).

329. *Id.* 7-9.8(a).

330. *Id.* 7-9.9(d). The clear and convincing standard is set forth at *id.* 7-9.9(c).

331. A parallel distinction is drawn between prisoners who are "seriously mentally retarded" and other mentally retarded prisoners. *Id.* 7-10.1(b)-(c); see *infra* note 341, 385-91. In the context of defining the scope of the insanity defense, Congress has also apparently attempted to distinguish defendants on the basis of the severity of their mental retardation. Insanity Defense Reform Act of 1984, § 402(a), 18 U.S.C.A. § 20(a) (West Supp. 1985) ("as a result of severe mental disease or defect"). See *supra* note 123. The Senate Report elaborates:

The provision that the mental disease or defect must be "severe" was added to section 20 as a Committee amendment. As introduced in S. 829, the provision referred only to a "mental disease or defect." The concept of severity was added to emphasize that nonpsychotic behavior disorders or neuroses such as an "inadequate personality," "immature personality," or a pattern of "antisocial tendencies" do not constitute the defense.

S. REP. NO. 225, 98th Cong., 2d Sess. 229, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3411; cf. *supra* note 126. There is no indication that the effect of the modifier on mental retardation ("defect") was considered, and there is currently no clarifying caselaw.

which grossly impairs judgment, behavior, or the capacity to recognize reality or the ability to meet the demands of life"³³² The commentary suggests that this dichotomy represents an attempt to reflect the psychiatric distinction between psychotic mental illness and lesser forms of mental disorder,³³³ and thus to assure that "the standard for commitment of the mentally ill should be the same for offenders and non-offenders."³³⁴ No parallel distinction exists in most mental retardation commitment laws on the basis of the severity of an individual's handicap.³³⁵ Nevertheless, the *Mental Health Standards* opt for a parallel structure, "reflect[ing] the policy view that the standard for commitment of the mentally retarded should, so far as possible, track the standard for the commitment of the mentally ill offender."³³⁶ A distinction in severity is therefore drawn, defining a "seriously mentally retarded offender" as one who has "very significant subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior."³³⁷

Ultimately, the attempt to treat mental illness identically with mental retardation fails because of differences between the composition of the two groups. Within the universe of mentally ill people, there are a substantial number of people, perhaps a majority, whose disability is so mild, ill-defined, and common that it subverts the purposes of the *Mental Health Standards* to address their situations with the same legal rules that encompass mental illness that is truly disabling, particularly psychotic illnesses.³³⁸ Mental retardation, as currently defined, presents no such problem.³³⁹ Even though the majority of mentally retarded individuals, and presumably an even larger majority of retarded defendants who reach sentencing, are labeled as "mildly" mentally retarded,³⁴⁰ their disability is not comparable in relative lack of severity to that of defendants whose mental illness results from a neurosis or personality disorder. The substantial disability en-

332. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1(b).

333. Cf. AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY 114 (5th ed. 1980) (defining psychosis as "[a] major mental disorder of organic or emotional origin in which a person's ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life.").

334. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 458.

335. DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 417-18 (1982). Apparently only Ohio and the District of Columbia limit by statute commitments based on the severity of an individual's mental retardation. OHIO REV. CODE ANN. § 5123.01(L) (Page 1981) ("at least moderately mentally retarded"); D.C. CODE ANN. § 6-1924 (1981) ("at least moderately mentally retarded and requires habilitation").

336. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 458.

337. *Id.* 7-9.1(c).

338. During the reign of the *Durham* rule, the District of Columbia Circuit addressed similar issues in the debate about whether "psychopathic personality disorders" would suffice to support a defense of insanity. See *Blocker v. United States*, 288 F.2d 853, 860-62 (D.C. Cir. 1961) (Burger, J., concurring).

339. Note that individuals previously labeled "borderline" mentally retarded no longer fall within the definition of mental retardation. See *supra* note 44.

340. It is likely that an even larger majority of retarded defendants who reach sentencing are labelled as "mildly" mentally retarded. See *infra* note 342.

compassed by even "mild" mental retardation defeats any attempt to find a parallel distinction in mental retardation analogous to the division in mental illness between psychoses and less disabling disorders.

Both the definition and the underlying attempt at distinction are problematic.³⁴¹ The commentary notes that the majority of people with mental retardation are mildly retarded³⁴² and suggests that the distinction between the "seriously" mentally retarded offender and other mentally retarded convicts should be drawn somewhere within the mildly retarded range, with all profoundly, severely, and moderately retarded persons within the class of the "seriously" retarded, and some mildly retarded offenders included while others are excluded.³⁴³ The *Mental Health Standards* attempt to accomplish this division by adding modifiers to the American Association on Mental Deficiency definition of mental retardation: the individual's intellectual functioning must be "very significantly subaverage" and the deficit in adaptive behavior must be "substantial."³⁴⁴ These "qualifying artifices"³⁴⁵ require the sentencing tribunal³⁴⁶ to consider "[t]he totality of the circumstances" in determining whether a particular mildly retarded offender falls within the commitment criteria, but "do not allow the sentencing tribunal to divide mathematically the I.Q. range of mild retardation and to thereby fix a precise I.Q. prerequisite dictating a commitment or incarceration decision."³⁴⁷

Drawing this line in individual cases is an unenviable task.³⁴⁸

341. It should be noted that the definition contained in the final version of the *Mental Health Standards* is far superior to that in previous drafts, which was likely to cause serious confusion among courts and mental retardation professionals. Cf. Provisional Standards 7-9.1(c), 7-10.1(c) (1st Tent. Draft, July 1983).

342. MENTAL HEALTH STANDARDS, *supra* note 4, 7-10.1 commentary at 494-95. The commentary further observes that "[f]ew retarded offenders who progress to a sentencing hearing will fall within the severe or moderate classes and it is next to inconceivable that any would fall within the profound class." MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 460. See also J. WILSON & R. HERNSTEIN, CRIME AND HUMAN NATURE 154 (1985) (the offender population contains relatively few very low IQ's). Our review of the appellate cases suggests that while the commentary's statement is generally accurate, it may be slightly exaggerated because a noticeable number of defendants with reported IQ scores indicating moderate retardation find their way to appellate courts.

343. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.1 commentary at 460. The *Mental Health Standards* state: "The . . . definition . . . is not meant to exclude from the commitment alternative all mildly retarded offenders nor is it meant to include automatically all mildly retarded offenders." *Id.*

344. *Id.* 7-9.1(c) commentary at 458-61.

345. *Id.* 7-9.1(c) commentary at 459.

346. *Id.* 7-9.9(a)(iv) (commitment hearing must take place before a "judicial hearing officer").

347. *Id.* 7-9.1 commentary at 460.

348. Part of the difficulty is semantic. An expert witness would be hard pressed to testify honestly and coherently that an IQ score that is at least two standard devia-

Determining whether it is worth the effort requires an evaluation of the anticipated benefit of the dichotomy. The principal purpose of drawing the line must be based on a conclusion that the less-disabled portion of mildly retarded individuals will more appropriately receive habilitation in prison while profoundly, severely, moderately, and the remainder of the mildly retarded convicts will more appropriately receive habilitation in mental retardation facilities.³⁴⁹ The validity of these premises are open to question. It is true that the population of large residential facilities for mentally retarded people is now concentrated at the more disabled end of the spectrum of disability.³⁵⁰ However, this strong trend toward deinstitutionalizing mildly retarded persons, and many individuals with much more substantial handicaps,³⁵¹ merely reflects the

tions below the mean and ranks in the bottom three percent of the population is not "very significant[ly] subaverage." It is even more difficult to imagine a mentally retarded defendant convicted of a criminal offense who does not have a "substantial" deficit in adaptive behavior.

349. The symmetry of parallel treatment of mentally ill and mentally retarded convicts may also have some modest benefit, but standing alone, it would surely be insufficient to warrant the litigation that will result from the required distinctions between "seriously" retarded convicts and others.

Another possible rationale would suggest that it is politically unacceptable for less seriously mentally retarded individuals to "escape" the full brunt of punishment by commitment, or transfer to a mental retardation facility pursuant to standard 7-10.4 of the *Mental Health Standards*. This argument appears more persuasive regarding mental illness that is less severe than psychosis than it does for "mild" mental retardation, which is a substantial disability. See *supra* notes 338-40 and accompanying text.

Finally, it may be thought desirable to limit the use of state coercion in effecting involuntary habilitation. This is a principal reason for limiting the mental illness civil commitment criteria to those with substantial disorders, and may apply in similar fashion to mentally ill convicts. But society has not similarly rationed its use of coercion in the area of mental retardation. See *supra* note 335. Of course, this rationale would not apply to habilitation that the convict or prisoner seeks pursuant to standard 7-9.8(a) or 7-10.4(a). When neither the prosecution nor the offender objects to commitment at the time of sentencing, standard 7-9.9(b) still requires expert certification that the individual's retardation is "serious." There is no similar requirement in the case of a consensual transfer pursuant to standard 7-10.3, and indeed a prisoner seeking a transfer need not even allege that he is "seriously mentally retarded."

350. Hauber, Bruininks, Hill, Lakin, Scheerenberger & White, *A National Census of Residential Facilities: A 1982 Profile of Facilities and Residents*, 89 AM. J. MENTAL DEFICIENCY 236, 244 (1984) ("nearly half (46.8%) of the residents of facilities of 16 or more [residents] were profoundly retarded"). This concentration, however, does not provide useful data for deciding which individuals among the mildly retarded population of convicts will appropriately be served in such facilities.

It is also paradoxical that the more "seriously" retarded offenders are guaranteed placement consistent with the least restrictive alternative principle, while less disabled retarded individuals, who are usually viewed as the most likely candidates for community placement, have no such right under the standards. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.10(b).

351. For example, the ENCOR (Eastern Nebraska Community Office of Retardation) program has had great success in providing services in the community for severely and profoundly retarded people, and even those who are also "medically fragile." See K. CASEY, J. MCGEE, J. STARK & F. MENOLASCINO, A COMMUNITY-BASED SYSTEM FOR THE MENTALLY RETARDED: THE ENCOR EXPERIENCE 4 (1985); see also J. STARK, J. MCGEE & F. MENOLASCINO, INTERNATIONAL HANDBOOK OF COMMUNITY SERVICES FOR THE MENTALLY RETARDED 89, 161-68 (1984). Further evidence is provided by the thorough study of the process of deinstitutionalizing the residents of the much-litigated Pennhurst institution in Pennsylvania. J. CONROY & V. BRADLEY, PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND

judgment that they can receive more humane and efficient services in smaller community residential facilities.³⁵² This reveals little about the relative merits of large residential facilities in comparison to prisons for mildly retarded individuals.

Part of the difficulty may stem from the apparent premise that the array of alternatives is limited to prisons and large residential mental retardation facilities. Mental retardation professionals have developed "structured correctional services"³⁵³ which provide habilitation to mentally retarded offenders in the community.³⁵⁴ There is no reason to believe that these services will be more effective or appropriate for "seriously" retarded convicts

ANALYSIS (Temple University and Human Services Research Institute 1985) (finding that all Pennhurst residents, regardless of their level of retardation, could be served successfully in the community); cf. *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

352. See Lensink, *ENCOR Nebraska*, in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 280 (rev. ed. 1976); S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 161-207 (1983); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595, 603-11 (1983). For the literature on community residential placement of mentally retarded individuals, see generally B. BAKER, G. SELTZER & M. SELTZER, AS CLOSE AS POSSIBLE: COMMUNITY RESIDENCES FOR RETARDED ADULTS 3-10 (1977); D. BRADDOCK, OPENING CLOSED DOORS: THE DEINSTITUTIONALIZATION OF DISABLED INDIVIDUALS (1977); THE MENTALLY RETARDED CITIZEN AND THE LAW 499-514 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976); F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 331-32 (1977); G. O'CONNOR, HOME IS A GOOD PLACE: A NATIONAL PERSPECTIVE OF COMMUNITY RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED 2-5, 66-73 (AAMD Monograph No. 2, 1976); R. SCHEERENBERGER, DEINSTITUTIONALIZATION & INSTITUTIONAL REFORM 39-52, 190-93 (1976); DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE, *supra* note 69, at 15.

353. F. MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 195 (1977); see Note, *The Mentally Retarded Offender in Omaha-Douglas County*, 8 CREIGHTON L. REV. 622, 667-68 (1975); see also THE MENTALLY RETARDED OFFENDER, *supra* note 33; Harbach, *An Overview of Rehabilitation Alternatives*, in REHABILITATION AND THE RETARDED OFFENDER 122, 132-35 (P. Browning ed. 1976) (the result of community treatment centers reveal that community based corrections can serve as a practical alternative to conventional imprisonment).

354. Specialized community services are especially attractive for the habilitation of mentally retarded offenders since generic residential institutions for mentally retarded people usually lack the facilities and expertise necessary to deal with such offenders. Santamour and West explain:

When placed in institutions for retarded persons, [offenders] victimize the other residents and disrupt routine. They present security risks and training needs that the institutions are ill-equipped to handle because of facility design and staffing patterns geared to meet the needs of the docile multiply handicapped individual. Accordingly, it is generally accepted in the field of retardation that the choice of residence for rehabilitation and training of the offender is some place other than existing state institutions for the mentally retarded.

Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of Issues*, in THE RETARDED OFFENDER 7, 29 (M. Santamour & P. Watson eds. 1982); see THE PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 40 (1963). Similar concerns were voiced more than 60 years ago. See W. Fernald, ANNUAL REPORT OF THE MASSACHUSETTS STATE SCHOOL FOR THE

than for those functioning at the upper end of the mildly retarded category; yet only the former appear to be eligible under the *Mental Health Standards* for post-conviction commitment to such programs.³⁵⁵

The problem may also inhere in the structure of the sentencing standards, which focus on whether the offender "requires" habilitation in a mental retardation facility.³⁵⁶ It is not completely clear what is meant by the term "requires."³⁵⁷ In any event, sentencing contemplates a formal inquiry into the individual habilitation needs of a particular offender, and yet access to this inquiry is limited artificially by a prerequisite of severity of handicap. The *Mental Health Standards* presuppose that the questions of degree of disability and need for services in a specialized facility will produce the same answer. This may be true for mentally ill prisoners; psychotic individuals may need the more intensive services of a mental health facility while persons with neuroses and personality disorders can be treated effectively in prison. Mental retardation, however, is different from mental illness, and the dividing line between "seriously" and "non-seriously" retarded offenders may not be closely related to habilitation needs. It is likely that most profoundly and severely retarded individuals would be difficult to serve in prison; the severity of their mental disability and the likelihood of accompanying physical handicaps³⁵⁸ require specialized professional attention which few prisons provide.³⁵⁹ Aside from discussion of physical disability, there is nothing in the literature to suggest that prisons are categorically better able to provide habilitation to individuals in the higher functioning range of

FEEBLEMINDED 19 (1922), quoted in Menolascino, *The Mentally Retarded Offender*, 12 MENTAL RETARDATION 7, 9 (1974).

355. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7. See also *supra* note 350.

356. See MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.7(a) (providing for habilitation in prison for convicts whose retardation does not "necessitate commitment"); *id.* 7-9.9(d) (formulating the criteria for commitment in terms of whether the offender "requires . . . habilitation in a . . . mental retardation facility rather than an adult correctional facility"); see also *id.* 7-10.4(b) (providing for transfer from prison when the seriously mentally retarded prisoner "requires care not available in the correctional facility").

357. For example, "requires" could be synonymous with "would benefit from" or, in the alternative, "will deteriorate or regress without." These different formulations will, of course, describe different groups of offenders.

358. There is a higher incidence of physical handicaps among severely and profoundly retarded individuals. Fewell & Cone, *Identification and Placement of Severely Handicapped Children*, in SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED 46, 47-48 (M. Snell 2d ed. 1983).

359. See *Ruiz v. Estelle*, 503 F. Supp. 1265, 1340-45 (S.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115, 1167 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). Severely or profoundly mentally retarded persons who have serious physical handicaps also require intensive specialized physical therapy services. For general discussions of the importance of physical therapy to people with mental retardation, see B. BOBATH, *ABNORMAL POSTURAL REFLEX ACTIVITY CAUSED BY BRAIN LESIONS* (2d ed. 1971); K. BOBATH, *A NEUROPHYSIOLOGICAL BASIS FOR THE TREATMENT OF CEREBRAL PALSEY* (2d ed. 1980); M. IRVANAINEN, *BRAIN DEVELOPMENTAL DISORDERS LEADING TO MENTAL RETARDATION* (1985); S. LEVITT, *TREATMENT OF CEREBRAL PALSEY AND MOTOR DELAY* (2d ed. 1982).

mild retardation than for other mildly retarded persons.³⁶⁰ Therefore the definition of the dividing line between the two categories of retarded offenders does not seem well suited to the tasks it is asked to perform in the *Mental Health Standards*.

The resolution of this difficult problem may be found in the individualized hearing processes which the *Mental Health Standards* already provide. The attraction of parallelism with mental illness is outweighed by the dissimilar service needs of mentally retarded individuals and the different relationship between those needs and the severity of an individual's disability. Therefore, the attempt to classify retarded persons on the basis of "seriousness" of their disability should be abandoned, and a hearing on individual habilitation needs provided to any mentally retarded offender or prisoner whose commitment or transfer to a mental retardation facility is proposed.³⁶¹ Such hearings will be superior to a categorical exclusion in distinguishing those individuals who belong in prison from those who are more appropriately placed in specialized facilities.³⁶²

C. *Mentally Retarded Prisoners*

As a federal court has recently observed, "[m]entally retarded persons meet with unremitting hardships in prison."³⁶³ They are more likely to be victimized,³⁶⁴ exploited,³⁶⁵ and injured³⁶⁶ than

360. Similarly, there are fewer differences in management requirements for serving individuals with IQs of 50, as contrasted with 65, than there are in the mental health field in serving psychotic prisoners as contrasted with those who merely have neuroses or personality disorders.

361. If a jurisdiction believes that individual commitment or transfer proceedings may result in too many retarded convicts finding their way out of prisons and into mental retardation facilities, limitations can be accomplished through the formulation of commitment and transfer criteria. See *supra* note 357.

362. This is not to say that the severity of a particular individual's disability is irrelevant, because it may be an appropriate factor to consider in determining where his habilitation needs can be served.

363. Ruiz, 503 F. Supp. at 1344.

364. Santamour & West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of the Issues*, in *THE RETARDED OFFENDER*, *supra* note 33, at 7, 29.

365. "[I]nmates with low intelligence levels are prime targets for exploitation. Consequently, they are peculiarly in need of special protection from physical, emotional, sexual, and financial abuse at the hands of others." Ruiz, 503 F. Supp. at 1344.

366. "Mentally retarded prisoners are markedly and abnormally prone to receive more injuries than the average inmate. Some of their injuries occur on the job; others are suffered at the hands of other inmates or security officers." *Id.* at 1344.

Injuries and beatings are also far from uncommon in large residential facilities confining mentally retarded people. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 310-12 (1982); Woestendiek, *The Deinstitutionalization of Nicholas Romeo: The Unwitting Revolutionary of Pennhurst*, Phil. Inquirer, May 27, 1984, (*Inquirer Magazine*), at 18 (detailing beatings sustained by Nicholas Romeo at the Pennhurst State Hospital for the mentally retarded following the Supreme Court's decision); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973) (1300 reported

other inmates. They are also more likely to be charged with disciplinary violations,³⁶⁷ and partially as a result, to serve longer sentences.³⁶⁸ Finally, they are unlikely to receive any habilitation designed to address the problems caused by their mental retardation.³⁶⁹

One of the most important provisions in the *Mental Health Standards* is the declaration that mentally retarded prisoners have a right to habilitation.³⁷⁰ This explicit recognition of the habilitation needs of retarded individuals is a substantial advance from previous standards,³⁷¹ which typically discussed treatment

incidents of injuries, assaults, and fights in an eight month period in one institution); D. ROTHMAN & S. ROTHMAN, *THE WILLOWBROOK WARS* 17-23, 75-76 (1984) (describing injuries, abuse and neglect suffered by residents of Willowbrook, a New York State institution for the mentally handicapped).

367. *Ruiz*, 503 F. Supp. at 1344. The court explained:

[Retarded inmates] are slow to adjust to prison life and its requirements, principally because they have almost insurmountable difficulties in comprehending what is expected of them. Not understanding or remembering disciplinary rules, they tend to commit a large number of disciplinary infractions. Because they are often not as well coordinated as persons of average intelligence, they also frequently fail to meet work performance quotas and are, therefore, subjected to disciplinary action for laziness or refusal to work.

Id.

The *Ruiz* court also observed that retarded inmates tend to fare poorly before disciplinary adjudication tribunals, in part because they seldom have the assistance of counsel and are unable to make a persuasive presentation on their own behalf. The court also noted that retarded prisoners are punished in solitary confinement with disproportionate frequency. *Id.*

368. *Id.* at 1344. In addition to problems with disciplinary infractions, the *Ruiz* court observed that retarded prisoners "are frequently unable to succeed in institutional programs whose completion would increase their chances for parole, and they are also unlikely to be able to present well-defined employment and residential plans to the Parole Board." *Id.*

369. "[P]risons provide few, if any, meaningful programs or services for the retarded." *United States v. Mathers*, 539 F.2d 721, 729 n.56 (D.C. Cir. 1976); see *Ruiz*, 503 F. Supp. at 1344; *Brown & Courtless*, *supra* note 63, at 1164, 1169. *Santamour and West* argue that "[t]he retarded offender is rejected . . . by the correctional field, who place the retarded offender as low man on the totem pole of those who might benefit from treatment and rehabilitation programs." *Santamour & West*, *supra* note 364, at 28-29.

370. See *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-9.7, 7-10.8. This right is extended to all retarded offenders and prisoners regardless of the "seriousness" of their mental retardation.

The *Mental Health Standards* distinguish between "seriously mentally retarded prisoners" and others who are less severely disabled. They provide that seriously mentally retarded prisoners can be transferred to a mental retardation facility while those who are less severely disabled are to receive habilitation services in correctional facilities. This distinction leads to the same problems discussed in the section on sentencing. See *supra* notes 326-62 and accompanying text.

