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## ABSTRACT

People with cognitive, intellectual, or developmental disabilities are a small but increasing portion of offenders in the criminal justice system. People with developmental disabilities are estimated to comprise 2-3% of the general population, but 4-10% of the prison population, and an even higher percentage of those in juvenile facilities and in jails. Officials believe the problem is likely to worsen, as the prevalence of cognitive disabilities in the general California population is increasing. This report features the findings of a California Policy Research Center-funded study on this topic. The study was an exploratory effort to understand the nature and extent of the problems people with disabilities face in the criminal justice system, and what legislation and programs the state is formulating to address them. Research methods included use of personal interviews and existing data to explore the particular problems, their prevalence, and possible remedies. Findings indicate that California has few programs or policies to accommodate the special needs of people with developmental disabilities, who often lack access to the legal protections that exist for others. Findings lead to the conclusion that the justice system often fails individuals with developmental disabilities, usually because it fails to identify or accommodate their uniqueness. Finally, suggestions are offered concerning how to better accommodate people with cognitive disabilities in the justice system. (Contains 87 references and 6 tables.) (GCP)

**DETAILED RESEARCH FINDINGS**

**Doing Justice? Criminal Offenders with Developmental Disabilities**

*Joan Petersilia*

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## DETAILED RESEARCH FINDINGS

### **Doing Justice? Criminal Offenders with Developmental Disabilities**

*Joan Petersilia*

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## **About the California Policy Research Center**

The California Policy Research Center (CPRC), which commissioned this study, is a University of California program that applies the extensive research expertise of the UC system to the analysis, development, and implementation of state policy as well as federal policy on issues of statewide importance. CPRC provides technical assistance to policy-makers, commissions policy-relevant research on statewide issues, and disseminates research findings and recommendations through publications and special briefings. The views and recommendations in this report are those of the authors and do not necessarily represent those of CPRC or the Regents of the University of California.

## **About the Author**

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## I. INTRODUCTION

People with cognitive, intellectual, or developmental disabilities are a small but increasing portion of offenders in the criminal justice system. Generally this population is referred to as being mentally retarded or developmentally disabled (MR/DD), though the second term is now preferred.<sup>1</sup> People with developmental disabilities are estimated to comprise 2% to 3% of the general population but represent 4% to 10% of the prison population, and an even higher percentage of those in juvenile facilities and in jails. As a result of a CPRC-funded study to explore the nature and extent of this disproportionate incarceration rate, I estimate conservatively that 15,518 Californians with developmental disabilities are currently in jail, in prison, on probation, or on parole. My findings also indicated that California has few programs or policies to accommodate the special needs of people with developmental disabilities, who often lack access to the legal protections that exist for others.

The definition used for mental retardation in this report is the one used by the American Association on Mental Retardation (AAMR), the principal organization of professionals in the field of mental retardation. According to the AAMR (1992), an individual is considered to have mental retardation based on the following three criteria:

- ▶ Intellectual functioning level (IQ) is below 70-75;
- ▶ Significant limitations exist in two or more adaptive skill areas, such as communication, academics, self-care, and work;
- ▶ The condition is present from childhood (defined as age 18 or less).

Further information and other definitions—for example, federal and state definitions—are provided in the next section on terminology, definitions, and the state system of care.

Mental retardation and mental illness are distinct conditions, although the two are often confused in criminal justice settings. Mental retardation pertains to sub-average intellectual functioning, impairment in social adaptation, is usually present at birth, and remains relatively stable over the life course. Mental illness, on the other hand, has nothing to do with IQ. A person with mental illness may be a genius or have sub-average intelligence, and may be very confident socially but have a character disorder. Mental illness may strike at any time, and a person with mental illness may vacillate between normal and irrational (and sometimes violent) behavior.

Some people with mental retardation may also have mental illness, and when this occurs, the condition is usually referred to as “dual diagnosis.” One key organization estimates that between 10% to 20% of people with mental retardation also have a mental illness. It should also be noted that “learning disability” is not synonymous with mental retardation or developmental disability. People with learning disabilities often have average or above-average intelligence, but have difficulty receiving, processing, or producing information, or any combination thereof.

Because increasing numbers of people with developmental disabilities are being incarcerated in California, I decided to undertake an exploratory study to examine how people with this condition interact with the state’s criminal justice agencies. By interviewing justice system officials, people

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<sup>1</sup> Although the term mental retardation is still used, the preferred term is cognitive, intellectual, or developmental disability (see pp. 2–3 for a complete definition). This report uses “people first” language, referring to the person first, rather than the disability (e.g., “person with a disability” rather than “disabled person”).

with disabilities and their care providers or families, as well as reviewing legislation, program guidelines and existing data, I hoped to better understand the nature and extent of the problem, with an eye towards recommending program and policy changes.

The two other primary research questions were:

- ▶ What are the particular characteristics of the justice system that preclude the ability of persons with developmental disabilities to obtain “equal justice under the law?”
- ▶ What is California doing and what might California do to address this problem?

The study was funded by a \$35,000 grant from the California Policy Research Center. The data come solely from personal interviews of over 100 people collected during 15 months, as well as existing descriptive information. The interviews were open-ended and lasted from 20 minutes to two hours each. Most of the interviews were conducted by the author, and some were conducted by University of California, Irvine students who were enrolled in the author’s “Justice and Disabilities” graduate seminar in winter 1999.

This report does not specifically address the topics of juveniles with MR/DD who are arrested or incarcerated, or to the imposition of the death penalty for people with developmental disabilities. Also, incomplete attention is given to crime *victims* who have this condition.<sup>2</sup> All of these topics are critically important, but resource constraints prevented their inclusion in this study.

## A. Terminology, Definitions, and the State System of Care

### Mental Retardation

In addition to identifying mental retardation by the three criteria noted above, the American Association on Mental Retardation divides the condition into four categories based on degree of disability, as indicated in Table 1.

**Table 1**  
**Degrees of Mental Retardation**

Degree	IQ Score	% of People with Retardation
Mild	51-70	89.0
Moderate	36-50	6.0
Severe	21-35	3.5
Profound	Under 20	1.5

Source: American Association on Mental Retardation, 1992.

A number of studies have estimated the prevalence of mental retardation within the general population, and it is generally agreed that between 2% and 3% of the U.S. population has mental retardation (AAMR 1992). Mental retardation can be caused by any condition that impairs development of the brain before birth, during birth, or in the childhood years. Although several hundred causes have been discovered, the cause remains unknown in about one-third of the people affected. The three major causes of mental retardation are Down’s syndrome (a chromosomal

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<sup>2</sup> The author is the project director of a National Research Council study on crime victims with disabilities, and a final report from that project will be published in late 2000.

disorder), fetal alcohol syndrome, and Fragile X (a single-gene disorder) (The Arc 1996). Mental retardation cuts across race, education, and socioeconomic backgrounds, although it is more frequent among the lower socioeconomic levels of society (Murphy et al. 1998).

About 89% of people with mental retardation will be mildly affected, and will be only a little slower than average in learning new material and skills. The Department of Justice reports that most prison inmates with retardation fall within the "mild category," although some are within the "moderate" range. They believe that people with severe or profound retardation are either unlikely to commit crime or are diverted out of the criminal justice system at an early stage (Coffey, Procopiow, and Miller 1989). People with mild retardation are not as likely to inherit mental retardation as are people with severe mental retardation, as the causes of mild retardation are thought to be related to such environmental factors as socioeconomic level, access to health care, and nutritional state, rather than genetic factors (The Arc 1996).

### **Federal Definition of Developmental Disabilities**

Federal law defines a developmental disability as a severe, chronic disability of a person age 5 years or older which is attributable to a mental or physical impairment or combination of mental and physical impairments; is manifested before the person attains age 22; is likely to continue indefinitely; results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency (42 U.S.C. 6001 (5)).

### **State of California Definition**

The definition of a developmental disability in California state law is more narrow than that in federal law. The Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code Sec. 4512(a)) defines a developmental disability as one that "originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual."

Also, the disability must be due to one of the following conditions:

- ▶ Mental retardation
- ▶ Cerebral Palsy
- ▶ Epilepsy
- ▶ Autism
- ▶ A disabling condition closely related to mental retardation or requiring similar treatment, but excluding other handicapping conditions that are solely physical in nature.

The California Department of Developmental Services estimates that 86% of those served by the state system for the developmentally disabled are mentally retarded (<http://www.dds.cahwnet.gov>, accessed August 25, 1999).

### **State System of Care**

The California Department of Developmental Services (DDS) is responsible for administering the Lanterman Developmental Disabilities Services Act (WIC Sec. 4500-4519, 1969). This landmark legislation, among other things, mandated the creation of a network of regional centers throughout the state to serve people with developmental disabilities. DDS designs and coordinates the wide array of services provided through the 21 regional centers, which are operated by private,

community-based nonprofit corporations, as well as five State Developmental Centers for those who need 24-hour care.

Regional centers (RCs) function as service hubs, coordinating, linking, and funding services and supports in local communities for all eligible people. As the regional center system is voluntary, people with developmental disabilities are not required to be registered or receive services. California's 21 regional centers serve all 58 counties, and are required to complete Client Development Evaluation Records (CDER) on all clients. The CDER contains a few items that pertain to a client's involvement with the justice system (e.g., currently on probation).

The California State Council on Developmental Disabilities is a federally funded state agency that assists in planning, coordinating, monitoring, and evaluating services for people with developmental disabilities and their families. In recent years, it has taken an active role in sponsoring projects to improve the system of services and support for offenders with MR/DD.

Protection and Advocacy (P&A) is a federally mandated system in each state, which provides legal advocacy to protect the rights of people with developmental disabilities under all applicable federal and state laws. P&A's were created by the Development Disabilities Assistance and Bill of Rights Act of 1975, and each governor designates the agency to provide this service. In California, that agency is the nonprofit Protection and Advocacy, Inc.

## **B. Prevalence of California Population with Developmental Disabilities**

Although the federal government estimates that the national prevalence rate of mental retardation is 2.5%, California has adopted a 1.8% rate, based on the National Health Interview Survey-Disability Supplement (NHIS-DS), a community survey conducted by the University of Minnesota that does not include people who are incarcerated or in the military. As of January 1998, California's total population was estimated to be 33,252,000 (Department of Finance Demographics Unit). Based on the 1.8% rate, the Department of Developmental Services estimates that 598,536 Californians meet the broad federal definition of a developmental disability (DDS 1999).

The DDS provided services to 131,094 active clients in 1998, meaning that 0.39% of all Californians are DDS clients.<sup>3</sup> Only 0.22% of those estimated to have developmental disabilities are formal DDS clients ( $131,094 \div 598,536$ ), which means that an estimated 78% of people with developmental disabilities are not DDS clients. The number who are unidentified or untreated would be even higher if California used the federal 2.5% prevalence rate.

If the social service system hasn't officially identified people as having mental retardation or developmental disabilities, and police are untrained and often fail to recognize people with MR/DD, then it is no wonder that people with developmental disabilities move through arrest, conviction, incarceration without anyone taking notice. Clearly, one means of better serving those with MR/DD who get caught up in the justice system is to increase the pool of RC clients so that some state system is responsible for identification, service provision, and advocacy on their behalf.

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<sup>3</sup> The current population of DDS clients is around 155,000, which includes some who are not retarded, others "at risk" (birth to age 3), and those in the intake process.

### **C. Problems for Offenders with Developmental Disabilities**

Offenders who are developmentally disabled represent a complex, troubling, and increasingly costly issue for the California criminal justice system. On the one hand, we don't wish to excuse the criminal behavior of criminals who are cognitively impaired. In a world where such persons are finally moving back into local communities and striving to be treated equally, it would make no sense to demand a double standard in criminal justice matters. In a normalized world, one has to live within society's rules and accept the consequences of one's actions.

On the other hand, however, many offenders with cognitive disabilities may not be so much "lawbreakers" as they are low-functioning citizens who lack education on how to function responsibly in a complex society. Some research suggests they are frequently used by other criminals to assist in law-breaking activities without understanding their involvement in a crime or its consequences. Most people with these disabilities have a deep need to be accepted, and sometimes agree to help with criminal activities in order to gain friendship. They may act as lookouts, transport drugs or other contraband, carry a forged check into a bank, or attempt to sell merchandise stolen by others. In an effort not to feel lonely and isolated from their friends, they may willingly go along with any scheme just to be included. As one Los Angeles police officer put it, "they are the last to leave the scene, the first to get arrested, and the first to confess."

#### **High Prevalence of People with Developmental Disabilities in Prison**

When they are arrested, many of the legal protections that exist for all of us—such as the right not to answer questions and the right to counsel—are inaccessible to those with developmental disabilities. They may not understand the legal proceedings, or be able to explain the circumstances surrounding their alleged offense to the police or their lawyers. As former U.S. Attorney General Richard Thornburgh wrote:

Disabled offenders must at times be treated differently from others to ensure protection of their rights and to ensure an equal opportunity to benefit from services. People with mental retardation cannot be "processed" exactly like others who come into contact with the criminal justice system because, for them, it may be a system they do not understand or a system that does not understand them (Conley, Luckasson and Bouthilet 1992: xvi).

There have been few studies of the crime commission rates of people with retardation, and most of them are methodologically weak. But the studies that do exist have shown that while their rates of crime are similar to those of other people, and consist mostly of misdemeanors and less-serious felonies, offenders with developmental disabilities are disproportionately represented in state and local correctional agencies (White and Wood 1986). While an estimated 2% to 3% of the general population has mental retardation and/or developmental disabilities (Murphy et al. 1998), about 4% to 10% of those in prison or jail are estimated to be developmentally disabled. The prevalence rates in the literature vary widely, from 3% in New York, to 8% in South Carolina, to 10% in Texas, to 17% in Wisconsin, and 27% in South Carolina (Santamour 1988; Coffey, Procopiow, and Miller 1989), as a result of different testing instruments and methods as well as underlying differences in the prevalence rates across the nation.

A number of cumulative factors appear to explain the high prevalence of people with developmental disabilities in the justice system:

- ▶ Offenders with developmental disabilities come disproportionately from low-income minority groups, where police presence and the probability of arrest are high. One-third (34%) of adults

with disabilities live in households with a total income of \$15,000 or less, compared to only 12% of those without disabilities (Harris 1998).

- ▶ Official justice system processing (from arrest through sentencing) usually proceeds without officials becoming aware of the offender's intellectual disability. McAfee and Gural (1988) found that 75% of offenders with MR were not identified at arrest, and more than 10% were not identified until they were in prison.
- ▶ Most justice personnel are unfamiliar with how to recognize the condition, and offenders with mild retardation are often clever at masking their limitations. A survey of 100 police officers found that 91% of the respondents had no training in working with individuals with MR/DD, and the findings were similar for judges and lawyers (Schilit 1989).
- ▶ Once arrested, offenders with developmental disabilities usually are jailed during pretrial proceedings, as they are unlikely to meet the criteria for personal recognizance or bail, since they are probably unemployed and friendless, two of the major criteria used in bail decision-making. Research has shown that people held pretrial, all other factors being equal, are more likely to be convicted (Toberg 1992).
- ▶ One study showed that defendants with retardation are more easily convicted and receive longer terms than offenders without disabilities (Laski 1992). They confess more readily, provide more incriminating evidence to authorities, and are less successful in plea-bargaining (Edwards and Reynolds 1997; Gudjonsson 1990).
- ▶ Once incarcerated, offenders with MR/DD may be cruelly abused or victimized (Sobsey 1994; Gold 1998). Their response to threatening situations is more likely to be physical rather than verbal or intellectual, and their resulting institutional behavior is poor. As such, inmates with retardation take up an inordinate amount of staff time, and many are eventually reclassified to a higher and more expensive security level (Hall 1992).
- ▶ Their poor institutional behavior and "over-classification" means that they fail to earn maximum good-time/work-time credits, are unable to participate in early release programs, and in states with parole, fail to become eligible because they have not finished the programs required for parole consideration. One study showed that offenders with MR/DD serve a greater portion of their court-imposed sentence than other offenders (Lampert 1987).
- ▶ In most prison systems, only inmates who score above 6th grade intelligence are enrolled in vocational training programs. Thus, inmates with MR/DD are denied all but the most menial jobs, and are rarely able to obtain any sort of paid employment in the prison system. For these and other reasons, incarceration for inmates with MR/DD has a more devastating impact than for offenders without disabilities (Cowardin 1997).
- ▶ When released, parolees with retardation are almost never placed in specialized supervision caseloads or given added assistance, and they often are explicitly excluded from rehabilitation programs because of their disabilities. California currently has few, if any, special supervision programs for parolees with developmental disabilities. Their resulting recidivism rates are high (Petersilia 1997).

