

MENTAL RETARDATION AND CRIMINAL JUSTICE: SOME ISSUES AND PROBLEMS

ROBIN JACKSON

King Alfred's College of Higher Education, Winchester, U.K.

INTRODUCTION

At the beginning of this century the view was widely and confidently proclaimed by social philosophers and social scientists in Britain and North America that criminality and mental retardation were inextricably linked (Kamin, 1974). An examination of the literature of that period reveals a number of related perceptions of the mentally retarded: they were seen as innately predisposed to criminality, particularly, serious crimes against the person (e.g., sexual crimes); because of a lack of awareness and understanding of the norms that govern social conduct, they were thought more likely to commit anti-social acts; and, as they had difficulty in anticipating the consequences of their actions, they were unlikely to be deterred by normal sanctions. Despite the fact that no other single characteristic of the retarded has been so thoroughly studied, there is no conclusive evidence that intelligence level plays a significant part in criminal behaviour, (Menolascino, 1974).

Nevertheless these views still enjoy popular currency and thus have the potential to affect the decisions, judgements and dispositions made in relation to the retarded person whether as accused, defendant or offender. No more clear and tragic example of the fallibility of our criminal justice system can be instanced than the case of Timothy Evans where a collective failure by police, lawyers, judge and jury members to appreciate the meaning of mental retardation, and its relevance to the case under examination, almost certainly led to his execution (Kennedy, 1961). With the abolition of capital punishment, a miscarriage of justice of this magnitude and irrevocable nature cannot be repeated. However, since Evans' execution over three decades ago, our criminal justice system still neither recognizes nor attempts to accommodate the particular needs and rights of the mentally retarded.

This paper seeks to identify a number of issues and problems that the retarded pose to the criminal justice and penal systems: (a) the notion of diminished responsibility; (b) competency to stand trial; (c) knowledge and understanding of mental retardation by members of the legal profession and police; (d) the propriety of disclosing to a jury a defendant's retarded status; (e) the case for special treatment; and (f) the conflict between the normalization principle and the case for special treatment.

THE NOTION OF DIMINISHED RESPONSIBILITY

English criminal law has made provision to exempt mentally disabled persons from criminal responsibility on the grounds of insanity. The M'Naghten Rules, which were formulated by Lord Chief Justice Tindal in the House of Lords in 1843, set out the grounds for a plea of diminished responsibility:

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

This formulation would have been much less circumscribed, if the phrase 'from disease of the mind' had been excluded from it. As the essence of the ruling is to draw attention to *defect of reason* as grounds for establishing a defence, it could be argued that

any such qualification or attribution of cause is irrelevant. Or put another way, defect of reason is as much a manifestation of mental retardation as a 'disease of the mind'.

The main problem with the M'Naghten Rules is that they deal with the more extreme cases of insanity, excluding the less obvious ones, in particular the 'non-sane non-insane' cases. Mannheim (1965) acknowledged that the position of the mentally retarded was particularly problematic. The shortcomings of the M'Naghten Rules have been reduced by the introduction of two important statutes, the Homicide Act, 1957 and the Mental Health Act, 1959. It is a feature of both Acts that they deal with mental retardation. Under the terms of the Homicide Act, 1957:

"where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

The 1959 Mental Health Act broadened the definition of mental disorder to embrace:

"mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind."

The major problem presented by the mentally retarded is a limited capacity for using complex methods of thinking which necessarily impairs their ability to learn. Particular difficulty is experienced in thinking in abstract terms, understanding the relationship between cause and effect and generalizing. Stephens (1974), in a study of moral judgement in retarded and non-retarded adults, noted that retarded persons also have problems in understanding the concept of guilt by association. They seem able to verbalize moral judgements but are unable to make such judgements before acting in a socially inappropriate manner.

Arrested or incomplete development of mind clearly implies that a retarded person has a reduced capacity to act rationally and consequently reasonably or sensibly. As the exercise of reason presupposes the capacity for rational thought and as the existence of our legal and judicial systems are to draw the distinction between reasonable (permissible) and unreasonable (impermissible) conduct and to exercise sanctions against those who act unreasonably, it is clear that a retarded person presents difficult problems for the criminal justice system.

What degree of retardation would be necessary to justify a plea of diminished responsibility? How would that judgement be made? Should it rest on the results of a psychological test or a battery of tests? If so, what account should be taken of the margin of error in such tests? Who should be responsible for test administration and interpretation?