371. *E.g.*, A.B.A. STANDARDS FOR CRIMINAL JUSTICE 23-5.1(a) (1982) ("Prisoners should receive routine and emergency medical care, which includes the diagnosis and treatment of . . . mental health problems."); STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 27 (Am. Pub. Health Ass'n 1976) ("Mental health services should be made available in every correctional institution."); see *George*, *Standards Governing Legal Status of Prisoners*, 59 DENVER L.J. 93, 101 (1981). But see COMMITTEE ON ACCREDITATION FOR CORRECTIONS, *MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTS.* standard 4278 (1977) (designating as "essential" the requirement that "[w]ritten policy and procedure specify that qualified psychological and psychiatric personnel provide services for inmates diagnosed as severely mentally retarded") The accompanying discussion does not make clear whether "severely

for mental illness without specific mention of the nonmedical services directed toward the amelioration of the handicaps caused by mental retardation.³⁷² There is little caselaw on the issue of whether failure to offer habilitation to retarded prisoners constitutes cruel and unusual punishment under the eighth amendment³⁷³ and therefore this provision of the *Mental Health Standards* may be particularly influential in determining whether such services are provided.

Following the United States Supreme Court's decision in *Estelle v. Gamble* that failure to provide needed medical care can constitute cruel and unusual punishment,³⁷⁴ numerous courts have held that psychiatric services are a form of medical care that must be available to mentally ill prisoners.³⁷⁵ However, mental retardation is not an illness,³⁷⁶ and habilitation includes services which are not medical in nature;³⁷⁷ thus courts may not automatically

mentally retarded" is intended as a term of art reflecting the American Association on Mental Deficiency classification system, but states:

Severely mentally retarded inmates should be placed in facilities specially designed for their treatment. If they cannot be placed in such facilities outside the correctional institution, the institution should provide adequate services for their health, development and protection of their dignity. Where possible, programs should provide for their continued physical, intellectual, social, and emotional growth and should encourage the development of skills, habits, and attitudes that are essential to adaptation to society.

Id.

372. For a discussion of habilitation, see *supra* note 57. Of course, some mentally retarded prisoners will also be mentally ill, and these individuals will also require mental health treatment. See *supra* notes 59-61 and accompanying text; HANDBOOK OF MENTAL ILLNESS IN THE MENTALLY RETARDED (F. Menolascino & J. Stark eds. 1984); MENTAL HEALTH AND MENTAL RETARDATION: BRIDGING THE GAP (F. Menolascino & B. McCann eds. 1983); PSYCHIATRIC APPROACHES TO MENTAL RETARDATION (F. Menolascino ed. 1970).

373. U.S. CONST. amend. VIII.

374. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

375. The leading case is *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977). See also *Balla v. Idaho State Bd. of Corrections*, 595 F. Supp. 1558, 1576-77 (D. Idaho 1984); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1332-34 (S.D. Tex. 1980), *aff'd in part and rev'd in part on other grounds*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 334-42 (1981); Brenner & Galanti, *Prisoners' Rights to Psychiatric Care*, 21 IDAHO L. REV. 1-34 (1985). But see *Capps v. Atiyeh*, 559 F. Supp. 894 (D. Or. 1983). In *Capps*, the court recognized a constitutional right to mental health care, but expressed concern about the subjectivity of psychiatric diagnoses, the possibility of malingering prisoners feigning mental illness, professional differences about the necessity of treatment in particular cases, and the possibility that some mentally ill prisoners may be uncooperative with treatment efforts. *Id.* at 916-21. The court stated: "The inmates must, therefore, show a pattern of cases, each of which discloses, with little or no room for reasonable mental medical opinions to differ, (1) a serious mental illness (2) for which the inmate wants treatment (3) which he does not receive (4) thereby causing the inmate to suffer mental pain." *Id.* at 917-18.

376. See *supra* notes 51-53.

377. See *supra* note 57.

conclude that the constitutional guarantee of medical care necessarily extends to habilitation services for retarded prisoners. The one court which has considered the matter concluded in *Ruiz v. Estelle* that the eighth amendment guarantees the availability of habilitation to mentally retarded inmates.³⁷⁸

This conclusion can be supported without designating habilitation as "medical," nor does it require courts to recognize a more general right to rehabilitation for all prisoners.³⁷⁹ It is well documented that mentally retarded people, institutionalized without proper habilitation, will regress and lose vitally important life skills they previously possessed.³⁸⁰ If such regression occurs in a prison setting, the eighth amendment's right to protection from harm³⁸¹ precludes the state from denying habilitation which would prevent that harm.³⁸² Where habilitation is necessary³⁸³ for

378. *Ruiz*, 503 F. Supp. at 1345-46. The portion of the district court's opinion reversed by the court of appeals was unrelated to the provisions regarding retarded prisoners, which had resulted in a consent decree prior to completion of the appeal. The consent decree required, in pertinent part, that defendants identify mentally retarded and other special needs prisoners, evaluate their needs, provide "individualized treatment and placement plans appropriate for such prisoners' needs and assurances for their implementation," and comply with procedural requirements for transferring mentally disturbed prisoners to mental institutions. *Ruiz*, 679 F.2d at 1167.

379. Most courts have been reluctant to recognize such a right. J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 342-343 (1981); see *McCray v. Sullivan*, 509 F.2d 1332, 1335 (5th Cir.), cert. denied, 423 U.S. 859 (1975) (failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment). Indeed, rehabilitation is offered less frequently as a justification for imprisonment. See Bainbridge, *The Return of Retribution*, 71 A.B.A. J. 61 (May 1985); see also Act of Oct. 12, 1984, Pub. L. No. 98-473, ch. 227 (D), 98 Stat. 1998 (to be codified at 18 U.S.C. § 3582(a)) ("imprisonment is not an appropriate means of promoting correction and rehabilitation").

380. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981) (*Pennhurst I*); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 127-28 (1984) (*Pennhurst II*) (Stevens, J., dissenting); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973). For citations to the scientific literature documenting institutional regression, see Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 603 n.37 (1983); Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 183-84 nn. 127-34 (1978).

381. J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 329 (1981); cf. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973). The constitutional right to medical care itself, as announced in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), is based on the unconstitutionality of deliberately failing to prevent the pain accompanying untreated illness or injury. One court has based the right of prisoners to receive psychiatric services on the constitutional duty to prevent "unnecessary pain or suffering." *Grubbs v. Bradley*, 552 F. Supp. 1052, 1124 (M.D. Tenn. 1982).

382. Cf. *Youngberg v. Romeo*, 457 U.S. 307, 329 (1982) (Blackmun, J., concurring) (if a mentally retarded individual possesses basic self-care skills and is sufficiently educable to maintain those skills with training then a state facility responsible for his care may be constitutionally required to provide that training).

383. The determination of a mentally retarded individual's habilitation needs is not fraught with the uncertainty and subjectivity that concerned one court regarding mental illness in *Capps v. Atiyeh*, 559 F. Supp. 894, 916-921 (D. Or. 1983). See *supra* note 375. The diagnosis of an individual as mentally retarded is a relatively objective exercise that uses standard instruments of measurement. There is no professional disagreement about what constitutes substantial impairment from mental retardation. Feigning mental retardation is more difficult than feigning mental illness, and habilitation does not always require the same kind of conscious decision to cooperate with the professional. Notwithstanding the Supreme Court's contrary view, there is a

an individual prisoner's mobility, physical safety, or other protected constitutional interests, such services cannot be denied.³⁸⁴ The right to habilitation recognized in the *Mental Health Standards* should be reflected in the courts' interpretation of the eighth amendment.

The provisions in the *Mental Health Standards* for committing and transferring prisoners to mental retardation facilities are more problematic.³⁸⁵ The difficulties stem, in part, from the fact that retarded convicts may not be suitable residents for either prisons or general mental retardation institutions,³⁸⁶ and therefore any provision will engender difficulties in the many jurisdictions where no other alternatives currently exist. Nevertheless, it is troubling that some mentally retarded convicts may be committed to a mental retardation facility without a determination whether that facility is appropriate for retarded convicts, whether it is willing to receive them, and whether the convicts need, or would benefit from, the services the facility can provide.³⁸⁷ Simi-

consensus among mental retardation professionals that habilitation is possible and desirable for severely and profoundly retarded people. Cf. *Youngberg v. Romeo*, 457 U.S. at 316 n.20 (stating that mental retardation professionals disagree as to whether effective training is possible for all severely retarded people.) The belief of the Justices that no such consensus exists is flat wrong. See Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 628-32 (1983).

384. Cf. *Youngberg v. Romeo*, 457 U.S. at 319 (concluding that liberty interests require that a state provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint).

385. One set of difficulties surround the question of the degree of restriction that retarded offenders require. The *Mental Health Standards* provide that committed or transferred retarded convicts should not "be permitted access into the community by . . . mental retardation officials without authorization from appropriate correctional officials or the court." MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.11, 7-10.8. Giving judges or correctional officials the final say over the liberty of such individuals makes some sense when the convict has demonstrated a risk of dangerous behavior. Cf. *id.* 7-7.11 (requiring a court order for authorized leave of specially committed acquittees). However, for some offenders transferred or committed at the time of sentencing there will be no indicia of dangerousness, or as the commentary suggests, "a threat to security," and thus in their cases the limitation is unwarranted. See *supra* note 245, at 19 (testimony of Gelman and Coval). In addition, the *Mental Health Standards* presuppose that the commitment or transfer is to a remote and secure facility, although it may in fact be to a "structured community program," for which the concept of limitation on "access to the community" is not meaningful. See *supra* note 353.

386. See *supra* notes 354, 363-69. The unsuitability of some retarded convicts for either institution buttresses the argument for creating special programs designed for mentally retarded offenders.

387. MENTAL HEALTH STANDARDS, *supra* note 4, 7-9.9(b). This standard addresses the sentencing of offenders when neither the individual nor the prosecution objects to the commitment, and the only evidentiary requirement is a professional report that the individual is "seriously mentally retarded." The Commentary suggests that under such circumstances, "the reason for an evidentiary hearing is eliminated." *Id.* 7-9.9 commentary at 476-77. But there remain two possible reasons for such a hearing. One is that the facility proposed for the commitment is not a party to the bargain, and may have legitimate objections to the commitment. The other is that the convict, while not "objecting," may not be competently consenting to the placement. Some retarded

larly, when a retardation facility objects to the transfer of a retarded prisoner, the court may order his placement upon evidence that he is "seriously mentally retarded and requires care not available in the correctional facility"³⁸⁸ without ascertaining whether the proposed facility is willing or suitable.

The alternative approach, which recognizes a right, or at least an interest, in a facility determining the clients it can appropriately serve,³⁸⁹ is not cost-free either, because it creates the risk of all available facilities declining to serve retarded offenders.³⁹⁰ Ultimately, where no existing facility believes it can properly provide habilitation to these individuals, the better approach is to create new programs specifically designed to address their needs.³⁹¹

VI. *The Role of Mental Retardation Professionals*

It has long been recognized that the fair and efficient administration of the criminal justice system requires the involvement of qualified professionals from disciplines other than the law. These professionals serve a variety of roles, including scientific, evaluative, consultative, and therapeutic. In this section, we will discuss the special concerns that arise when professionals perform evaluations and subsequently give expert testimony about mentally retarded defendants.

One of the first issues to arise is the selection of appropriately qualified professionals.³⁹² Given the historic confusion between mental illness and mental retardation³⁹³, it is not surprising to find confusion on the question of which professionals have mental retardation expertise useful to the criminal justice system. Thus, courts have often addressed questions regarding scientific inquiry in the area of mental retardation and criminal justice, evaluation consultation, and habilitation, without the assistance of mental retardation professionals.³⁹⁴ Excessive reliance has been placed on

individuals will lack the ability to make such a judgment. See *supra* note 170. Because *Vitek v. Jones*, 445 U.S. 480, 487-94 (1980), suggests that there is an important liberty interest at stake in commitment even when the alternative is imprisonment, care should be taken to protect that interest on behalf of an individual who lacks the capacity to voluntarily waive his rights.

388. MENTAL HEALTH STANDARDS, *supra* note 4, 7-10.4(b).

389. Cf. N.M. STAT. ANN. § 43-1-13(I) (1978 & Repl. 1984) ("[N]o developmental disabilities treatment or habilitation facility is required to detain, treat or provide services to a client when the client does not appear to require such detention, treatment or habilitation.").

390. See *supra* note 354, 369.

391. See *supra* note 353; SANTAMOUR & WEST, *supra* note 353, at 27-31. For a compilation of state laws on transfers from prisons to mental hospitals, see Favole, *supra* note 120, at 281-95.

392. MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.1 commentary at 14.

393. See *supra* text accompanying notes 51-61.

394. See, e.g., *State v. Schlaps*, 78 Mont. 560, 577-78, 254 P. 858, 862 (1927) (testimony of teacher who administered test ruled properly excluded as not competent to express an opinion); *State v. Bennett*, 345 So. 2d 1129, 1137 (La. 1977).

This problem can be compared to a similar problem that arises when mentally retarded defendants are imprisoned. Daniel and Menninger explain: "Mentally re-

psychiatrists to fulfill these duties, even after psychiatrists have suggested the limitations of their expertise.³⁹⁵

Selecting a qualified professional involves many factors. One major concern is the type of training received by the professional asked to evaluate or testify about a mentally retarded defendant's condition. In contrast to psychiatrists and other mental health professionals, whose training is usually limited to the needs of people with mental illness, mental retardation professionals have focused their training on the special needs and characteristics of people with mental retardation. The graduate course work of special education teachers, for example, will generally include work in the impaired learning ability of mentally retarded people; specialized educational curricula, techniques, methods, and materials; standardized assessment of deficiencies; applied behavior analysis;

tarded forensic patients have often been confined in state hospitals where there are only a few clinicians with expertise in mental retardation. Consequently, the mentally retarded forensic patient may have stayed longer than some mentally ill patients because he received no appropriate rehabilitation." Daniel & Menninger, *Mentally Retarded Defendants: Competency and Criminal Responsibility*, 4 AM. J. FORENSIC PSYCHIATRY 145, 154 (1983).

395. In 1961, Dr. Walter Barton, president of the American Psychiatric Association, observed: "Psychiatrists as a group are disinterested in mental retardation. Many have no more accurate knowledge about the retarded than the layman does." Barton, *The President's Page: The Psychiatrist's Responsibility for Mental Retardation*, 118 AM. J. OF PSYCHIATRY 362, 362 (1961). Other psychiatrists express similar views. Dr. Menolascino states:

[Psychiatry's] withdrawal and the historical events that led up to it have resulted in a number of stereotyped views or blindspots that psychiatrists characteristically exhibit when they must deal with the retarded. Briefly these blindspots are: uncritical acceptance of mental age as an adequate description of a person; treatment nihilism that is usually based on lack of program knowledge and a myopic view of conceivable or even available program alternatives; and excessive focus on the severely retarded and their families, in contrast to the mildly retarded.

Menolascino, *Psychiatry's Past, Current and Future Role in Mental Retardation*, in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 709, 717 (F. Menolascino ed. 1970). According to Dr. Bernstein, "Psychiatrists generally are not interested in and do not use the broad range of knowledge or treatment techniques available when confronted with [mentally retarded] patients." Bernstein, *Mental Retardation*, in THE HARVARD GUIDE TO MODERN PSYCHIATRY 551, 551 (A. Nicholi ed. 1978); see also Dybwad, *Psychiatry's Role in Mental Retardation*, in DIMINISHED PEOPLE: PROBLEMS AND CARE OF THE MENTALLY RETARDED 123 (N. Bernstein ed. 1970). Dybwad has stated:

"[A] profession's commitment to a human problem and its solution can be measured by the extent and quality of its research operations in that field, by the volume of relevant papers in the journals maintained or largely supported by the profession, and by the attention given to the particular subject in the course of the profession's academic training program. On all of these three counts the factual evidence clearly points to a lack of interest in or commitment to mental retardation on the part of the psychiatric profession."

Id. at 123-24. See also 6 AM. JUR. PROOF OF FACTS *Idiocy and Mental Deficiency* Proof 1, 254 (psychiatrist more likely to concentrate on mental diseases of psychogenic origin than on mental deficiency).

communication for mentally retarded people; and extensive field work and supervised teaching of people with mental retardation in a variety of settings, including residential facilities and public schools. Other professionals, whose work addresses the types of disabilities which often accompany mental retardation, such as speech, language and hearing impairments, physical and motor disabilities, and vocational training and transitional problems, should have similarly extensive training in mental retardation.

The Federal Rules of Evidence limit the availability of "expert" status for the purpose of testimony. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.³⁹⁶

This requirement limiting testimony to the individual professional's area of expertise is reflected in the *Mental Health Standards*.³⁹⁷ The *Mental Health Standards* preclude mental health professionals from testifying, evaluating, or otherwise participating in the trial and adjudication of a mentally retarded individual if the mental health professional's expertise does not include substantial training and expertise in the field of mental retardation.³⁹⁸

Thorough assessment of the abilities and weaknesses of a mentally retarded defendant can result in information of tremendous assistance to a court. However, the assessment process requires great care and professional skill and any proffered results must be viewed with caution. At many points during the process, seemingly minor departures from good practice can severely limit the utility or validity of an assessment report.³⁹⁹

396. FED. R. EVID. 702.

397. MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.1(a) ("the [mental health and mental retardation] professional's performance within these roles should be limited to the individual professional's area of expertise and should be consistent with that professional's ethical principles").

398. The *Mental Health Standards* define mental retardation professionals as: individuals who have received extensive, formalized, post-graduate education and training in identifying specific functional deficits or habilitation needs of persons with mental retardation or developmental disability. Mental retardation professionals include special education teachers, speech and language pathologists, audiologists, physical therapists, occupational therapists, and those psychiatrists, psychologists, clinical social workers, psychiatric nurses or other mental health professionals who have received the necessary education and training on mental retardation issues. Mental retardation professionals must be licensed or certified to practice if the jurisdiction requires licensure or certification for the respective discipline.

MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.1 commentary at 14. For a discussion of training techniques employed by mental retardation professionals, see D. MACMILLAN, MENTAL RETARDATION IN SCHOOL AND SOCIETY (2d ed. 1982); SYSTEMATIC INSTRUCTION OF THE MODERATELY AND SEVERELY HANDICAPPED (M. Snell 2d ed. 1983); E. POLLOWAY, J. PAYNE, J. PATTON & R. PAYNE, STRATEGIES FOR TEACHING RETARDED AND SPECIAL NEEDS LEARNERS (3d ed. 1985).

399. See HANDBOOK OF PSYCHOLOGICAL ASSESSMENT (G. Goldstein & M. Hersen eds. 1984). Even when an examination has been conducted in consistence with good

Competent, professional assessment requires personal observation and interaction with the allegedly mentally retarded defendant. The *Mental Health Standards* instruct that no witness should be qualified as an expert on a defendant's mental condition unless the witness "has performed an adequate evaluation, including a personal interview with the individual whose mental condition is in question, relevant to the legal and clinical matter(s) upon which the witness is being called to testify."⁴⁰⁰ This required evaluation may be particularly important in cases involving mentally retarded defendants because it precludes hypothetical testimony about the mental status of a defendant based solely on the characteristics of a particular class of mentally retarded individuals without analyzing the individual characteristics of the defendant.

Only professionals who have training and experience in evaluating people with mental retardation should perform the assessments. As discussed earlier, mental retardation differs sufficiently from other forms of mental disability that training in mental illness cannot, without more, qualify a physician to provide useful information about a mentally retarded person. Similarly, typical medical school training and the attainment of the academic degree of M.D. cannot, without more, qualify a physician to give expert testimony about mental retardation.⁴⁰¹ The *Mental Health Standards* recognize that the field of mental retardation requires particular training and experience and that relatively few professionals have expertise in both mental illness and mental retardation.⁴⁰²

Courts should not operate under the illusion that the simple administration of any test will resolve all questions regarding a re-

professional practice, the report may prove inadequate. One study found that despite specific instructions to examiners to report on the issues of competence and sanity, the majority of reports submitted to the court made no mention of either issue. Geller & Lister, *The Process of Criminal Commitment for Pretrial Psychiatric Examination and Evaluation*, 135 AM. J. PSYCHIATRY 53, 58 (1978).

400. MENTAL HEALTH STANDARDS, *supra* note 4, 7-3.11(a)(iii).

401. To qualify as an expert under Standard 7-3.11 three criteria must be established. The professional must meet certain clinical educational and training requirements that are more stringent than merely possessing an academic degree. Thus, the commentary advises that "a mental health professional whose training has been limited to evaluating mental illness should not be permitted to testify as an expert in a case involving a mentally retarded defendant." *Id.* 7-3.11 commentary at 142. Some psychiatrists and other physicians will be qualified in the area of mental retardation, but most will not.

402. *Id.* 7-3.11 commentary at 143. The commentary states: "Standard 7-3.11 attempts to assure that only those mental health and mental retardation professionals who are truly qualified to testify as experts are permitted to do so." *Id.* Of course, a few mental disability professionals will have training and experience that gives them expertise in both mental illness and mental retardation. These professionals are uniquely qualified to assist courts in evaluating defendants who may have both disabilities. See *supra* notes 59-61 and accompanying text.

tarded person's status in a criminal case.⁴⁰³ Systematic assessment requires the thoughtful selection and administration of valid examination instruments together with careful observation, interviewing, and analysis of all the data by a professional with proper training and experience. The test instruments chosen must meet the minimum criteria for test construction. These include a supportable theoretical base, proper question content, proper item format, standardized administration, standardized scoring, adequate reliability (dependability), adequate validity (a true measurement of what the test claims to measure), and normative data.⁴⁰⁴ Few tests in common use can be rated highly in all categories. A determination of how a certain test rates can only be made after thorough analysis of the accompanying test manual and supporting statistical data as well as independent scholarly research performed with the test. This is not to suggest that less than scientifically perfect tests can never be used, but only that the substantial number of tests which do not withstand scientific scrutiny must be used with great care by professionals thoroughly grounded in evaluation skills. Any test battery must be scrutinized by courts in terms of the above criteria and the skills and experience of the examiner.⁴⁰⁵

The legal issues of each case will dictate the relevant tests to be administered. In all cases where the defendant is suspected of being mentally retarded, an individual intelligence test should be administered in order to formulate an estimate of the defendant's general intellectual functioning. Even if a defendant has had IQ tests in the past, a new examination should almost always be conducted in order to provide a comparison to the older test results.⁴⁰⁶ This test assures that an examination was conducted in a manner

403. Courts should similarly reject testimony in which no evaluation was performed. In *State v. Bennett*, 345 So. 2d 1129, 1138 (La. 1977), the court dismissed the testimony of a psychiatrist and a coroner, each of whom alleged an IQ level for the defendant without performing an examination. The court stated: "The conclusory reports by Drs. Rees and Anthony that defendant was able to assist counsel were not, without supporting information which was lacking at the hearing, entitled to reliance by the court." *Id.* Similarly, in *State v. Rogers*, 419 So. 2d 840 (La. 1982), a psychiatrist's "intuitive interactions with the patient," absent testing, were rejected as "clearly insufficient." *Id.* at 844.