This situation does not appear to result from the malice of justice system officials, but rather from lack of knowledge and programs. Mild mental retardation has been labeled a "hidden handicap," because it is often not obvious from a person's physical appearance. As attorney Ruth Luckasson has written (1990): "Ninety percent of persons with mental retardation don't drool, don't

stumble, aren't mute. They have significantly impaired intellectual ability, but often don't have any physical stigmata that indicate mental retardation. They won't 'look' a certain way."

Anthropologist Robert Edgerton, in *The Cloak of Competence* (1967), found that people with this handicap did everything they could to pass as so-called normal. He writes: "they were often surprisingly clever in their techniques of passing, and they were always dogged in their efforts. They struggled to maintain self-esteem by hiding their incompetence." The Arc of the U.S.—the largest advocacy organization focused on mental retardation—also notes that most people with developmental disabilities are not immediately recognizable by appearance alone, and this problem is especially dangerous to those who become involved in the criminal justice system (The Arc 1993).

The battle to appear normal—and particularly not to be called "retarded"—is a major crusade of most disability advocates. Robert Perske, a long time advocate for the disabled, writes: "[This] battle . . . contains an ironic twist. Not being called *retarded* might enrich their lives in the community. In the criminal justice system, however, if the word *retarded* is not used, they might be imprisoned or killed" (Perske 1991:20).

When people with developmental disabilities are stopped and questioned by the police, they often give answers they believe the police want to hear, rather than answers that are correct. They have difficulty solving problems, and they attempt to gain the friendship of authority figures who appear to be good problem-solvers. According to legal scholars Ellis and Luckasson (1985), some people possess a "particular susceptibility to perceived authority figures and *will seek the approval of these individuals even when it requires giving an incorrect answer* [emphasis added]. 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." They listen for words, look into faces, and even copy moods in their tries for "correct" answers.

One can find many examples of police transcripts filled with questions to which yes and no answers had been unwittingly mandated by the way the interrogator posed the questions (for examples, see Perske 1991). Leo and Ofshe (1998) reviewed 60 cases of well-documented false confessions and identified about one-quarter of those as suspects with mental handicaps. They note that when such cases have gone to trial, a jury convicts about 73% of the time, and 48% of the cases resulted in a "miscarriage of justice," meaning wrongful incarceration or execution.

#### **D. Legal Options for Processing Offenders with Developmental Disabilities**

Some people with MR/DD *do* commit serious crimes, and for those who are convicted, the system demands public safety and accountability. Unfortunately, for offenders with developmental disabilities who have committed less-serious crimes, there are few options outside of criminal conviction and sanction.

If defendants are charged with a misdemeanor, California Penal Code sections 1001.21–1001.34 permit the diversion of such inmates to community-based programs. If the crime is more serious or the offender is ineligible for "diversion"—e.g., must be a regional center client and cannot have been previously diverted using this statute in the preceding two years—there are civil remedies that can be invoked. For example, the California Welfare and Institutions Code (WIC 5150) allows for the civil confinement of people with developmental disabilities for up to one year in a mental health facility.

To utilize this option, it must be proven that: 1) the individuals are developmentally disabled (IQ <70); 2) the onset occurred before age 18; and 3) they are a danger to themselves or others. This category often includes “dual diagnosis,” which is a developmental disability and other mental health diagnosis (e.g., suicide risk or mental illness). This is usually a temporary commitment, but it can be continued indefinitely, with a yearly review, if they continue to be a danger to themselves or others. Generally, criminal charges are not filed against people committed under WIC 5150. The usual route to long-term civil commitment of people with developmental disabilities is WIC 6500, which requires annual reviews of commitment.

A second civil option for offenders with developmental disabilities is covered under California Penal Code (PC 1370.1), which requires that court proceedings be suspended when a defendant with a developmental disability is found to be mentally incompetent to stand trial. This section further specifies that the court shall order residential placement to “promote the speedy attainment of mental competence.” According to legal expert Bruce Williams, in addition to state mental hospitals (or developmental centers, where there are trained competency experts running daily classes), this kind of placement can consist of people living in their own homes, with family, or in a group home—and they may or may not actually get competency training. The court sometimes just uses this as a diversion without requiring training. Offenders may be committed for purposes of this “competency” training for up to three years or for the maximum prison term for the offense(s), whichever is less. Under PC 1370, criminal proceedings are suspended pending a determination of competency.

To be competent to stand trial, defendants must: 1) understand the nature of the charges against them; and 2) be able to assist counsel in their defense. If defendants are found competent, criminal proceedings resume. However, if the defendants are found incompetent to stand trial, they are committed to a state mental institution for a duration of time equal to the maximum term of incarceration had they been tried and found guilty. At the end of this period, a hearing is held and offenders are either released or recommitted to a mental institution (under civil order such as WIC 5150) for one year, with reevaluations every year.

The third noncriminal option for offenders with developmental disabilities is outlined in Welfare and Institutions Code 7325, more commonly referred to as the Lanterman-Petris-Short Act, or “LPS conservatorship.” Generally speaking, LPS conservatorship covers those who are “gravely disabled.” This means: 1) they have a mental illness; 2) because of this mental illness, they are unable to provide for their own food, clothing and shelter; 3) they are a danger to others or to themselves; and 4) they have no family willing or able to care for them adequately. While LPS is a civil commitment, criminal activity often brings these people to the attention of the authorities. Hospital staff usually initiate LPS proceedings at the behest of the police or a concerned family member, and once initiated, criminal action does not proceed. LPS begins with a three-day hold under WIC 5150, which is followed by a hearing for a 14-day hold, and then a hearing for temporary conservatorship. This hearing is a jury trial, which determines LPS conservatorship by the Public Guardian.

These options are utilized for offenders with serious mental illnesses, like schizophrenia, as well as for those with dual diagnoses or who are severely retarded, and are not usually available to offenders who are mildly retarded. Those who are mildly retarded constitute the majority of offenders with MR/DD.

As Petrella (1992) observed, some defendants are identified and then *unidentified* as being mentally retarded because it better serves their legal interests. If they are processed criminally, they may serve shorter prison or jail terms, but be subject to inmate-to-inmate victimization and receive

little appropriate treatment. If they are handled through civil remedies, they may be housed for longer (sometimes indefinite) terms, without ever having been convicted of any criminal wrongdoing, but receive more psychological counseling and habituation programs. The increasing presence within state hospitals of people who are mentally *ill*, as opposed to mentally *retarded*, may also place those with MR/DD at high risk of victimization from other residents. The common assumption—that if individuals with mental retardation were identified they would be appropriately served—may not be valid, particularly if there are no appropriate programs to serve them.

According to a defense attorney in Orange County, even when offenders with developmental disabilities are identified, their cases are likely to proceed without special consideration, since the typical avenues available to handle such offenders, including diversion and civil commitment, mean court delays and generally result in a longer time in custody. Several attorneys noted that they were likely to plea-bargain these cases, and have their clients plead guilty, simply to get them out in the quickest time possible. This may seem a quick fix, but ultimately may do more harm than good if the conviction counts as a “strike” or becomes the basis for showing a pattern of criminal behavior at a later time.

Recognizing that a problem exists is far easier than identifying a solution. Philosophically, the issue of how to handle people with MR/DD in criminal justice matters quickly becomes mired in debates concerning “normalization.” Nirje (1969: 369) defines normalization as “making available to the mentally retarded patterns and conditions of everyday life that are as close as possible to the norms and patterns of the mainstream of society.” If full normalization is the goal—and to many MR advocates it is—then logically it follows that people with MR/DD are fully responsible for complying with normal laws and expectations, and violations should result in the same kinds of punishments given to those without such disabilities.

Some maintain that individuals with MR/DD cannot automatically be deemed exculpable based on mental retardation because their intellectual and social functioning varies—that they should be held criminally responsible, just as they are allowed equal rights to marry and raise families (Edgerton 1992). Nonetheless, MR/DD specialists hotly debate how the “normalization” concept should be applied to justice matters. The consensus within the profession, and endorsed by The Arc of the U.S., the President’s Committee on Mental Retardation, and the American Association on Mental Retardation, is that because of the unique aspects of the law enforcement and correctional environments, the normalization goals for people who are mentally retarded should *not* fully apply to those settings (see statements in Reynolds, 1997, and the President’s Committee on Mental Retardation, 1991).

Beyond these philosophical debates, there are also serious practical problems. Is it really beneficial to identify offenders with developmental disabilities? If identification is deemed desirable, how and at what point in the process should such people be identified? What types of additional training would criminal justice personnel need to more accurately identify and appropriately handle offenders with this condition? If programs were developed, *which* offenders with developmental disabilities could be successfully diverted to them—i.e., what types of programs seem to work, for which offenders, at what cost? What agencies should be responsible for operating such programs, and what collaboration is necessary? If incarceration is warranted, what are the implications of different housing arrangements? Should people with developmental disabilities be segregated from the rest of the population, housed with the total inmate population, or something in between? Do specialized probation and parole caseloads make a difference to offenders’ success

and recidivism rates? What expectations are reasonable for supervising offenders with MR/DD on probation or parole?

These questions cannot be answered at this point because we have not devoted public policy attention to the attempt. Offenders with developmental disabilities never have attracted the attention that other “specialized populations” have or that their numbers alone should warrant. For example, we spend enormous amounts of time and energy debating programs and policies for elderly inmates, child molesters, spouse assaulters, and offenders with AIDS, yet generally there are fewer of them in the criminal justice system than offenders with MR/DD. As shown in Table 5 (p. 25), for example, only about 2% of federal and state prison inmates are infected with the HIV virus that causes AIDS (BJS 1995), yet the topic has generated hundreds of articles, federal data collection activities, and special study groups and conferences. This is not to say that we shouldn’t be concerned with AIDS; it’s just curious why offenders with MR/DD get little scholarly or policy attention. As Talent and Keldgord (1975) wrote: “Less effort has been expended in the US to the mentally retarded offender than any other group of offenders.” Their statement is still true 25 years later.

Some believe that this lack of attention reflects a long history of callous disregard for the lives of people with developmental disabilities and a constant devaluing of their worth. Others suggest it results from the fact that offenders with MR/DD lack a committed, well-organized, and fiscally sound advocacy group. As one lawyer told the author: “They aren’t a shouting population.” Whatever the reason, the topic has garnered little scholarly, public, or policy interest.

#### **E. Expected Growth in the Prevalence of MR/DD and Implications for Criminal Justice**

For a number of reasons, officials believe that increasing numbers of people with developmental disabilities will be entering California prisons over the next several years. First, the prevalence of MR/DD in the general California population is rising due to a number of social indicators known to cause this condition, such as the increasing cost of health care, poor prenatal nutrition, increased exposure to pollutants and chemicals, child abuse, and increases in drug and alcohol use during pregnancy (Fryers 1993). The California State Council on Developmental Disabilities recently reported that while the state’s population grew about 20% between 1985 and 1996, the number of people identified as being developmentally disabled increased 52%, and the number of people showing mild retardation doubled between 1985 to 1996 (Frankland 1996).

More than 43 million people in the United States have disabilities—about 14% of all Americans—and an estimated 6.2 to 7.5 million have mental retardation (LaPlante and Carlson 1996). This is one of America’s largest groups of citizens with disabilities. Mental retardation is 12 times more common than cerebral palsy and 30 times more prevalent than neural tube defects such as spina bifida. It affects 100 times as many people as total blindness. One out of 10 American families is directly affected by mental retardation (The Arc 1996).

Second, more young people of all intellectual abilities are choosing to commit crime—particularly minority youth, among whom the rates of MR/DD are highest (Cook and Laub 1998). With the growth of gangs in urban areas, there appears to be a greater incidence of exploitation of people with mentally retardation in criminal activities (Petersilia 1997).

Third, the overall trend towards deinstitutionalizing people with developmental disabilities has led to a rise in the number who live on the streets or in shelters. Prouty and Lakin (1997) report that in 1994, institutionalized populations with MR/DD nationally were barely one-third of their 1967

numbers, decreasing from nearly 200,000 to about 65,000 over the period. California's trends are identical. The population in state developmental centers decreased 40% between 1992 and 1998, and now represents just 2.6% of the total population served by the State Department of Developmental Services (DDS 1999). Although care is taken to identify housing and support resources when people are released from developmental centers, sometimes those resources are abandoned or are found to be less comprehensive than desired. A number of people with cognitive disabilities flounder and eventually come to the attention of the police and the courts. The result is that they end up trading one institutional address for another, and their number in correctional institutions continues to grow.

Fourth, the Welfare Reform Law signed by President Clinton in August 1996 substantially reduced the number of children with disabilities receiving benefits. The Congressional Budget Office estimates that by 2002, 22% of the children who would qualify under the current law will be denied Supplemental Security Income. A recent analysis by the nonpartisan Center on Budget and Policy Priorities concluded: "Low-income disabled children . . . are among those whom the legislation will most adversely affect" (Super et al. 1996). As poverty grows, they and their families will experience economic stress, may move to substandard housing (or be forced to live on the streets), and, as a result, become attractive prey to criminals—either as victims or crime partners.

Finally, many offenders with MR/DD are finding it increasingly difficult to avoid a prison or jail term. Diversion programs and intermediate sanctions are not widely available in many states, and recently passed mandatory sentencing laws, like "Three Strikes," have removed the courts' discretion to "individualize justice." One such offender is Duane Silva, who in 1994 earned the dubious distinction of becoming one of the state's earliest Three Strikes defendants. Mr. Silva is a 23-year-old from Tulare with an IQ of 70 (the mental capacity of a 11-year-old), who is serving a 28-years-to-life prison sentence for stealing a VCR and some jewelry in a residential burglary. He is clearly not a danger to society, as noted in a *Sacramento Bee* editorial entitled: "Maximum Exploitation: The Criminal Justice System at It's Worst" (January 20: 1998).

## II. VULNERABILITY DURING JUSTICE SYSTEM PROCESSING AND INCARCERATION<sup>4</sup>

By definition, people with developmental disabilities have significant impairments in reading, expressive language, understanding verbal material, in working memory, and in attention span. These impairments seriously affect their verbal exchanges with the police during questioning, their understanding and ability to participate in the plea bargaining process, and the waiver of their Miranda rights. These deficits also affect their ability to successfully participate in many correctional programs. In fact, people with cognitive disabilities are automatically excluded from participation in many rehabilitation programs (Cowardin 1997; Petersilia 1997). As Lindsay (1994) wrote: "There are no jobs available for disabled inmates, so they can't work . . . Then they're classified as idle inmates and so they lose privileges and are sent to facilities used for punitive segregation of inmates who don't work."

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<sup>4</sup> Much of the material in this section appeared in a report of the Criminal Justice Process Committee of the California Task Force on Persons with Disabilities in the Justice System—noted here as the California Task Force (1997a)—and is used with permission. The indented material in this section is drawn from the report, but in some instances has been edited.

## A. Police Interrogation, Miranda Warnings, and False Confessions

During interrogation, suspects with cognitive impairments tend to be more suggestible and therefore more vulnerable to the pressures of interrogation (Kassin 1997). Ellis and Luckasson (1985) found that people with retardation often provide more incriminating information about themselves and others than suspects without retardation, and Perske (1994) has shown that an increased desire to please those in authority often leads to false confessions by innocent suspects with mental retardation.

