

### RESOURCES OF THE CRIMINAL JUSTICE PROCESS REQUIRED BY THE POLICE, THE CROWN, AND THE COURT IN DEALING WITH THE MENTALLY RETARDED OFFENDER<sup>1</sup>

When considering the question of the mentally retarded offender in the Criminal Justice Process, because of the generally condoning attitude of Society towards mentally retarded persons, one is initially of the opinion that it is a very minor problem. However, recent research has indicated that it is in reality a problem of greater magnitude than heretofore was believed to be the case.

Casual inquiry reveals that there have been many studies in this area, particularly in the United States, and the results are of much interest and considerable benefit in giving an appreciation of the problem. As a result of my research I am of the opinion that they have equal validity in Canada.

Preliminary consideration of this area assigned to me led me to decide that it would be of advantage to take a cursory sampling in the Province of Manitoba for the purposes of ascertaining just what was the situation with regard to the problem of retardation in the Criminal Justice System in that Province.

I endeavoured to relate what I found in the Province of Manitoba to some of the United States studies, and as crude as my sampling was, I found that there was a considerable similarity, in fact to such a degree, that I am of the opinion that there is very little that needs to be done in Canada from the point of view of ascertaining the problem, but that more work should be done with a view to establishing the resources, facilities, and personnel that would be required when dealing with the problem.

As a result of reviewing these Reports and other information, I became aware of resulting legislation and programs that apparently would bear considerable fruit by their establishment in Canada.

I found that very comprehensive and advanced plans were in effect in Maryland, under the Maryland Defective Delinquency Statute with

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1. The text of this comment was delivered as a paper to the Canadian Conference on Social Development, "The Mentally Retarded Offender," City of Quebec, June 20th, 1972.

the establishment of the Patuxent Institution. To name a few of the other programs, they are the Tennessee Re-Educational Program; the New Jersey Comprehensive Plan; legislation in the States of Illinois and Pennsylvania, and the New York Comprehensive Plan.

As the subject matter of this paper states, I am going to discuss the problem of the mentally retarded offender in terms of the resources required in the Criminal Justice System to enable the Police, the Crown, and the Court properly to deal with the problem. Although greatly tempted, I am not going to discuss, in any detail, the legal problems that arise in the Criminal Justice System such as McNaughton's Rule, evidence, or the legal ability to instruct counsel for trial or comprehend Probation Orders for the purposes of signature as it affects the mentally retarded offender. I will only make some cursory remarks occasionally. I would further point out that it is not within the terms of this presentation nor is there time to discuss the relation of the criminality of retardates to the general public, or the relationship of retardation to criminality as cause or result. These are still vague areas that would benefit greatly from further research and inquiry.

For the purposes of my study to ascertain the quantum of the problem of the mentally retarded offender and his involvement in the Law, I used two sources.

Through the very kind co-operation of the Classification Department of the Stony Mountain Institution, being the Federal Penitentiary in Manitoba, and in particular Mr. Om Chodray, Classification Officer, I was provided with an analysis of the classification records of inmates in that Institution. I was also allowed to analyze the admission records of retardates to the Rehabilitation Services of the Province of Manitoba through the kind co-operation of Mr. Robert Creasy, the Director of Personal Services, Department of Health and Social Development.

For the purposes of this study the application of the definition of "Mentally Retarded" was the acceptance by both Rehabilitation Services and Stony Mountain of an I.Q. score under 89. The United States studies limited their findings, on the whole, to under the I.Q. score of 70, but I took the higher score because those reporting from my two sources felt that the problem of retarded offenders was broad enough to include those of the upper borderline classification, i.e. 80 to 89 (International Classification of Diseases, adapted).<sup>2</sup>

Firstly, to consider the information from the statistics from the study of the Rehabilitation Services. The records were based on agency intake

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2. *The Mentally Retarded in Penal and Correctional Institutes*: American Journal of Psychiatry, March, 1968.

from November 24th, 1964, to May 31st, 1972. The sampling was of a total of 1,075 persons referred to the agency. Eighty-seven were extracted as having criminal involvement and 78 of these required special attention.

The referrals to this agency came from the Court or from agencies and institutions in the community and represented persons over the age of 16 years and under the jurisdiction both of the Juvenile and Adult Court.

In considering the 78 persons who were integrated into its vocational and educational programs, there was an average I.Q. of 74.