404. For example, the name of a test may suggest that it will evaluate one aspect of intelligence, while in fact scientific data indicate that it evaluates an entirely different aspect. Similarly, a test may require such subjective judgment on the part of the examiner that adequate reliability between different examiners can never be achieved. In addition, the test may have been standardized on a population of pre-school children and, therefore, normative data for adults have never been collected. HANDBOOK OF PSYCHOLOGICAL ASSESSMENT, *supra* note 399, at 19-37.

405. This is an appropriate topic for cross-examination. See 1 J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 200-88 (3d ed. 1981) (discussing the leading psychological tests).

406. Substantial disparities between test scores for the same individual generally indicate a variety of problems that invalidate the scores. It may mean that a test is unreliable, that an examiner did not receive adequate professional preparation, that testing conditions such as physical environment or the rapport with the examinee were improper, or that test anxiety depressed the score. See A. ANASTASI, PSYCHOLOGICAL TESTING 23-44 (4th ed. 1976).

consistent with good professional practice, and also that the witness is testifying based upon his own evaluation rather than one whose principal virtue may be that it is conveniently on file.

Many cases also will require one or more of the following: personality assessment, adaptive behavior assessment, moral development examination, speech and language evaluation, motoric functioning evaluation, or academic achievement evaluation — as well as mental retardation forensic evaluations in the indicated legal issues.⁴⁰⁷ A professionally competent assessment should provide the court with an indication of the defendant's general intellectual functioning or IQ. However, careful analysis of the defendant's performance on an IQ test may provide more specific information that will be even more valuable to the court. Other information from different parts of the assessment will often elucidate the defendant's ability to understand concepts, use numbers, remember past events and previously learned information, put representative items in proper sequential order, solve puzzles, answer questions, respond speedily, resist coercion, and the like. These are factors an examiner untrained in mental retardation will be unable to evaluate without the assistance of an expert professional. This knowledge, therefore, is central to the court's needs from an expert witness. The evaluation can produce testimony regarding the defendant's abilities and characteristics that the court can apply to the relevant legal test,⁴⁰⁸ and about the possibilities for effecting change in the defendant's functioning.⁴⁰⁹

Expert witnesses need some familiarity with relevant legal issues in addition to their professional expertise.⁴¹⁰ The *Mental Health Standards* recognize the existing limitations in forensic training for mental health professionals.⁴¹¹ Such training appears to be even more rare for mental retardation professionals. Crea-

407. See *id.* at 180-81.

408. Note that the expert witness is limited in his or her ability to testify to the ultimate legal issue in controversy. MENTAL HEALTH STANDARDS, *supra* note 4, 7-3.9.

409. The next step in the process is designing an individualized habilitation plan for effecting the desired change (such as attainment of competence to stand trial). The outlines of such a plan may be presented to the court for approval. See Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375, 389-92 (1985).

410. Although experts may not be permitted to testify about the ultimate legal issues, see *supra* note 408, they will need to understand the legal elements of competence to stand trial or the defense of mental nonresponsibility, for example, in order to present relevant and coherent information in their testimony.

411. MENTAL HEALTH STANDARDS *supra* note 4, 7-3.10. In addition to requiring that the evaluating mental health and mental retardation professional have sufficient professional education and clinical training, the *Mental Health Standards* also require "sufficient forensic knowledge, gained through specialized training or an acceptable substitute therefor, necessary for understanding the relevant legal matter(s) and for satisfying the specific purpose(s) for which the evaluation is being ordered." *Id.* 7-3.10(b).

tion of such training programs is essential if the courts are to have access to a sufficient number of competent professional experts in the field of mental retardation.⁴¹²

Assuming a witness has the necessary professional expertise as well as sufficient forensic knowledge, the mental retardation expert might usefully testify to issues such as the defendant's intelligence,⁴¹³ his ability to understand the components of the *Miranda* warning or to waive his constitutional rights,⁴¹⁴ his general level of functioning,⁴¹⁵ his academic attainment and potential,⁴¹⁶ and similar aspects of his disability.⁴¹⁷

VII. *The Right to a Mental Retardation Professional as an Expert Witness*

Recently, the United States Supreme Court in *Ake v. Oklahoma*⁴¹⁸ ruled that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one."⁴¹⁹

The Court reached this conclusion by applying the four-part standard now common in procedural due process cases,⁴²⁰ factoring the defendant's interest affected, the governmental interest in avoiding the requested procedures, the probable value of the additional safeguard sought, and the risk of erroneous deprivation if the safeguard is not provided.⁴²¹ The Court emphasized that the defendant's interest in the accuracy of the proceeding is "uniquely compelling."⁴²² The Court went on to discuss the pivotal role of

412. In the absence of such organized training programs, it falls to counsel to be sure that the expert eyewitness in a particular case has sufficient understanding of the relevant legal issues.

413. See, e.g., *People v. Bruce*, 62 A.D. 2d 1073, 403 N.Y.S. 2d 587, 588-89 (1978) (certified school psychologist testified on IQ testing as well as on defendant's ability to waive constitutional rights).

414. See, e.g., *Cooper v. Griffin*, 455 F.2d 1142, 1143-44 (5th Cir. 1972) (defendants' special education teacher and their rehabilitation specialist testified that neither boy could understand the *Miranda* warning); *Hines v. State*, 384 So. 2d 1171, 1177 (Ala. Crim. App. 1980) (special education professor testified that defendant was susceptible to suggestion and could not understand the abstract concepts of the *Miranda* warning).

415. See, e.g., *Cooper*, 455 F.2d at 1143-44.

416. See, e.g., *May v. State*, 398 So. 2d 1331, 1334 (Miss. 1981) (defendant's special education teacher testified to defendant's abilities in math, language, and spelling; his speech pathologist testified on the evaluation she had performed for school placement).

417. See *United States v. Mathers*, 539 F.2d 721, 730 (D. C. Cir. 1976) (Hastie, J., concurring) ("It should not be too difficult to find someone skilled in working and communicating with the mentally retarded who could and would communicate effectively with him, so that his participation in any further proceedings would be knowing and meaningful.").

418. 105 S. Ct. 1087 (1985).

419. *Id.* at 1092.

420. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

421. *Ake*, 105 S. Ct. at 1094.

422. *Id.* at 1094.

psychiatrists when insanity is raised in a criminal defense, and the impossibility of maintaining an insanity defense without an appropriate expert witness. Finally, the Court found the state's economic interest in avoiding the cost of an expert to be outweighed by the importance of the individual's interest.

Applying *Ake* to the situation of a mentally retarded defendant asserting the defense of mental nonresponsibility must surely produce a similar result. The four-part test yields a virtually identical analysis except that when a defendant is mentally retarded, the necessary expert testimony will be provided by a mental retardation professional whose training and experience conforms to the requirements specified earlier.⁴²³

While *Ake* dealt only with the insanity defense, the Court's reasoning suggests that a similar conclusion would be reached on other criminal issues to which expert testimony by a mental disability professional was comparably crucial. The procedural due process balancing test produces parallel results when applied to a defendant's request for expert assistance in the context of competence to stand trial or of civil commitment subsequent to acquittal by reason of mental nonresponsibility. In each instance, due process is denied by requiring a mentally disabled defendant to litigate the issue without the assistance of a competent professional with relevant training and experience in the appropriate discipline or disciplines.

The *Mental Health Standards* provide for the right to an independent expert witness in the context of incompetence to stand trial,⁴²⁴ the defense of mental nonresponsibility,⁴²⁵ commitment following acquittal,⁴²⁶ and sentencing.⁴²⁷ The *Mental Health Standards* thus anticipated *Ake*, and made similar provisions for other adjudications to which mental condition or ability are crucial issues.

VIII. Specialized Training in Mental Retardation

Professionals in the field of mental retardation have long called

423. See *supra* note 398 and accompanying text; see also Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 CIN. L. REV. 574, 580-99 (1982) (discussing the constitutional right to expert defense services under the due process clause and the sixth amendment).

424. MENTAL HEALTH STANDARDS, *supra* note 4, 7-4.8(a)(i).

425. *Id.* 7-3.3(a).

426. *Id.* 7-7.5.

427. *Id.* 7-9.4. The standards for postconviction commitment and involuntary transfer from prisons to mental facilities provide for the right to call independent expert witnesses. See *Id.* 7-9.9(a)(iii), 7-10.5(a)(iii). Although these standards do not explicitly address the right of indigents to such assistance at state expense, there is nothing in the text or commentary to suggest that this right was intentionally omitted.

for specialized training in mental retardation for all participants in the criminal justice system. Police officers have often been identified as primary targets for this training,⁴²⁸ because their initial contacts with mentally retarded offenders are crucial to ultimate resolution of the case.⁴²⁹

Part II of the *Mental Health Standards* addresses police and custodial rules.⁴³⁰ The frequent failure to identify potential issues of competence and nonresponsibility prior to trial induced the framers of the *Mental Health Standards* to require that when police officers have reason to believe that an individual is mentally retarded, they should communicate that information to the prosecutor or the court.⁴³¹ The ability of police to detect mental retardation in defendants is limited, however, and thus courts cannot rely upon this process to identify defendants who may be mentally retarded.

The *Mental Health Standards* address specialized training for law enforcement personnel as well as for individuals who have custodial responsibilities.⁴³² It calls for the involvement of mental health and mental retardation professionals in the design of curriculum and training materials for police officials.

Police often perceive individuals who are mentally ill as a greater law enforcement problem than persons with mental retardation. As a result, police departments may err in focusing all of their training upon the characteristics of mentally ill individuals, and ignoring the indicia of mental retardation. A police officer may incorrectly conclude, for example, that an individual has no special medical needs, when in fact he is a mentally retarded person with very low verbal ability who requires regular doses of an anti-seizure medication. Or arresting officers may assume that the individual does not wish to make a phone call, when in fact he cannot remember his mother's telephone number, cannot read the telephone book, or is simply unable to operate a telephone.⁴³³

The *Mental Health Standards* provide that custodial personnel "should receive training in identifying and responding to the symptoms and behaviors, including self-injurious behavior, associated with mental illness and mental retardation. Emphasis should be placed on those symptoms and behaviors that arise or are aggravated by the fact of incarceration, particularly as they relate to suicide prevention."⁴³⁴ While suicide prevention is a principal concern during incarceration, attention should also be paid to other

428. Norley, *The Least Restrictive Alternative and the Police Investigatory Process*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW*, *supra* note 35, at 525, 525-27.

429. Cf. L. TEPLIN, *MENTAL HEALTH AND CRIMINAL JUSTICE* 157 (1984) (discussing police interrogation with mentally disordered individuals).

430. *MENTAL HEALTH STANDARDS*, *supra* note 4, 7-2.1 to -2.9.

431. *Id.* 7-2.5(c).

432. *Id.* 7-2.8.

433. See Haggerty, Kane & Udall, *An Essay on the Legal Rights of the Mentally III*, 6 *FAM. L.Q.* 59, 60 (1972).

434. *Id.* 7-2.8(c).

forms of self-injurious behavior in which some mentally retarded persons may engage, including self-biting, head-banging, psychogenic vomiting, and the like.⁴³⁵ The distress, guilt, shame, or confusion of the arrest may trigger such behaviors and the potential danger to the mentally retarded person requires that police officers recognize and effectively manage the situation, preferably with the assistance of competent mental retardation professionals.

Lawyers also need education in the area of mental retardation. The limited ability of most lawyers to recognize mental retardation in their clients has been well documented.⁴³⁶ The *Mental Health Standards* suggest that educational programs and courses in mental retardation be offered by law schools, bar associations, and other judicial organizations.⁴³⁷

There is a similarly acute need for mental retardation professionals to become more knowledgeable about, and thus more effective in, the criminal justice system.⁴³⁸

Conclusion

Mentally retarded criminal defendants present substantial difficulties for the criminal justice system.⁴³⁹ These difficulties are exacerbated by misunderstandings about the nature of mental retardation and confusion about the similarities and differences between this disability and mental illness. The new *Mental Health Standards* fall prey to similar misunderstandings and confusion in a few instances, but generally represent a substantial improvement over current laws and practices. Translating these proposed improvements into the reality of everyday practice will greatly improve the quality of justice that these individuals receive.

435. See AMERICAN ASSOC. ON MENTAL DEFICIENCY, LIFE-THREATENING BEHAVIOR: ANALYSIS AND INTERVENTION 3-278 (J. Hollis & C. Meyers eds. AAMD Monograph No. 5 1982).

436. BROWN & COURTLESS, *supra* note 63, at 1168; see Haggerty, Kane & Udall, *supra* note 433, at 59-60 (1972).

437. MENTAL HEALTH STANDARDS, *supra* note 4, 7-1.3.

438. See *id.* 7-1.3(d).

439. State v. Bennett, 345 So. 2d 1129, 1136 (La. 1977). The Bennett court observed: The mentally retarded offender poses unique problems for the criminal justice system: his reduced understanding challenges traditional notions of criminal responsibility; his physical presence at trial is offset by an abstraction of mind which may be severe enough to invoke the ban against trying a defendant in absentia; his need for specialized care and training argues against his commitment upon conviction to a penal institution ill-equipped to habilitate him.

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November 26, 1986

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The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Attention: Mary Ellen Abrecht, Esq.
Special Counsel

Dear Mr. Chairman and Members of the Commission:

In response to the Commission's invitation, I submit the following written comments in conjunction with my testimony to be received at the Commission's public hearing in Washington, D.C. on December 3, 1986. I have confined my discussion and analyses to two topics that are covered, or necessarily implicated, in the Commission's preliminary draft sentencing guidelines.

1. Organizational Sanctions and
Voluntary Disclosure of Corporate Misconduct

Under the guidelines, an offender's total offense value may be reduced by mitigating offender characteristics such as "acceptance of responsibility" and "cooperation". These mitigating factors are defined in Sections B321-322 and Sections B331-333, respectively. None of these offender characteristics covers the situation in which an organizational offender voluntarily discloses its misconduct to the government. Actively encouraged by a number of federal agencies, including the Department of Defense, "voluntary disclosure" of corporate misconduct is rapidly becoming one of the most important issues in federal law enforcement policy. */

The philosophy of voluntary disclosure is straightforward. It rests on the premise that corporations should voluntarily report criminal conduct of their employees in order to avoid the harsh consequences that result from application of the rules imposing vicarious criminal liability on organizations. Voluntary disclosure usually arises in one of two contexts. First, the corporation learns of undisclosed misconduct before it is detected by a government agency. The discovery of wrongdoing may be inadvertant or may arise from ongoing internal monitoring of employees' activities. Second, the corporation may uncover the criminality in the course of an internal investigation generated by a government probe. Often the wrongdoing detected by the company far exceeds that known to the government at the time the government's investigation begins. Once acquired, the company's knowledge of wrongdoing forces its counsel to make an exceedingly difficult choice: whether to (1) voluntarily disclose the wrongdoing to the government in the hope of avoiding prosecution or punishment, or (2) simply remain silent in the hope that the criminality will escape the government's attention.

*/ See, e.g., 46 F.C.R. 273-274, 292-294 (BNA, August 11, 1986); 46 F.C.R. 900-902 (BNA, November 24, 1986). Both reports are provided as attachments to this letter.

In the areas of government contracting and banking where federal regulation and audit are commonplace, the corporation's decision is particularly difficult. Silence may achieve nothing because the misconduct may eventually be uncovered anyway. On the other hand, voluntary disclosure of the misconduct may not be rewarded or may be so inadequately rewarded that there is no incentive in making the disclosure. In my judgment, the Commission's sentencing guidelines must speak to this issue in a precise and comprehensive manner. Reliance on the residual authority granted by 18 U.S.C. § 3553(b), to justify special treatment for the corporate defendant that voluntarily discloses misconduct is not adequate to assure the organizational offender that its self-incrimination will produce significant benefits at sentencing.

I recommend that the Commission create a separate category in Part B (Post-Offense Conduct) of Chapter Three (Offender Characteristics) entitled "Voluntary Disclosure". This mitigating circumstance should be available only to organizational offenders. Two forms of voluntary disclosure must be recognized, namely (1) that emanating from disclosure before governmental detection; and (2) that emanating from disclosure following governmental detection. In the first situation, applicable to corporations that reveal their own misconduct before it is discovered by the government, a maximum discretionary sentence reduction of 50% should be permitted. (Alternatively, a reduction in offense value of 50% could be provided by allowing the offense value to be multiplied by .5.) In the case of voluntary disclosure which follows detection by law enforcement officials, the sentence reduction or offense value multiplier should be smaller. Because I am speaking here of organizational offenders, the sentence reduction would apply primarily to the monetary fine otherwise dictated by application of the guidelines.

Voluntary disclosure of corporate misconduct by an organizational offender is fundamentally different from "cooperation" or "acceptance of responsibility", and, for that reason, deserves separate treatment in the guidelines. First, unlike the situation generally applicable to individuals, an organization may be criminally liable for the acts of its agents even if the agent is acting outside the scope of his authority. The decided cases are uniform in holding that where a corporate employee commits a crime which benefits the corporation, the corporation is criminally liable even if the agent's conduct violated internal policy or was beyond the scope of employment. Second, as a matter of sound law enforcement policy, the Commission should encourage organizational offenders to undertake

compliance and prevention programs designed to prevent crimes within the corporation. A significant reward at sentencing is consistent with this policy. Third, voluntary disclosure produces enormous savings in investigative costs which would otherwise be entailed if the corporation remained silent. As a practical matter, most government agencies lack the time and resources to fully investigate the industries under their regulation and are forced, therefore, to rely in significant measure on self-regulation. Rewarding a corporation for voluntary disclosure furthers this goal of self-regulation. Fourth, since corporate self-incrimination runs counter to other pressures within a corporation, a significant incentive should be built into the guidelines to encourage it. The modern corporation is probably more likely than the average individual to make decisions based on clear-cut cost-benefit considerations. A significant reward for such disclosure presumably will produce more such disclosure.

In summary, I believe that it would be a mistake to omit recognition of voluntary disclosure as a significant mitigating factor in the sentencing of organizational offenders. The guidelines should confront this issue directly and provide reasonable incentives to a corporation that is considering whether to disclose or bury knowledge of wrongdoing.

2. Plea Bargaining

The Commission has invited comment on the role of plea bargaining under the sentencing guidelines. Let me first observe one point concerning application of the draft guidelines to the typical guilty plea. Under the Commission's proposal, a convicted offender would be entitled to a discretionary reduction of as much as 20% for the "acceptance of responsibility" inherent in his guilty plea. In my opinion, this does not provide a sufficient incentive to induce offenders to tender pleas of guilty.

For better or worse, the guilty plea is a central component of the federal criminal justice system. Resources do not exist to try any more than a fraction of the indicted criminal cases. Under current practice, most offenders who plead guilty do so in the hope of lenient treatment at sentencing. When weighed against the risks of a trial followed by conviction and incarceration, the guilty plea is often attractive because it offers the possibility of a significant sentence reduction. I would

urge, therefore, that the Commission consider increasing the discretionary sentence reduction to 25% or more for those offenders whose "acceptance of responsibility" consists of pleading guilty.

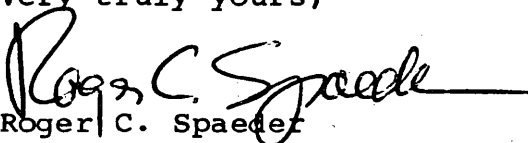
Next, I submit that the role of plea bargaining under the new guidelines should be no different than under the current practice. A prosecutor, for example, will be permitted to offer a plea of guilty to a single count in return for dismissal of the remaining counts on a multi-count indictment. In this case, the guidelines will invoke the offense value for the count to which the offender pleaded guilty as augmented by consideration of harms and conduct "related to" or "in furtherance of" the charge of conviction.

However, two other circumstances are often presented in plea bargaining. The first situation arises when the prosecutor and defense counsel wish to strike a plea bargain which calls for a specific sentence to be imposed by the court, regardless of the sentence otherwise dictated by application of the guidelines. The second circumstance occurs when the parties to the plea negotiation wish to stipulate facts which, if applied strictly by the court without regard to other information, would effectively dictate the sentence required by the guidelines. In my judgment, both of these practices should be permitted to continue because neither is inherently inconsistent with the Congressional policy reflected in the guidelines.

As the governmental branch charged with law enforcement responsibilities, the Executive must be given flexibility in applying the laws enacted by Congress. Frequently the prosecutor is better equipped than others to balance the competing values presented in a plea bargaining situation. One such consideration is the strength of the government's case. Although the guidelines do not speak directly to this issue, it can be a dominant consideration in the negotiations between prosecutor and defense counsel. A prosecutor burdened with an exceedingly weak case needs the flexibility to bargain, not only as to the charge of conviction, but also as to the likely sentence to be imposed. Whether the bargain focuses on the specific sentence to be imposed or on a "stipulation of facts" which effectively dictates the sentence, the need for flexibility remains. Under Rules 11(e)(1)(C) and 11(e)(4), Federal Rules of Criminal Procedure, the sentencing court retains the power to reject a plea bargain calling for a specific sentence if the bargain is not in the interest of justice. Enactment of the guidelines should not change this rule nor its application in practice. Similarly, I

believe that Rule 11(e)(4) should be amended as part of the guideline enactment process to permit plea bargains containing a stipulation of facts by which the court is bound in applying the sentencing guidelines. This minor modification to Rule 11 would permit judicial oversight of those plea bargains which effectively dictate a specific sentence, without depriving the prosecutor of the right to strike such a bargain when, in his judgment, the circumstances warrant it. With this safeguard, I believe it unlikely that the Congressional policy manifest in the guidelines would be undermined by the plea bargaining process. For a defendant to plead guilty under a bargain that effectively sets the sentence (whether by express agreement or by stipulation of facts), the court would have to be satisfied that the disposition is in the interest of justice.

Very truly yours,


Roger C. Spaeder

RCS/jke

area of disagreement is the restructuring of headquarters staffs in the services and military departments. While both versions call for a reduction in the size of the staffs by eliminating duplicative functions, only the House version would actually combine them.

Another difference between the two bills is the authority and independence given to the unified commanders; the House version goes further than the Senate version in that it would give the CINCs full command of the forces assigned to them, as well as give them their own operating budget.

Text of the Mavroules amendment to HR 4428 appears in the text section.

Text of the Traficant amendment regarding priority for domestic firms follows:

SEC. 935. PRIORITY FOR DOMESTIC FIRMS WITH RESPECT TO DEFENSE CONTRACTS.

(a) Establishment of Priority. —

(1) In general. — Chapter 141 of title 10, United States Code, is amended by adding at the end the following new section:

“§2408. Contracts: priority for domestic firms

“(a) In General. — The Secretary concerned shall award a contract to a domestic firm that, under the use of competitive procedures, would be awarded to a foreign firm if —

“(1) when completely assembled, not less than 50 percent of the final product of the domestic firm would be domestically produced; and

“(2) the difference between the bids submitted by the foreign and domestic firms is not more than five percent.