This process is reported well by the California Task Force (1997a):

People with developmental disabilities are often aware that others learn more quickly, often experience themselves as being mistaken or wrong, and they are often told so. They come to rely on others for guidance and direction, and often, by necessity, become quite trusting of persons in authority. Authority figures such as teachers and police officers are often viewed as “good” or “helpful” and are trusted unquestioningly. Years of repeated attempts to give correct answers lead people with developmental disabilities to become sensitive to clues to say what is wanted. Understanding why an answer is correct is more difficult and often less important to them than getting praise or pleasing the person asking the question. When faced with uncertain situations in which an authority figure is present, people with developmental disabilities usually defer to the authority figure. This makes them especially sensitive to response shaping, mild coercion, coaching, hints, and other verbal and nonverbal questions.

When an authority figure says “I am your friend, I am here to help you,” it is difficult for a person with cognitive impairments to consider the situation independently or think critically. As (Reynolds 1998) reports, a recent survey of persons with mental retardation in New Jersey found:

- ▶ 38% think they could be arrested for having a disability;
- ▶ 50% would disclose that they have a disability when arrested;
- ▶ 58% would talk to the police before talking to a lawyer;
- ▶ 68% believe that the arresting officer would protect them.

If they become suspects in criminal cases, they often do not understand or benefit from the protections afforded by the Miranda warning against self-incrimination (e.g., you have the right to remain silent), which is typically read or stated to a suspect by a police officer at the time of arrest. Miranda sets the standard that confessions may be admissible in court only if they are voluntary, knowing, and intelligent.

The Miranda warning itself has been evaluated to be at a 7th grade level of reading and listening difficulty (Baroff 1991). Most 7th graders are 13 years old. The mental age—the intelligence level found in most people of a certain age—for an adult with an IQ of 60 is 10 years and 8 months; for an IQ of 70 it is 11 years and 8 months, according to the scoring standards for the Stanford-Binet Intelligence Scale. Thus, even people at the upper limit of mental retardation (IQ 70) could not be expected to understand the Miranda warning and thus be able to avoid needless, and perhaps false, self-incrimination. As shown later in this report, a simpler version of the Miranda warning has been developed for people with developmental disabilities (Grisso 1981).

However, even the modified Miranda warning does not appear to be an adequate solution to the problem of poor comprehension or guarantee the right against self-incrimination. Police officers take at face value suspects’ assurances that they understand their constitutional rights and options to

waive or protect those rights. Defendants with mental retardation often answer “yes” to each of the police officer’s questions because they do not want others to know of their retardation and lack of understanding, and because of their propensity to acquiesce to those in authority (particularly the police).

As the California Task Force for Persons with Developmental Disabilities (1997a) explained: “Persons with mental retardation can be their own worst enemies when being questioned by the police. [They] often misuse or misunderstand common terms. They may say, ‘bruise’ for ‘scar,’ and ‘voluntary’ may mean, ‘having no other choice.’ ‘Waive’ may mean ‘to signal with your hand.’ ‘Accomplice’ might be misunderstood as ‘instrument used to find north, south, east, west.’ They often give answers to questions they do not understand.” Consider the following fictional exchange between a police officer and a suspect with mental retardation, which typifies the communication difficulties encountered in such situations:

(Police) “Do you understand the Miranda rights I just read to you?” (Suspect) “Yes.”

(Police) “Do you wish to waive your rights and talk to us now?” (Suspect) “Yes.”

When interviewed later, the suspect may demonstrate no understanding of the concept of rights, but a wish to be cooperative in a stressful situation.

(Police) “Did you have an accomplice?”

(Suspect) “No.”

(Police) “But two people were seen there.”

(Suspect) “Yeah, another guy was with me.”

(Police) “So, another person was there?”

(Suspect) “Yeah.”

(Police) “But you said earlier you were alone . . .”

(Suspect) “No, not alone. Another guy came too.”

(Police) “So now you’re telling us you did have an accomplice. Another person was there with you?”

(Suspect) “Yeah.”

(Police) “Who was it . . . who was your accomplice?”

(Suspect) “Well, Tommy Jones was there.”

(Police) “Tommy Jones was your accomplice? He was there, too?”

(Suspect) “Yeah, Tommy Jones was with me.”

Typically, one expects someone who does not understand something to ask a question, such as “what do you mean by accomplice?” However, people with retardation will seldom question things which they do not understand, hoping to get the gist of the meaning later, or to “pass” as knowledgeable.

The misuse and imprecision of terms and language by people with cognitive disabilities leads to many misunderstandings, which have serious consequences in a criminal justice proceeding. As exemplified above, people with mental retardation may change answers during questioning, or may change an initial account in retellings. This creates inconsistencies and appears as though the suspect with mental retardation is lying.

As noted by the California Task Force (1997a) in the following three paragraphs:

“People with cognitive disabilities are also unlikely to appreciate the adversarial nature of criminal investigations and interrogation, and often fail to realize the long-term disadvantages of statements that have short-term gains. For example, a person with mental retardation might sign a statement, thinking, ‘I will sign this paper (a confession statement) so I can go home and go to bed.’ The person may rationalize, ‘The police want to go home, too. People seem mad and upset with me. They said they want me to sign so we can get on with things. What harm is there in signing my name to a piece of paper? It is what they want and I can’t go home ’til I do. My mother will explain it to them tomorrow after I tell her I didn’t do it. I am telling the truth, the police believe the truth and will help us.’”

People with cognitive disabilities often demonstrate a lack of metacognition in their thinking—an inability to think abstractly about their own thoughts, to suspend judgment, to put themselves in another’s shoes, to consider alternatives, propositions, ideas, and hypotheses. Metacognition (thinking about thinking) requires mental perspective, the ability to take a detached, analytical position. It requires the manipulation of ideas to assess various outcomes without actually performing any action. Unlike people who can rearrange furniture in their minds to “see” how another grouping will look, those with mental retardation cannot move ideas and hypotheses to see how they will fit, or what the outcome might be. Such abstract mental ability is beyond the scope of most people with mental retardation, especially as the options increase in number from one, to two, three, and beyond. This is a critical disability when trying to consider legal defense strategies.

In addition, as reported by the task force, people with cognitive disabilities can be susceptible to “magical thinking.” In magical thinking, things are taken literally, as they appear. Such people often do not seek rational explanations to reconcile conflicting details. For example, an audience of first- and second-grade children is excited because the magician made the rabbit disappear. An older audience of children is skeptical but may be excited that the magician created a baffling illusion that could not easily be explained. The first audience is sense-dependent and reconciles illogical outcomes with explanations that defy logic: the rabbit’s disappearance. The second case is an example of analytic thinking that appreciates a good trick, knowing that rabbits and tigers do not really disappear, but that a logical explanation is not forthcoming: Hence the pleasure in being tricked by a good magician.

People with these disabilities often demonstrate thinking like that of the younger audience, believing in the literal disappearance of the rabbit. Abstract reasoning and knowledge is secondary to personal and direct experience. Individuals who lack representational thought, lack abstract reasoning. An interrogator telling a suspect he has a “sixth sense” about the guilt of a suspect has far greater currency with an individual whose reasoning is flawed, and who depends upon others to tell him what he should know. In the case in Missouri of Johnny Lee Wilson, the suspect signed a statement to a crime he did not commit, saying, “I wasn’t there, but if you say I did it, I must have” (*Wilson v. Missouri* 1991).

In the experience of the California Task Force (1997a), defendants with mental retardation often remarked that they did not understand anything of how hearings and trials work. Generally, they do not understand how the judicial system works except in basic terms and situations. They do not have an adequate appreciation for legal strategy, especially with respect to the demands and requirements of a confession, alibi, and trial. The judges and lawyers talk things over and inexplicably, “magically,” reach a decision. It is extremely common to hear such defendants explain a judicial process as being related to “the guys with suits talking with the judge.” When asked for more details,

these defendants say, "They just decide, somehow. I don't know how. I don't understand all this. They tell me to be quiet and I am."

Without effective abstract and representational thinking, people with cognitive disabilities must rely on trusted others (such as their attorneys) uncritically. They cannot make suggestions or offer counter arguments. When asked what they would do if a witness told a lie about them in court, effective verbal alternatives are less available than they would be to others. They typically do not demonstrate an ability to differentiate crucial from trivial aspects of testimony in a manner that would allow them to assist counsel in developing strategy.

## **B. Assessing Competency and Legal Responsibility**

The California Task Force (1997a) says the following about competency and legal responsibility:

Competency to stand trial is defined by California Penal Code Statute 1367, which states, "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Thus, this competency refers not only to the actual trial, but also to the arraignment, the development of defense strategy, plea-bargaining, pleading, and other steps prior to the full trial.

Baroff (1997) notes that people with mental retardation who have IQs in the mild range—between 60 and 70—are usually considered by courts to be competent to stand trial. Bonnie (1990) has shown how the impairments related to mental retardation adversely affect trial-related competencies at each of the three stages of criminal proceedings: confession and waiver of rights, proceeding to trial, and functioning during the trial.

As noted earlier, California Penal Code 1370.1 requires the suspension of court proceedings when a defendant with a developmental disability is found to be mentally incompetent to stand trial. It further specifies that the court shall order residential placement to "promote the speedy attainment of mental competence." If competency training is successful, and the person is found by the court to be competent to stand trial, the trial is to proceed. If the person is never found to be competent, civil commitment procedures may be considered.

Competency training generally consists of teaching a person with mental retardation about the court process. Training is often carried out in programs in developmental centers or in state hospitals, but may also be given by a local trainer who has been educated by a court if a defendant lives in a community-based facility approved by the regional center director. Training focuses on terms that are used in court and identify different components of the court process (e.g. judge, defense attorney, jury). The Trial Competency Training Program at Atascadero State Hospital, for example, used a variety of training procedures to teach courtroom concepts and then assesses competency by means of the Competency Assessment Instrument, which consists of multiple-choice questions about juries, evidence, witnesses, etc., and asks a few short-answer questions.

There are some shortcomings to this training, however:

There are no published outcomes studies that demonstrate the effectiveness of competency training to make an incompetent person 1) judged to be competent in court and/or 2) competent to understand the nature of court proceedings and to assist counsel in a rational manner, as

adjudged by impartial clinicians or other experts. There appears to be consensus in California that competency training for people with mental retardation is not effective, at least for many of the cases for which it is provided. Many believe that the assessment tools, which help determine whether a defendant is competent to stand trial primarily, assess court-related vocabulary and information, which may be 'parroted' without full understanding. A recent survey of California public defenders indicated little belief in the effectiveness of competency training (California Task Force 1997a).

Another problem is whether people with cognitive disabilities are aware of the illegality and wrongfulness of their criminal actions. Although comprehensive methods of evaluating criminal responsibility have not yet been fully developed for this population, research by Baroff (1991) suggests that although such defendants may acknowledge that killing or other crimes are wrong, they have great difficulty explaining *why* they are wrong.

### **C. Diversion, Imposition of Criminal Sentence, and Incarceration**

Most offenders proceed through the police and court phases of the justice system without anyone raising the issue of mental retardation. McAfee and Gural (1988) found that just 25% of those having mental retardation were so identified at arrest, 52% were identified at arraignment or pretrial, 9% were identified during trial, and 9% during imprisonment. A 1995 survey of the 50 state police academies indicated that only 16 clearly addressed mental retardation in their training curriculum (McAfee and Musso 1995).

Once they reach the sentencing phase, offenders with mental retardation find that probation is less frequently granted to them (Santamour 1988). Such defendants are at greater risk of being incarcerated than nondisabled defendants, and are more likely to suffer sexual and physical abuse than other inmates (Sobsey 1994). As Allen and Simonsen (1992) noted about inmates with disabilities: "The funding crunch of the early 1990s, combined with continuing and increasing overcrowding, continues to place these sometimes despised misfits into a correctional bureaucratic system, where their special needs are more often ignored than met" (1992: 423).

In 1996, for the first time, the Bureau of Justice Statistics' annual *Survey of Inmates in Local Jails* included an item to measure both jail violence and whether or not the inmate has any disabilities. The survey asked inmates: "Since your admission, have you been involved in a fight or hit or punched?" This item is not ideal for measuring victimization per se, since it may capture inmates who attacked another inmate (or staff), as well as those who were victimized but were not aggressive. However, the items serve as a measure of involvement in jail violence generally. The survey also asked about the presence of a variety of disabilities, although developmental disabilities were not separated from mental illness. The results show that, in general, inmates were at greater risk for violence if they reported a learning disability, difficulty seeing, a physical or mental condition that limits work, or a mental or emotional condition. However, risk of violence in jail was *significantly* higher only for those reporting a mental or emotional condition (McCleary and Wiebe 1999).

Several cases of victimization of inmates who are retarded have come to light in recent years. One recent case involves "Bryan," a California jail inmate with mental retardation who was bleeding rectally for three days. He had been raped several times, and other inmates told him he would be killed if he told authorities. During interviews with the California Task Force (1997b), he said he felt "sick" because he had "piles" that were bleeding. After a medical exam revealed he had been

raped and he was placed in a single cell for his own protection, he thought he was being punished (California Task Force 1997b).

Time spent in jail is fraught with additional burdens as well. Inmates with MR/DD are often unable to read or understand jail regulations. Such signs as “follow the yellow line for the infirmary” are often not read or understood. What is an “infirmary”? “No loitering in hallways” is a cause for an in-house charge of “insubordination.” But many people with MR/DD are not likely to understand the word “loitering” (California Task Force 1997b).

Similar problems emerge in prison. The failure of inmates with MR/DD to comply with the prison routine, in part because of their inability to read and to understand prison rules, as well as to advocate effectively for themselves, contributes to them more often being denied parole (Wolford, Nelson, and Rutherford 1997). In addition, inmates with mental retardation tend to serve longer sentences because of their higher frequency of infractions in prison and increased difficulty in securing parole (Noble and Conley 1992). In a sample of Texas prisoners, Lampert (1987) found that inmates with mental retardation served a significantly longer portion of their sentence when contrasted to inmates with normal intelligence.

The landmark *Ruiz v. Estelle* (1980) decision in Texas has set the tone for judicial consideration of inmates with cognitive impairments for the past decade. This class action suit involved crowding, medical care, inmate trustees as guards, and other conditions. Judge Justice found that between 10% to 15% of Texas Department of Corrections inmates were retarded and that they were distributed throughout the system. Further, he found that they were abnormally prone to injuries, many of them job related, and were decidedly disadvantaged when appearing before a disciplinary committee. As a result of *Ruiz*, the Texas Department of Corrections (DOC) instituted a number of staff training programs, as well as policies of inmate assessment, specialized rehabilitation, and housing. Most importantly, the Texas Code of Criminal Procedure was amended to allow for the transfer of offenders with retardation from the Texas DOC to the Texas Department of Mental Health and Mental Retardation.

Once released from prison, such offenders have a higher recidivism rate than other released offenders (Coffey, Procopiow and Miller 1989)—probably because of the lack of provisions to help them adjust back into the community. The biennial report of the Texas Council on Offenders with Mental Impairments illustrates the importance of specially tailored programs that fit the needs of those with those with disabilities. The program includes the development of county-based diversion programs, special-needs parole programs, and the establishment of pre-release planning and referral services for inmates with special needs. These measures have resulted in reduced recidivism rates in counties where state-funded programs exist. For other examples of specialized programs for offenders with MR/DD, see Petersilia (1997).

#### **D. Constitutional Rights Issues**

Everyone in the U.S., including people with developmental disabilities, enjoys the limits of governmental power and the scope and range of freedoms outlined in the U.S. Constitution (mostly in the Bill of Rights). Several of these rights are difficult for persons with developmental disabilities to access, as cited by the California Task Force (1997a):

1. The Fourth Amendment prohibits unreasonable searches and seizures. A person who is the subject of a criminal investigation is entitled to certain constitutional safeguards prior to arrest

or being formally charged. Any detention by law enforcement is a “seizure” and therefore must be reasonable within the scope of the Fourth Amendment. Any governmental search or seizure without a valid search warrant is unreasonable, with a few exceptions. One such exception is when the detainee voluntarily consents to the search. One can refuse to consent, but it is not essential that a police officer inform a person of the right to refuse. Also, the search must be limited to the scope of the consent given and can be revoked at any time during the search.