The breakdown of the 78 persons into their I.Q. score is as follows:

I.Q. SCORE	NUMBER
90 - 100 dull normal .....	5
80 - 89 borderline .....	16
70 - 79 borderline .....	34
60 - 69 mild .....	17
50 - 59 mild .....	4
40 - 49 moderate .....	2
<b>TOTAL</b> .....	<b>78</b>

It will, therefore, be seen that the 78 referrals reflect approximately 7% of the total as having criminal involvement and records.

Further, the statistics showed that there were 51 adults and 27 juveniles, which represented 74 adult and 43 juvenile current or recent offences.

An examination of all of the I.Q. scores shows that the highest I.Q. was 97 and the lowest 46 (Weschler Scale).

In detail the breakdown of crimes was as follows:

CRIME	ADULT	JUVENILE
Theft .....	23	16
Possession of stolen goods .....	4	1
Attempted Suicide .....	1	0
Break and Enter .....	9	6
Possession burglar tools .....	1	0
Drugs and glue sniffing .....	1	1
Homicide .....	0	0
Threaten to Kill .....	1	0
False Pretences and Forge and Utter .....	2	0
Robbery .....	1	0
Sexual Offences .....	8	6
Assault .....	3	1

Promiscuousness .....	0	1
Public Mischief and wilful damage .....	4	3
Arson .....	3	0
Truancy .....	0	1
Liquor Act Offences .....	5	0
TOTAL:	74	43

The analysis of the figures indicate that for crimes of violence (threats, robbery, assault, etc.) adults constitute 6.6% and juveniles 1.3%; charges of theft and possession of stolen goods, adults 36%, juveniles 22.6%; break and enter, adults 13.3%, juveniles 8%; sexual offences, adults 10.6%, juveniles 9%; public mischief and wilful damage, adults 5.3%, juveniles 4%.

Further examination of the background information indicates that the liquor offences were usually associated with other offences. Also, the reason that there are more offences than persons is because the offender, in some cases had several charges of a different nature. In tabulating this information, one charge was recorded if an offender had several offences of the same kind.

When I endeavoured to obtain information from the Manitoba Provincial Correctional Institution, I was advised that no records were kept of the I.Q. of inmates and there is no entry classification. Mentally retarded offenders receive special attention only if identified by the Court or by accident while serving sentence. The Institution tries to give custodial care but if the accused creates a management problem, a transfer is negotiated to the Manitoba Training School for the Mentally Retarded.

There is no specific program in the Provincial Correctional Institution for retarded offenders because the average sentence to this Institution is only four to five months, and it is difficult to develop a program of any significance. This is the same problem that confronts city lock-ups and remand centers.

Secondly, I refer to the information obtained from the Manitoba Institution at Stony Mountain based on admissions from December 1st, 1966 to date. During this time up until December, 1971, the Institution was classified as maximum, but now is classified as medium.

This sampling is of 1,067 male admissions to a Federal Institution and sentences are of two years or longer. All of the inmates tested were considered to be adult.

The test extracted from the inmate sampling those who scored an I.Q. of 89 or less. The lowest score was 52 (Beta Scale), a most significant score that raises, to my mind, many questions.

The information showed the I.Q. breakdown as follows:

80 - 89 .....	88 inmates
70 - 79 .....	29 inmates
70 and below .....	10 inmates

for a total of 137 in all.

These figures, using the same criteria, reveal a retarded offender inmate population of approximately 13%.

The crime breakdown is detailed as follows:

CRIME	NUMBER	PERCENTAGE (to round figures)
Sexual offences .....	20	8%
Narcotics .....	3	1%
Break and Enter .....	56	22.5%
Robbery .....	24	10%
Robbery with violence .....	9	4%
Dangerous weapon .....	6	2%
Theft .....	52	20%
Escape prison and violate parole .....	37	4.5%
Forge and Utter .....	11	4.5%
Assault Cause Bodily Harm ..	15	6%
Homicide .....	15	6%

It is noted from the crime breakdown that there are more crimes than offenders. The explanation is that some offenders were sentenced for more than one offence, and also there is the element of recidivism when one considers the length of the period covered by the testing. Unfortunately, no analysis of the figures was available for the purposes of ascertaining the amount of recidivism. This is another area that could be the subject of research.