“(b) Waiver. — This section does not apply to the extent to which the Secretary of Defense determines that —

“(1) such application would not be in the public interest; or

“(2) compelling national security considerations require otherwise.”

(2) Clerical amendment. — The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

(b) Effective Date. — Section 2408 of title 10, United States Code (as added by subsection (a)), shall apply to contracts for which solicitations for bids are issued after the date of the enactment of this Act.

Fraud

TAFT URGES CONTRACTORS TO VOLUNTARILY DISCLOSE WRONGDOING

Deputy Defense Secretary William Taft has called on defense contractors to voluntarily disclose evidence of fraud or other wrongdoing, and in return promised that DOD will look favorably on such disclosures in deciding on the appropriate administrative action.

In a letter sent to 87 defense contractors, Taft said, “I encourage you to consider adopting a policy of voluntary disclosure as a central part of your corporate integrity program.” The letter was dated July 24 but was not released by the Pentagon until Aug. 1.

The letter states that “early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an atti-

tude of contractor integrity even in the wake of disclosures of potential criminal liability. We will consider such cooperation as an important factor in any decisions that the Department takes in the matter.”

The 87 contractors were selected because they were among the 100 largest dollar recipients of DOD contract dollars in FY 1985. A DOD official told FCR Aug. 5 that letters were not sent to the remaining 13 contractors because they are educational institutions.

While the policy does not guarantee that a contractor who comes forward with evidence of wrongdoing will escape suspension or debarment by DOD or prosecution by the Justice Department, it is intended to encourage contractors to undertake to police themselves better, and to provide DOD with the results of their findings. From DOD's point of view, better internal controls by contractors will save both time and money, as well as cut down on the incidence of wrongdoing, since contractors who undertake voluntary disclosure and corrective actions are less likely to repeat their improper activities.

An official in the Inspector General's office told FCR that contractors “should not expect to get off scot-free” simply because they admit they have been overcharging the government for years. He added, however, that voluntary disclosure will work to a contractor's advantage when DOD evaluates a contractor's present responsibility to perform a contract in determining whether or not to suspend or debar the contractor.

The IG official admitted that there are “considerable risks and uncertainties” involved in a contractor's disclosing wrongdoing, since the Taft policy affords no guarantees that disclosure will enable the contractor to avoid debarment, suspension, or civil or criminal liability.

Actually, the policy announced by Taft regarding voluntary disclosure is not new. A number of contractors have already undertaken voluntary disclosures, and DOD has dealt with them under essentially the same ground rules outlined in the letter, albeit on an informal basis.

Even with the inherent risks, the concept of voluntary disclosure has a certain appeal to contractors, and for some time they have been pressing DOD to formally establish ground rules and points of contact for voluntary disclosure. Also, the Packard Commission recently recommended that defense contractors adopt a voluntary disclosure program, and that DOD institute a policy governing such a program.

Taft's letter, then, puts DOD's seal of approval on an ongoing practice and seeks to expand the use of that practice among the defense industry.

The letter directs contractors to refer matters involving potential criminal or civil fraud to DOD Deputy Inspector General Derek Vander Schaaf; matters not involving potential criminal issues are to be referred to the appropriate contracting officer or Defense Contract Audit Agency auditor. The focal point in the IG's office will be Michael Eberhardt, the Assistant IG for Criminal Investigations Policy and Oversight.

The details of the voluntary disclosure policy are contained in accompanying material to the letter. Among other things, the material indicates that DOD, through the IG's office, “will seek to expedite the completion of any investigation and audit conducted in response to a voluntary disclosure, thereby minimiz-

ing the period of time necessary for identification or remedies deemed appropriate by the Government."

However, the material states that DOD will recognize a contractor's voluntary disclosure only if it meets four conditions:

1) The disclosure must not be prompted by a contractor's realization that the underlying facts are about to be discovered by the government or reported to the government by third parties.

2) The disclosure must be on behalf of the business entity rather than an admission by individual officers or employees.

3) The disclosure must be accompanied by prompt and complete corrective action on the part of the contractor.

4) After disclosure, the contractor must cooperate fully with the government in any investigation or audit.

The IG's office has prepared a list of "key elements" of the information and cooperation it expects contractors to provide when making a voluntary disclosure.

Taft's letter to contractors regarding the voluntary disclosure policy, together with accompanying material and a list of the contractors to whom the letter was sent, appears in the text section.

Contract Policy

CODSIA SEEKS BAN ON 'PREMATURE' FIXED PRICE CONTRACTS

A major defense industry group has asked Deputy Defense Secretary William Taft to "restore the prohibition against premature fixed price type contracting to DOD Directive 5000.1."

The Council of Defense and Space Industry Associations (CODSIA), in an Aug. 1 letter to Taft, protested the services' demands for fixed-price type contracts for full-scale engineering development (FSED) coupled with priced production options for new defense systems. In CODSIA's view, there are too many inherent risks and uncertainties in new programs to employ the use of fixed price contracts.

The letter notes that the services' insistence on fixed price contracts for FSED, coupled with priced production options, marks a return to the so-called Total Package Procurement concept. DOD experimented with the concept in the 1960s, but rejected it in 1970, when then-Deputy Defense Secretary David Packard issued DOD Directive 5000.1, stating that cost-plus incentive contracts are the preferred approach for both advanced development and full-scale development of major systems.

The subsequent removal from the directive of the policy prohibition against early fixed-price contracts has had the effect of "opening the door for the Navy and the other Services to reinstate such practice, and thus to act as de facto [sic] DoD policy makers on a course which disregards the lessons of past mistakes," the letter reads.

The Navy has led the way in the practice, with its issuance last November of an Instruction that precludes a program from entering into full-scale development until the risks have been sufficiently reduced to enable contractors to commit to a fixed price

contract that includes a not-to-exceed price (45 FCR 359).

The CODSIA letter quotes the Packard Commission as stating that "fixed price contracts effectively can enshrine overstated requirements and understated costs in a legal arrangement that allows little or no flexibility for needed trade-offs between cost and performance."

The letter points out that the fact that companies have made individual business decisions to accept early commitment to a fixed price contract "should not be construed as endorsing such practice as a prudent modern-day acquisition policy for DoD. In most cases, these contractors have not agreed that the risk has been sufficiently reduced, but have recognized that the Government's superior bargaining position affords no other choice."

"The history of major defense programs is full of examples where competitive pressures have forced companies to commit prematurely to fixed-price type development contracts resulting in significant overruns, huge financial losses, delays, claims and long drawn-out legal battles," the letter reads.

Accordingly, CODSIA urges Taft "to act quickly to restore the prohibition against premature fixed price type contracting to DoD Directive 5000.1 and ensure its implementation by all of the Services."

Concern over Navy Spare Parts Policy

In an Aug. 4 letter to Taft, CODSIA expresses concern over the Navy's recent issuance of a spare parts refund policy and contract clause. CODSIA maintains that the Navy policy, which requires a contractor to agree in advance to a refund whenever the price of a part exceeds its intrinsic value after considering the impact of delivery terms and quantity, "appears to go far beyond" the policy promulgated by Defense Secretary Caspar Weinberger in November, 1985.

That policy (44 FCR 885) states that DOD will seek a refund from contractors whenever it believes a price paid is unreasonable.

CODSIA maintains that "the concept of reasonableness is broader and more equitable than intrinsic value and includes consideration of the circumstances, such as additional inspection, testing or design modifications, under which particular parts were produced."

CODSIA asks Taft to have the Navy's final rule and the DAR Council approved deviation withdrawn and recommends that a standard DOD-wide policy on spare parts refunds that conforms to the Weinberger policy be adopted.

Space Program

SENATE RESTORES \$556 MILLION IN DOD FUNDS FOR NASA

The Senate Aug. 7 voted 58-40 to restore more than \$500 million in Defense Department payments to the National Aeronautics and Space Administration for defense missions launched from the Space Shuttle.

The Senate Armed Services Committee had eliminated \$556.3 million in Air Force funding for fiscal 1988 defense shuttle payloads from the S 2638, the FY 1987 Defense Authorization bill (46 FCR 117). NASA



Text

DEPUTY SECRETARY OF DEFENSE WILLIAM TAFT'S LETTER TO 87 DEFENSE CONTRACTORS URGING VOLUNTARY DISCLOSURE OF POSSIBLE FRAUD, AND RELATED MATERIALS

24 Jul 1986

Dear

During the past few years, public and congressional interest in the Department of Defense management of its programs and operations has remained intense. This is nowhere more true than in the acquisition area. These issues continue to command our personal attention and involvement. Many of the problems in the acquisition area came to light because of audits and investigations conducted by the Department of Defense. We are committed to detecting and eliminating inefficiency and improper practices in our acquisition process; we believe that most Defense contractors have institutional commitments to these same goals.

To demonstrate this commitment, a number of major Defense contractors have adopted a policy of voluntarily disclosing problems affecting their corporate contractual relationship with the Department of Defense. These disclosures are made by the contractor, without an advance agreement regarding possible Department of Defense resolution of the matter. The contractors understand the Department's view that early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability. We will consider such cooperation as an important factor in any decisions that the Department takes in the matter.

I encourage you to consider adopting a policy of voluntary disclosure as a central part of your corporate integrity program. Matters not involving potential criminal issues should be presented to the appropriate contracting officer or Defense Contract Audit Agency auditor. Matters involving potential criminal or civil fraud issues should be directed to the Deputy Inspector General, Department of Defense.

A description of the Department of Defense program for voluntary disclosures is enclosed herewith for your consideration.

I believe that your corporate commitment to complete and timely disclosures of irregularities, regardless of their magnitude, is essential to increasing confidence in our ability to provide for the national defense effectively and efficiently.

Sincerely,
William H. Taft, IV

Enclosure

Department of Defense Program for Voluntary
Disclosures of Possible Fraud by
Defense Contractors

Background

Officials within the Department of Defense (DoD) have been approached by a number of contractors to determine

the conditions and agreements that might be structured with the Government if a contractor sought to disclose voluntarily information that might expose the contractor to liability under Federal statutes relating to criminal and civil fraud. From the Department's perspective, the voluntary disclosure of information otherwise unknown to the Government, and contractor cooperation in an ensuing investigation, offers a number of significant advantages:

- the Government is likely to recoup losses of which it might otherwise be unaware
- limited detection assets within the Government are augmented by contractor resources;
- consideration of appropriate remedies can be expedited by both DoD and Department of Justice when adversarial tensions are relaxed;
- voluntary disclosure and cooperation are indicators of contractor integrity; and
- contractors engaging in voluntary disclosure are more likely to institute corrective actions to prevent recurrence of disclosed problems.

Requirements on Contractors

Department of Defense recognition of a contractor as a "volunteer" will depend on four key factors:

1. The disclosure must not be triggered by the contractor's recognition that the underlying facts are about to be discovered by the Government through audit, investigation, or contract administration efforts or reported to the Government by third parties.

2. The disclosure must be on behalf of the business entity, in contrast to admissions by individual officials or employees.

3. Prompt and complete corrective action, including disciplinary action and restitution to the Government where appropriate, must be taken by the contractor in response to the matters disclosed.

4. After disclosure, the contractor must cooperate fully with the Government in any ensuing investigation or audit.

Defining DoD expectations of "cooperation" in any situation will depend on the individual facts or circumstances underlying the disclosure. However, DoD may enter into a written agreement with any contractor seeking to make a voluntary disclosure where such an agreement will facilitate follow-on action without improperly limiting the responsibilities of the Government. This agreement, which may be coordinated with the Department of Justice, will describe the types of documents and evidence to be provided to DoD and will resolve any issues related to interviews, privileges, or other legal concerns which may affect the DoD ability to obtain all relevant facts in a timely manner.

Department of Defense Actions

If a contractor is recognized as a "volunteer" based on the

preceding criteria, the DoD is prepared to undertake the following:

1. Identify one of the Military Departments of the Defense Logistics Agency as the cognizant DoD component to represent DoD for suspension/debarment purposes, i.e., to assess contractor integrity in light of the disclosures. Early identification of the appropriate DoD component will permit the contractor, from the outset of its cooperation, to provide relevant information relating to contractor integrity and management controls, e.g., internal controls, corrective measures, or disciplinary action taken as a result of the information disclosed.

2. The DoD, through the Office of the Inspector General and in cooperation with the Department of Justice, will seek to expedite the completion of any investigation and audit conducted in response to a voluntary disclosure, thereby minimizing the period of time necessary for identification of remedies deemed appropriate by the Government.

3. Advise the Department of Justice of the complete nature of the voluntary disclosure, the extent of the contractor cooperation and the types of corrective action instituted by the contractor. As always, any determinations of appropriate criminal and civil fraud sanctions will be the ultimate prerogative of the Department of Justice.

Commencing a Voluntary Disclosure

Since initial judgments as to appropriate investigative and audit resources will be necessary in any voluntary disclosure involving possible fraud, the initial contact with the DoD on fraud-related disclosures should be with the Office of the Inspector General.

While the Office of the Inspector General will be the initial point of contact for fraud-related disclosures, other DoD components are expected to be advised or involved as circumstances warrant. Besides the Office of General Counsel, DoD, and the appropriate suspension/debarment authority, other DoD components that expectedly would be advised, or involved, in voluntary disclosures are the Office of The Assistant Secretary of Defense (Acquisition and Logistics) and the Defense Contract Audit Agency.

The Office of the Inspector General that will serve as the initial point of contact is:

Assistant Inspector General for Criminal
Investigations
Policy and Oversight
400 Army Navy Drive
Room 1037
Arlington, Virginia 22202

- I B M
- Rockwell
- ITT Corp
- Dylallectron
- Grumman
- Burroughs
- Sanders Assoc
- Harris Corp
- G T E
- A T & T
- No Am Phillips Trust
- G A I Corp
- Lear Siegler Inc
- Eastman Kodak
- Marine Trans Lines Inc
- Atl Richfield

- ICI American Holdings Inc
- Western Electric
- United Technologies Corp
- Eastern Corp
- E-Systems Inc
- Textron Inc
- Duchossais Ind Inc
- Draper Charles Stark Lab
- Sundstrand Corp
- United Ind Corp
- Figgie Intl Holdings Inc
- The Singer Co
- R C A Corp
- Fairchild Ind Inc.
- Todd Shipyards
- Motorola
- Exxon
- Hercules Inc
- Phibro-Salomon Inc
- Pace Ind Inc
- Ashland Oil Inc
- The LTV Corp
- Allied-Signal Inc
- Computer Sciences Corp
- E I du Pont
- Northrop
- Texas Instr Inc
- Chevron
- Tenneco Inc
- Lockheed
- Emerson Electric
- Amerada Hess Corp
- Ogden Corp
- Morton Thiokol Inc
- F M C Corp
- Tracor Inc
- Sun Co Inc
- Mitre
- McDonnell Douglas
- Texaco
- Goodyear Tire
- T R W Inc
- Amoco
- Oshkosh Truck Corp
- Control Dat
- Litton
- Gemcorp
- Gen Dynamics
- Ford Motor
- Raytheon
- Martin Marietta
- Sperry
- Congoleum
- Loral Corp
- Aerospace Corp
- Teledyne
- Rolls-Royce
- General Motors
- Honeywell
- Mason & Hanger-Silas Mason Co
- Penn Central
- Mobil Corp
- General Electric
- B D M Intl Inc
- Boeing
- Logicon Inc

- Coastal Corp
- Caltex Petroleum
- Gould Inc
- Day & Zimmerman Inc
- Hewlett-Packard

KEY ELEMENTS IN CONTRACTOR VOLUNTARY DISCLOSURES RELATED TO FRAUD

In order for a voluntary disclosure of improper or illegal practices to be truly effective, and in order for the contractor and DoD to be completely assured that these practices have been fully identified and rectified, it is essential that any internal examination undertaken by the contractor addresses certain important issues. The contractor should be prepared to share information regarding its resolution of these issues as part of its disclosure to DoD.

A. Nature of the Improper or Illegal Practice

A full examination of the practice should be conducted to include:

1. Source of the practice (e.g., lack of internal controls; circumvention of corporate procedures or Government regulations).
2. Description of the practice, to include:
 - a. Corporate divisions affected.
 - b. Government contracts affected.
 - c. Detailed description as to how the practice arose and continued.
3. Identification of any potential fraud issues raised by the practice and relevant documentation.
4. Time period when the practice existed.
5. Identification of corporate officials and employees who knew of, encouraged or participated in the practice.

6. Estimate of the dollar impact of the practice on DoD and other Government agencies.

B. Contractor Response to the Improper or Illegal Practice

1. Description of how the practice was identified.
2. Description of contractor efforts to investigate and document the practice (e.g., use of internal or external legal and/or audit resources).
3. Description of actions by the contractor to halt the practice.
4. Description of contractor efforts to prevent a recurrence of the practice, (e.g., new accounting or internal control procedures, increased internal audit efforts, increase supervision by higher management, training).
5. Description of disciplinary action taken against corporate officials and employees who were viewed as culpable or negligent in the matter, or who were viewed as not having exercised proper management responsibility.
6. Description of appropriate notices, if applicable, provided to other Government agencies, (e.g., Securities and Exchange Commission and Internal Revenue Service).

C. Conclusion

1. List and description of supporting investigative, audit and legal information to be provided to the Government as part of voluntary disclosure, including reports of interviews, audits and audit working papers.
2. Assurance that contractor is willing to reimburse Government for any damages suffered, including restitution and payment of Government costs to resolve the matters disclosed.
3. Assurance of contractor's full cooperation with Government audit/investigative efforts to resolve contractor's voluntary disclosure information, to include access to corporate records, premises and personnel.

AMENDMENT OFFERED BY REP. NICHOLAS MAVROULES TO HR 4438, THE FY 1987 DEFENSE AUTHORIZATION ACT

Amendment offered by Mr. MAVROULES: Page 182, strike out lines 16 through 22 and insert in lieu thereof the following:

"(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted—

"(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a representative of the contracting officer designated by the contracting officer for the purposes of the negotiation of the contract); or

"(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

Page 203, after line 4, insert the following new subsection (and redesignate the succeeding subsection accordingly):

"(e) JUDICIAL REVIEW.—

"(1) RIGHT OF REVIEW.—(A) A member of an armed force aggrieved by a final order of the Board may obtain judicial review of the order by filing a petition for review before the end of the 60-day period beginning on the later of—

"(i) the date the member received notice of the order of the Board; or

"(ii) the date on which the member was

deemed to have exhausted administrative remedies under subsection (d)(3).

"(B) A petition for review under subparagraph (A) shall be filed with the United States Court of Appeals—

"(i) for the circuit in which the member resides;

"(ii) for the circuit in which the member is stationed; or

"(iii) in the Court of Appeals for the District of Columbia.

"(2) REVIEW OF RECORD.—With respect to any case for which a petition for review is filed under paragraph (1)(A), the court—

"(A) shall review the record; and

"(B) in any case in which it determines that the record fails to resolve significant issues of fact, may refer the case to the appropriate United States district court for a hearing de novo.

"(3) STANDARD OF REVIEW.—The court shall set aside any order of the Board that, upon completion of a review under paragraph (2), is determined to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or

"(B) not supported by substantial evidence.

"(4) ATTORNEYS FEES.—If, upon completion of a review under paragraph (2), the court

finds that the claim of the member is meritorious, the court shall award such member reasonable attorneys fees and costs.

Strike out section 923 (page 212, lines 14 through 19) and redesignate the following sections accordingly.

At the end of title IX of division A (page 214, after line 18), insert the following new sections:

SEC. 925. CONFLICT-OF-INTEREST IN DEFENSE PROCUREMENT.

(a) IN GENERAL.—(1) Chapter 141 of title 10, United States Code, is amended by inserting after section 2397a the following new sections:

"§ 2397b. Certain former Department of Defense procurement officials: limitations on employment by contractors

"(a)(1) Any person—

"(A) who is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

"(B) who, during the two-year period preceding the person's separation from service in the Department of Defense, participated personally and substantially, and in a manner involving decisionmaking responsibilities, in a procurement function with respect to a contract through contact with the contractor,

Helm said DOD supports the concept of a two-year budget and said he is "optimistic" that Congress will go along with the idea.

The main advantage of a biennial budget is to increase program stability for major systems, Helm said.

He conceded that "accuracy is going to be affected somewhat" by having to forecast inflation three years in advance—the budget is prepared nine months to a year before the start of the year in which it takes effect—but said, "I don't see it as a problem."

Helm said that it is in the operations and maintenance area where the greatest uncertainties are and it is in this area where adjustments may have to be made after the two-year budget is in place.

Helm noted that putting DOD on a two-year cycle will require the cooperation of both the Armed Services and Appropriations Committees. Otherwise, a situation could arise in which there would be a two-year authorization but a one-year appropriation, or vice versa.

The expectation is that the first year of the two-year cycle would be devoted to drafting a budget, leaving the second year for committee oversight hearings.

Helm would not reveal what the budget request for FY 1988 and 1989 is, although he did say that it calls for a 3 percent after inflation increase in each of those years.

Neither did he indicate whether DOD had decided to base the FY 1988 budget request on the Administration's revised FY 1987 request of \$299 billion in budget authority or on the congressionally-approved level of \$289.6 billion. Using the revised budget forecasts recently issued by OMB, a 3 percent increase would translate into \$318.4 billion for the national defense function in FY 1988 and \$338.8 billion in FY 1989.

Apart from mapping out a committee structure and agenda, Nunn said he will be devoting time over the next few weeks to deciding whether to seek the Democratic nomination for President. Nunn has been frequently mentioned as a possible presidential or vice presidential candidate.

Nunn, 48, told reporters he is "not leaning toward that direction now," but added that he will make his decision within the next few weeks. In deciding whether to run for President, Nunn said a person ought to consider whether he can make "a unique contribution" to the country.

The three-term senator was elected to the Senate in 1972. His current term expires in January 1991. Nunn received his law degree from Emory University in 1962. The following year, he served as counsel to the House Armed Services Committee and, after that, he was in private law practice. From 1968 until 1972, he was a Georgia state representative.



JUSTICE DEPT. DECIDING ITS POLICY ON DOD'S VOLUNTARY DISCLOSURE PROGRAM

The Department of Justice is reviewing the Defense Department's policy encouraging contractors to voluntarily disclose procurement improprieties, and expects to decide by the end of the year what Justice's

approach should be in implementing it, FCR has learned.

Deputy Secretary of Defense William Taft, who last July urged defense contractors to voluntarily disclose evidence of possible wrongdoing (46 FCR 801, 807; 46 FCR 273, 292) has asked for Justice's views, senior Justice officials told FCR.