Given the cognitive and expressive language deficits characteristic of mental retardation, the chain of rights denials is likely to begin as soon as police stop a person with this condition. Most people with cognitive disabilities are less able than the average person to understand their right to be free from unreasonable search and seizure and to refuse consent to a search. Also, as mentioned, some are more eager than others to please authority figures such as police officers. Therefore, detainees with mental retardation will often fail to invoke these rights and will consent to a search in most cases, not knowing they can refuse. For these reasons, people with mental retardation are generally more vulnerable than the average person to police abuse of these rights.

A police officer may detain and question a person in the field if he or she reasonably suspects criminal activity. A person with cognitive disabilities may not understand or be able to formulate an answer to those questions. If a police officer fails to identify the disability, he or she may perceive this behavior as intentionally evasive or obstructionist and indicative of guilt. That, in turn, would likely lead the officer to find probable cause for arrest, which may not have ensued for someone who could exonerate himself by answering the questions appropriately.

2. The Fifth Amendment is meant to prevent the use of involuntary or coerced confessions. The intelligence of the accused is considered relevant in determining what constitutes coercion. Nonetheless, as is often the case, if a police officer is not trained to identify the detainee as someone with cognitive disabilities, he or she may not perceive the questions as coercive or the responses they elicit as involuntary.

In *Miranda v. Arizona*, a confession obtained from an accused during custodial interrogation—before or after formal charges are filed, and regardless of voluntariness—is not admissible unless certain procedural safeguards are observed. Specifically, the police must have clearly informed the accused of his right to remain silent; that anything he says may be used against him; and that he has the right to consult with counsel which, if he is indigent, will be appointed at the time of interrogation.

This right is very difficult for suspects with mental retardation to access because of their propensity to please the authority figures questioning them, or fear of admitting they did not understand the warning. Not only will some people with this disability fail to understand the meaning or ultimate significance of self-incrimination and the importance of representation, many will be unable even to understand the basic meaning of the words in the *Miranda* warning. For example, the words “silent,” “consult,” “counsel,” and possibly others are foreign to some people with cognitive disabilities. Police officers who are uneducated in identifying mental retardation may take advantage of the suspect’s willingness to cooperate and ask leading questions. These combined factors can result in incriminating statements and even false confessions.

3. The Sixth Amendment provides the right to counsel upon the filing of formal charges against an accused. As noted above, many suspects with cognitive disabilities would not understand the

importance of representation. Counsel is not required at nonadversarial hearings (e.g., to determine whether probable cause exists to hold pending trial). Clearly, many defendants with mental retardation would be unable to advocate for themselves in such proceedings. Finally, ineffective assistance of counsel has been found to violate the Sixth Amendment. In a case where the defendant has cognitive disabilities, the effectiveness of the representation depends greatly on the attorney's ability to compensate for the client's limitations, which obviously requires awareness of the disability.

4. The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." The Constitution does not require lawmakers to include moral culpability elements in their definitions of crimes. However, the Eighth Amendment does require that a defendant's moral blameworthiness be proportionate to the punishment. The strength of this argument grows with the severity of the sentence and has culminated in a moratorium on execution of people with mental retardation by 12 states and the federal government (Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, New Mexico, New York, Tennessee, Washington, and Nebraska [Keyes, Edwards, and Perske 1997]).

The U.S. is almost alone in the world in allowing the execution of persons with retardation. At least 33 men with mental retardation have been executed since the U.S. reinstated the death penalty in 1976 (Keyes and Edwards 1996). Some experts estimate that as many as 10% to 15% of the 3,000 men and women on the nation's death row are developmentally disabled (Miller and Radelet 1993). The California Task Force for Persons with Developmental Disabilities (1997a) estimated that in 1997, there were as many as 30 people with mental retardation on California's death row. Polls consistently show that even death penalty supporters believe people who are mentally impaired should not be executed. But in some two dozen states, including California, such executions are permitted.

The U.S. Supreme Court does not yet concur that the imposition of the death penalty in such cases constitutes cruel and unusual punishment. The Court ruled that the execution of the mentally retarded is not categorically prohibited by the Eighth Amendment (*Penry v. Lynaugh*, 107 S.Ct. 2934 1989). The Court agreed that "mental retardation is a factor that may well lessen a defendant's culpability for a capital offense," but thought its importance could be evaluated on a case-by-case basis. Given the much higher rate of victimization of people with mental retardation in prison, and the relatively longer sentences that inmates with these impairments serve, an argument can be made that imprisonment itself is a disproportionately harsh punishment and therefore constitutes cruel and unusual punishment for some defendants with mental retardation.

5. The Fourteenth Amendment's "equal protection" clause assures that whatever rights or privileges are provided by state law to criminal defendants must be made available to all—i.e., no discrimination on the basis of disability. Nevertheless, as seen in this discussion of constitutional principles, defendants with mental retardation are routinely denied fundamental rights afforded to those who have the cognitive ability to understand the concepts.

The inability of some people with mental retardation to understand their rights, the consequences of not exercising them, and their inability to advocate on their own behalf, continue to result in rights violations for as long as the disability goes undetected.

## E. Witness and Victim Issues

In addition, according to the California Task Force, “people with cognitive impairments are involved in the criminal justice process as witnesses more often than one might expect. They often have low incomes and tend to live in poor communities with high crime rates, where they are more likely to witness crimes” (1997a). More significantly, however, people with retardation are themselves victimized by crime at a higher rate than the general population. Wilson and Brewer (1992) found that the relative risk of victimization for people with retardation is highest for personal (or violent) crimes. They are 13 times more likely to be robbed, 11 times more likely to be sexually assaulted, and three times more likely to be assaulted (nonsexual). (For a review of this issue, see Petersilia 2000.)

Contributing to this victimization risk is the social powerlessness of these individuals, deficits in communication skills, impaired mobility, frequent lack of privacy, social isolation, and lack of sex education (Sobsey and Calder 1999). Investigation and prosecution procedures are critical to the prevention of sexual abuse, in that failure to convict offenders allows for the continuation of abuse without fear of punishment. When victims with mental retardation are considered incompetent, and therefore denied the right to testify in court, the risk of further victimization is enhanced.

Research indicates that only 3% of cases of sexual abuse involving people with developmental disabilities are reported to authorities (Sobsey 1994). The lack of reporting makes it difficult to accurately assess the incidence of such crimes. Of the reported allegations, Sobsey (1992) found that although the offender was known in 96% of the cases, only 22% of the alleged offenders were charged and 8% were convicted.

As reported by the California Task Force (1997a), “People with mental retardation are as challenged and poorly accommodated as victims and witnesses in the criminal justice process as they are as defendants (Henry and Gudjonsson 1999). This is due in part to the cognitive deficits characteristic of mental retardation. Relevant characteristics include deficits in expressive and receptive communication, memory, and attention. In the criminal justice context, these deficits translate into a lesser ability to encode, store, retrieve, and report information. In addition, such witnesses are often suggestible, easily distracted and fearful, although research evidence suggests if the questions are worded in a straightforward manner, victims and witnesses with developmental disabilities can provide reliable testimony (Perlman et al. 1994).” The research by Henry and Gudjonsson provided evidence that people with mental retardation have considerable eyewitness memory skills and were as good at recalling a witnessed event one day later as were peers without retardation of the same age. However, people with mental retardation were more vulnerable to suggestive questioning. Victims and witnesses with retardation will provide the most accurate answers to open-ended, free-recall questions. Research has shown that they may provide less information overall, but they will usually include the most important details, if properly supported.

As the task force also notes:

The challenges witnesses and victims with mental retardation face are due not only to their cognitive deficits, but also to the general misperception that these deficits preclude sufficiently accurate testimony, particularly under cross-examination. Despite what was said about memory deficits, some people with this disability often can relate accurate accounts of events they have witnessed. To foster this accuracy, however, and enable a witness with mental retardation to meaningfully contribute to the investigation and prosecution of a crime, we must accommodate

Title II of the ADA requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity” (42 U.S.C. §12132). A court of law is a covered entity, and the U.S. Department of Justice (DOJ) has made it clear that courts must ensure that individuals with disabilities, including mental retardation, are not discriminated against in the services, programs, or activities of a court system. The Title II regulations, in fact, require courts to take affirmative measures to avoid discrimination, and to make “reasonable modifications in policies, practices and procedures” when necessary to avoid discrimination. The DOJ identifies such reasonable modifications as including modified identification and screening processes and simplified communications, covering the testimony phase as well.

In June of 1998, the California legislature amended penal code sections 1346 and 1347.5 to provide alternative methods of presenting testimony of people with cognitive disabilities who are witnesses or have been victims of violent and/or sexual crimes. Alternative formats include the use of videotaped testimony, as well as closed-circuit television. There are also provisions to:

- ▶ allow the witness “reasonable periods of relief” from examination/cross-examination during which he or she may retire from the courtroom (PC Section 1347.5(b)(1);
- ▶ allow the presence of a “support person” or a regional center representative. The court may also allow the use of a person necessary to facilitate the communication or physical needs of individuals with developmental disabilities (PC Section 1347.5(b)(2);
- ▶ allow the judge to remove his or her robe if the judge believes that this formal attire prevents the full participation of the witness with a disability because it is intimidating (PC Section 1347.5(b)(3);
- ▶ allow the judges, witnesses, support persons and court personnel to be relocated within the courtroom to facilitate a more comfortable and personal environment for the person with a disability, as well as accommodate any specific requirements for communication by that person (PC Section 1347.5;
- ▶ the testimony of a person with a disability may be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, and defendant, and communicated to the courtroom by means of two-way closed circuit television, if the court makes certain findings (PC Section 1347.5).

Unfortunately, few people are familiar with these provisions and, if utilized, they may serve to minimize the full impact on the jury of the victim’s testimony. Mickey Coyle, a Deputy District Attorney in Ventura County, knows of such accommodations and has used them to prosecute cases where the victim has cognitive disabilities. However, she believes that most prosecutors were unaware of such accommodations, or did not have the equipment or personnel necessary to complete videotaped testimony. More importantly, however, she said that presenting victim testimony through videotape often minimizes the impact of the victim’s story, since the victim is seen on a small screen rather than in person. She thinks the *offender* should be removed from the courtroom if that is intimidating the victim, rather than have the victim’s statement appear on a small television screen, which tends to minimize the victim’s testimony to the jury.

### III. ESTIMATING THE NUMBER OF PEOPLE WITH MR/DD IN THE CALIFORNIA JUSTICE SYSTEM

It is unknown how many people with MR/DD are in the California (or U.S.) justice system at any one time—meaning they’ve been arrested, are on probation, in jail, in prison, or on parole. California maintains no database for this purpose, and offenders’ MR/DD status is not recorded on any of the major criminal justice databases (such as the Offender Based Transition Data, the Arrest and Citation Index, or the Uniform Crime Reports). In fact, all available data on the topic must be viewed with caution.

We took the best available (and sometimes only) estimates of the prevalence rates of people with MR/DD in various components of the justice system (e.g., youth confinement, probation, adult arrestees, inmates, parolees) in order to give a *rough* estimate of how many people with MR/DD are currently in the California justice system.

#### A. On Probation or Diversion

The California Department of Developmental Services completes a Client Development Evaluation Report (CDER) every one to three years on each person who has been officially diagnosed as developmentally disabled and is receiving services from the state through regional centers. The CDER contains some items that related to whether current clients can be considered “forensic”: those who were on probation, parole, or incarcerated for a criminal offense; on “diversion” from the criminal justice system; or classified as a dangerous mentally retarded individual committed by the court. The DDS provided summary data for this report on all clients as of 8/4/1999. Table 2 shows the frequency of these items.

Although the 1.9% estimate is the only estimate of judicial involvement available, it is likely to be a serious underestimate of the prevalence of persons with MR/DD who get arrested and judicially

**Table 2**  
**Number of California Regional Center Clients with Specified Legal Conditions, 1999**

Condition Type	Number	% of Total
Client on Probation or Parole	826	0.6
Client on Diversion PC 1001.20	237	0.2
Client Dangerous-MR Committed by Court WIC 6500	939	0.7
Client under Mental Health Conservatorship	484	0.4
<b>TOTAL</b>	<b>2,486</b>	<b>1.9%</b>
Client is Conserved Under Probate Court	2,658	2.0
Client in Dependent Child of the Court	1,495	1.1
<b>TOTAL</b>	<b>6,639</b>	<b>5.0</b>

*Note:* There were 130,500 total Regional Center clients on September 8, 1999. The California Department of Developmental Services, Sacramento, California, provided this data to the author.

processed. Arrests are not measured at all on CDER, and one needs to be officially registered as a regional center client and receiving services from the state in order to be covered in the CDER database. (In addition, as previously noted, just 22% of those estimated to be eligible are, in fact, RC clients.)

Additional analysis of the CDER data (Strauss 1997) of the characteristics of forensic (vs. nonforensic) clients found that forensic clients<sup>5</sup> tended to be male, mildly-retarded, African-American, in the adolescent or young-adult age group, and involved in maladaptive behaviors, particularly drug and alcohol abuse. Probationers tended to be involved in sex offenses, usually minor. Strauss also identified the number of male clients age 15–40 (the higher crime-prone years), and computed their percentage of “forensic involvement” by regional center. Those results are shown in Table 3.

**Table 3**  
**Percent of Forensic Clients by Regional Center, 1995**

Regional Center	Total Clients	% Forensic Clients (of total RC clients)	% Male Forensic Clients Age 15–40, Mild MR
Alta	8,586	2	5
Central Valley	8,040	2	6
East Bay	8,577	2	3
East Los Angeles	8,577	0	1
Far Northern	3,807	2	6
Golden Gate	5,549	2	3
Harbor	6,111	1	2
Headquarters	4	0	0
Inland	11,717	1	3
Kern	3,543	6	15
Lanternman	4,423	1	3
North Bay	4,186	3	8
North Los Angeles	6,419	1	3
Orange	8,626	2	3
Redwood Coast	1,816	3	6
San Andreas	6,404	2	5
San Diego	11,102	2	4
San Gabriel/Pomona	6,610	1	2
South Central LA	6,245	2	5
Tri-Counties	5,607	2	7
Valley Mountain	5,513	3	9
Westside	3,744	1	3
<b>TOTAL</b>	<b>130,932</b>	<b>2</b>	<b>5</b>

Source: Strauss 1997.

<sup>5</sup> Strauss defines forensic clients as one of the following: 1) currently on probation, parole, or committed for a criminal offenses; 2) currently on “diversion” from the criminal justice system; or 3) currently classified as a dangerous mentally retarded individual committed by the court. These are coded as items 95, 96, and 97 on the CDER form.

Kern Regional Center has the largest proportion of forensic clients, but that may reflect a practice of transferring forensic clients to the state developmental center there. Surprisingly, East Los Angeles RC, which serves a high crime area, has the lowest forensic rates of all RCs, and South Central Los Angeles RC has a rate fairly close to the average. Table 3 also includes the percent of forensic clients as a proportion of all RC clients who are male and between ages 15–40 without severe or profound retardation. As expected, the overall forensic rates are higher, but the pattern by regional center is similar (Strauss 1997).

## B. In Jail

The 1996 *Survey of Jail Inmates* revealed that approximately 37% of all U.S. jail inmates had a physical, mental, or emotional disability (Bureau of Justice Statistics 1998). A higher percentage of jail inmates than the general population reported having some kind of disability—37% compared to 26% of the U.S. population (see Table 4). Unfortunately, like most other surveys, mental retardation was not distinguished from mental illness, but using conservative figures we might estimate that the percent of inmates with mental retardation would be about 10% (using either the “mental/emotional condition” or the “learning disability” category).

As we noted earlier, a recent analysis shows that persons having “mental or emotional conditions” have significantly higher rates of engaging in or being victims of violence in jail (McCleary and Wiebe 1999).