Should a plea of diminished responsibility rest on the testimony of expert witnesses? If so, who would qualify to act in such a capacity? The matter of expert testimony is fraught with difficulties. In view of the fact that most retarded defendants brought before the courts tend to be mildly retarded, the most contentious issue will relate to the nature of retardation. Sociologists, if called as expert witnesses, are likely to testify that mild retardation is essentially a sociological phenomenon and that the labels 'mentally retarded' and 'educationally sub-normal' are given to legitimize the withdrawal of troublesome but otherwise *normal* working class children and young people from mainstream education, (Tomlinson, 1982). In brief, special provision is seen as a mechanism of social control exercised by powerful professional vested interest groups in our society. If called to testify, psychologists are likely to argue that mild retardation is an identifiable condition that possesses characteristics that are amenable to psychological measurement.

Such strongly conflicting interpretations may induce defence lawyers to refrain from seeking any expert testimony, to the detriment of retarded defendants.

If a mentally retarded person is excused from culpability, under what circumstances would it be permissible for the state to commit him to an institution? Must an individual be deemed dangerous to himself or society, before he is committed? How long can a retarded person, who has been acquitted on a plea of diminished responsibility, remain institutionalized, before it constitutes an infringement of his basic human rights?

COMPETENCY TO STAND TRIAL

An important feature of our legal tradition is that an accused person may not be tried on a criminal charge if at the time of the trial his mental condition is such that he cannot appreciate the nature of the proceedings and participate fully and intelligently in his defence. Establishing that an accused person is not mentally competent to stand trial does not cancel the trial, it merely postpones it until such time that the accused is competent. In such cases the mentally incompetent accused is usually committed to an institution until he becomes competent, when the trial will resume. For the retarded, this is tantamount to imposing a 'life sentence'.

The issue of competency to stand trial and the issue of criminal responsibility are frequently confused. If a defendant appears to know right from wrong — the usual test of criminal responsibility — his competency to stand trial is rarely challenged. However, because a retarded person may have a limited ability to distinguish right from wrong, it does not follow he has the mental capacity to stand trial. Marsh, Friel and Eissler (1975) have commented that:

“as long as the courts, defence lawyers and prosecutors think of competency to stand trial in terms of criminal responsibility, even if they recognize mental deficiency in the defendant, there will always be the danger that mentally retarded persons will be tried and convicted without their competency to stand trial questioned, let alone judicially determined.”

KNOWLEDGE AND UNDERSTANDING OF MENTAL RETARDATION

Recent research would appear to demonstrate that there is a serious lack of knowledge and understanding of the nature of mental retardation by members of the legal profession and police. In a survey conducted in the USA with judges, lawyers and police, Schilit (1979) found that all groups were “surprisingly uneducated” with regard to mental retardation. Considerable disagreement was found with respect to certain fundamental issues in the area of mental retardation and the law, (e.g. whether mentally retarded persons were more easily led into criminal behaviour than non-retarded persons; the validity of confessions given by retarded persons, etc.). Schilit concluded his study by observing that the lack of understanding and the basic disagreements among legal professionals could result in retarded persons being sentenced inappropriately. State court administrators, recently surveyed in the USA, were asked whether judges and/or lawyers in their state were provided with formal training related to the retarded defendant, (Reichard, Spencer and Spooner, 1980). A negative response was received from 29 of the 36 states (80.6%) which replied! There is no reason to suppose that similar studies conducted in England with comparable groups would produce markedly different results.

The lack of knowledge and understanding evident among police, lawyers and judges concerning mental retardation is mirrored by an even greater ignorance by the retarded of the working of the criminal justice system. A retarded person is unlikely to (a) understand police procedures and their consequences; (b) be cognisant of his right to legal counsel; (c) be aware of his right to refuse to answer incriminating questions; and (d) withstand the psychological pressure applied when a confession is sought by the police.

The validity of many statements secured from retarded accused is open to question. Police procedure normally requires that a statement be taken down and read back to the accused to establish its accuracy. When this has been done, a signature is sought from the accused. This routine procedure often overlooks the fact that the accused is unable to read. Or he is able to read but cannot understand and/or grasp the significance of what he has read. As Morrow (1976) has pointed out our everyday precautions presuppose a literate and intelligent criminal! 'Warning — these premises are equipped with burglar alarms.' Similarly, once an individual is caught up in the judicial process, literacy and intelligence are still expected. 'Read this form!' 'Sign this statement!' Menolascino (1974) has argued that if the police were properly trained to recognize retardation, there would be fewer arrests and, where arrests were made, efforts would be made more frequently to obtain immediate legal aid. Accordingly, recognition at the time of arrest is critical for subsequent court proceedings, placement and treatment.