The Department's comments will focus on how the prosecutors should respond to contractors' voluntary disclosures, a Justice Department spokesman said Nov. 14.

"We support the program," another Justice official said, but added that DOD's voluntary disclosure program "is not an amnesty program."

Meanwhile, Defense Procurement Fraud Unit chief Morris Silverstein, speaking at a Nov. 12 seminar in Washington D.C., stated that from a prosecutor's perspective, voluntary disclosure by a contractor should be only one factor in deciding whether a fraud indictment should be pursued.

Scope of DOJ's Review

DOD's voluntary disclosure policy was set forth in a letter from Taft to 67 major defense contractors earlier this year (46 FCR 273, 292). Voluntary disclosure, full cooperation, and complete access to necessary records are strong indications of contractor integrity even in the wake of disclosures of potential criminal liability, the Deputy Secretary observed, adding that DOD would consider cooperation as an important factor in "any decision that the Department takes in the matter."

Speaking at a National Security Industrial Association seminar last month (46 FCR 807), Taft concluded that the voluntary disclosure policy was needed to assure that contractor-discovered problems are "dealt with properly—consistent with the law and our interest in a speedy return to the high standards essential to public trust." It is not meant to be a system for excusing contractors from responsibility for past improprieties," he declared. In addition, he pointed out that voluntary disclosure would be made known to the Justice Department for their use in deciding "what actions would be necessary."

Justice Department sources confirmed last week that Taft had requested the department's comments on the voluntary disclosure policy and DOJ's role in implementing it. "The matter is presently under review in the Criminal Division," one senior official told FCR Nov. 14.

There has been informal discussion about the policy between DOJ staffers and the Defense Inspector General's Office, according to another Justice spokesman. DOJ is serious about the program and intends to make it work, he stated. However, it is the Defense Department's program, the official emphasized, adding that Justice's comments would focus on implementation by DOJ.

Consequently, DOJ will likely not comment on debarment and suspension, and other issues which can be viewed as a Defense Department matters, he explained. Rather, DOJ will comment on such issues as what the prosecutor's response should be to voluntary disclosure by government contractors, he said.

Excerpts from the comments, which may be forwarded to DOD by the end of the year, will likely be made available to contractors, a DOJ source ob-

served, adding that the agency wanted to provide guidance to the defense industry. "Our comments are not going to be perfunctory."

Prosecutor's Perspective

Speaking at an American Corporate Counsel Association seminar Nov. 12, Defense Procurement Fraud Unit chief Morris Silverstein discussed the impact of the DOD voluntary disclosure policy from the prosecutor's perspective.

Noting that he was expressing his personal views, Silverstein said that voluntary disclosure should be only one of the factors in determining whether to prosecute a procurement fraud case. He then listed some of the other factors to be considered.

- The extent of the fraud, measured by dollar loss to the government or other indicia.
- Pervasiveness of the fraud, measured by the employees/departments involved: Was the fraud an isolated occurrence?
- Level of employees involved: Were senior corporate officials involved or was the impropriety the work of a sole, lower level manager?
- The existence of a corporate compliance program, with stringent procedures to prevent the conduct, that was implemented in good faith.
- The amount of discretion delegated to employees: There ought to be a mechanism for supervisors to ask how to charge particular questionable costs, he explained.
- The extent to which the contractor cooperated during the government investigation.
- The extent to which remedial action was taken: "Did the company discipline the violators or give them a bonus?" Silverstein also included restitution efforts and strengthened internal controls in this category.

A compliance program is "not just coming forth, it is prevention," Silverstein told the conferees.

Debarment Is a DOD Matter

Silverstein also told the gathering that DOJ would not act as "broker" in global settlements involving Justice, DOD and a contractor.

Contractors that wish to plead guilty in procurement fraud cases are going to have to independently resolve debarment and suspension issues with DOD, Silverstein explained after the conference. DOJ is not going to "go to DOD" for the contractor and recommend against debarment or suspension in order to preserve a plea agreement, he explained. "We are going to make the decision to prosecute—and will prosecute—even if the contractor may not resolve the [debarment/suspension] matter with DOD."

Consequently, a contractor who is considering a plea agreement will want to make sure that it will not be debarred or suspended *before* it enters into such an agreement, he added.

The Defense Procurement Fraud Unit, though part of DOJ, has been assigned attorneys, investigators and auditors from the Defense Department.

Guidelines for Voluntary Disclosure

Deputy Defense Inspector General Derek Vander Schaaf provided guidelines for voluntary disclosure. If the allegation is significant, the contractor should come first to the Inspector General's Office, he said.

"We'll inform the Defense Procurement Fraud Unit and put you in touch with the debarment and suspension line of authority so that you can establish present responsibility," Vander Schaaf said, adding that his office could not "protect" contractors from debarment without knowledge of the improper conduct.

Mere "administrative snafus," however, should be disclosed to the contracting officer, he added.

It is difficult to establish a voluntary disclosure policy in advance, McDonnell Douglas Corp. Vice President and General Counsel John Sant observed. McDonnell Douglas looks at a number of criteria in making disclosure determinations, including amount of money and number of employees involved, he noted.

Sant agreed with Vander Schaaf that matters involving potential criminal charges should be referred to the IG, and that the U.S. Attorney should be advised in special circumstances. For example, if the improper conduct involved kickbacks paid to subcontractors in southern California, the contractor should consider disclosure to the U.S. Attorney for the Central District of California, who has been conducting a major investigation in that area.

Creating Corporate Compliance Programs

The panelists also discussed the essential ingredients of a good compliance program. "I think that what has to be there is more than a 15-page standards of conduct," Silverstein commented. The good compliance program explains to employees what constitutes labor mischarging and defective pricing, he noted, adding that the contractor's program should provide a mechanism that allows employees to ask how to charge a questionable cost.

Vander Schaaf cited the ten-point compliance approach that has been developed by the National Security Industrial Association (46 FCR 807):

- Develop a code of corporate philosophy, i.e. that the company builds a good product at a fair price.
- Develop a code of conduct for employees.
- Update written policies and procedures.
- Improve the oversight function.
- Involve the employees; get their input, make sure they read the code of conduct.
- Increase training and education efforts; contractors may wish to target specific groups of employees or possible problem areas.
- Improve the internal audit function, by increasing the staff and instituting training in government contract accounting.
- Establish a corporate policy on access to records. Contractors should be aware that fewer types of documents can be withheld, and thus may want to generate documents with a view as to their possible disclosure to DOD.

- Establish a corporate policy on disclosure.
- Devote more resources to compliance reviews, which determine which policies are in need of improvement.

"If you have all ten of those, you'll be in good shape," Vander Schaaf commented.

Compliance remains the responsibility of the chief executive officer of each operating unit, United Technologies Corp. General Counsel Irving Yoskowitz observed. At United Technologies, each operating unit has a compliance officer, who reports to both the chief

executive officer and the corporate vice president for government contract compliance. Each unit also has a compliance audit team that performs audits on a continuing basis. The company also has updated its employee code of conduct, and has had a major accounting firm review the compliance controls in place at each operating unit.

Joseph Handros, Vice President and Deputy General Counsel for General Electric Co., sought to dispel the notion that a voluntary disclosure program is a "policeman operation."

It is important, he said, that employees "know the rules" and are educated as to their compliance obligations. Getting the message out to the GE employees has taken numerous forms, he said. The company has used plant newspapers, employee newsletters, memoranda from senior managers to lower-level supervisors, videotapes, training sessions, and even notes on vouchers and timecards to get the importance of compliance across, he emphasized.

Attorneys' Fees

PROTESTER ENTITLED TO FEES INCURRED IN RECONSIDERATION, PETITIONING FOR COSTS

The General Services Administration Board of Contract Appeals has authority to award attorneys' fees incurred by a protester in seeking reconsideration of a board decision or in connection with a petition for the costs of filing and pursuing the protest, the GSBCA rules.

However, the board declines to award proposal preparation costs to the protester, which had withdrawn its offer from consideration for reasons unrelated to the government's failure to maximize competition (Computer Consoles, Inc., GSBCA No. 8450-C (8134-P), 11/6/86).

The Department of Energy issued a solicitation for a major automated data processing system. The agency evaluated revised proposals, and chose one offeror—IBM Corp.—for final negotiations leading to an award. CPT Corp., one of the competing offerors, filed a protest with the board. Computer Consoles intervened in that protest.

In ruling on the protest, the board concluded that DOE's selection of one offeror for final negotiations violated the regulations (44 FCR 714).

DOE requested reconsideration, arguing that the board's decision had the effect of invalidating the Defense Department's four-step source selection process and the National Aeronautics and Space Administration's source evaluation board procedures (44 FCR 714). DOE contended that the selection procedure was consistent with the FAR's requirement for maximum competition.

Nevertheless, the board on reconsideration decided that DOE's alternative source selection procedure was "conspicuously bad" as applied to fixed price general purpose ADP contracts (45 FCR 370).

The board also noted that DOE's source selection official had discounted Computer Consoles' technical superiority without explanation, emphasizing that offerors had not competed on an equal basis. Accordingly, the board revised DOE's delegation of procurement authority, directing the agency to redetermine the competitive range to include those proposals to

include those proposals with a reasonable chance of being selected for award.

The GSBCA also instructed DOE to ensure that the original solicitation properly reflected its needs.

DOE then amended the solicitation to reflect its needs. Computer Consoles objected, charging that the amendment merely accepted a series of changes proposed by IBM. In dismissing this second protest, Administrative Judge LaBella concluded that issuance of the amendments was valid (45 FCR 827).

Meanwhile, DOE and Computer Consoles had filed to recover their attorneys' fees and costs in the CPT proceedings. The board denied DOE's request for fees and costs, chiding the agency for a lack of candor in presenting the facts to support its request (45 FCR 981).

Attorneys' Fees Awarded

However, the board now concludes, Computer Consoles is entitled to recover its attorneys' fees incurred in the CPT proceedings.

The Competition in Contracting Act authorizes the GSBCA to award fees and costs, once it determines that the challenged award violated statute, regulations, or the terms of a delegation of procurement authority, Administrative Judge LaBella notes.

Computer Consoles, as a successful intervenor, prevailed in the CPT protest, the board states. DOE had violated the applicable statute, regulations, and its delegation of procurement authority, the GSBCA points out, adding that Computer Consoles was prejudiced by these violations.

DOE conceded that the hourly rates charged by Computer Consoles' attorneys—which varied between \$60 to \$175 per hour—were reasonable. In addition, the agency generally did not object to award of those fees incurred before Oct. 3, 1985, when the reconsideration proceedings in CPT began.

However, DOE contended that fees incurred after that date were not allowable. The GSBCA's statutory authority to award the costs of filing and pursuing a protest is a waiver of sovereign immunity, and thus must be strictly construed, the government emphasized. Accordingly, fees and costs incurred during reconsideration of protest decisions and in connection with petitions for costs may not be awarded because neither action constitutes a "protest," the government maintained.

The board disagrees. DOE and CPT both requested reconsideration of the board's initial protest decision, Administrative Judge LaBella points out.

"In granting reconsideration, the board recognized that the abbreviated protest process under which the original decision was rendered was too restrictive, and the board therefore reopened the record to take in new evidence in order to adequately consider the issues on reconsideration," he states. These actions were not under Computer Consoles' control, the board stresses. Computer Consoles could not have ignored the reconsideration proceedings without risking a reversal of the initial ruling in its favor, the GSBCA emphasizes.

Citing *Schuenemeyer v. U.S.*, 776 F.2d 329 (CAFC, 1985), the board says that expenses incurred in preparing and filing a motion for award of attorneys' fees are reimbursable.

"We are not insensitive to the fact that the statute

00072
11-28-86

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

LAREDO, TEXAS 78040

CHAMBERS OF
JUDGE GEORGE P. KAZEN

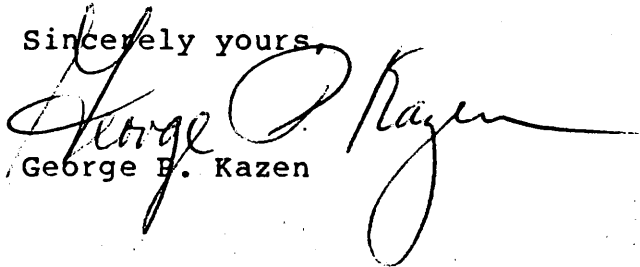
November 26, 1986

Mr. Paul Martin
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 440
Washington, D. C. 20004

Dear Mr. Martin:

Enclosed is our written submission of comments concerning the proposed sentencing guidelines. This paper will supplement our oral presentation on December 3. Thank you for your consideration.

Sincerely yours,



George P. Kazen

GPK/gsh

STATEMENT TO UNITED STATES SENTENCING COMMISSION
HEARING ON PRELIMINARY DRAFT SENTENCING GUIDELINES

WASHINGTON, D. C., DECEMBER 3, 1986

Submitted by

Hon. George P. Kazen
United States District Judge and
Southern District of Texas
President, Fifth Circuit
District Judges Association

Hon. Robert M. Hill
Judge, United States Court
of Appeals for the Fifth Circuit

Overview. These comments reflect the personal views and experiences of the author, but were shared with and endorsed by the District Judges of the Fifth Circuit at a November workshop during which the guidelines were discussed at length.

We are impressed with the scope of the guidelines and the issues which the Commission has attempted to address. We also appreciate your willingness to listen to all views with an open mind. We strongly believe, however, that the guidelines -- at least in their present form -- inappropriately attempt to resolve an issue as complex and varied as human life by an arbitrary, mechanical, mathematical exercise. We endorse these words of Professor Norval Morris, written in the Summer, 1979 issue of "The Judges' Journal" (ABA):

"Does the judge add up the numbers and say, within these numbers the sentencing commission tells me this is the right sentence? Many people are advocating this. I think it is a grave mistake. It gives a false precision of that which by its nature can never be precise. I much prefer the form of guidelines which are in the traditional common law form -- an effort, gradually over time, to define principle and purpose.

...This numerical system leads us into a false certainty that will in the long run skew the system. I observed this in a prison where the parole release date is done on a numerical system known to the prisoners, and they talk incessantly about these numbers, and the fact of the matter is that the numbers come out the same for very different people, and it would be much better if we did not pretend to that precision. In a difficult world, a squalid world, we cannot do good work, we can only do better work, and that is an important point as yet not understood."

The present guidelines attempt to quantify factors that cannot fairly be quantified with any real precision. Preliminary attempts to apply the guidelines to real pending cases have yielded quite severe prison sentences and have apparently made probation a rarity. Moreover, the sentences are especially severe when the lack of parole is considered. While the commentaries proclaim that only "serious offenders" are barred from probation, the determination of who is a "serious offender" does not turn on a careful evaluation of the defendant and the peculiar facts of the case, but rather upon the adding and subtracting of arbitrary numbers.

For example, in the offense of transporting undocumented aliens, an epidemic on the Mexican border and of growing national concern, the overwhelming majority of the persons caught driving the vehicles are themselves aliens who have entered this country illegally. They deny receiving direct monetary compensation and insist that they were attempting to "go north" to look for employment along with their fellow travelers. They allege to have volunteered to drive the vehicle in return for a free ride. While this story is probably not always true, it is often true. Under the guidelines, such an individual is receiving something "of value."

This automatically doubles the offense value. Then a series of completely arbitrary numbers are to be applied depending upon the number of aliens in the vehicle. Ten aliens equals 16, while 11 equals 20. In fact, however, the driver of the vehicle rarely has any say or control over the number of aliens that are placed into the vehicle with him.

The same problem exists in the drug guidelines. Again, completely arbitrary numbers are assigned entirely on the basis of the amount of the drug involved. Moreover these values are doubled for any prior drug conviction, apparently no matter its vintage.

Along the international border, the defendant is often not acting independently. Even if he is charged alone, he is frequently part of an international conspiracy trafficking between nations in whatever commodity is lucrative, be it drugs, people, clothing, jewelry, automobiles, etc. Typically a defendant is the classic "mule," a poorly educated, extremely poor male or female, often an alien, being used by others to haul something or someone at high personal risk with little compensation. Extremely lengthy prison sentences are frequently not the proper disposition for these types of cases. Many other illustrations can be given of the harshness of the present numbers. Undoubtedly you have heard this from many other witnesses.

We urge you to reconsider and considerably broaden the unrealistically precise numerical categories. In the property table (\$B251), the tax evasion table (\$C211), the fraud table (\$F211) and similar areas, expand and overlap the categories and provide for a range of points for each category. In other areas, let us not

pretend that we can numerically assess with precision the difference between an "extreme" injury and a "significant" injury or that all injuries fall within those two definitions. (§A251). It would also be more realistic to provide a percentage range for the general aggravating factor of psychological injury. The same comment applies to the attribution of a single, distinct numerical value to "severe," "permanent," and "serious" bodily injuries. (§§A222-224).

Application Instructions. The proposed method of arriving at the sentence is wooden and unnatural. While Chapter Three undoubtedly identifies many of the factors that a conscientious judge will consider in arriving at a sentence, no judge considers them in a lockstep fashion, taking each separate factor sequentially while adding or subtracting precise numbers for each factor.

It is imperative that the Commission mentally place itself in a real courtroom setting to evaluate this procedure. The defendant and his attorney stands before the tribunal of justice in a most profound and dramatic moment. The press and the public are frequently present. Sobbing relatives await the outcome with apprehension. Possibly a victim is present.

While the presiding judge has undoubtedly read the presentence report before entering the courtroom and has therefore been given the Probation Officer's views as to the various factors and how they should be scored, this is only one side of the picture. Even if the defense attorney has stated his objections in advance, the court only knows where the areas of dispute will be. Absent a binding plea bargain, there will clearly be areas of disagreement that can only be resolved in open court at the sentencing hearing.

We certainly have no objection to the judge's having to state clearly what conclusions he has drawn. Good judges should be doing this already. Thus it is entirely appropriate and beneficial to the defendant, the victim, the public, and the system for the judge to announce that the defendant is to be sentenced for the precise offense(s) contained in the count(s) to which he has been convicted by a jury or pled guilty. The judge would then announce that the basic offense has been aggravated by certain defined factors, such as use of violence, injury to the victim, amount or value of property or contraband involved, and that therefore the guidelines indicate a certain sentence for that offense. In effect, this would be the fixing of a suggested sentencing range at the conclusion of Chapter Two. The judge would then address the infinitely varied factors in Chapter Three in general terms, finding whichever aggravating and mitigating factors exist. The judge would then conclude that the sentence should be either within, above, or below the guidelines, specifying which of the varied Chapter Three factors were deemed to be more significant than the others.

The procedure dictated by the present guidelines, however, would be intolerable and a disgrace to the criminal justice system. Because there are so many distinct factors which apparently not only must be considered but must be quantified and factored into the formula, the court would be forced to make a whole series of detailed mathematical calculations, adding, subtracting and multiplying by fractions. Moreover as will be illustrated hereafter, while the steps are sequential, the starting point for any given calculation is sometimes the cumulative total but sometimes is a

figure derived several steps earlier. This raises the unseemly spectacle of the court, prosecutor, and defense attorneys, with calculators and scratch pads in hands, juggling various totally arbitrary numbers to reach a conclusion. Like a bookkeeper, or even a quiz show host, the judge finally reaches the grand total, looks up the guideline table, and out pops the sentence. This must not be allowed to happen. This proposed cure is far worse than the perceived problem.

In addition to this philosophical objection to the application instructions, we offer the following specific comments. When a defendant is actually convicted of more than one count, the manner of calculating his sentence on each count is most confusing. On pages 9-10, the application instructions indicate that once an offense value is established for a given offense, the steps are repeated "for each offense of conviction." Then when "all offenses have been scored," you total the offense value.

What is done then? Is the resulting sentence applied to one count or to all counts? If to one count, how then is the sentence calculated for the other counts? Are they concurrent or consecutive? What of the typical narcotics case where the defendant is found guilty of importation, possession, and distribution arising out of the same underlying fact situation? Are the values for each still added?

The instructions are also confusing as to the application of the criminal history. By the time the judge has reached Step 10, the base offense value has already been increased or decreased by the cross references and by the factors in Parts A & B of Chapter

Three. Then in Step 10, the judge is directed to make an adjustment for criminal history. At that point, however, the table on page 131 refers back to the offense value from Chapter 2, apparently without whatever modifications were already made under Chapter 3.

Is the discount in §A314 mandatory? The commentary explains that this section applies to an individual who has a limited role in an offense that is planned, directed and controlled by another person or persons. What if this defendant, notwithstanding his subservient role, is privy to vital information which could unlock the door to a major conspiracy, but he refuses to divulge any information? Must he be given a discount? Can he even be given an enhanced sentence under these facts?

In §B311, the court may increase the total offense value if the defendant has "knowingly and intentionally offered untruthful testimony concerning a material fact." If a defendant never formally testifies under oath but gives his version of the offense to the probation officer prior to sentencing and/or gives a similar version to the court at the time of sentencing, can the court increase the sentence upon a determination that the defendant's version is not thought to be truthful?

Section §B321 first speaks in terms of reducing the sentence, as distinguished from reducing the sanction units, but then provides for a cap phrased in terms of "total offense value from Chapter 2." Both the reduction and the cap should be based on the same reference point. Also while the cap is phrased in terms of the offense value from Chapter 2, the court by that point may have already applied a modification of that value, as for example in §A314.

The discounts provided for cooperation (page 125) are too inflexible. Generally, at least in these days, most cases involving exceptional cooperation under life threatening circumstances are narcotics cases. Defendants who offer this assistance have usually been caught in sizeable transactions and often have criminal records. Under the current guidelines, their offense values would be extremely high. It is not realistic to believe, certainly not in our experience, that such individuals would risk their lives for the government and still face 10 to 15 years in prison without parole.

At least in drug cases, prior drug convictions cause the base offense value to double. The same prior convictions then are used in Chapter Three to further enhance the sentence. An extreme range of circumstances lies beneath every drug conviction. It would be unnecessarily harsh in many cases to use the same prior conviction to enhance the sentence at both ends.

At page 129, it is stated that there is no decay factor for crimes involving "the distribution of drugs." Assuming this exception should apply, which is debatable, why is it limited only to the distribution of drugs? Why not possession or possession with intent to distribute? What about a prior drug case reduced to a charge of using a communications device to facilitate a drug transaction?