**Table 4**  
**Physical and Mental Disabilities in U.S. Jail Inmates, 1996**

Reported Disability	% of Jail Inmates
Any disability	36.5
Physical, mental, or other health condition	20.7
Mental/emotional condition	10.4
Physical disability	10.4
Difficult seeing, even with glasses	9.2
Learning disability	9.1
Difficulty hearing, even with hearing aid	6.1
Speech disability	3.7

Source: Bureau of Justice Statistics 1998.

## C. In Youth Facilities

The only estimate of incarcerated youth with mental retardation comes from a national Department of Justice-sponsored survey on the conditions of confinement in youth facilities. Using this data, Snyder and Stickman (1995) reported that nearly 50% of juveniles in custody have learning problems, and 10% have mental retardation. A similar assessment was made by the National Center for State Courts (1987), which concluded that the prevalence of mental retardation was 12.6% in the juvenile population, and the percent of learning disabilities was 35.6% of juvenile offenders.

## D. In State Prisons

The most recent estimate of the prevalence of MR and other disabilities in the prison population comes from a recent survey of all federal and state prisons by Veneziano and Veneziano (1996). Researchers sought information from each facility on inmates with the following five types of disability: visual deficits, mobility/orthopedic deficit, hearing deficit, speech deficit, and psychological disability. They asked specifically about mental retardation. One should regard this data with caution, however, since it is unclear how survey respondents came to know the intelligence levels of their inmates, or how accurate their information was.

The Veneziano findings, shown in Table 5, lead to estimates that 4.2% of all prison inmates are mentally retarded, and 10.7% are learning disabled. These authors had conducted a similar survey in 1987, and at that time found that 1.8% of the prison population was retarded (Veneziano and Veneziano 1996). These data suggest that the national prevalence rate of MR in prisons has more than doubled—in fact, increased by 133% in less than a decade. However, it is impossible to know if this increase is due to a real difference in prevalence rates or a difference in recording the condition.<sup>6</sup> Additional information from a recent study conducted by Mawhorr (1997) as well as

**Table 5**  
**Percentages of Total U.S. Prison Populations with Disabilities**

TYPE OF DISABILITY	% Prevalence
<b>Physical Disabilities</b>	
Visual deficit	0.2
Mobility/orthopedic deficit	0.3
Other major health problems	14.2
Cancer	0.2
Cardiovascular disease	3.4
Diabetes	3.1
Epilepsy	0.9
Hypertension	6.6
Human immunodeficiency virus (HIV)	2.4
<b>Communicative Disabilities</b>	
Hearing deficit	0.2
Speech deficit	0.06
<b>Psychological Disabilities</b>	
Learning disabilities	10.7
Mental retardation	4.2
Psychotic disorders	7.2
Other psychological disorders	12.0

Note: All figures except for the HIV rate come from Veneziano and Veneziano (1996). The HIV estimate is from the Bureau of Justice Statistics (1995). Neither study reports multiple conditions.

<sup>6</sup> It is important to note that estimates of incarcerated youth with MR/DD are always reported as being much higher than those for adults, and yet MR/DD is not something one grows out of. The higher rate is likely due to the fact that legal mandates require correctional agencies to test for this condition so that legally required special education services can be provided according to the Education of the Handicapped Act (PL 94-142) and its amendments (PL 101-476, the Individuals with Disabilities Education Act of 1990).

from the U.S. Department of Education (Haigler et al. 1994) seems to confirm this 4% to 5% estimate of prisoners with MR/DD.

If we take the current California jail, prison, probation, and parole population, and apply the available estimates of the percent of inmates who might have developmental disabilities, we can get a rough sense of the numbers of people with MR/DD in California who may be in these various categories. Table 6 does this.

Some may argue that, relative to the total of nearly 660,000 Californians under correctional control, an estimated 15,518 persons with mental retardation are not a high-priority problem. Yet, as Brown and Courtless noted in 1971, when the problem was much less pronounced, “the problem of the mentally retarded offender is small in absolute numbers and large in significance.” If one considers the human toll, and the \$22,000 yearly cost of prison per inmate, or the \$36,000 CYA cost per ward, the problem is now both large and significant.

## IV. CALIFORNIA PRACTICES AND PROSPECTS

### A. Responses from Stakeholders

During this research we interviewed more than 100 people throughout California about the nature of the problems concerning people with MR/DD in the justice system. The one point of consensus among everyone interviewed was that *people with disabilities should not be relieved of legal obligations and responsibilities*. They are capable of committing serious and/or violent crimes, and they must be held accountable—for their own good, as well as for the good of their communities. However, holding them accountable should *not* mean denying them due process in the courts, housing them in settings where they face high risks of victimization, or denying access to work and treatment.

Although data on trends do not exist, people with disabilities, their family members, and advocates thought that more people with developmental disabilities were getting involved in justice matters, and that the issue was serious and not receiving the attention it deserved. As a member of the President’s Committee on Mental Retardation recently wrote:

We can quibble about whether education or medicine has responded more quickly to the societal need to end discrimination of the mentally retarded—but I don’t think there is much question that of all societal institutions, the criminal justice system is the last to adequately respond to the special circumstances of people with developmental disabilities. This remains true whether the individual with a disability has been accused of committing a crime or is the victim of a crime. For people with developmental disabilities, the criminal justice system is the last frontier of integration (Luckasson 1999).

Families, caseworkers, and people with cognitive disabilities all recounted horror stories of being stopped by the police, interrogated, sometimes incarcerated, and in most instances being dealt with in a manner that showed lack of appreciation for cognitive limitations. One caseworker told of a young man in his early 20s who is now in jail in Riverside, charged with attempted car jacking and attempted rape. As it turned out, the young man was afraid of dogs and was being chased by one. He ran to a nearby car and banged on the window, asking to be let in. Witnesses called the police and they arrested the young man, who was still trying to get into the car. When the police questioned

**Table 6****Estimated People in California Correctional System  
with Mental Retardation/Developmental Disabilities**

	<b>Total 1999 Offender Population</b>	<b>Estimate of % with Mental Retardation (National)</b>	<b>Estimate of Number with MR/DD (California)</b>
<b>YOUTH</b> California Youth Authority (CYA)	7,617	10.00	761.00
<b>ADULT</b>			
Probation	300,000	1.00	3000.00
Jail	77,633	10.00	776.00
Parole	112,494	4.20	4499.00
Prison (CDC)	162,064	4.20	6482.00
<b>TOTAL</b>	<b>659,808</b>		<b>15518.00</b>

Note: The population figures come from the California Department of Corrections, the California Probation, Parole, and Corrections Association, California Legislative Analyst's Office, and the U.S. Bureau of Justice Statistics.

the suspect, they asked him what he planned to do once in the car, and was he planning to rape the woman? He answered "Yes." He offered this "confession" at the crime scene, with no familiar person present or any record that identified him as disabled. The police took him to the station and booked him for attempted car jacking and attempted rape, even though he never got into the car or touched the woman. He now sits in jail, and the regional center is working with the police and others to try and get him released. They believe they will eventually be successful, but in the meantime, he sits befuddled in jail.

Unfortunately, most families and service providers—as well as regional center employees we interviewed—feel ill-equipped to handle people with these disabilities once they get arrested. Most are not trained in criminal procedures, and even those who are charged with protecting the rights of the developmentally disabled (e.g., Protection and Advocacy, Inc. and regional center staff) admit to knowing more about civil than criminal matters. The regional center is central in securing diversion for offenders with retardation. Clients must agree to diversion or it cannot be initiated, but clients rarely refuse and choose to remain in custody. The regional center therefore has primary responsibility for advocating for or against diversion, and recommending an appropriate program plan to the court. (The court may not order diversion, but interviewees suggested that courts usually follow the RC recommendations.) Regional centers must also fully implement and monitor a client's post-release plan.

A 1995 survey of all 21 regional centers on their policies and procedures involving their clients as perpetrators of crime found a markedly different approach toward diversion among regional centers. The study noted that some regional centers lacked "enthusiasm for diversion . . . , while others were well staffed and organized to advocate for [their] offender population" (California Task Force 1997b). In response to questions about whether RCs provided services while their clients were incarcerated in local, state, juvenile, or adult correctional facilities, some clearly stated that they did not perceive they had any responsibilities for clients committed to correctional facilities, whereas

other RCs kept in touch with the clients while they were incarcerated and helped them with pre-release planning and post-release assistance.

Some regional centers have specialized caseloads for legally involved clients; some have a designated team of professional consultants on forensic matters. But other RCs do not train staff in judicial matters or diversion statutes, and clients remain in mixed caseloads, with case managers who are untrained in legal procedures and their responsibilities. The task force that conducted the survey concluded there was no uniformity in services offered to clients involved in the justice system, and significant gaps in available services (California Task Force 1997b).

Interviewees also reported that once these clients had been incarcerated, RCs and other providers of services for the developmentally disabled became less willing to serve them. The offenders were generally seen as being more intelligent and sophisticated (“street wise”) and to have fewer physical handicaps than others with developmental disabilities. The task force reported that many regional centers have adopted an informal policy of terminating services upon arrest. Once these offenders are released, there is no systematic procedure to identify them and resume services, leaving a large portion of them in the dangerous position of needing a high level of services and finding them unavailable or inadequate.

Neither of the two systems charged with handling offenders with developmental disabilities seems prepared to do so. Regional centers, which exist to provide services for people with developmental disabilities, do not seem equipped to handle criminal offenders. Similarly, the criminal justice system, whose purpose is to prosecute, incarcerate, and monitor convicted criminal offenders upon their release, is not equipped to handle those with developmental disabilities. The result is two systems, often at odds, leaving a vulnerable population with poor service delivery, increased victimization in custody, and what amounts to harsher sanctions.

The California Task Force for Persons with Developmental Disabilities recommended that each regional center designate a member of its staff as a Forensic Service Coordinator (FSC) to handle all of their clients who are involved with the criminal justice system. The FSC should carry a small caseload, and should also be responsible for identifying inmates in local county jails who may have a developmental disability. Advocacy for separate housing within the jail and liaison activity with the local police and judiciary are also warranted (California Task Force 1997b).

### **Beliefs vs. Practice**

Law enforcement and other judicial personnel (judges, prosecutors, defense attorneys) we interviewed also thought these problems are important and deserve attention, but they didn’t think people with cognitive disabilities were being arrested with any frequency. Most police officers interviewed believed they would be able to adequately identify people with developmental disabilities and, as one police officer put it, “do the right thing.” He went on to say: “I deal with alcoholics and the mentally ill all the time. I can certainly identify the retarded.” Unfortunately, statistics and prior research prove him wrong. As discussed earlier, research has shown that most mildly retarded suspects proceed through arrest, booking, and sentencing without ever being identified as developmentally disabled.

The officer’s statement reflects a common finding in these interviews: justice system personnel nearly always talked about the mentally *ill* and the mentally *retarded* as if the groups were synonymous. Even direct questions such as, “Would you house inmates with mental retardation separately from the general jail population?” would elicit responses describing how they handled inmates with *mental illness*, not with retardation. When the interviewer would clarify the study’s

specific interest in the mentally *retarded* rather than the mentally ill, the respondent often answered, “Aren’t they the same thing?” The interviewer would then explain the differences, and the interviewee would continue to describe procedures in place for the mentally ill.

In policy and program decisions, distinctions between the retarded and the mentally ill were nonexistent in most justice agencies whose staff we interviewed. Clearly, this lack of distinction between the two conditions is a serious problem. Knowing about the mentally ill may, in reality, have little applicability to knowing about the mentally retarded. As discussed earlier, people who are mentally ill tend to be volatile and are likely to be “acting out” during a police encounter, whereas those who are mentally retarded are more likely to be quiet, withdrawn, and confused. Many California jails and prisons are developing procedures and crisis teams to handle the mentally ill, but almost no one had any formal statements regarding the mentally retarded as a distinct population.

One comment by a Ventura public defender was typical of responses to questions about the mentally retarded. After the interview he said: “You know, I never thought about the retarded. I now think maybe I have had clients that I didn’t recognize were developmentally disabled. Maybe I should have better training on what to look for. Eventually I think we probably find out if the person is seriously impaired, but it is sometimes difficult to get them out of the system if they have proceeded too far, like if charges have been filed. Once they have been labeled ‘criminal,’ diversion for *anyone* is difficult. The public is just tired of hearing excuses—and that includes retardation.”

### **Importance of Training**

The general sense from law enforcement personnel was that this was indeed an issue they should be more familiar with, and most would be receptive to receiving additional training on this issue—although many complained about increases in the number of mandatory police training courses. Officers did often mention arrests for disorderly conduct in which the situation could have been better handled had they known how to communicate with the offenders. But one officer questioned how effective the training would be for officers in areas where they may not have much contact with people with disabilities. “If you don’t get to use the training often, you have a tendency to forget,” he said. Also, police are concerned that officers would be held liable if they miss signs of a disability after receiving training. “Training won’t hurt, but don’t expect miracles,” this officer said. “Officers have to make critical decisions in a short amount of time. Is someone being a knucklehead or is this someone with a mental illness? It’s sometimes difficult to discern.”

More than training for themselves, however, law enforcement personnel expressed a desire for prevention training for people with cognitive disabilities. Police thought it would be very useful, and help avoid unfortunate incidences, if education programs could be developed to instruct people with disabilities on how to behave when stopped or questioned by the police (i.e., not to run), and how to identify themselves to the police as someone with a disability. Several police noted that once a crime is committed, “processing” must often proceed and diversion is less of an option. Police also commented that officer safety in the field is paramount, and when a person with a disability runs, or otherwise acts skittish in questioning, the officer will become suspicious and often handcuff the suspect and bring him into the station for questioning. This escalates the fear of the person with a disability, and may result in injury or a false confession.

A person with a disability may choose not to disclose the existence of impairment or may be unable to communicate the existence of impairment to a peace officer. One Ventura County officer recounted an incident in which he had noticed a young man in the park with a backpack, who began

to run when the officer noticed him. The officer recounted that normally he would have thought the backpack contained drugs and would have pulled his weapon and pursued the individual on foot or called for backup. But the officer has just completed training on “Law Enforcement and Persons with Disabilities,” and felt that this person looked innocent and might be disabled. He caught up with the young man, and asked him gently what was in his backpack, and the young man replied, “leaves.” He had been collecting leaves from the park to take back to his group home, and thought he might get in trouble for doing that—hence, he ran when the police came. The officer said that the training had made him more alert to cognitive disabilities, and he thought that it had probably prevented this particular incident from escalating. He thought, however, that educating the young man not to run from the police would have been extraordinarily useful as well.

### **Identification Registries**

Police also suggested identification cards for clients of regional centers, indicating a disability and listing an emergency contact. Officers suggested taking the regional center business card and laminating it together with the individual’s emergency information and specific disability. Clients could then be instructed in a personal safety course to show that identification card to a police officer if they were ever stopped or questioned. Officers believed this card would not be offensive to carry, and would be useful to the police in recognizing people with cognitive impairments and their emergency contacts.

A coalition of interested agencies is pursuing these suggestions. The Tri-County Task Force on Justice and Disabilities<sup>7</sup> is working with law enforcement agencies in Ventura, Santa Barbara, and San Luis Obispo counties to establish a Disability Alert Registry, which is modeled after an existing program begun in the Portland, Oregon, Police Department. In Portland, each person with a disability (any kind of disability, not just developmental) may choose to have identifying information entered into this special database accessible to the police from the station or their squad cars. In the field, when officers stop someone whom they suspect may have a disability, they run the person’s name through the computer, which indicates his or her specific disability (e.g., epilepsy), how that disability might manifest itself (e.g., appear drunk), and emergency contacts.

The Tri-Counties Regional Center has just initiated a special project with the MedicAlert Foundation. The MedicAlert Foundation is a nonprofit organization whose mission is to alert law enforcement and medical emergency personnel that a person has specific medical problems or other conditions (such as a developmental disability) that require special attention. People enrolled in the Tri-Counties program will wear either a necklace or bracelet with the MedicAlert logo, and/or affix a “peel and stick” label with additional vital information to their California DMV Identification card. Once contacted, MedicAlert transmits vital information about the person to those needing to know. The program is designed to assist police and emergency personnel in dealing more appropriately with crime victims and suspects who have developmental disabilities.<sup>8</sup> The program is voluntary for all regional center clients, and when no other funding is available, TCRC will cover the full cost of the application.