In studying the figures of both sources, (1) Rehabilitation Services, and (2) Stony Mountain, it is obvious that most of the offences committed by the retarded offender are directed against property, an observation that is similar to the reports from the United States. However, the figures for crimes of violence and sexual offences are of such consequence as to cause grave concern. This is another point of similarity to the findings of the United States' studies.<sup>3</sup>

May I comment that the above does not include those retarded of-

3. See, for example, Report of the President's Commission on Crime 1967: *The Challenge of Crime in a Free Society*; Allan: *The Retarded Offender — unrecognized in Court and untreated in Prison*, Federal Probation Journal, September, 1967; *Mentally Disabled in the Law*, American Bar Foundation Study, 1961.

fenders who were dealt with by the Court through suspension of sentence. One can, therefore, safely assume that the appearance of retarded offenders in the Criminal Justice System would be greater than the prison figures would indicate.

I am sufficiently aware of the principles of research and the deficiencies of my sampling to realize the lack of exactness of the above. However, I will say that I am satisfied that the findings establish the existence of a problem of sufficient significance to raise concern.

In my view the fact that a minimum of 7% of the referrals to the Rehabilitation Program, and 13% of the admitted inmates over the testing period to the Manitoba Institution, could be considered retarded offenders, forces one to appreciate that the problem of the mental retarded offender in the Criminal Justice System is not one to be treated lightly.

Having established and having satisfied myself statistically about what I had long believed to be a fact, I then considered the resources that should be available at the various levels of the Criminal Justice Process to deal with the retarded offender.

#### POLICE:

It has been stated many times and cannot be stressed too often that the first step in the Criminal Justice System and the Correctional Process takes place at the offender's first contact with the Police. For rehabilitation, the Treatment Process starts at this time. At the time of arrest, the accused is immediately subject to the inquiry of the Police.

I would refer to the "Mentally Retarded Offender" (*supra*) which states as follows:

"One must recognize that the "Treatment" of the Mentally retarded offender begins with the first official contacts by the Police. The entire area of the mentally retarded suspects' rights at the time of arrest and during interrogation, and the admissibility of the statements and confessions made by such persons need careful study. We know from an analysis of a small sampling of cases that a substantial majority of retardates make confessions or incriminating statements during the pre-trial period of the administration of Criminal Justice."<sup>4</sup>

It seems to me that at this crucial time, the retarded offender should be identified as quickly as possible. There should be some mechanism set up whereby the Police would be able to take a suspected retarded offender to a facility immediately for appraisal and to be held there if found to be in fact retarded. The problems of management and exploitation by other inmates should not be magnified by incarceration in the local lock-ups.

4. Allan: *The Retarded Offender — unrecognized in Court and untreated in Prison*, September, 1967, *Federal Probation Journal*.

The Pennsylvania Model Statute provides for a special Service Unit attached to a Mental Health Institution that can be called by the Police authorities at any time of the day or night for the purpose of attending, appraising, and otherwise dealing in a non-judicial way, with the mentally retarded offender, not only to protect his rights but also to ascertain his competency to stand trial. If found to be suffering from a mental disorder, including retardation, he is removed to an appropriate mental health facility.

Failing this, Police should be able to call on the staff of a Psychiatric Institute for an appraisal to be made in the lock-up and to remove the suspect if he is found to be retarded. The Police should be able to make this referral at any time without waiting for action to be taken in Court, as is the case now.

The problem of the initial Police encounter with retarded offenders is particularly acute with regard to youthful offenders, and is all the more crucial because whatever happens at this time, may establish the process to be followed in Court, and the possible subsequent sentencing.

To quote a participant in the New England Seminar on Retarded Youth and Law Enforcement Process, 1971:

“One thing missing in a Police station is a list of phone numbers for the officer to call and say:

“I think we’ve got a retarded kid here. Will you come down and look at him?”

“To me a cop is a facility. From the minute he picks up a kid he will have an effect on him. He has no options except to bring the kid in and lock him up. The Police officer has no one to call for help. Give the cop an option, give him a chance to be human, give him something to work with. (Lou Moore)”<sup>5</sup>

However, to assist the Police in being competent to appraise the situation, it is necessary that they have the required training to make a preliminary assessment and to appreciate how to treat the mentally retarded offender while in his custody.