PROPRIETY AND POSSIBLE CONSEQUENCES OF DISCLOSING DEFENDANT'S RETARDED STATUS TO JURORS

A further important issue is the legal and ethical propriety of disclosing to jurors that a defendant is retarded. Not informing jurors could have one advantage, besides increasing the objectivity of jurors' decisions, it might reduce the need for extensive pre-trial jury selection procedures in which possible jurors are challenged on the basis of their general attitudes toward retarded persons. The findings of a recent study are of interest here (Gibbons, Gibbons and Kassin, 1981). College students' attitudes toward retarded criminal offenders and their estimates of the types of crime most often committed by retarded persons were examined. Based on this survey's findings an experiment was conducted in which the students' reactions to one or two different types of crime committed by either a retarded or non-retarded person were studied.

The results indicated that the retarded offender received a lighter sentence regardless of the type of crime. Apparently this was because the students thought that he had been coerced into committing the crime and also confessing to it. The fact that the retarded label had such a strong influence on the students' reactions to the defendant's criminal behaviour underlines the problem of disclosing to the jurors that a defendant is retarded. It is quite possible that other more conservative and less knowledgeable populations than college students might be less favourably disposed toward a retarded defendant.

It is worth noting that only 10% of the students believed that jurors should not be made aware of a defendant's mental retardation. One interpretation of this finding is that the students believed retardation should relieve a defendant of some responsibility — therefore jurors should take this into account when arriving at a verdict. As Gibbons *et al* (1981) point out the findings of this survey can only be suggestive but they do indicate that the question of whether a plea of mental retardation should be equivalent to a plea of insanity in terms of criminal responsibility requires serious consideration. Clearly the students — potential jurors — assumed some degree of equivalence.

The students also believed that the retarded person's behaviour was more the result of external factors and thus he should not be held responsible for his actions. This kind of response has been described by Gibbons, Sawin and Gibbons (1979) as the 'patronization effect'. That's to say, the students were making external attributions for the retarded person's behaviour and consequently were reluctant to punish him for the crime even when they knew he was guilty. One possible consequence of the 'patronization effect' is that the retarded person may become aware of the fact that he is not likely to be blamed for his failure and/or credited for his successes. This may lead to a reduction in his motivation to improve his behaviour. Gibbons *et al* (1979) also suggest that **retarded persons who are aware that being mentally retarded may partially exonerate them from blame may actually be more likely to commit a contemplated crime.**

The conclusion of Gibbons, Gibbons and Kassin (1981) is that a judge should only inform a jury that a defendant is retarded if he feels that the defendant's retardation is a factor that directly contributed to the crime itself, otherwise this type of evidence should be deemed inadmissible so that neither the prosecution nor the defence can use it to their advantage. The results of the survey appear to indicate that most people believe a judge should take retardation into account when pronouncing sentence so that attention can be paid to the special needs of the retarded offender.

THE CASE FOR SPECIAL TREATMENT

The particular problems presented by the retarded defendant has led to the idea of establishing a system of special courts. The point has been made that some courts have altered and adapted their physical facilities and procedures to suit the needs of the physically and sensory handicapped but that no formal adjustments have been made for the retarded. It has been suggested that retarded individuals judged competent to stand trial should benefit from modified pre-trial and courtroom procedures to ensure that their impaired ability to understand, think quickly and communicate effectively will not prejudice the judicial proceedings (Reichard, Spencer and Spooner, 1980).

The proposal to establish special courts has not met with general support. Such a system, it is argued, would be unnecessary and undesirable as the retarded accused are dealt with fairly in the existing criminal justice system, given early and competent legal assistance. A special court could easily lead to the retarded defendant being labelled as a second class citizen, for it would soon be known that the special court dealt only with cases involving the incompetent. Further, there would be the practical difficulty in deciding what degree of retardation warranted referral to this court which, in turn, would result in arbitrariness and unfairness.

Particularly difficult is the issue of suitable placement for the retarded offender as neither prison nor hospital — mental subnormality, psychiatric or state hospital — is an appropriate institutional setting. If panel treatment aims, among other things, to reform and rehabilitate then placement of retarded persons, susceptible to injurious influence, in prison, is likely to prove self-defeating. Further, to provide specialized services for the retarded in the world outside prison but to deny special provision and treatment in a penal institution is logically inconsistent.