The Oxnard Police Department, in cooperation with the Ventura Autism Society, is currently developing a Disability Alert Registry (DAR) that will include scanned photos. The Oxnard DAR will also include locations the clients like to frequent, so that if someone is reported missing by the

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<sup>7</sup> For more information on the Tri-County Justice and Disability Task Force, see <http://joantl.home.mindspring.com>.

<sup>8</sup> For more information, contact Bernie Schaeffer, Tri-Counties Regional Center, TC4LT@Tri-Counties.org.

parents or group home, the police will immediately be able to search viable locations. Parents of children with autism suggested this feature, as their children often wandered off and they called the police for assistance. The DAR is attracting the attention of those concerned with other specialized populations, such as elders with Alzheimer's. Participation in the registry is always voluntary to protect the privacy of individuals with disabilities who do not wish to be identified to authorities.

### **Appropriate Placements for Offenders**

Judges talked of the need for earlier identification of defendants with special needs, prior to formal charges being filed by the prosecutor. Once charges are filed, and if plea-bargaining proceeds without awareness of the individual's cognitive disabilities, an inappropriate sentence may be imposed. Once that sentence is imposed, it is more difficult to reverse the process and get the suspect with MR/DD sentenced to a more appropriate program. Judges also talked about the erosion of their discretion through mandatory sentencing provisions, and that it was becoming more and more difficult to individualize sentencing to take account of an individual's special circumstances. "Tough-on-crime" public sentiments often discourage judges and prosecutors from invoking "alternative" community-based sanctions—which are perceived as lenient. Because prosecutors and judges are elected officials, they are more directly accountable to the public. Everyone interviewed talked of the lack of suitable alternatives—which to them combines treatment, offender accountability, and assurances of public safety.

Jail and prison staff were most vocal in calling for alternative placements for inmates with MR/DD. Although none of the nearly 20 corrections staff interviewed had *ever* had any specific training on the developmentally disabled, many had seen first-hand the tragedies that occur when people with these disabilities are mainstreamed into the general jail or prison population.

If an inmate is identified as being developmentally disabled, the most likely scenario is that he is placed in the separate cell or wing holding inmates with "special needs." Most of the correctional staff interviewed thought this placement was inappropriate, and often resulted in placing inmates with disabilities in *closer* contact with those likely to victimize them. In most instances, however, the inmate with cognitive disabilities is not identified, and is mainstreamed with the general jail or prison population. This too is inappropriate, since the inmate is unlikely to be able to follow general prison rules, participate in work or treatment programs, and is at higher risk of victimization than higher-functioning inmates. One prison guard mentioned the good work ethic of inmates with MR/DD—and even said that some guards don't like to see them transferred from their cellblocks because they are the worker bees of the units! But most talked of their inability to protect such inmates from abuse, ridicule, sexual victimization, and theft. Unless prisoners act out in prison, staff usually leave them alone—and inmates with MR/DD are usually quiet and cooperative. Jail and prison staff offered several tragic stories of results of these two unacceptable (but only available) options: special needs housing (usually with the mentally ill) or mainstreaming with the general population.

Inmates with disabilities are often unable to participate fully in the daily activities that are part of prison life, according to Nancy Cowardin, Ph.D., who teaches the Criminal Justice Training Workshops on Disability Issues in Pasadena, California, for law enforcement officers and clients with disabilities. For example, she states, although inability to read posted notices has resulted in negative, and occasionally life threatening, circumstances, the posting of important information in printed form remains the primary and sometimes the only method of communication between inmates and prison officials. Asking other inmates for help may be viewed as a sign of weakness, thereby making an individual more vulnerable to predators. Neither is asking prison officials for

reading assistance a workable alternative. In such circumstances, inmates with disabilities are rendered more dependent on staff than their nondisabled peers. Further, such requests may be viewed as pestering by a staff member, and can result in retaliation, ridicule, or disciplinary action (Cowardin 1997).

Although the interviews elicited different perceptions about the extent of these problems, depending on one's vantage point, there was universal agreement that no one was well-equipped, trained, or had the responsibility for addressing them. Everyone thought that the responsibility for people with MR/DD who became involved in justice matters rested with someone else. No single California agency has assumed responsibility for teaching people with MR/DD how to avoid getting involved in the justice system, or what to do if they are arrested and incarcerated. Moreover, interviews revealed that most agency personnel did not feel equipped to handle the problem appropriately.

## **B. Enhance Public Information and Community Awareness**

California took a major step in fostering understanding of these issues by establishing the statewide Criminal Justice Task Force for Persons with Developmental Disabilities. This task force, funded originally in 1995 by The Arc of California and later by the State Council on Developmental Disabilities, was composed of five separate committees.<sup>9</sup> The Criminal Justice Process Committee studied how the police, courts, and corrections personnel handle people with cognitive disabilities. Committee members represented a cross-section of professionals knowledgeable about people with MR/DD in the criminal justice system. This dedicated group met over a two-year period, reviewing the laws and interviewing experts, and produced a final report with recommended policy and legislative changes. This report is an excellent summary of the key issues, from which I have drawn significantly. The Arc of California has a standing Criminal Justice Task Force, and its members have become vocal proponents for this population. They continue to give public presentations on people with MR/DD in the justice system, encourage (and help draft) new laws, and attempt to keep on the front burner the topic of the appropriate handling of people with MR/DD in justice matters.

During legislative hearings in Sacramento in January 1998, the task force repeatedly emphasized the theme of mandated police training about people with MR/DD, as well as mandated advanced officer training in addition to courses at the police academy. Senator John Vasconcellos subsequently sponsored California Senate Bill 2049, which would have required police officers to participate in a telecourse training program on disability issues every four years. Former Governor Wilson vetoed the bill—allegedly because of resistance from law enforcement officers for more mandated training. As this report was going to press, on July 25, 2000, Governor Davis signed legislation (AB 1718) introduced by Assembly Speaker Robert Hertzberg to expand the basic training course for law enforcement officers on interaction with people who are developmentally disabled and mentally ill; require the Commission on Peace Officer Standards and Training to develop a continuing education training course; and to report to the legislature by October 1, 2003, the effectiveness of the course.

Training of law enforcement officers is still critical, and California is home to one of the nation's premier training organizations on disability issues. For more than five years, a Mill Valley organ-

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<sup>9</sup> The five subcommittees were: Victims of Crime; Diversion and Community Resources; Criminal Justice Process; Incarceration; Inter-Agency Coordination Committee. The Victims of Crime Committee is still in existence.

ization called Critical Focus has been training law enforcement personnel on appropriate response to individuals with developmental disabilities, during both custody and patrol, using a train-the-trainer model. The training is 24 hours long and highly interactive, has been provided throughout the country, and is certified for reimbursement for both police and sheriff's staff in California. More than 500 law enforcement personnel have been trained by Critical Focus and are now able to provide training in their own agencies. It can be certified in other states as well. Recently Critical Focus was awarded a contract from the California Department of Corrections to provide training statewide to both clinical and corrections staff.

This training has been incorporated into the West Virginia State Police Academy, so all law enforcement staff will have training in appropriate response to individuals with developmental disabilities. The response from trainees, Peace Officer Standards and Training (POST), and Standards and Training for Corrections, has been uniformly positive. Critical Focus has also been working with POST this year and has developed curricula to train hate crimes investigators regarding individuals with disabilities. As community awareness grows, requests for this specialized training seem to follow. For example, the Santa Barbara County Law Enforcement Chiefs recently received the Critical Focus training on persons with disabilities and judged it highly worthwhile.

The POST course includes instructions, such as those reprinted below, to help officers identify individuals with MR/DD who may be reluctant or unable to identify themselves as disabled.

**Helpful Hints for Law Enforcement  
on Identifying Persons with Mental Retardation**

If you suspect that a person may have a disability, but you are not sure, you can ask questions such as the following to either confirm or rule out a disability:

- Do you have or can you show me an ID card or your wallet or your purse?
- Do you have a MedicAlert bracelet?
- Have you graduated from high school?
- Were you ever in special education classes?
- Are you a client of . . . ?
  - The regional center
  - A work training program
  - United Cerebral Palsy
- Have you ever participated in Special Olympics?
- What is the name of your job coach, therapist, and case manager?
- Do you live alone or with others? What is their phone number?

Source: Reynolds 1998.

Some police officers also said that, even if they were better able to *identify* suspects with MR/DD, they weren't certain their procedures would change much or were unsure exactly how their procedures would change. Many said they would call the group homes in the area, or attempt to find family members. But most said that unless the disability was particularly severe, their policing procedures would not change much. As one officer put it: "our job is to solve the crime, it is someone else's responsibility to figure out what to do with them if they are convicted."

### C. Police and Court Accommodations for Suspects with MR/DD

In addition to more formal police education to *recognize* disabilities at arrest, advocates argue for more appropriate procedures *following* arrest. Two modifications are particularly important: 1) the reading of a modified Miranda warning prior to interrogation, and 2) the presence of an “appropriate adult” during questioning, plea negotiations, or trial of a person with MR/DD.

As noted earlier, it requires a 7th grade education level to understand the Miranda warnings, and people with mild mental retardation do not normally possess that level of understanding. The Arc of the U.S. recommends that the traditional Miranda warning be given, followed by the *modified* Miranda warning illustrated below.

Fears have been expressed about using the modified warning, however. Dianne Wolfe, R.N., one of the two principal trainers at Critical Focus, believes that “A modified Miranda warning is actually contra-indicated when dealing with individuals with mental retardation or cognitive impairment. If an officer gives a Miranda warning and the individual does not understand, and then the officer tries to simplify the warning, it can backfire whether the individual is innocent or guilty. The purpose of Miranda is to protect the individual. Thus, if the person seems confused at all, the appropriate action is ‘GET A LAWYER!’ Officers are allowed by law to lie to individuals who are given their rights, so if a modified warning is used, the confusion of the person is magnified if they do not understand the subtleties of the situation.”

The Arc of the U.S. has also published three bulletins for people with disabilities, their families, caretakers, and law enforcement, to help each understand the other. In addition to the bulletins, they have produced an excellent training course, *Understanding Mental Retardation: Training for Law Enforcement*. Course materials contain overheads, a video, and instructor’s manual (available from

TRADITIONAL MIRANDA WARNING	MODIFIED MIRANDA WARNING
You have the right to remain silent.	It’s OK if you don’t want to talk; I won’t try to make you.
Should you give up the right to remain silent, what you say can and will be used against you in a court of law.	If you do talk to me about what happened, I will use what you tell me to try to send you to jail.
You have the right to have an attorney present during questioning.	You’ll do better if there is a lawyer to help you.
If you want an attorney, but cannot afford one, one will be appointed for you.	If you can’t afford to pay a lawyer, I’ll get you one for free. You won’t have to pay me back.
Do you understand these rights as I have explained them to you?	Do you understand what I am telling you about getting a lawyer?

The ARC of New Mexico suggested the modified Miranda warning.

<http://thearc.org.ada/crim/html>). The course tells the officer to keep in mind that the offender with mental retardation will be extremely fearful and may appear to be uncooperative. The officer should try to calm and reassure the individual. Questioning should pause if the person is obviously distracted. If the person does not understand the questions, repeat them using different words. Use pictures, gestures, or props to help the person understand. The Arc of the U.S. training guide also includes communication techniques to use for persons with MR/DD, and some of them are reprinted in the box on communication techniques, as illustrated below.

### COMMUNICATION TECHNIQUES

In interacting with persons suspected of being mentally retarded, it is best to use simple language. Give specific and concrete directions and check for understanding. Try to refrain from giving more than three commands at a time.

If the individual is a victim of or a witness to a crime, avoid questions that have abstract ideas. Do not ask questions about length of time. Speak slowly but do not exaggerate your inflection or speak more loudly than usual. Do not reveal the expected answer by the questions you ask.

In addition, slow down and take plenty of time. If needed, use pictures to communicate. Give positive feedback and never mock or tease the individual. If assistance is needed, call the local Association for Retarded Citizens or the nearest Regional Center.

#### **Helpful Hints on How to Deal with a Victim, Witness or Suspect Who May Have Mental Retardation**

- Use simple language; speak slowly and clearly.
- Use concrete terms and ideas.
- Avoid questions that tell the person the answer you expect.
- Phrase questions to avoid *yes* or *no* answer.
- When giving Miranda warnings, ask the person to explain rather than give *yes* or *no* answer.
- Repeat questions from a slightly different perspective.
- Ask for concrete descriptions, colors, clothing, etc.
- Proceed slowly and give praise and encouragement.
- Avoid frustrating questions about time, complex sequences, or reasons for behavior.
- Never make fun of the person; they will sense it and become less cooperative.

Because of the tendency to self-incriminate, advocates believe strongly that people with MR/DD should have an "appropriate adult" or attorney present during questioning, and that any evidence obtained of a person with MR/DD should be excluded unless a qualified or trained support person was present. The California Task Force recommended a system similar to England's. In 1984, England passed the Police and Criminal Evidence Act (PACE) to protect suspects who are vulnerable because of a mental handicap. The accompanying codes of Practice specify that mentally handicapped suspects, victims, and witnesses must only be interviewed by police, or asked to sign statements in the presence of an independent person termed the "appropriate adult." If an

interrogation without an appropriate adult garners incriminating evidence or confession, that evidence is ruled inadmissible in court. Even if the evidence is properly obtained, the judge must warn the jury that there is a special need for caution before convicting a suspect with mental retardation on the basis of the confession (Clare and Gudjonsson 1995). No state in the U.S. ever has had similar legislation (although as discussed in Section II, California penal code section 1347.5 now allows the use of a support person during court proceedings).

Some advocates believe that the ADA *requires* the police to have an appropriate adult present, similar to the requirements to have an interpreter present when a suspect is non-English-speaking or hearing-impaired, but so far the ADA requirements have not been clear on this matter. Nonetheless, having an appropriate adult present to help the suspect (or victim) with MR/DD during questioning seems extraordinarily important.

#### **D. Educating People with Disabilities on the Criminal Justice System**

Justice officials cannot be held solely responsible for assuring that suspects are identified and treated appropriately—especially since so many people with MR/DD hide their disability. Adolescents and adults with MR/DD must learn about the possibility of meeting a police officer and how to protect their rights during questioning. Advocates are developing programs to educate people with cognitive disabilities on how to behave if they are stopped by the police or arrested, how to request assistance, and how to assist the police and others to appropriately handle their cases.

The Arc of the U.S. has taken a major step in this direction and has developed a brochure (reproduced on the next page) entitled: “What To Do If You Are Arrested?” The Arc has 1,100 affiliated chapters nationwide, and many of them are providing education to clients using this curriculum.<sup>10</sup>

In spring 1999, a coalition of concerned parents, agency representatives, and law enforcement officials formed the Tri-County Task Force on Justice and Developmental Disabilities. The group is working closely with The Arc of Ventura and the Tri-Counties Regional Center. The task force represents Santa Barbara, Ventura, and San Luis Obispo, and currently has nearly 100 participants and a dozen community partners (agencies affiliated with the task force). The group has five goals, focusing initially on victimization issues rather than on the offender. It plans to address the offender issue in the year 2001–2002. Immediate goals are to:

1. Develop and deliver personal safety training curriculum to people with disabilities
2. Educate law enforcement and other justice system officials on the needs of victims with disabilities
3. Promote equitable prosecution and sentencing of their perpetrators
4. Increase accessibility of victims with disabilities to crisis services, victim/witness assistance, and shelters
5. Engage in community coalition-building to increase awareness of this topic

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<sup>10</sup> A free copy of this brochure as well as the others from The Arc’s “Access to Justice” project can be obtained by going to <http://thearc.org/ada/crim.html> or calling (817) 261-6003.

## WHAT TO DO IF YOU ARE ARRESTED?

Do you know what to do if you are arrested? You have rights. For example, you have the right to vote, to marry and to work. Did you know that you also have rights if you are arrested?