Although some Police authorities do have a minimal understanding of the problem, every police department should have inservice training and instruction in this regard, but further instruction should be provided at the college level to up-grade all police officers, particularly senior men dealing directly with the public, to obtain these skills. However, emphasis should be on the first line officers.

There should be further training available for the custodial officers in local lock-ups. If the mentally retarded offender should escape the attention of the arresting police officer, the custodial officers holding

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5. **The Mentally Retarded Offender: Brochure of The National Institution on Mental Health.**

the accused should be at least minimally equipped to deal with them. It is necessary that they also should have adequate inservice training and be up-graded in this regard.

As I said previously, while my topic is restricted to resources, I would comment that the rights of the mentally retarded offender must be protected while in police custody. It is necessary that his legal rights be made well-known to him and his family. If he does not have the ability to comprehend and to appreciate his rights, Society must assume the responsibility of protecting him so that his incapacity does not operate to his prejudice.

All Legal Aid Associations should have within their service personnel especially equipped to appreciate mentally disordered persons, including the mentally retarded, who would be available at all times and on call to protect the rights of such accused persons.

To quote again the group report of the New England Seminar above:

"The element of retardation should be introduced into the judicial process as soon as possible. If the Police officer has reason to believe that the offender is retarded, it is crucial that a lawyer be present. Often a mentally retarded youth or his parents do not know how to take advantage of the rights guaranteed everyone else. The presence of a lawyer to protect the youth's rights is imperative."<sup>6</sup>

#### THE CROWN AND THE COURT:

Rather than dealing separately with these two segments of the Criminal Justice Process, I have chosen to deal with them together.

My reason for doing so is mainly because both are represented by persons trained in the law and my observations with regard to the appreciation of the problem of the mentally retarded offender applies equally to both of them.

Of all persons forming part of the Criminal Justice Process, lawyers and judges should be aware of the problem of the mentally disordered person in Court, and for this purpose, particularly the mentally retarded offender. Traditionally, the law has not been too interested in the Social Sciences, Psychology, Mental Health, and in some cases has actively resisted the assistance that can be received. Fortunately, more emphasis is now given in law school curricula. However, at this time few practising lawyers have the background training or knowledge with which to make an adequate appraisal of their client or the accused.

It is not the practise of the Judicial System to provide for Crown Attorneys and/or Judges to take instruction, inservice or otherwise, for

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6. Ibid.

the purpose of being informed or up-graded with regard to these problems. Many Crown Attorneys and Judges are not even aware of the minimal facilities now provided in non-correctional institutions or in the community for the purpose of dealing with mentally disordered persons, which occasionally may include the mentally retarded offender.

Generally speaking, Federal Statute and Provincial Law gives the Crown and the Court only two alternatives to consider for the purposes of dealing with the mentally retarded offenders, they are either jail or probation.

As a result of my inquiries, I found that the Provincial and Federal Institutions in Manitoba give little, if any, treatment or rehabilitation to mentally retarded offenders. I suspect the same general statement applies to other Provincial Jurisdictions. The Federal system gives some educational and vocational training if the retarded offender can be assimilated without creating a management problem.

I would suggest that the Crown when dealing with an accused person that appears to be a mentally retarded offender, even before a charge is laid, should be able to make immediate reference to a psychiatric facility for the purposes of ascertaining the mental status of the accused, subject, however, to the appropriate controls of the Court so that the accused is not lost in the limbo of psychiatric treatment.

In considering the alternative of Probation, it is evident that both the Crown and Court, and needless to say, the Defence Counsel, must be aware of the community facilities that are available. This would enable the Crown to make appropriate recommendations and comment, if necessary, and would enable the Court to effect an appropriate disposition to the Probation Services.

In Canada, today, there are some facilities available for the treatment of retarded persons, both in Institutions and in the community. In the community there are Government and private agencies that are involved in the Rehabilitation Process, both educational and vocational. But after an examination of the programs and discussion with the Directors in Manitoba of these programs, it is obvious that they prefer not to be involved in the rehabilitation of mentally retarded offenders, fearing the disruptive effect on their programs. It, therefore, is clear that enlargement of present facilities is required and that new specialized facilities are also needed for the purpose of dealing with such offenders.