Criminal History. Calculating the effect of the criminal history score further illustrates the vice of the present guidelines. The Commission is entirely correct in stating at page 130 that "no formula exists for determining how much a criminal record should matter when fixing blame." The Commission

nevertheless proceeds to create formulas for doing so. The proposed formulas provide sharp enhancements in high base offense cases, even when the criminal history score is modest. In Texas, for example, the offense of driving while intoxicated carries a maximum sentence of more than a year. Assume an offender with a prior DWI, given three days to serve. If he is before the court as a "mule" in a case involving 25 grams of cocaine, his score is boosted by 14 points, netting a substantial increase in hard jail time. A false notion of mathematical precision thus yields an unfairly harsh result in the name of consistency.

A criminal history score for "drug abuse" should be eliminated. It may be true that drugs are more likely to be used by people who commit crimes. It may be true that people who abuse drugs commit crimes at a higher rate than others. It may be true that past drug use predicts future criminal behavior. Nevertheless you punish the crime, not the fact of being a drug abuser. Statisticians could probably also show that more crimes are committed by persons from certain minority groups, certain income levels, children of broken homes, victims of child abuse, etc. Nevertheless you would not punish the offender for having that background. Moreover, what is an "abuser"? Is it someone who has been in a methadone program? Someone who has voluntarily sought rehabilitation? Someone who has ever used a substance?

With respect to the decay factor, it is much more preferable to focus on a designated continuous period prior to the offense in question rather than focusing on intervals between prior convictions.

Juvenile sentences should also be counted if they are for essentially the same crime for which the offender is now being sentenced, especially if a reasonable decay factor is employed.

Modified Real Offense Sentencing. This approach is clearly superior to the pure charge-of-conviction method for the reasons discussed in the commentaries. However, some of the distinctions made in the examples on pages 15-17 are problematical.

Example number 3, for instance, indicates that if a defendant has gone on a bank robbing spree in several counties, is indicted for each bank robbery, but strikes a plea bargain to plead to one count, all the other bank robberies should be disregarded if they are "not in furtherance of a conspiracy" and if they are "unrelated." Whether the defendant worked alone or conspired with others is a curious basis for determining whether or not to count the other robberies. Further, if it is clearly established that the same defendant robbed several banks over a short period of time, what else is needed to make these incidents "related"? Similarly, if an offender sells a quantity of narcotics to undercover agents on several occasions over a period of time, the total facts should be considered, even if they are the subject of separate counts and the defendant pleads to only one of them.

The example of the cocaine dealer having an illegal weapon is also curious. The commentary says that the weapon will be disregarded if no indictment or conviction results from the seizure of the weapon. What if, as is much more likely the case, the indictment does charge possession of the illegal weapon in a separate count but then, like the bank robber, the defendant pleads

to one cocaine count and the weapons charge is dismissed? Can the weapon then be considered by the court? If so, the result seems inconsistent with the case of the bank robber? If not, however, it is clearly an unrealistic result. The combination of dealing in hard narcotics and possessing illegal weapons is definitely significant. Would it make any difference if the weapon were in the defendant's automobile instead of in his apartment? Would it matter if it were in the trunk of the automobile rather than resting beside him in the front seat?

In example 8 on page 17, the Commission would allow consideration of 20 stolen, forged checks when the defendant pleads guilty to conspiracy to steal and forge only one check. The commentary suggests that this is true because of the conspiracy element. What difference does that make? Assume an identical case where the defendant has clearly stolen, forged and cashed 20 checks but pleads guilty to only one. If this defendant were acting alone and not in conspiracy with another, would the trial judge then disregard the other 19 checks? The logic of this is questionable.

In the typical embezzlement case, an employee engages in a series of transaction over a period of time wherein the books and records of the employer are manipulated. Assume these transactions are the subject of several counts in an indictment and the defendant ultimately pleads guilty to one count. Some interpret the guidelines to mean that the offense values would not be aggregated for each count but that the sums of money involved in each count would be aggregated in order to determine the dollar value for use of the property table on page 78. Others, however, read the

guidelines to mean that the amounts cannot be aggregated unless the defendant is convicted of the other counts. At the least, the matter is confusing. There is again the issue of consistency. Why would we aggregate the total number of illegal transactions committed by the embezzeler but not do so for he who steals checks or robs banks?

In summary, it is essential that the trial court be able to consider all pertinent facts in the case. Whether or not these facts are actually used to calculate the basic offense value is not as important as whether it is clear that they can be used to go above or below the guidelines. The arguments against the real criminal conduct method are not impressive. The main argument is that of the "problem of proof." Unless these guidelines are drastically modified, trial judges are doomed to a mini-trial for each sentencing hearing anyway. The hearing might as well determine the whole truth without artificial limitations. The other argument is the potential increase in not guilty pleas, but this result will likely occur anyway without a liberal approach to plea bargaining. Conversely, if full plea bargaining continues, the defendant can significantly limit his exposure through charge bargaining. He should not have the further advantage of requiring the court to ignore the true facts in the case.

Plea Bargaining. At least in any jurisdiction with a substantial criminal docket, the system would cease to function without plea bargaining. Regardless of one's personal philosophy on that subject, it is a fact of life as certain as death and taxes. Consider these statistics from three divisions in the Southern

District of Texas. From January 1986 through October 1986, only ten months, the cases of 420 defendants have been concluded in Laredo with one judge, 733 in Brownsville with two judges, and 260 in Corpus Christi with one judge. If each of these defendants, or even a substantial number of them, had invoked all of their available procedural rights, including a not guilty plea and a jury trial, the criminal justice system would become paralyzed. There would not be enough judges, prosecutors, marshals, courtrooms or funds to prosecute these cases. Realistically, not all cases are equal in the quantity and quality of proof available. Not all cases are of equal importance in the overall administration of the criminal justice system. Effective plea bargaining can help insure that limited resources are utilized for the greatest effect.

When plea bargaining is an available option from the outset, the current rules provide a healthy system of checks and balances between the court and the parties. When rigidity enters in, the system goes askew. An incident occurring ten years ago in the Corpus Christi Division, documented by the attached newspaper articles, illustrates the point. The resident judge shunned plea bargains and generally refused to grant probation. He thus accumulated a backlog of almost 300 pending jury trials. During a week that he was on vacation, a colleague was assigned to his court and disposed of over 100 cases in three days through plea bargaining. That solution was hardly ideal. It illustrates, however, what measures become necessary when the criminal justice system finds itself collapsing under its own weight.

Similar problems resulted during the era of the statute which provided for a minimum, mandatory five-year prison term for marihuana offenses regardless of the circumstances or quantities involved. The general inappropriateness of this statute was so clear to prosecutors, judges and defense counsel that it was uniformly circumvented. Time and again defendants pled guilty to the so-called "tax count" in return for dismissal of the mandatory counts. Even when the United States Supreme Court indicated that the marihuana tax statute could not be constitutionally applied, defendants continued to bargain for that count and simply waived their Fifth Amendment rights. The defendants receiving the minimum mandatory sentence were generally those whose attorneys could not negotiate a better plea bargain or, more likely, those who truly believed themselves innocent and insisted upon a jury trial. Thus the rigidity of the system itself created sentence disparities of monumental proportions.

Without plea bargaining as a safety valve, the present guidelines are destined to straitjacket the system. With a reasonably competent attorney, a future defendant could predict his sentence with some accuracy before he enters a plea. The sentence would, more than likely than not, involve a substantial prison sentence without parole. The defendant would be more likely to take his chances with a jury trial. At the same time, as more and more defendants do this, they will radically increase the pressure on the prosecutor and the court. A prosecutor facing 20 or more jury trials, realizing that similar numbers will be added each month, will rather quickly find the need to plea bargain extensively. If

no other option is available, the prosecutor would turn to charge bargaining. At least in the Fifth Circuit, the prosecutor has been held to have almost plenary control over what charges are initially filed and what charges are prosecuted, dismissed or reduced.

If the sentencing guidelines would attempt to strip the prosecutor of the power to reduce charges once filed, the bargaining process would shift from post-indictment to pre-indictment stage. Clearly no sentencing guidelines could tell the prosecutor what charges to file in the first place. If the prosecutor realizes that once he files the charges they somehow become chiseled in granite, and he will then be locked into a rigid system with which the resources of his office cannot cope, he will simply make the necessary adjustments before the charges are filed.

We strongly urge the Commission not to attempt to disallow or restrict the ability of the parties to enter into a plea bargaining. The present procedure, particularly as in Rule 11(e)(1)(A) and (B), Fed. R. Crim. P., contains a prudent system of checks and balances among the prosecutor, defense attorney, and the court. The court could be directed to ask the parties to explain what motivated the particular bargain, and the court could then state whether those reasons were deemed satisfactory. More importantly, the court could be asked to find whether the particular bargain was an "unwarranted" decision from the guidelines, thus satisfying the Congressional concern that no such deviations be allowed.

Probation. The proposed option 1 on page 142 further illustrates how this mechanical, numerical system has distorted the true goal of fair sentencing. To even propose "mandatory

satisfaction of all sanction units" really means that there is no sentencing range. Instead sanction units would be converted into a maximum sentence that must be served in one form or another. This comes after a series of totally arbitrary numbers have been added, subtracted and multiplied and then applied to an equally arbitrary mathematical table.

The permissive satisfaction option is obviously an improvement but not much. Instead why not assign sanction values to non-imprisonment techniques and then allow these to be used in lieu of custodial imprisonment? What ever happened to probation? We have spent years developing a highly professional probation office, refining techniques such as community service, halfway house confinement, home curfew, restitution, substance abuse counseling, etc. Now the Commission speaks only of probation "in addition" to other sanctions and allows outright probation only for the rare offender whose sanction units total less than 14. We urge you to reconsider. We submit that Congress never intended this wholesale abandonment of probation. Granted the enabling legislation is internally inconsistent in many respects, nevertheless it provides that the guidelines shall be formulated "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." 28 U.S.C. §994(g). The Congress also specifically provided that a defendant may be sentenced to a term of probation unless the offense is a Class A or B felony or unless probation is otherwise expressly precluded. 18 U.S.C. §3561(a). Further, the Congress specifically directed that a series of factors be considered to determine whether to impose a term of imprisonment. §3582.

We submit that it is not inconsistent with the congressional intent to provide that if the court decides an offender must be imprisoned, a suggested range of imprisonment is appropriate, but that the court may alternatively decide not to imprison the defendant at all. The court is then provided a wide range of non-custodial restrictive conditions that it may impose and, of course, if these provisions are violated subsequently, the defendant will then serve the guideline sentence.

§C324. This provision is confusing. The first part apparently contemplates a situation where the offender fails to appear at some time during the proceedings, but presumably is apprehended prior to sentencing. In that circumstance, it is obviously reasonable to allow enhancement of the sentence for such conduct. The second portion, however, is less clear. It apparently refers to post-sentence conduct, presumably a defendant granted permission to voluntarily surrender to the penal institution and who fails to do so. The section states that this individual shall be "sentenced to a mandatory consecutive sentence which may exceed the guideline range." For what offense? For the offense to which he has already been sentenced? What is the mechanism for amending and enhancing a prior sentence? Do you contemplate the filing of a new charge with a new conviction for failing to report? If so, what are the guidelines for that offense? In that connection, I do not see any guidelines for the offense of escaping from custody, 18 U.S.C. §751, a not uncommon occurrence.

The Cost. Has anyone endeavored to realistically evaluate the costs of implementing this system? Is the Congress prepared to build many new prisons and quickly? These guidelines not only

dictate far more prison terms, but also lengthier terms. Surely the plight of the Texas prison system is well known and probably not unique. The prisons were horrendously overcrowded and a federal court ordered drastic changes. Everyone wanted lengthy prison sentences but few proposed spending tax money to build prisons and even fewer were willing to vote for it. The result is a revolving door process where prisoners with lengthy judicial sentences are sent out the back door shortly after they come through the front door.

Absent effective plea bargaining, far more defendants will plead not guilty and those that plead guilty will necessarily demand evidentiary hearings to challenge every arguable interpretation of the guidelines and the calculation of every factor in the formula. Can we seriously expect the Congress to provide additional judgeships anytime soon to meet this situation? What about prosecutors? At least in the Southern District of Texas, with an exploding criminal docket, the United States Attorney's Office is still under a hiring freeze and unable to fill several vacancies. Appeals will mushroom. Will anyone calculate the effect on court reporters having to transcribe a greater number of records? What of the appellate dockets? Appeals will not be limited to sentences imposed outside the guidelines, but will include appeals on the question of whether the guidelines were correctly interpreted and whether there was sufficient evidence to support the findings underlying the application of the guidelines. This is clearly true if various separate factors will directly cause an increase in jail time. The recent case of State v. Bianco, 511 A.2d 600 (1986) reflects that in the State of New Jersey, appeals from allegedly

excessive sentences have created such an appellate backlog that the Supreme Court was forced to initiate a pilot program eliminating all written briefs. We are told that in five years, a guideline system has generated over 300 appellate decisions in the State of Minnesota. What provisions will be made for these developments?

Miscellaneous. We realize that the sentencing reform legislation is binding on the Commission and cannot be modified by guidelines. Nevertheless there are a few features of the legislation that merit comment, in the event future amendments are contemplated. First, it is truly lamentable that the new legislation eliminates the "split sentence" provisions of 18 U.S.C. §3651. This is a widely used technique that allowed the defendant to sample prison life and then remain under the threat of a lengthier return if he did not stay out of the trouble for several years. The judiciary will lose a valuable tool.

The provisions of §3553(c) are simply ludicrous. Once the judge goes through the various mathematical gyrations to reach the result on page 140, he has presumably considered most everything there is to consider. He then finds that he must impose a prison term of, for example, not less than 120 months and not more than 150 months. What possible further reasons could he articulate for selecting 124 versus 128 versus 132 versus 136 months? It makes a mockery of the system to require judges at this point to incant ritualistic phrases pretending that there is some precise objective reason to choose one numerical figure over another.

It is also unfortunate that in a case of multiple counts, a defendant can no longer be sentenced to confinement on one count

followed by a period of probation on another count. This too has proved an effective tool in the past. However, the supervised release provisions of §A413 might be the same procedure under a different title.

Summary. The concept of sentencing guidelines in federal court is a revolutionary one. The legislation dictating these guidelines sends mixed signals. It calls for much certainty and also much discretion. There may be some science to sentencing but there is unquestionably much art. The statute was promulgated to remedy a perception that criminal sentencings were disparate and therefore unfair. Let us not substitute that perception for the far more sinister perception that the sentencing of a human being can be simplified into a mathematical exercise as easily performable by a clerk as by a judge. Will the system really be improved by a perception that the judge was not actually sentencing this defendant for these facts but was instead being controlled by tables and calculators?

We submit that the abolishing of parole, the availability of appeals from sentences, and the requirement that specific articulable reasons for every sentence be stated in open court would alone be a significant development. Let us proceed carefully from that point. We find the effort to place numerical weights on the offense itself less objectionable than quantifying the personal factors under Chapter Three, although even under Chapter Two we urge broadening of the tables and the methodology of calculating enhancement factors. We then urge that the Chapter Three factors be stated in true guideline form, spelling out those factors which

could be deemed aggravating and those which could be deemed mitigating. At sentencing the judge would be expected to tell the defendant which of the factors has caused the court to either stay within the guidelines or go outside them.

Finally, probation should be considered a sentence in itself, again with specific reasons being given for its use and with a variety of restrictive, but non-custodial, conditions being encouraged.

Judge runs 'bargain days' at courthouse

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"Welcome to bargain days," one person told a visitor today as he entered the federal court house. What he was referring to was probably the largest number of federal cases ever disposed of here in a three-day period, most of them on probationary terms.

U.S. Dist. Judge Robert O'Connor of Laredo has been sitting on the federal bench usually occupied by Federal Judge Owen Cox for the past three days. He has been here since Tuesday and leaves today.

In that time period, O'Connor has disposed of more than 100 cases, about a third of Cox's pending case workload. All have been guilty pleas. Cox had 297 cases at the end of April.

"He's a great judge," a defense attorney said. "We've had clients coming down from Nebraska, Alabama, Georgia."

One observer said the defendants being sentenced today were those who couldn't get down here earlier.

"The word has been out on the grapevine," another attorney said two days ago. "Lawyers have been telling their clients to come on down while the getting is good."

Cox and O'Connor have radically divergent philosophies on sentencing. Cox, who is the resident judge, does not agree to



plea bargaining involving sentencing. No one knows what the sentence will be until Cox pronounces it.

O'Connor, however, will agree to certain sentences as part of a bargaining agreement between defense attorneys and the government prosecutor.

In two days, Tuesday and yesterday, O'Connor disposed of 106 cases. Only 15 of those cases involved any prison time; the rest, 91 cases, received probation. He also assessed more than \$30,000 in fines, a procedure rarely used by Cox.

"He's in the avant-garde," a knowledgeable observer said of O'Connor's method of handling cases.

There has been some grumbling from the regular members of the courthouse staff, feeling perhaps that O'Connor's bushload disposal of cases is making their own boss look bad in comparison.

Most other federal judges in the Southern District, one ob-

server said, don't agree with O'Connor's sentencing procedures.

The observer pointed out that there is a provision in the federal rules for a judge to either accept or deny a proposed sentence agreed on by the defense and the prosecution. "Most of the other judges act like it (the rule) doesn't exist."

"People are afraid of the unknown and will not plead guilty if they don't know what they're going to get," one attorney said.

Each federal judge usually has his own entourage when he visits other courts but O'Connor has had a special government prosecutor here from the Rio Grande Valley. Some observers say the special prosecutor is here so that the resident U.S. attorney won't be "compromised" in dealing with defendants later who also want the seemingly light sentences and quick disposal.

One attorney said that of the 115 cases sentenced as of noon today, 78 per cent were fair and just sentences.

Cox has been on vacation and recently attended a judicial conference out-of-state.

Some young members of the courthouse today said they are "stunned" and "overwhelmed" by the bushload disposal of cases.

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Visiting judge gives probation to 60

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By BARRY BOESCH

Staff Writer

A visiting judge engaged in a little spring cleaning in federal court yesterday, accepting guilty pleas from 68 defendants and assessing more than \$82,000 in fines.

U.S. Dist. Judge Robert O'Connor of Laredo gave 60 defendants probation ranging from two to five years in mostly drug-related cases.

Most of the defendants receiving probation were persons caught at the U.S. Border Patrol checkpoints carrying marijuana.

O'Connor is presiding in federal court here this week while U.S. Dist. Judge Owen Cox is on vacation.

Included in the parade of guilty pleas were a former Duval County official charged with tax eva-

sion and a Starr County truck owner charged with two counts of marijuana smuggling.

Former Duval County Assistant Treasurer Silvestre Gonzalez received three years probation after pleading guilty to tax evasion. He was charged with not reporting income he allegedly embezzled from the county.

Reynaldo Alvarez pleaded guilty to marijuana smuggling and received probation and a \$15,000 fine, the largest fine O'Connor assessed yesterday.

Convicted South Texas drug czar Fred Brulloths Jr. was scheduled to testify against Alvarez in Brulloth's last case as a government witness.

Alvarez got a better deal from O'Connor than he did from Cox. He pleaded guilty earlier before

Cox with the understanding he could withdraw his plea if Cox did not grant probation.

After reading a pre-sentencing investigation, Cox said he could not give Alvarez probation. Trial had been set for June 1.

Though O'Connor granted probation to most of the marijuana defendants, two received six-month prison terms.

O'Connor also gave two-year prison terms to two bond jumpers, but made the sentence in one case concurrent to a prison term already being served.

Defendants in two heroin cases received prison terms of five and four years. Another heroin defendant received six months imprisonment.

Several courthouse observers marvelled at the swift dispatch of the large number of cases.

O'Connor's judicial style is decidedly different from Cox's.

Cox requires pre-sentence investigations before he sentences any defendant.

O'Connor allows defendants to waive their pre-sentence investigations.

Cox assesses few probation terms and even fewer fines in marijuana cases.

The courtroom atmosphere is decidedly looser under O'Connor. Cox runs a serious, no-nonsense courtroom.

O'Connor even volleys an occasional joke.

After most of the cases were cleared late yesterday afternoon, O'Connor stood and said, "Anyone for a seventh inning stretch?"

O'Connor will preside here the rest of the week.

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Testimony of Justice Fellowship
before the
United States Sentencing Commission

Presented by
The Honorable Albert Quie
and
The Honorable Robert Utter

December 3, 1986
Washington, D.C.

We are pleased to have the opportunity to offer testimony to the Sentencing Commission in response to the Draft guidelines issued in September 1986.

Justice Fellowship is a public education and lobbying organization. Our objective is to change the focus of the criminal justice system so that offenders are held accountable for the harm they have caused their victims, rather than solely for the harm they are considered to have caused the state.

We have three goals. One is to reduce the use of prison for property offenders by increasing use of alternative punishments such as restitution, community service and so on. The second is to improve programs of victim assistance and compensation. The third is to insure that prisons are safe and effective in confining those who must be there.

Justice Fellowship was formed in 1983 by Chuck Colson and is affiliated with Prison Fellowship Ministries, a national Christian ministry to prisoners, ex-prisoners and their families.

We are currently focusing our advocacy efforts in six states (Virginia, Indiana, Arizona, South Carolina, Michigan and Delaware), although we have worked with public officials in 26

states so far this year. In addition, we have members in 46 states.

There can be little doubt that there is a crisis in our criminal justice system today. Crime rates, although declining because of demographic changes, are still too high. Prisons are filled beyond capacity, and 38 states are currently under court order because conditions in those overcrowded facilities violate the constitution. Victims are rightly protesting the callous treatment they have routinely received from criminal justice professionals.

Each of these problems is exacerbated by a more fundamental crisis: the failure of society to agree on the purposes and role of the criminal justice system. Since the demise of the rehabilitation model in the last 20 years, there has been little consensus on what should guide criminal punishments.

This is, in part, why the work of this Commission is so important. The guidelines it develops will not simply establish federal sentences, but will also establish a model for states to implement. We understand that Tennessee's Guidelines Commission, for example, is following your work closely.

It is obvious that the Commission has taken its responsibility seriously. We commend the Commissioners and staff for their hard

and thoughtful work. What follows are our recommendations and comments. Some of these, of necessity, question certain directions the Commission has taken. When that is the case, we have attempted to offer constructive alternative approaches.

We stand ready to assist in any way we can as the Commission revises the guidelines for submission to Congress.

Our comments fall into six general categories:

1. Impact on the Criminal Justice System.
2. Sentences Other Than Imprisonment.
3. Modified Real Offense Approach.
4. Relative Values of Offense Scores.
5. Supervised Release.
6. Determining the Criminal History Score.

Impact on the Criminal Justice System

There are many indications that the Draft guidelines would dramatically increase the federal prison population, which is currently operating at around 150% of its design capacity. For example:

- o the Commentary notes (page 111) that currently only 15% of those convicted of price fixing receive prison sentences, and that under the new guidelines all who are convicted will serve mandatory sentences.