The Americans with Disabilities Act (ADA) is a law that says you should not be treated differently because you have a disability. But, if you get arrested, you may need to be helped differently. Police, lawyers and judges may need to talk slower, use simple words and take more time to explain things.

If you do a crime, you can be punished just like anyone else. If you did not do a crime, but someone says you did, tell the police, the lawyer and the judge that you did not do a crime. Don't admit to a crime you did not do!

If you are arrested, the ADA can help you. It tells police, lawyers and judges to treat you fairly and to help you understand your rights.

When you meet a police officer, don't be afraid. Stay calm. Don't run away. Let the police know you have a disability if you need help.

Tell police your name. Give police a phone number of someone to call or your ID card if you need help. If you are arrested and do not understand your rights, **ASK FOR A LAWYER**. Do not say anything to the police until you talk to a lawyer. You may need a lawyer even if you did nothing wrong. You don't need money to get a lawyer.

**NOTE:** Do you know what other crimes can get you arrested?

Here are some examples:

- Hanging around one place for a long time without a reason to be there
- Taking or selling drugs
- Being drunk in public
- Helping someone else do a crime
- Breaking into someone's house or business
- Writing checks to pay for something when you have no money in the bank

Let your lawyer know you have a disability. This will help your lawyer help you in court. Ask your lawyer to talk slower and repeat things if you can't understand what is being said.

## WHAT HAPPENS IF I GO TO COURT?

You will go to court to talk to the judge about the crime.

Your lawyer goes with you to court to tell the judge your side of the story.

The judge asks you if you did the crime. Your lawyer helps you know what to say to the judge.

The judge decides whether or not you did the crime. (Sometimes a group of people called a jury will decide this instead of a judge.)

If the judge thinks you are guilty (that you did do the crime), you will be punished.

*Written and published by The Arc of the United States, 1997*

Given the number of prisoners with MR/DD, and the overwhelming evidence that many may not have benefitted from their constitutional protection from self-incrimination, some special education teachers are beginning to incorporate into their classroom instruction on delinquency prevention and control. Some California teachers reported successfully using *LifeSmart* special education curriculum, published by Stanfield Publishers, which includes a SafetySmart module. The SafetySmart module teaches students how to recognize and report being a crime victim, and how to cooperate with the police as a victim, witness, or suspect (see [www.stanfield.com](http://www.stanfield.com) for curriculum details).

Most of the available curriculums (including The Arc's and *SafetySmart*) teach a cued-response reaction to being taken into custody or simply being identified as a suspect by law enforcement officials. For example, the Arc's instructional curriculum for special education teachers tells the teacher, "the thought process in the instruction should focus on the environment." For example, Are police present? Are you in a police car/van? Are you at the police station and emotional—e.g., fearful, threatened, confused? If answers are "yes," your response should be immediate and unequivocal: "I WANT A LAWYER!" The request should be repeated in a respectful manner in front of a variety of witnesses. Students should also be taught to resist making any statements after requesting an attorney other than giving their name, address, and the telephone number of a responsible person to call. The full curriculum includes an "instructional scenario," in which a student is subjected to a mock arrest and is taken to a booth for questioning. This material is being distributed to special education teachers by Area Board XI, Tustin California (Orange County), along with the modified Miranda warnings discussed earlier.

## E. Assisting Those Who Go to Jail or Prison

The South Central Los Angeles Regional Center (SCLARC) Forensic Project is California's most organized and formal effort to identify and advocate on behalf of arrestees with developmental disabilities is. This project is particularly important for two primary reasons: SCLARC has become a model for the best means to identify and intervene on behalf of arrestees who are developmental disabled, and this regional center serves about one-third of the state's jailed population.

The SCLARC Project is funded by a grant from the State Council on Developmental Disabilities, and has just completed its second year. SCLARC developed a specialized, multidisciplinary forensic assessment team (FAT) that works within the criminal justice system to identify suspects at intake to the jail, and coordinate with criminal justice staff on matters involving medical and psychiatric care, housing, and appropriate sentencing. The team has both a juvenile and adult law enforcement liaison, and both liaisons make referrals to and work with the FAT to develop treatment and legal options. FAT members sometimes interact directly with district attorneys and public defenders, and often write letters directly to the court requesting specific sentences and programs. This team is discussed in more detail below.

According to Bruce Williams, a FAT member, as of August 1998 the team had processed 155 judicially involved regional center clients from the Los Angeles area. "FAT's primary focus," he said, "is to work with the individual's regional center service coordinator to obtain the most appropriate court outcome, improve their conditions while incarcerated, and provide facilitative treatment when released." According to Williams, the program has been extremely successful, and

at the end of the first year, only two of 71 clients had re-offended (although 46 of the 71 had prior offenses).<sup>11</sup>

Forensic project staff also provide training and education to jail personnel to help identify offenders with developmental disabilities. As the liaison positions are staffed only 40 hours per week and cannot possibly screen all jail inmates, the liaisons are largely dependent on jail staff to bring questionable cases to light. To encourage bringing such cases to light, SCLARC has also hosted three regional conferences on the topic, has provided specialized training sessions to police and jail personnel nationwide, worked closely with the LAPD SMART team, and has developed literature for criminal justice representatives and clients as well as their caretakers and family.

The Forensic Assessment Team was developed through a multidisciplinary forensic grant in Los Angeles in order to intervene when people who are known to have cognitive disabilities become involved with the criminal justice system as suspects, defendants, or inmates. The team meets weekly to discuss cases and develop individual recommendations for the courts, and includes a behavioral psychologist, forensic psychiatrist, forensic psychologist, physicians, juvenile and adult law enforcement liaisons, and other consultants as needed. Although the FAT program is designed to serve all regional center clients in the Los Angeles area, the South Central Los Angeles Regional Center referred most of the cases, probably because the FAT team meets most regularly at the South Central site.

As of spring 1999, most of those seen by the forensic assessment team were male adults (90%), although FAT also reviewed 12 juvenile cases. Approximately 80% of the those reviewed were mildly retarded. Presumably, offenders with more severe mental retardation were handled informally. Interestingly, almost half of the offenders with disabilities seen by FAT had dual diagnoses due to major mental health disorders, such as schizophrenia, depression and psychosis, while 30% had only mental retardation with no other diagnosis.

This project reviewed the team's case files during their first year. One involved a 20-year-old male charged with breaking and entering. He had served 10 days in jail, in the general population, before coming to the attention of FAT. Upon review, it was learned that he was severely retarded, with an IQ of 35. He had been living in a board and care facility, where he awoke one morning at 4:00 a.m. and decided to go for a walk. Because he couldn't find his way home, he began trying to open doors in the neighborhood, found one unlocked, and went inside. When the residents awoke they found him in their home and called the police, who arrested him and charged him with breaking and entering. Clearly, this is not the type of offender we need to see incarcerated; he simply needed adequate supervision. Had no intervention been available to him, he could have been processed criminally and received a maximum sentence of six years.

In a non-FAT case we reviewed in Orange County, a woman with an IQ of around 65 was charged with a third-strike offense for residential burglary. Her previous offenses included a commercial burglary and a robbery that yielded a carton of cigarettes at a 7-11 store. Her present offense consisted of entering five separate apartments in a complex for elderly persons and taking small amounts of money from the countertops and tables—less than \$35 in all. In this instance, the district attorney was resistant to a negotiated sentence and was planning to pursue the case to the full extent of criminal law.

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<sup>11</sup> Personal interview 12/19/1999.

In another case, a man with developmental disabilities in his 60s was forced to leave his long-time placement for administrative reasons. He was homeless for a brief time and eventually found a job at a grocery store. An elderly female befriended him and fed him dinner, after which time he sexually assaulted the woman by laying on her and kissing her, all the while telling her he loved her. He did not penetrate her, but left after he ejaculated on her nightgown. The man was arrested and it was recommended that he be placed in a supervised facility and receive outpatient treatment to help him develop socially appropriate sexual expression. However, the DA in the case demanded that this defendant be identified and registered as a sex offender. Such registration would prevent placement in any community residential facility. Experts were still battling over disposition as this report was being written.

Many (but not all) of the cases that FAT reviewed involved low-level offenses that, upon examination, were much less severe than their official charges appear on the surface. Many of the offenders brought to FAT's attention were not hardened criminals, but clients with developmental disabilities who simply lacked the supervision and social skills to behave according to societal norms. In most instances, FAT was able to work with the courts to individualize acceptable sentence recommendations. The most common recommendation was a change in residential placement to provide greater supervision. Other typical recommendations included diversion, probation, treatment, and (in one instance) prison. By far, most of the offenders FAT reviewed received probation; only seven were sentenced to a term of incarceration.

The Lanterman Developmental Disabilities Services Act (Divisions 4.1, 4.5, and 4.7 of the Welfare and Institutions Code) requires that regional centers have "criminal justice expertise to assist the regional center in providing services and support to consumers involved in the criminal justice system as a victim, defendant, inmate, or parolee" (Section 4640.6 (c) (1)). The SCLARC Forensic Project provides an excellent model for consideration.

SCLARC has also begun to educate regional center clients on justice matters and has developed a program entitled: "What to Remember If the Police Stop You." They instruct clients to be COOL: Cooperative, Open, Organized, and Legal. Their training curriculum talks about being calm and cooperative if stopped by the police; being open by telling the police they have special needs and may need the police to talk slower or be clearer; be organized, which means carrying some form of identification with an emergency contact and showing it to the police when stopped; and knowing their rights, telling police if they do not understand what is being said or do not want to talk with them, and instructing the police to ask for a lawyer.

Passports to Learning's Incarcerated Jail Program. The Los Angeles County Men's Central Jail operates the The Los Angeles County Men's Central Jail operates the *only* program uncovered in this study to specifically assist incarcerated adults with developmental disabilities. The Passports to Learning, Inc. (PTL) program is an independently owned, nongovernmental organization that specializes in providing services to people with developmental disabilities throughout Southern California.

In 1998, PTL implemented an Adaptive Learning Skills program in the LA Men's Central Jail for Los Angeles County Regional Center clients. The Sheriff's Department supports the class by providing the classroom facility and a deputy to work in the class. According to Betty Walkes, president of PTL, the jail program has two goals: "to provide preparatory assistance to incarcerated persons with developmental disabilities, and to provide post-incarceration follow-up assistance to

prevent recidivism.”<sup>12</sup> In addition, Sheriff’s Department staff report that the program helps bridge services to people with learning disabilities within the local criminal justice system—since PTL staff often accompany clients to court, recommend sentencing options and placement within and outside of the jail, assist with regional center managers, and help educate clients on legal proceedings. Clients are often identified and referred to the program by the forensic assessment team (discussed above).

PTL’s initial training occurs within the jail. For three hours a day, five days a week, clients are removed from the general jail population and taken to classrooms to learn reading, writing, math, and other skills. In addition to teaching these academic skills, the program addresses problem areas associated with being incarcerated, such as drug/alcohol abuse, peer pressure, conflict resolution, anger management, and personal programs. Reduction in recidivism is stressed by encouraging an effort to change daily routines and encourage clients to associate with other people in positive settings.

A key component of the program is assisting clients following release. These transition services are composed of three parts: an initial/transitional phase, a clinical phase, and an employment/education placement phase. The initial phase is completed within one month of release from custody. PTL staff members become involved at the request of regional center service coordinators or other local agencies to ensure compliance with terms of probation or release, at a client’s request, or as part of an individual program plan (IPP) outlined by the service coordinator and agreed upon by the client. This usually includes meeting with the regional center service coordinator, the probation officer, and, if needed, Alcoholics Anonymous and other treatment programs.

Phase II, the clinical phase, is considered the most important phase of the follow-up program. Clients are classified in two categories: violent and nonviolent. Those deemed to be violent receive response/diversion training three times per week, focused on teaching problem-solving techniques and other skills to assist clients in coping with social obstacles. Nonviolent clients receive supervision and counseling twice weekly with instruction in a group intervention meeting at PTL’s Training Center or their community learning center, or in one-to-on counseling sessions by PTL jail staff.

Phase III, completed in two to three months following release, focuses on assessing a client’s educational or vocational need and working with regional center counselors and others to locate appropriate placement in the community.

PTL reports that, of the 22 regional center inmates completing the program thus far, only two have been rearrested—a much lower rate than for jail releasees generally, which hovers around 60% in Los Angeles County (Petersilia and Turner 1999).

Interviews with several Sheriff’s Department staff revealed that they were extremely supportive of the PTL program, believing that people who take the classes behaved with less animosity over time, looked forward to their daily class sessions as rewards for “good” behavior, and appeared to be less stressed than other inmates. They also were more cooperative with jail staff, which reduces incidents such as assaults, fights, and suicide attempts. Jail staff interviewed suggested they would very much like to see the program expanded to the other LA County jail facilities, and are discussing how to make that happen. Currently, the cost of the PTL program is borne by the client’s regional

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<sup>12</sup> Personal interview 1/7/2000. PTL is located at 19641 Singing Hills Drive, Northridge, CA 91326.

center. Sheriff's Department staff noted that many others with developmental disabilities could benefit from the PTL program, but they may not be officially registered with the regional centers.

## **F. Assuring ADA Compliance in Correctional Facilities**

During the last year, significant progress has been made in assuring that prisoners with disabilities are provided reasonable accommodations as required by the Americans with Disabilities Act. The ADA prohibits discrimination against people with disabilities in employment, public accommodations, and state and local government programs. It also mandates that state and local government programs be made accessible to and usable by people with disabilities, including making reasonable modification to policies, practices, and procedures to enable qualified individuals with disabilities to participate. The ADA expressly covers state governments and "any" or "all" of the operations therein.

Until recently, however, the courts had differing views on whether or not Title II of the ADA applied to prison settings. Title II of the ADA prohibits state and local governments from discriminating against people on the basis of a mental or physical disability. It requires reasonable accommodations in policies or practices when necessary to ensure that an individual with mental retardation is not subject to discrimination based on disability. Some courts have found this language clear and have applied the ADA to prison facilities in certain circumstances, whereas other courts have rejected this view and refused to apply the ADA to correctional facilities without more specific language.

This debate was finally put to rest in the single most influential case decided under the ADA pertaining to the criminal justice system. In *Pennsylvania Department of Corrections v. Yeskey* (1998), the U.S. Supreme Court held in a unanimous opinion that the ADA applies to state prisoners. That case pertained to an inmate who was refused entrance into a motivational boot camp because of a history of hypertension. He sued under the ADA, but the Pennsylvania Department of Corrections claimed they were not subject to the act's requirements. The United States Supreme Court held that "state prisons fall squarely within Title II's statutory definition of 'public entity.'" In the amicus curiae brief submitted in the *Yeskey* case, Gold (1997) wrote: "Eliminating discrimination against people with disabilities in prisons requires that disabled inmates be treated equally with nondisabled prisoners: their disabilities not be an excuse for segregating them from nondisabled prisoners; they have the same opportunities as nondisabled prisoners to work, recreation, education, sanitation, dining, and health care; and their lives not be perceived or treated as less valuable than nondisabled prisoners."

The repercussions were immediate for California, as seen in *Clark v. California* (1998). In this case, the Prison Law Office of San Francisco had filed a class action lawsuit on behalf of all prisoners with developmental disabilities. The lawsuit alleged that California prison officials discriminated against prisoners on the basis of their disabilities. The prisoners had filed suit in federal district court, stating that some prison facilities lack adequate emergency evaluation plans for prisoners with disabilities. They also said the range of vocational programs for prisoners with disabilities is more limited than the range offered for prisoners without disabilities. In addition, they said that some inmates with disabilities were improperly classified for work and educational purposes and, as a result, could not get gain-time credits that were available for other inmates. The lawsuit said inmates with developmental disabilities had been assaulted by other inmates, taunted by correctional officers, and excluded from medical, work and education programs.