One would hope that Government agencies, such as the various Provincial Rehabilitation Services, could be enlarged and up-graded for these purposes so that the facilities would be at the disposal of the Courts. Specialized workers in the area of Criminology and those equipped to deal with the mentally retarded offender should be the main

development in this area to assist the Probation Services in carrying out the desires of the Court for community rehabilitation of mentally retarded offenders.

Other non-governmental agencies should be encouraged to assess whether or not the existing sheltered work-shops, vocational centers and educational centers, are suitable for the offender. They should also determine whether or not adequate rehabilitation personnel is available in their facilities for the specialized programs for retardates having criminal propensities or background.

The Parole and Probation staff should have more intensive and specialized training and education to assist them in dealing with the mentally retarded offender. Possibly the establishment of specially trained units and case-workers for the purpose of developing special case loads of mentally disordered offenders, including the retarded, would be a feasible development.

Both the public and government should provide more facilities and support for the existing agencies. And they in turn should direct more comprehensive information of their programs to the Courts. The Courts should have enabling legislative power to use these facilities directly, provided, however, that the services can be developed in such a way as to be open to delinquent offenders.

Unfortunately, there are retarded offenders that can not be treated in the community and these, if needing custodial care, are not welcome in the present hospital atmosphere of mental hospitals, training schools, and correctional institutions. It is, therefore, necessary that special institutions be developed for the rehabilitation of all mentally disordered offenders, including the retarded, in a custodial atmosphere. These would have to develop special programs in education and vocational training conducted by specially trained personnel. These facilities should focus on retarded offenders who commit crimes of violence and sexual offences or create management problems in the conventional institutions. These could be attached to present mental health facilities.

In view of the numbers involved, accommodation need not be large and the facility could have the use of the personnel already part of the institution.

Notwithstanding the great pressures today for the theory of normalization of retarded persons, the duty of the Criminal Justice system to protect society should always be uppermost in the mind of the Court, even when dealing with the mentally retarded offender. A caution-care must always be taken that mental health custodial institutions be subject to the review of the Court, for if placement in such institutions amounts to committal, it might be tantamount to a life sentence.

On the part of the Crown and the Court indifference to the mentally retarded offender must always be avoided. The pressure of the court docket and work must not cause him to be passed by. The Court must, if there is any suggestion of mental disability on the part of the accused, protect his rights by assuring legal representation and accepting the assistance of trained experts in the area of treatment and rehabilitation. The retarded accused must not be dealt with in the ordinary way, leaving his retardation to be identified in jail, or later, with the present unsatisfactory consequences as a result.

The Court and the Crown Attorney, if aware of the problems of a mentally retarded offender, will appreciate the fact that this person has difficulty in articulating and appreciating the problems of presenting a proper defence, based on a clear understanding of his rights.

Indifference in this area has a grave effect on the veracity of the judicial system and the correctional system.

I am well aware that the provision of the resources outlined above would not be without cost. Not so much in capital expenditure, but more in that it would take time and money to acquire the required special and trained personnel. But in view of the fact that the problem is an urgent one, can we afford *not* to provide the facilities and programs to deal with the retarded offender?

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## CANADA AND THE HIJACKING OF AIRCRAFT

Despite the attempts of the international community, through such multilateral treaties as the Tokyo Convention on Offences and Certain Other Acts committed on board Aircraft (1963)<sup>1</sup>, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970)<sup>2</sup>, and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)<sup>3</sup>, to combat the increasing number of unlawful seizures of aircraft, sabotage and terrorist activities, the sad fact remains that this kind of activity presents as great a threat to the traveller by air as it did ten years ago when the Tokyo Convention was concluded. After a relatively "quiet" first six months of 1973, major incidents have erupted in July<sup>4</sup> and August<sup>5</sup>, giving rise once again to the

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\* Provincial Judge, Province of Manitoba.

1. Signed at Tokyo, September 14, 1963. I.C.A.O. Doc. 8364; (1964) 2 Int. Legal Materials at 4042.
2. Signed at The Hague, December 16, 1970. (1971) 10 Int. Legal Materials at 133.
3. Signed at Montreal, September 22, 1971. (1971) 10 Int. Legal Materials at 1151.
4. The hi-jacking and destruction of a Japan Airlines "jumbo" jet after leaving Amsterdam for Tokyo. It was eventually flown to Libya, where the passengers were released and the aircraft blown up. On July 29, Libya announced its intention to put on trial the four surviving Japanese hi-jackers.