- o anyone convicted of tax evasion involving more than \$5,000 will serve some prison sentence (page 44). We understand, however, that the government seldom prosecutes for tax evasion if the amount involved is under \$10,000. This means as a practical matter that everyone convicted of tax evasion under the guidelines will be imprisoned.

- o everyone convicted of simple burglary resulting in loss of \$1,500, would receive a minimum prison sentence of between 18 - 24 months under the guidelines. (The sentence would increase if the building were occupied or were a dwelling, if the burglary resulted in a greater loss, or if the offender had a criminal history.) We understand that under current Parole Commission Rules, such offenders, if

sent to prison at all, serve a median sentence of 11.0 months.

o the increase in prison terms is even greater for the more serious drug, assaultive and robbery offenses. We understand that under the Draft guidelines, these sentences are four to five times longer than current prison terms.

One issue that must be considered, of course, is what length sentence is appropriate for a particular offense. There is no indication in the Commentary of how those decisions were made, and therefore, no way of evaluating the legitimacy of concerns the Commission may have had concerning current sentencing practices.

But another, equally important, issue is whether the criminal justice system can absorb the effects of the guidelines. The legislation setting forth the duties of the Commission states that it shall

take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed

the capacity of the Federal prisons, as determined by the Commission. (28 U.S.C. S s 994(g); ital. added)

The Commentary to the Draft indicates (page 20) that because no final decisions concerning the offense values and the mechanism for incorporating mitigating and aggravating circumstances have been made, the impact study has not been completed. We urge the Commission to conduct the study prior to making those decisions, so that capacity can be a factor in selecting final offense values. It was clearly the intent of Congress that the Commission consider the capacity of the Federal prisons in developing the final guidelines.

Sentences Other Than Imprisonment

The Commission has requested comment on "what kinds of sentences, other than imprisonment, should be measured by sanction units?" (p. 142). The importance of this issue cannot be overstated.

We suggest that the draft, taken as a whole, offers a promising approach which could help the Commission structure a guideline table consistent with the Congressional mandate to incorporate sentences other than prison for certain offenders.

The Draft guidelines appear to be reparation-oriented in their definitions of crime and the elements to be considered in determining the sentence, but they revert to imprisonment as virtually the only sanction available to judges. Justice Fellowship believes that a return to a reparation model in criminal justice is essential. Therefore, we applaud the efforts of the Commission to deal with the "real" elements surrounding the offense, and the inclusion of consideration of victim losses (with reservations noted on page 17 of this testimony). But the failure of the Commission to convert the offense values into punishments consistent with the reparation model is a major concern.

If crime is viewed as it has been defined historically in the United States -- as an offense against the State -- then the

focus of the guidelines should be on just deserts, deterrence and incapacitation of offenders who pose a danger to society. One would expect that the guidelines would be built on the offense of conviction, would have little reference to the extent of the injuries to victims (particularly psychological injuries), and would emphasize imprisonment as the principle sanction. Rehabilitation might reduce or channel the sentence in appropriate cases.

Guidelines reflecting an orientation toward reparation -- holding the offender responsible for restoring the victim -- would emphasize a real offense approach, consider the actual injury to the victims and include punishments designed to repay them, and impose only the amount of restraint necessary to prevent offenders from committing new crimes.

There is ample evidence that the reparation model is consistent with Congressional intent expressed in the Commission's enabling legislation:

- o imprisonment is clearly viewed as appropriate for those offenders who require incapacitation [see Chapter 58, subsections 994(h), (i), (j), and (k)].

- o Punishments other than prison are provided for those

who do not pose this kind of risk [see Chapter 58, subsections 994(j) and (l)].

o The importance of restitution to the victim is currently an important feature of federal law [see, for example, Chapter 227, section 3553(c)].

Unfortunately, while the reparation model is evident in the guidelines' description of offenses, it has not been reflected in the sentencing table. There is no offense which is not imprisonable, in spite of the requirement that the Commission "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" [section 994(j)]. Nor do the guidelines assist a judge in determining "whether to impose a sentence to probation, a fine, or a term of imprisonment" [section 994(a)(1)(A)].

We make the following suggestions:

First, use the base offense values (not including the references to loss, damage or psychological injury) to compute an offense score. This score determines the length of the sentence to be imposed.

Second, use the special characteristics scores relating to loss, damage or psychological injury to determine a reparation score. This score determines the amount of victim restitution or of community service (if there is no victim, if the victims cannot be easily identified, or if the amount of restitution exceeds the amount the defendant will be able to pay).

Third, use the offender characteristics to compute a risk score. These should include not only the ones mentioned in Chapter Three, but also the other offender characteristics mentioned in Section 994(d). This score determines the amount of control over the offender's freedom that must be imposed. Control can range from routine probation through intensive supervision to house arrest, community detention and ultimately to time in prison. The guidelines should be written to impose the least restrictive control required to protect the public.

The judge would determine an offender's sentence by comparing the three scores. The offense score would give the length of the sentence, the reparation score the amount of restitution and/or community service, and the risk score the degree of loss of liberty.

We have not established specific tables, but we would be pleased to work with the Commission in developing one.

Modified Real Offense Approach

One of the biggest problems that architects of sentencing guidelines must address is how to define, for purposes of sentencing, the offense. As the Commentary mentions on pages 11 - 18, the approach usually used is to consider only the charge of conviction. However, this is not always effective in reducing disparity, since two offenders convicted of the same charges may actually have committed vastly different offenses.

The other approach is to consider the "real offense" at the sentencing, and therefore to permit the judge to consider elements which were not proven at trial. In effect, the offender is sentenced for crimes of which he was not convicted (e.g., pistol whipping a teller in the course of a bank robbery).

The Commission has adopted a "modified real offense" system which begins with the offense of conviction and then specifies the "real offense" factors a judge may consider. These additional factors are laid out in what is called a "road map" for the judge to follow while sentencing.

This is an admirable and creative effort to deal with a very difficult issue. Unfortunately, there are flaws in the specific plan laid out in the Draft.

The first is the complexity of the road map. Its specificity may actually create disparity if it is so complex that judges, defense attorneys, prosecutors and probation officers preparing presentence investigation reports do not have a national understanding of which elements apply in specific situations.

This will certainly be further complicated by the reality of plea bargaining concerning the elements themselves, and by court practice in different Districts.

While reduction of unwarranted disparity is an important goal, as the Commission notes, limiting discretion at one level generally simply transfers it to another level: limiting judicial discretion expands prosecutorial discretion in charging and plea bargaining. If the effort to limit this transfer of discretion results in too much complexity, the guidelines will simply have created a new reason for unwarranted disparity: confusion.

A solution is to accept the reality of discretion and unwarranted disparity, and build in mechanisms to identify and correct cases of injustice. For example, it should be explicit that judges may sentence outside of the guidelines in the event that imposition of the sentence indicated by the guidelines would result in unwarranted disparity.

Another step toward reducing the complexity of the current draft would be to separate the factors considered into three major

groups: one dealing with the offense score, another dealing with the reparation score, and the third dealing with the offender's criminal history and other aggravating and mitigating circumstances. This would simplify the process of determining the scores for each, and would permit the Commission and the sentencing judge to explicitly determine the interrelationships the three should have with each other. We have suggested one approach on pages 10 and 11.

The second problem with the modified real offense approach concerns the standard of proof required at sentencing. Allowing the judge to consider elements which could not be proven beyond a reasonable doubt, but can be proven by a preponderance of the evidence, poses problems. There are several examples illustrating the road map approach beginning at page 15 of the guidelines. The first involves a judge finding by preponderance of the evidence that an offender convicted of unarmed robbery actually carried and pointed a firearm during the robbery. The judge is instructed to add the offense value for using a dangerous weapon to the offense value for unarmed robbery.

Using this example, let us look at some of the issues this approach presents:

Problem 1: Suppose the defendant was originally charged with armed robbery, but the element of the weapon was not proved

beyond a reasonable doubt. Will the judge make a new finding at sentencing based on a lower evidentiary standard, and sentence the offender for something of which he was explicitly found "Not Guilty"? Or is this excluded as "conduct for which further prosecution is barred" (page 10)?

Problem 2: Suppose the prosecutor concluded that the evidence of gun use could not meet the standard necessary to win conviction on armed robbery charges. There is, however, evidence of gun use that would satisfy the less demanding preponderance standard. What prevents the prosecutor from simply charging the base offense of robbery, and waiting until sentencing to prove the enhancements?

There are several possible solutions to the standard of proof problem. The first is use the modified real offense approach only as part of the plea bargaining process, and to use the charge of conviction system when there has been a conviction following trial.

The second is to retain the modified real offense approach, but to require the additional elements affecting sentence length to be proven beyond a reasonable doubt. This would undoubtedly prove to be prohibitively burdensome to administer.

Relative Values of Offense Scores

It is unclear what factors the Commission has used in assigning offense values to various offenses. The enabling legislation instructed it to consider current sentencing practices as a starting point. But the significant increase mentioned earlier in the numbers and length of prison commitments under the Draft suggests that the Commission has used other criteria in setting the offense scores.

Determining the relative scores was admittedly a monumental task, especially when done in so short a time. Justice Fellowship has not had time to prepare a comprehensive analysis of the relative scores, but we would like to point out several anomalies:

- o a first-time burglar who does not enter a dwelling, and who does no damage and takes no property would receive a base score of 24, and serve a sentence of 12 - 18 months. A person who owns or operates a house of prostitution would receive a base score of 12 and serve no time. A person who interferes with another's civil rights would receive a base score of 6 and serve no time.
- o a person convicted of importing pure heroin would receive the same sentence as the street dealer who pedaled a substance of the same weight but which contained only a "detectable amount" of heroin.

o the offense values for PCP and LSD are higher than for heroin or cocaine, which is a major departure from current Parole Commission practice.

o the laudable concern for the effect of the crime on the victim is reflected in the wrong way. The effect on the victim should be considered in determining the amount of restitution, not the amount of the prison sentence.

It would be particularly inappropriate to consider psychological injury in calculating the offense score. As civil courts have discovered, emotional distress is difficult to prove, but there is precedence to assist in converting such injuries into damages. It would, however, be virtually impossible to establish clear guidelines for judges in calculating the offense score, thus creating the likelihood of unwarranted disparity.

Supervised Release

Many states with determinate sentencing have developed programs of supervised release. This permits supervision of the newly-released prisoner re-entering the community, and provides a mechanism for that person to receive guidance and support in adjusting to the change from total confinement.

Studies conducted by the State of Massachusetts have demonstrated that recidivism rates for all kinds of offenders are significantly reduced when they are released from less restrictive forms of supervision rather than directly from maximum or medium security facilities.

A substantial number of released prisoners need supervision. We understand that at least 25% of those leaving federal prisons are heroin addicts, and at least 50% have had a history of drug abuse. For these and other prisoners, supervised release can both assist the prisoner and protect the community.

The enabling legislation provides that supervision will be done by federal probation officers, as it currently is. However, it also phases out the Parole Commission. This body has not only determined the length of prison terms (no longer necessary when the guidelines are adopted), but also conducts parole revocation hearings. Responsibility for these revocation hearings will be

transferred to the courts which will treat them as contempt of court proceedings.

There are at least two problems with this approach. First, it could create a tremendous caseload burden on the courts. Second, there is likely to be disparate treatment of similar offenders in revocation hearings as each judge conducts them.

Therefore, we recommend that Congress either create a new national body or modify the Parole Commission, to handle revocation petitions. This would permit uniform handling of cases and relieve the caseload in the courts.

This body should have other options available to it in resolving revocation matters, such as increased reporting requirements, residence in Community Treatment Centers and drug testing programs.

Further, since the amount of time needed for the supervision will generally increase with the length of time the prisoner has served, we suggest that the guidelines provide that a specific portion of the sentence (for example, the final quarter of the prison term) be served on supervised release. This would preserve the determinate feature of the guidelines, provide for needed supervision, and reduce considerably the overwhelming

impact of the current draft on overcrowding of Federal Bureau of Prisons facilities.

Determining the Criminal History Score

The Commission Draft weights the seriousness of prior convictions based on the length of prior imprisonment. This simply perpetuates the effect of unwarranted sentencing disparity which may have affected the offender in the past. This is particularly a problem because the criminal history score considers state as well as federal convictions and sentences.

A Bureau of Justice Statistics report, "Time Served in Prison", issued in June 1984, illustrates this problem. It reviewed the average time actually served in prison by felony offenders in eleven states, and found considerable variation from state to state. For example, the average time served for burglary ranged from 13.8 months in Oklahoma to 30.5 months in Iowa. The average for rape ranged from 25.5 months in Delaware to 63.7 months in Maryland.

Enhancing federal sentences because of the length of time served for previous convictions would be unfair since that appears to be dependent as much on where the defendant committed those crimes as on the crime itself. Therefore, we recommend that criminal history scores should be based on the charge of conviction, not on the sentence served.

Second, inclusion of juvenile records could result in similar disparity, since state laws permitting disclosure vary. An offender with a lengthy juvenile record could serve less time (because the state of conviction would not disclose that record) than another with a much less serious, but disclosed, juvenile history.

Third, the decay factor which proposes ignoring convictions of offenders when there have been at least 10 years (out of prison) since the last conviction is excellent. However, this should apply to all such ancient convictions, including violent or drug offenses. The purpose of looking to prior history is to determine whether the defendant has demonstrated a pattern of criminal activity which suggests a risk of future crimes. If a crime-free life for 10 years is sufficient evidence for other crimes, it should be sufficient for violent and drug offenses as well.

FEDERAL PROBATION OFFICERS ASSOCIATION

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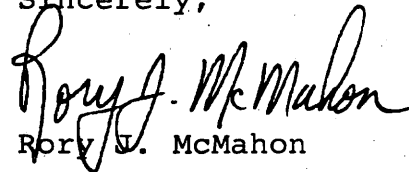
Re: Draft of the Sentencing Guidelines

Dear Judge Wilkins:

Attached please find the FPOA Position Statement containing the collective thoughts and comments of the Executive Board relative to the Commissions Sentencing Guidelines Draft. Additionally, I have attached the thoughts and statements of several Board members that had provided input to Susan Smith, our legislative chairperson, for your information and consideration.

I will be representing the FPOA Board at the Public Hearing held on December 3, and reading the attached statement. I look forward to seeing you and the other members of the Commission again. I hope that our feedback to you has been beneficial, and I look forward to working with you in the future.

Sincerely,



Rory J. McMahon
Secretary, FPOA

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**PREPARED STATEMENT OF THE
FEDERAL PROBATION OFFICERS ASSOCIATION**

**FOR THE
U.S. SENTENCING COMMISSION**

PUBLIC HEARING ON THE SENTENCING GUIDELINES DRAFT

DELIVERED BY:

RORY J. McMAHON

SECRETARY, FPOA

PREPARED STATEMENT OF THE FEDERAL PROBATION OFFICERS

ASSOCIATION:

Mr. Chairman, I am Rory J. McMahon, Secretary of the Federal Probation Officers Association, and a Senior U.S. Probation Officer, working in the Southern District of Florida, assigned to the Ft. Lauderdale office. I wish to thank you, Chairman Wilkins, and all of the distinguished members of the U.S. Sentencing Commission for allowing us the opportunity to address you today regarding the recently promulgated sentencing guidelines draft.

I would like to divide our comments into two sections; general comments and specific recommendations. First, we would like to make some general comments about the overall guidelines and their implementation, then I will make specific comments and recommendations regarding issues of specific concern.

The efforts and progress of the Sentencing Commission in addressing the basic injustices and uncertainty of present sentencing practices, and the development of a "truth in sentencing" system are laudatory. Based upon a review of the Draft and prior discussions with members of the Commission, it is apparent that the U.S. Probation System will maintain an integral role in the new sentencing guidelines system. We strongly recommend that the Commission give concrete support, by whatever means are available and appropriate, to insure that U.S. Probation offices

are adequately trained and staffed, to facilitate congressional intent and implament Commission guidelines into reality.

As a member of the panel of " working Probation Officers" that convened in Washington D.C. in July to work with the proposed set of guidelines, I experienced first hand the complexity and additional responsibility that will be thrust upon the U.S. Probation Service upon adoption of the guidelines. I realize that U.S. District Court Judges will be relying heavily, if not solely, upon the calculations and interpretations of the guidelines formulated by the U.S. Probation Officer. As a result of these additional responsibilities and duties assigned to the Probation system, there needs to be a concomitent increase in the resources available to the Probation Division, as well as a review of the workload formula and staffing patterns to assess the impact of these guidelines on the personnel staffing.

We urge that the Commission use its considerable power and influence with the Congress to ensure that funds are available to the Probation Division, Administrative Office, and the Federal Judicial Center to enable Probation Officers to perform their vital role in this process. Additionally, we urge the Commission to consider, and if deemed appropriate, recommend to the Congress, that the U.S. Probation System be allowed to retain a certain percentage of the fines collected by our agency, and specifically

earmark those funds for the training and resources needed for implementation of the sentencing guidelines. Certain proposals of the Commission, such as the Home Detention concept, can most appropriately be performed through the use of electronic monitoring equipment, which will require the purchase or lease of expensive hardware and software. In view of the fact that Probation Officers are responsible in most cases for the collection of fines, we see that it is appropriate for a percent of those funds to be allocated for the use of the Probation system.

With respect to our specific comments and recommendations, these are primarily concerning the Probation and Post Release Supervision sections of your Draft. While realizing that the Commission has primarily addressed the categorizing of crimes, and assigning numerical sanction units to them in this draft, the comments regarding Probation and Supervised Release leave the reader uncertain as to the Commission's expectations as to what are the purposes and philosophy of both Probation and Post release supervision? This uncertainty lends itself to certain perceived problems in the implementation of the proposed concepts regarding supervision conditions, methods and manner of formulating and filing violations, sanctions for violations of Probation and Post Release supervision, and other concepts proposed in the Draft such as Home Detention.

As an example, nowhere in Chapter Three is the need for cooperation with the U.S. Probation Office by the

defendant, ever mentioned. There needs to be built into the process a mechanism for mitigating or aggravating adjustments provided for the cooperation, attitude and responsiveness of the defendant with the Probation Officer. Otherwise, it is not in the defendant's best interest to cooperate with the officer assigned to conduct the Presentence Investigation. The defendant's cooperation can only hurt him/her by disclosure of such things as prior record, financial and employment irregularities and other damaging information that may result in the the aggravating of his scoring. Conversely, without his cooperation, the job of of the USPO becomes much more difficult We recommend that cooperation with the U.S. Probation Officer be included in section Part B- Post Offense Conduct (page 122). Furthermore, we recommend that perjured statements to a USPO and attempts to destroy or conceal information or material evidence, should be considered a aggravating factor and scored appropriately.

With respect to the conversion of sanction units into sentences, we favor a combination of Option 1 & 3. In order for the guideline system to work effeciently, in our view, there needs to be a requirement that the Judge use all the sanction units accumulated by the defendant, including a minimal range required as a term of imprisonment. The balance of the sanction units should then be satisfied with non-imprisonment sanctions such as Probation, Post

PREPARED STATEMENT OF FPOA: PAGE FIVE

Release Supervision Terms, and other appropriate considerations.

With respect to the conditions of supervision (page 146), we recommend that certain vague, unenforceable terms and descriptions be clarified or avoided. The word "promptly" in Condition G should be changed to a more specific time frame such as two days or within 72 hours, which we believe is clearer, and less likely to lead to misunderstanding or inability to be clearly enforced by the Courts. Additionally, in Condition H, we submit that "maintain reasonable hours" and "associate with law abiding persons" is vague and unenforceable. We recommend that that condition read "the offender shall not associate with individuals with criminal convictions unless granted permission to do so by the Probation Officer." Furthermore, we recommend that the Commission propose the adoption of wording for the imposition of certain special conditions of supervision. Special Conditions such as financial disclosure for white collar criminals, employment and travel restrictions for the third party risk offender and conspiratorial offender, and search conditions for the narcotics trafficker and violent offenders, should all be worded similarly to avoid misunderstanding and unenforcibility. We have submitted written suggestions as to recommended wording for the Commissions consideration.

The Violations of Probation & Post Release Supervision

section of the Draft is of concern to us. It is speculated that the proposed revocation terms for violators are unacceptably low. Our reading of Chapter Five suggests that if an offender is convicted of an A or B felony, subsequently released to Post Release supervision, and commits a lesser technical violation, revocation will result in service of a six month period of additional incarceration, following which, there will be no resumption of the up to three years of supervision. In essence, the post release offender can dispense with his three year supervision term by committing a lesser technical violation which will result in service of a six month term and no further supervision. We believe that a number of offenders, in particular the career criminal and organized crime offender, would prefer to serve the six months than to be responsible to a Probation Officer for three years. We believe that this highlights a flaw in the revocation process that needs to be addressed by the Commission. We further suggest that this process needs to be more clearly defined and refined, to ensure that supervision terms are meaningful and provide more control than the historical "paper tiger image" of community supervision.

In conclusion, we thank the Commission for allowing this Association and U.S. Probation Officers individually to have input into the formulation of these sentencing guidelines. We offer to the Commission our continued interest

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and availability to continue to work closely with you in your task of clarifying, completing, enlarging and defining the remaining sections of the guidelines and sentencing structures. We remain at your disposal for whatever task you deem appropriate and in the interest of the Federal Probation System.

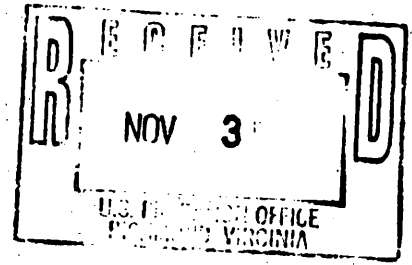
WE THANK YOU FOR THIS OPPORTUNITY TO PROVIDE COMMENT, AND WE CONGRATULATE YOU ON THE OUTSTANDING JOB THAT YOU HAVE DONE UNDER THE MOST TRYING OF CIRCUMSTANCES.

Mr. Chairman, this completes my prepared remarks. I will be happy to respond to any questions the Commission may have.

TO : Susan Smith, USPO
Richmond, VA

FROM : Chuck Stearns, SUSPO
West Covina, CA

SUBJECT: Preliminary Draft of Sentencing Guidelines



Having just completed the reading of the Guidelines Draft, I can appreciate the time and effort the Commission and their staff has devoted to this very difficult task. Along the way, the Commission has been good enough to keep us apprised of their activities and suggestions have been made. However, the full impact is never realized until the finished product, such as this, is seen in totality. I must say, however, whether it was the legislative intent of Congress or the unique bias of the Commission, I find myself diametrically opposed to the approach and the underlying philosophical orientation.