The whole notion of special treatment for retarded defendants has not been without challenge. There are those, like Morris (1973), who argue against confusing criminal and mental health law:

"the police powers of the state should not be infected by the mental health power of the state. There should be no defence of insanity or mental retardation to a criminal charge: there should be no incompetency plea to stay the criminal trial of a mentally retarded person. The mentally retarded accused should be subjected to exactly the same principles of criminal law and the same trial processes as any other citizen."

However, Morris' contention that mental illness and mental retardation both constitute *mental health* problems betrays a basic but common misconception as to the nature of retardation: a misconception that necessarily invalidates his argument for non-discrimination.

CONFLICT OF PRINCIPLE

To argue for special treatment, it has been suggested, not only flies in the face of the principle of normalization but denies the principle that all citizens are equal before the

law. If retarded citizens are to be accorded the same rights and privileges as other citizens, they should also be subject to the same rules, laws and sanctions.

Those who suggest that one cannot at one and the same time argue for normalization and for special treatment perhaps misunderstand the purpose of the normalization process. The principle of normalization as originally conceived and advocated by Nirje (1969) was, essentially, to effect attitudinal, behavioural and organizational change within residential institutions for the retarded in such a way to remove their dehumanizing features. In other words, to provide *more normal* environments. Thus, normalization is not about treating mentally retarded persons as if they were normal but of recognizing and treating them as human beings. Recognition of an individual's human worth does not logically require that society has to accord a retarded citizen identical treatment to that accorded to a non-retarded citizen.

CONCLUSION

This paper has sought to demonstrate that the mentally retarded present to the criminal justice and penal systems a complex and unique set of problems and challenges. The inclusion within professional training courses for lawyers, police, probation and prison officers of a special element devoted to an examination of the nature of mental retardation and its implications for their professional group could lead not only to a critical appraisal of present practice but, more importantly, to a questioning of certain principles upon which that practice is based.

If it is accepted that mental retardation is an identifiable and irreversible condition which impairs an individual's intellectual functioning to the extent of seriously limiting his capacity for rational thought and action then the continuing failure of the criminal justice system to acknowledge the nature and consequences of this condition can be interpreted as a denial to the retarded — whether as accused, defendant or offender — of his rights to equitable and appropriate treatment. Possibly the only effective way in which the rights of the retarded, and all other citizens, may be safeguarded and accorded constitutional recognition and protection is through the introduction in England of a 'Bill of Rights'.

REFERENCES

- GIBBONS, F. X., GIBBONS, B. N., & KASSIN, S. M., (1981) Reactions to the criminal behaviour of 'Sympathy' or patronization? *Am. J. Mental Deficiency*, 84, 124-131.
- GIBBONS, F. X., GIBBONS, B. N., & KASSIN, S. M., (1981) Reactions to the criminal behaviour of mentally retarded and non-retarded offenders. *Am. J. Mental Deficiency*, 86, 235-242.
- KAMIN, L. J., (1974) *The Science and Politics of I.Q.* Maryland: Lawrence Erlbaum.
- MANNHEIM, H., (1965) *Comparative Criminology*. London: Routledge and Kegan Paul.
- MARSH, R. L., FRIEL, C. M., & EISSLER, V., (1975) The adult mentally retarded in the criminal justice system. *Mental Retardation*, 13, 21-25.
- MENOLASCINO, F. J., (1974) The mentally retarded offender. *Mental Retardation*, 12, 7-11.
- MORRIS, N., (1973) Mental retardation and the criminal law. Paper presented at the National Conference on the Retarded Citizen and the Law. Columbus: Ohio.
- MORROW, C. C., (1976) A legal framework: an insider's perspective. In P. L. Browning (Ed.) *Rehabilitation and the Retarded Offender*. Springfield: Charles C. Thomas.
- NIRJE, B., (1969) The normalization principle and its human management implications. In R. B. Kugel and W. Wolfensberger. *Changing Patterns in Services for the Mentally Retarded*. President's Committee on Mental Retardation, Washington, D.C.
- REICHARD, C. L., SPENCER, J., & SPOONER, F., (1980) The mentally retarded defendant-offender. *J. Special Education*, 14, 113-119.
- STEPHENS, W. B., (1974) Symposium: Developmental gains in the reasoning, moral judgement and moral conduct of retarded and non-retarded persons. *Am. J. Mental Deficiency*, 79, 113-115.
- TOMLINSON, S., (1982) *A Sociology of Special Education*. London: Routledge and Kegan Paul.