As the Commission aptly stated in the conclusion on Page 169, it is immensely difficult to capture in a single set of guidelines the vast range of human conduct likely to be relevant to a sentencing decision. The work only is beginning. An iterative process will refine, modify and improve the guidelines. What I perceive as folly is the belief on the part of the Commission that these guidelines will meet the enunciated purposes. I believe that what we have captured here is an elaborate Sentencing Guideline scheme that will be neither cost effective nor impact significantly on the reduction of crime. Instead, we have standardized penalties to remove unwarranted disparity and opted for custody as the punishment of choice. Lip services is given to the concept of rehabilitation, but there really is no substantial belief in the capacity of people to change. In an artificial way, we have ascribed a measure of seriousness of offense, afforded adequate deterrence, but it is unlikely that we have protected the public from further crime other than that provided by a respite while the offender is incarcerated. It is unlikely that these guidelines will lead to advancement of knowledge of human behavior. Instead, we are thrusting forward to place individuals in numerical cubbyholes with little discretion accorded the courts for individual differences.

Having verbalized my general disenchantment with the entire guidelines process and recognizing that I must be in a small minority by believing still that people can change and that custodial sanction should not be the first or primary choice of disposition, I will devote the remainder of this critique to concerns raised by the Commission and how the guidelines impact on the probation service.

First, although the guidelines direct the Court in the appropriate sentence to impose, it is unlikely that our overburdened judges are going to take the time to do the scoring. It is obvious that this responsibility will be delegated to the Probation Officer. As such, there is a critical need for training to meet effectively the challenge of equitably administering the guidelines. It is incumbent upon the Commission to bring such pressure to bear as is necessary for the Congress to allocate adequate funds to provide necessary training. Similarly, it is important that this new, complex and different function be recognized in a pecuniary way by increasing the salaries of probation personnel charge with implementing the system.

Real Offense Sentencing

Regarding standard of proof and real offense sentencing, I agree with the Commission that the standard of proof should be a preponderance of the evidence. Also, real offense sentencing takes into account and more accurately reflects offense behavior. It does appear, however, that in offenses like multiple robberies in which the defendant is permitted to plead guilty to one count, there would be no weighting in the sentence for the additional unadjudicated counts. Explicit cross-references would meet better the test of parity of sentence since judges would be using the same standards. Procedural issues might best be resolved by a conference process between prosecution and defense with the Probation Officer serving as arbitrator. This would reduce the substantial costs inherent in open court resolution of issues. Only in those cases where agreement cannot be achieved should the court be intimately involved. There is a concern, however, that by utilizing a real offense sentencing standard, there might be fewer guilty pleas leading to substantial increases in costs and the need for more judges to timely administer a growing criminal calendar. I doubt also that the Commission is realistic in expecting that factual disputes will be readily resolved by juries or the court.

Offense Conduct

It is unclear from the Preliminary Draft how offense values were established since the Commission indicates it will consider from nine principal resources final offense values. It is surmised that the present offense values were derived from an historical perspective on past sentencing practices. Such a reliance has no validity base to it. Although I am in no favored position to evaluate the values attached to the offenses, nor is the Commission, some of the cross-references will be difficult to determine by the time of sentencing. For example, the issue of psychological injury to a victim may not yet be present by the time of sentencing. Similarly, the distinction between extreme psychological injury and significant psychological injury would be difficult to ascertain. Finally, the Commission has attempted to quantify criminal behavior and its affects resulting in a prescription for precise weighting of issues previously never measured in any quantifiable way. I am sure that courts have considered items such as psychological injury and aggravation of sentence but without specific values for gradation of injury. It is incredible to me that the Commission believes it is in a position to affix accurate or meaningful standards to offense conduct. What the Commission has created is a complex scoring device that will result in more offenders serving longer sentences thereby exacerbating an already costly and overcrowded prison system. I have offered before and say again that as a national strategy we need to develop appropriate sanctions that are not steeped in a "lock them up" philosophy. Instead, they should be strategies that will impact on the offender, protect the community and reduce the incidence of crime. There just has to be a better way than warehousing people. The Commission in its perception of the legislative mandate has adopted a philosophy that incarceration is the best answer. I heartily disagree.

Offender Characteristics

Although it is commendable that discretion be built into the system to differentiate among offenders for factors in aggravation or mitigation, it is interesting that the Commission departed from a numerical weighting to one of percentage of offense value. It would seem that if there is an offense value and the guidelines provide for discretion within the guideline limits, such an elaborate

scoring device is confusing and confounding and opens the door for challenge and costly court time. It would be better to leave to the total discretion of the judge the panoply of choices within the guideline range. The judge then takes into consideration the role of the offender in the offense, past offense conduct and cooperation. Under the proposed guidelines there are provisions allowing the judge the discretionary responsibility to reduce the sentence by a sum not exceeding 20 percent. It provides also for the prosecutor to certify credit amounting to a 40 percent reduction. Combined, there is the possibility of a 60 percent reduction which can only defeat the Commission's interest in reducing disparity. Under the examples of acceptance of responsibility there appears to be a class distinction bias which will serve to the benefit of the "have's" and to the detriment of the "have not's." Additionally, plea negotiations already will impact on the bottom line time to serve.

So far as criminal history is concerned, what is primarily measured is incarceration history. It would appear more appropriate to consider convictions and affix sanction units based on the grade of felony and in an effort to simplify the process, exempt misdemeanor convictions from consideration. I still argue against the utilization of a decay factor. An argument could be made that having been through the criminal justice system previously, the choice to commit crime was a more informed one. Also, offenses for which dismissals are entered upon satisfaction of certain conditions should be counted as prior convictions. In considering the impact of criminal history score, I prefer the alternative approach although in both indexes, the base offense value is the significant measure. So far as other offender characteristics are concerned, it makes sense to allow the court the discretion to consider these characteristics and to utilize the 25 percent range to accommodate sentencing thereby adjusting for offender characteristics.

Determining the Sentence

It seems that the Commission is wed inextricably to the concept that incarceration is the option of choice. As a system, the need for incarceration for 14 or more sanction units will prove costly both in dollars and human waste. What is obvious is that more people are going to be locked up for longer periods of time. Already, we incarcerate at a level higher than most

civilized countries. Incarceration has not worked, and in all probability, will not work. We need to think of sanctions not necessarily focused on jail but, rather, on punishing equitably in ways that bring offenders to feel a sense of responsibility, to dissuade them from their self-centered orientation and to compensate the victim for their losses. Incarceration needs to be reserved for the offenders who pose a serious threat to the welfare of the community or whose persistent behavior demonstrates that they need to be isolated from that community. 18 USC 3553(c) which requires the judge to explain specific reasons for imposing a sentence at a particular point in the guideline range negates true discretion to sentences within the guidelines and will result in expensive challenges to the mental gymnastics of the judge in deciding an appropriate sentence. I would prefer to see a sanction system that applied only if incarceration is ordered and would thus allow a judge, for whatever reasons deemed appropriate, to grant probation except where specifically statutorily prohibited. It would preferable not to consider converting sanction units into sentences other than imprisonment. I know that it is comforting to have a handy-dandy numerical equivalent for everything, but I think to attach sanction units to nonimprisonment conditions will be burdensome, time consuming and confusing. It is better that we calculate a range of imprisonment and leave the imposition of other sanctions to the total discretion of the judge.

Probation

In reviewing this section, there appeared to be too many conditions enumerated as general conditions of probation and terms like promptly and immediately need operational clarity attached to them. Certainly the requirements on the Probation Officer are such that substantial training needs to be provided. It is obvious that the major responsibility for computing guidelines determination will rest with the Probation Officer. Such a vital responsibility argues for compensation commensurate with that level of responsibility. The Commission is employed to bring about such budgetary adjustments as are necessary to meet this new challenge. The issue of community confinement and home detention might be appropriate sanctions for those offenders not requiring closed facilities. Again, however, funds need to be allocated to provide the hardware and software necessary for program implementation and enrichment of staff to meet the mandate.

Imposition of a condition of supervised release sets forth general concepts in the code but deals ineffectively with the implementation. Many questions remain unanswered but undoubtedly will grow out of the experiences of implementing the program.

Violations

The Commission's approach to the handling of violations tries to prescribe the nature of the action to be taken by the court. Again, the mind set is custody oriented. Jail is not always the best solution. In response to the Commission's request for comment on issues related to violation of probation and supervised release, the grading of less serious and more serious violations vary based on the eye of the beholder. It seems that all violations should be reported to the judge as the final decision maker. The proposed sentences for application to revocation of supervision focuses on punishing the violation rather than the original offense. Credit should not be afforded offenders for time spent on supervision or compliance with conditions if in the final analysis, they fail to meet their responsibilities and violated their psychological contract with the court. Since custody sanctions do not apply to organizations, failure to meet the condition should result in action that forecloses the organization from being in business or in establishing new businesses in an effort to evade responsibility.

Fines

I am not sure where the Commission got the idea that judges avoided fines because they were not in an amount sufficient to punish or deter. That certainly has not been my experience. Regarding whether the proportionate approach or the harm based approach is best is difficult to determine since there are aspects of both that make sense. It seems to me that we need to weave into the decision making process elements both of ability to pay and that of a harm based deterrent. If part of the fine purpose is to offset the system expenses, consideration might be given to allocating a portion of the revenue collected by the Probation Service to offset training and implementation expenses. So far as organizations are concerned, fines ought to be imposed in relation to the harm done or the difficulty of discovering the crime. It may well be that offender organization should be forced out of business. Yet on the other hand, organizational fines should relate to the income or wealth of the organization so that the fines would not be viewed simply as cost of doing business.

Susan, I don't know how you are going to weave this into your ultimate presentation, but I hope that it is of some value in understanding some of the short falls of the proposal.

CS:de

The proposed method of calculation for implamentation of the guidelines is unduly complex. It is too complex for the USPOS, the Court and the Defense Bar to all arrive at the same score and same conclusions. Therefore if it is that complex that everyone is not going to be able to arrive at the same conclusions, there will be massive challanges and the Courts rulings will be subject to challanges based upon what lawyers will say is erroneous calculation of the scoring, which will put the USPO in a bad position.

The other major concern is the scoring for white collar offenders. The major white collar offenders will be scored on a par with the least serious drug trafficker. The white collar criminal who commits an offense involving less than \$ 1 million, is a candidate for probation, whereas drug traffickers of minor significance are facing substantial time for a kilo of cocaine, which is an everyday occurance in South Florida. The offense scoring for white collar criminals needs to be significantly increased to have any deterrent effect, particularly in a high white collar crime area such as South Florida.

Comments on Chapter 3 -

Nowhere in the draft is cooperation with the U.S. Probation Officer mentioned. There needs to be built into the draft aggravating and/or mitigating adjustments provided for the attitude and response of the defendant to the Probation Department conducting the PSI. If an offender cooperates with the US Probation office that should be factored into Part B - Post Offense Conduct (page 122). Perjured statements to a USPO, attempts to destroy, or conceal information or material evidence, should be considered an aggravating factor, and scored accordingly.

Under section B321 & B322, I concur with the Commission's consideration of an offenders acceptance of responsibility for wrongdoing; a defendant who takes affirmative action toward disaccociation from past criminal conduct and attempts to rectify harms done to others. I believe that the USPO conducting the PSI is in a good position to determine the offenders remorse and acceptance of responsibility, in particular, in regard to his Version of the Offense.

Comments on Chapter 4 -

With respect to conversion of sanction units into sentences, I favor Option 1 proposed by the Commission wherein the Court is required manditorily satisfy all santions units in imposing sentence.

With respect to the Conditions of Probation, I recommend that Condition G be reworded to read; the offender shall notify the probation officer within 72 hours if arrested or questioned by a law enforcement officer;

Comments on Chapter 4 - (continued)

Condition H should be ammended to read; the offender shall maintain reasonable hours, and shall not associate with individuals with prior criminal convictions unless granted permission in writing to do so by th probation officer.

I believe that the wording for certain Special Conditions of Supervision should be included; such as,

For white collar criminals; - You shall submit to an audit of your personal and business financial records by your probation officer on a quarterly (semi-annual, yearly) basis or as deemed appropriate and necessary.

For the third party risk offender; - Employment restrictions
You are prohibited from entering into employment involving _____ during the term of probation (post release supervision).

For the narcotics and violent offender; - Search Condition
You shall submit to a search of your person or property conducted in a reasonable manner and at a reasonable time by your probation officer.

For any conspiratorial offender; - Travel Restriction
You shall not leave _____ County without the permission of your probation officer.

Comments on Chapter 5 -

Violations of Probation & Post Release Supervision

Question 5 Issues for Comment; Which Conditions should be considered les seriously when non-compliance - B,F,G (when the offense not reported is a non serious offense i.e. Violations and simple misdemeanors), H,J (Dr ing alcohol to access periodically) & M.

More serious Conditions - A,C(Lying to conceal material facts from USPO) D(Refusal to allow USPO into residence),E,G(Failure to inform PO of a felony arrest or assaylt of any type),H,I,J,K,L.

Additionally, other than violations of conditions A,G,I,J,& K, which sho require immediate notification to the sentencing Court, violation of the remainder of the conditions can be dealt with by the USPO in accorda with policy established within the District.

3) The proposed revocation terms for Probation Violators is suitable; however, the proposed terms for Post release supervision violators is unacceptably low. 1/6 of three years or less is not a substantial period of incarceration when considering that these are the more serious offenders than probationers, and yet the sanctions are less severe that those faced by the probationers. Revocation terms for the post release offenders must be significant in order for the supervision of these hard core offenders to be meaningful. Studies demonstrate that the offenders eased from prison are more likely to recidivate than probationers, so th

period of incarceration must be lengthy to impress upon them the need for compliance with the supervision conditions. Thereby the USPO can attempt to deter new criminal conduct. In most cases, if the offender is not in compliance with the supervision conditions, they usually are involved in new criminal activity.

4) No credit for time served, it defeats the purpose of supervision otherwise.

Additional Comments for this Chapter; There should be some additional consideration for allowing the Court and the Probation Department flexibility for using Home detention and Community Confinement as the first steps to resolving Violations before the Court. Intervention of a more extreme nature can always be considered for serious violations.

Comments on Chapter 6 -

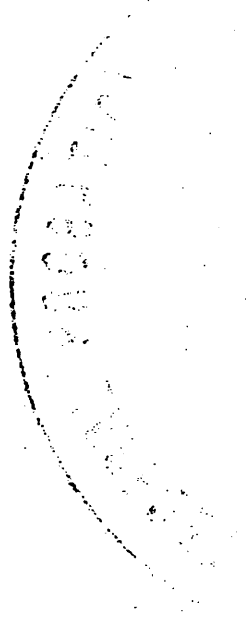
Part C - It must be stressed that there should be no attempt on the part of the prosecutor to undermine the intent and spirit of the Sentencing Guidelines. Therefore, there should be no "charge bargaining", "sentence bargaining", prosecutorial stipulation to underlying fact or any other attempt to provide the Probation Department or the Sentencing Court with anything other than the entire fact of the case obtained by the gov't. during the course of the investigation, indictment and prosecution of each defendant.

Part D - The Commission can most appropriately use Community Confinement, Home Detention as appropriate conditions of supervision when the offender is placed on probation but is in need of more structure, and stricter supervision than ordinarily received without the imposition of special conditions. When it is determined that the offender poses a marginal risk but the Court is uncertain if his remaining in the Community will pose a threat to that community, and when the Court needs to use the balance of sanction units in a case, the Court should impose special conditions such as community confinement and home detention.

In the case of supervised releasees, community confinement and home detention should be used as half-way measures. Offenders convicted of serious crimes can be released through community confinement prior to Post release to monitor them more closely so that if they represent a threat to the community, their acting out behavior will be easily identifiable in the close scrutiny of the community confinement and/or home detention, thus they can be returned to custody before committing substantial new offenses.

Additionally, it can be used as a half-way back into custody measure for those offenders who have committed minor technical violations

they can be placed in community confinement or home detention to more closely scrutinize their behavior. If they act out more, than they can be returned to custody. Otherwise, they can be returned to the community. In essence, both of these measures can be used as a means of getting the offenders attention, without having to provide the expense of incarceration.



**RE: Comments Concerning Sentencing
Commission Guidelines**

As per your most recent request, we are submitting for your perusal some comments regarding the above-mentioned subject.

1. The proposed sentencing guidelines will reduce unwarranted disparities in sentences. The new system will be more specific as to how to sentence a given offender based on the severity of the offense, background of the offender, and certain aggravating or mitigating circumstances. By and large, offenders convicted of the same offense will receive the same sentence.

2. The modified real offense approach is not new to the District of New Mexico. Nevertheless, it certainly will be a step forward nation-wide to reduce disparities. We support the idea 100%.

3. Page 34 A251 Psychological Injury

Your past experience as a trial judge would certainly come handy in this issue. What is "extreme" or "significant" psychological

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injury? The terms could be reversed and still not have a clear cut differentiation. Is there room for potential victim abuse when monetary reimbursement is a factor? Needless to say, two psychiatrists or psychologists presented with the same information usually reach opposite conclusions depending who is paying for their services. Thus, is this matter to be resolved by the "preponderance of evidence?" Would this delay the sentencing process?

4. Page 123 B322 Acceptance of Responsibility

Under the modified real offense approach, the reward of credit is already considered. As a result of considering aggravating or mitigating circumstances, the defendant already receives credit.

It is noted that repeat offenders know the ropes and they go to great lengths to convince the prosecution, Probation Officers, and Judicial Officers that "they are sorry" for their mistakes and many even "find the Lord" etc.

We do not agree that a reduction of 20% is appropriate. Determining acceptance of responsibility is subject to individual interpretations.

Page Three

5. Page 125 Cooperation

Although the cooperation issue would be the exception rather than the rule, the fact remains that a sophisticated criminal could receive a 20% reduction through melodramatic antics claiming responsibility and 40% more by the government certifying cooperation. The critical issue is that this rule could result in abuse by prosecutors and defense attorneys in an attempt to reach a "good" plea bargain agreement.

In some cases, defendants would agree (cooperate) to testify at a later date against codefendants or companion cases in return for "a break" from the prosecutors. However, since the defendant's cooperation must be considered at the time of sentencing, is it not unfair to credit a defendant with cooperation when in many instances his codefendant plead guilty? In essence, the defendant's agreement to testify is mute and receives credit for something he did not do.

6. Page 127 Criminal History Score

Since the Commission puts a precedent by relying on McMillan v. Pennsylvania, U. S. 106 St. Ct. 2411 (1986), it would seem appropriate that in considering the criminal history

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of a defendant, further Court decisions be incorporated in this section, i.e., U. S. v. Tucker, 404 U. S. 443 (1972), Townsend v. Barker, 334 U. S. 736 (1948), Angersinger v. Hamlin, 407 U. S. 25, 33 (1972).

7. Page 130 Effect of Criminal History Score

We agree that there is a close relationship between a defendant's criminal history and behavior prognosis. Thus, the criminal history score must be considered in the sentencing process. Statistics will show that recidivists make up the larger population of defendants being processed through the Criminal Justice System and in confinement.

8. Page 142 Conversion of Sanction Units

As part of the individualized sentencing approach, which includes the modified real offense, aggravating or mitigating circumstances, the defendant's role in the offense, etc. we believe the third approach, Page 143, is best. This option would dramatically enhance the judicial prerogative in imposing conditions of probation (Page 143) and supervised release (Page 146).

9. Page 148 A15 Home Detention

Section b-1 is somewhat troublesome in that for recidivists who

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had gone through the system several times, home detention could become a meaningless condition. The only way to enforce it would be for the Probation Officer to literally "baby-sit" with the probationer or the person on supervised release to make the "condition" valid and meaningful.

Accountability by the defendant appears to be almost nil as the full responsibility of enforcement, and in fact accountability, rest upon the Probation Officer. We feel this is an unenforceful condition.

10. On Page 152, Paragraph 3, a violation of conditional release is treated as a contempt of Court (18 USC 401 (3)). Thus, if a defendant is committed to prison for Contempt of Court, does the remainder of the conditional release period (Page 156, Paragraph 1) satisfy the original sentence imposed? If so, the individual does not have to be under conditional release supervision any longer.

11. We support the idea expressed on Page 155, Paragraph 3 concerning the sanctions to be imposed upon revocation of probation.

Page Six

In regards as to what are more serious or less serious violations of conditions of probation, it should be noted that "usually" when a condition of probation is violated, the violation is in conjunction or in furtherance of one or more conditions.

It is our position that a "probationer" should not receive credit for any of the issues described on Page 156, Item 4. The Courts have ruled that "probation is a privilege, not a right." Any defendant sentenced to probation has already received great benefits (credits) such as remaining at liberty in the community, continuing to earn a living, thus allowing him and his family to continue with the same standard of living.

12. Page 157 Fines

We support the "proportionate ability to pay" proposal as it is fair, practical, and consistent with the guideline philosophy.

It is obvious that during the sentencing procedure, the Harm - Base Deterrent would have been considered by the Judge, i.e., modified real offense, aggravating or mitigating circumstances, role of the offender and his criminal history, etc.

Page Seven

To impose fines for the sake of impressing the defendant when he will be unable to pay, is meaningless, cumbersome for the Government, and ultimately one more unsuccessful case in the books of criminal justice failure.

13. Page 161-162 Organizational Sanctions

From the practical point of view, the imposition of a fine determined by the injury resulting from the criminal act would be sufficient punishment and deterrence. Probation should not be considered. Experience in this type of situation shows that a convicted president, vice-president, or other high official of a company or organization is usually removed or a resignation is rendered. In the case of lower hierarchy employees, "normally" they are fired. Once the leadership changes, who then should be supervised, a new president or a new board of directors?

Conditions of probation are to be reasonably related to the nature and circumstances of the offense (18USC 3553(a)(2)). Thus, conditions as reflected on Page 163, Paragraph 5 must be carefully evaluated as the Federal Courts have already ruled on some of these issues. (see U. S. v. Clovis Liquor Dealers)

Page Eight

14. Plea Bargain

It is our position that the Sentencing Commission must be very careful in issuing guidelines in this critical area. Plea bargain could become a judge's v. prosecutor's discretion. Instead of hoping for a lenient judge, the defendant may find himself hoping for a lenient or overworked prosecutor.

At all stages of the plea bargain, the prosecutor must inform the defendant that at the time of sentencing:

- a. The Court will consider the modified real offense.
- b. The prosecution is not engaged in a "sentence bargain."
- c. That there are other issues the Court will consider for an appropriate sentence such as harm to the victim, restitution, fines, etc.

For example, in a case where the Grand Jury returns a homicide Indictment and later is reduced to manslaughter through a plea bargain, the defendant should be advised that the Judge would work essentially from the homicide sentencing guidelines.