After the Supreme Court ruling in *Pennsylvania vs. Yeskey*, the California Department of Corrections (CDC) quickly settled the lawsuit, and prison authorities promised to identify prisoners with developmental disabilities and house them safely, educate prison staff in dealing with disabled inmates, and provide the inmates with access to a variety of programs to which they were previously denied access. The state also agreed to provide inmates with developmental disabilities appropriate access to educational, vocational and work programs, medical, dental and psychiatric care, recreation, libraries, telephones, emergency procedures, visiting, orientation, and exercise. The state conceded that inmates with disabilities have been denied access to many of these activities because personnel were not trained in communicating with them.

The "Remedial Plan" for *Clark vs. California* will be facilitated through "clustering" at designating specific sites for inmates with developmental disabilities. Identification of inmates with retardation by CDC staff will use a three-phase assessment process to screen, identify, and then verify the disabilities. The Remedial Plan also specifies that all department psychologists shall receive training in assessing mental retardation, and all institution staff shall receive training in how to communicate with people who have developmental disabilities. The plan further states that the Department of Corrections will identify all inmates with developmental disabilities currently housed in prison by 1/1/2002, establish an interdisciplinary support team to review and determine program needs of these inmates, and ensure that support services are provided to enable the inmates to function in the correctional environment. As Don Specter, Prison Law Office lead attorney, said following the case: "They'll finally be recognized and protected."

The Prison Law Office subsequently filed suit against the Board of Prison Terms (California's equivalent of the parole board) regarding its failure to comply with ADA requirements in parole hearings. In *Amstrong vs. Davis*, now in progress, a federal district judge ordered the Board of Prison Terms to remedy its "shocking and appalling failure to comply with the Americans with Disabilities Act" during parole hearings. The order came after a trial during which one prisoner told of having to leave his wheelchair behind to crawl upstairs to a hearing, a deaf prisoner told the judge he was shackled during his hearing and could not communicate with the sign language interpreter, and a blind inmate said he was offered no help with complicated written materials. It is clear that the ADA applies to corrections settings, and litigation will eventually bring them into compliance (for a complete legal review, see Rubin and McCampbell 1994).

Similar to law enforcement, corrections staff usually have little training on disability issues. The State Council on Developmental Disabilities and the Department of Developmental Services recently funded California Drug Consultants in Los Angeles to implement a pilot project entitled, "Education Negotiation Attitudes by Law Enforcement Towards Developmental Disabled Individuals" (ENABLE - DD). This is a training program for the state's Department of Corrections and the California Youth Authority to improve their understanding of persons with developmental disabilities who are incarcerated or on parole. The curriculum uses individuals with disabilities as peer educators, as well as mental health and medical professionals.

## **G. Developing Appropriate Criminal Sanctions for Offenders**

The area in greatest need of state policy attention pertains to the development of good programming or habilitation programs once people with developmental disabilities have been convicted. There is urgent need for in-custody programs as well as those in community settings following incarceration. California falls far behind some other states in this regard, although the

number of offenders with MR/DD who could benefit is probably much larger here. During the course of this research, we could identify no state-run specialized rehabilitation or substance abuse program—for people on probation, parole, in jail, or in prison—to meet the unique needs of offenders with retardation.

This is unfortunate for many reasons, since a few jurisdictions elsewhere have implemented special corrections programs for offenders with cognitive disabilities, and their experiences have been positive. Some programs have increased social functioning and reduced recidivism rates, while at the same time reducing corrections costs (McDonald and Teitelbaum 1994). Day-treatment programs seem to be particularly promising, since they can provide assistance in accessing low-income housing and the various services critical to success in the community. These programs can also alleviate public concerns about safety by more closely monitoring offenders in work and recreational activities.

While few formal program evaluations exist, people who operate and fund these programs believe they protect the public, educate offenders with MR/DD to obey the law, and save tax dollars. For example:

- ▶ Boston MassCAPP (Community Assistance Parole Program) is operated by the Massachusetts Parole Board to provide extra assistance to parolees with mental retardation following prison release. Although parolees with MR have the same parole conditions upon release as other inmates, they are given additional help in following them. MassCAPP utilized volunteer community assistants to help paroled offenders by providing advocacy, positive role modeling, and guidance in use of leisure time, as well as academic training or tutoring. MassCAPP also provides a weekly counseling group and resource meeting led by a forensic psychologist and a social work intern. The state-funded program has been operating for 15 years and is judged highly successful.
- ▶ Texas has a wide variety of programs within and outside institutions. In Fort Worth, Volunteers of America works with the Adult Probation Department in specialized programs for probationers with MR. The goal of the 24-hour residential program includes eliminating drug and alcohol problems, obtaining employment, and developing basic hygiene and survival skills. All inmates entering the Texas Department of Corrections are given group intelligence tests. Inmates identified as MR are transferred to a specified unit where they receive rehabilitation, social support, and help in pre- and post-release planning.
- ▶ Cuyahoga County (Cleveland, Ohio), Tucson (Arizona), and Lancaster County (Pennsylvania) all operate exemplary programs for probationers with MR/DD. Each of these programs incorporates a wide variety of activities designed to help probationers in the community with social support and vocational education. Most also involve an educational component to familiarize people who have developmental disabilities with the workings of the justice system and the law.
- ▶ New York has a number of small residential halfway houses specifically for offenders with MR. These programs, which accept both full-time residents and “day reporting” offenders, accept referrals from corrections facilities throughout the state and can be used as a probation alternative, a prison/jail diversion, or as a means of transitioning from prison. Individuals receive training on basic skills as well as on building socialization skills.
- ▶ The Arc of New Jersey—a voluntary national organization with chapters in every state—operates the Developmentally Disabled Offenders Program (DDOP) in New Jersey. This is one of

the few programs nationwide that specifically provides alternatives to incarceration for defendants with cognitive disabilities. Directed by an attorney with a background in criminal law, the program acts as a liaison between the criminal justice and human services systems. DDOP, through the use of a personalized justice plan, offers the court alternatives to incarceration by identifying community supports and programs to appropriately treat and sanction offenders with disabilities. If the judge accepts the plan, the offender is “diverted” to DDOP and then appropriately monitored by probation staff and Arc volunteers until the sentence is completed. The DDOP also provides training and technical assistance to professionals on matters relating to identifying and processing defendants with developmental disabilities, and develops materials for this population on what to do if they are arrested. The Arc of New Mexico operates a similar program called the Justice Advocacy Project (Berkobien and Reynolds 1997), and The Arc of Florida has just been funded to begin the Diversionary Program for Developmentally Disabled Offenders (Dale 1999).

The goal of all of these programs is to help offenders attain the skills and discipline needed for them to live independent, productive, and crime-free lives. Program operators say such programs help “break the cycle” of crime and recidivism and, as such, end up saving taxpayers money.

California’s prisons currently house nearly 165,000 inmates and are operating at 200% capacity. Building more prison capacity will cost taxpayers millions of dollars each year—as exemplified by a recent \$24 million appropriation to begin construction of a new prison in Delano County capable of holding just 5,000 inmates. As California continues to struggle to fund the growth in prison populations, the positive experiences of specialized MR/DD programs should attract attention as a means of diverting low-risk inmates to community-based programs.

A recent analysis (Petersilia 1997) showed that intermediate sanction programs for inmates with MR/DD are an ideal way to reduce prison costs without sacrificing public safety benefits. California has joined many other states in searching for such community-based programs that are tougher than traditional probation, but less stringent and expensive than prison. The most popular intermediate sanctions are intensive probation supervision, house arrest, electronic monitoring, substance abuse treatment, and boot camps. All these programs are considerably cheaper to operate than prison because they do not require the state to provide secure structures, guards, food, or the other expenses of prison.

As discussed above, offenders with MR/DD are usually convicted of less serious offenses, but spend a longer-than-average term in prison due to institutional behavior and an inability to participate in early release programs or to put together an acceptable pre-release plan. Because of poor prison behavior, these inmates require greater attention and therefore larger staffing. Eventually, inmates with cognitive disabilities may be reclassified to a higher security status, and occupy more expensive prison cells. California estimates that the construction costs alone for a maximum-security cell average \$113,000 each, whereas a minimum-security cell costs \$60,000 each. The 2:1 cost differential between maximum and minimum-security inmates also applies to operational costs, which now average about \$22,000 per year, per inmate (Laskey, Hooper, and Dery 1997). These cells could be more appropriately reserved for violent, repeat offenders.

Finally, evidence is emerging that offenders with MR/DD can be supervised safely under intermediate sanctions given the right support, and importantly, that recidivism can be reduced—avoiding the costs of *subsequent* incarcerations. The Lancaster County, Pennsylvania, intensive probation/parole program for offenders with MR reports maintaining a 5% recidivism rate, compared to the often-cited national rate of 60% (White and Wood 1986).

Importantly, there is likely to be widespread public support for handling offenders with MR/DD outside of institutions. Officials interviewed during the last several months continually voiced their concern over the mishandling of this population, and often noted that sending these offenders to prison or jail was done not out of malevolence but lack of options.

## V. THE IMPORTANT QUESTIONS TO ANSWER

As reliable statistics and other information on the prevalence of offenders with MR/DD are not available nationally or in any state, observations noted in this report are only preliminary. In most instances the data are descriptive, represent a single state or program, and the statistics were not collected in a scientifically rigorous fashion. Nonetheless, these are the data that exist to describe the problems related to criminal offenders with cognitive disabilities. Administrators at the California Department of Developmental Services are currently revising the Client Development Evaluation Report to include more detailed information regarding judicially involved clients. With better prevalence data, we will be able to assess more accurately the nature and scope of these problems.

But beyond prevalence data, there is a serious need for more basic research. At a minimum, we need to conduct research to answer the following questions:

- ▶ How many times do police, attorneys for the defense or prosecution, and judges actually encounter someone with a cognitive disability, and how does that designation affect their further processing (or case outcome), if at all? Is a defendant with cognitive disabilities distinguished from one who is mentally ill, and are there different processing options for the two categories?
- ▶ How do the presence of regional center representatives, special criminal justice system programs, private advocates, or closer ties between the mental health and criminal justice systems appear to affect sentencing outcomes?
- ▶ Do pre-sentence investigation reports address the intellectual capabilities of defendants? If so, what specific measures are employed and how accurate are they?
- ▶ If someone with cognitive disabilities is incarcerated, what screening (if any) is done to identify him or her? How is this information used in subsequent decisions (regarding classification level, institutional placement, program recommendations)?
- ▶ If people with MR/DD are incarcerated, what were their experiences? How long were they in custody? Were they housed separately from the general inmate population? Any attempts at suicide? Any mistreatment? Any particularly good treatment by jail or prison staff?
- ▶ When these offenders were released from jail or prison, were post-release plans developed for treatment and supports? Were the clients consulted in developing the plans? If plans were developed, how did they work?
- ▶ What are the components of prevention programs that educate people with MR/DD about the justice system? How successful have these programs been?
- ▶ What are the components of model programs—in police diversion, community corrections, jail, and prison? How do such programs measure their success?

These questions are not unanswerable, but we haven't devoted the public policy attention needed to answer them. As noted earlier, offenders with developmental disabilities never have attracted the attention that other "specialized populations" have or that their numbers should warrant.

## VI. CONCLUSIONS AND RECOMMENDATIONS

Study findings lead us to conclude that the justice system often fails individuals with developmental disabilities, and thus the public, usually because it fails to identify or accommodate their uniqueness. It does not routinely identify them as developmentally disabled at any phase of the justice process—from arrest through adjudication. Routine screening methods should be required for identification throughout the justice system, since persons with mental retardation often try to conceal their disabilities. However, even where judges or others suspect a cognitive disability, they often cannot act on it because there are few provisions to treat the *retarded*, particularly the *mildly retarded*, any differently from other suspects. (The provisions for different treatment of people with *mental illnesses* are inappropriate for most people with mental retardation.) As the interviewees repeatedly noted, identification without alternative procedures and programming is not particularly useful.

We elicited many good suggestions concerning how to better accommodate people with cognitive disabilities in the justice system, but highest priority and consensus emerged in regard to the following:

1. Increase justice-related education for clients and their families/care providers. Education programs concerning justice matters and what clients should do if they come in contact with the police should be a priority for agencies responsible for people with cognitive disabilities. People with these disorders must have access to education that, among other goals, enhances their ability to protect themselves from criminal victimization and avoid possible criminal activities. If they do become involved with the police and the court system, they and their families need to better understand their legal rights (as well as those that can be requested under the ADA) if they become suspects. A number of curriculums have been developed for these purposes, but they are not widely offered. Special education programs in schools should incorporate personal safety training in their curriculum. Outside the classroom, regional centers should serve as the coordinating agencies to assure that clients are offered such educational opportunities, and RCs could coordinate training with local chapters of The Arc.
2. Establish a legal advocate to assist arrestees. Prior to being formally questioned by law enforcement personnel, people with these disabilities must have the right to confer with an advocate who understands mental retardation and the criminal justice system. This advocate should be trained on legal matters as well as disabilities and be called when an offenders is suspected as being MR/DD. ADA litigation does not yet mandate this, but some believe it is similar to having a sign-language interpreter present during police questioning of someone with a hearing impairment.

Each regional center should have a legal services review team to function as an in-house, central clearinghouse to deal with criminal matters involving their clients. Ideally, this team should be housed at the regional center and utilize its professionals (e.g., psychiatrists, psychologists, education specialists, community resource specialists). These professionals are already familiar

with the regional center resources and the clientele. The team should utilize a multiagency advisory committee, which consists of representatives from the Department of Mental Health, the Department of Education, Probation, Law Enforcement, and the Council on Developmental Disabilities. It (or some designated staff) should develop a working agreement with local law enforcement so all parties in the criminal justice system are more aware of how to identify people with developmental disabilities, whether or not they are regional center clients.

3. Routinely educate justice system personnel on developmental disabilities. Education about mental retardation, including ways to accommodate offenders with this disability during justice system processing, should be provided routinely to defense lawyers, prosecutors, judges, court personnel, forensic evaluators, law enforcement personnel, victim assistance providers, and criminal justice policymakers in order to improve the likelihood that people with cognitive disabilities will be treated fairly. These sessions should be incorporated into required in-service training courses. Current training is provided on general disabilities—usually as it relates to ADA compliance—but generally these curriculums just define mental retardation without going into detail about appropriate accommodation in the justice system.
4. Implement a system to identify offenders with MR/DD at jail intake. Jail personnel should implement a standardized process for determining whether suspects have a developmental disability. The use of the CAST-MR has obtained national recognition as an adequate process to determine competency to stand trial, although it is not recommended as a means to determine retardation or understanding of Miranda.<sup>13</sup> There are modified IQ tests, which may be used for screening purposes, and one could merge client databases from special education or regional center services, but the latter would constitute a violation of confidentiality. Establishing standardized evaluations and/or merging education, social service, and criminal justice databases should be debated among professionals, but would ultimately require legislative as well as budgetary support. Screening during jail or prison intake will likely be mandated as a result of ongoing ADA litigation.
5. Educate public defenders on how to represent people with developmental disabilities. It is particularly important that criminal defendants with mental retardation have competent lawyers who understand their disability and have access to a list of expert witnesses who can provide information or testimony about this condition. Defendants with no appropriate adult should be able to call on regional center staff who have the requisite legal training to serve in that capacity as suspects move through police questioning, plea agreements, and incarceration.
6. Establish appropriate sentencing options for people with MR/DD. There is a serious need to develop rehabilitation programs for people with MR/DD who are convicted of criminal offenses. California lags other states in developing such programs, although it probably has a greater number of offenders who could benefit. The *Clark v. California* ADA case is likely to improve conditions in prison, but leaves probation and jails untouched. The current diversionary options are inappropriate for offenders with mild mental retardation—the majority who get convicted in the justice system. Probation programs specifically designed for offenders with MR/DD are

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<sup>13</sup> The CAST-MR is the Competency Assessment to Stand Trial—Mental Retardation (Everington and Luckasson 1992). It is the only instrument that has been designed specifically for use with a mentally retarded population. The three-choice multiple-choice questions ask about the meaning of legal terms and behavior based on hypothetical court situation and interactions with a defense attorney. The final 10 questions are open-ended questions about what happened at the crime scene, what the criminal charges are, and what they mean.

sorely needed, and California could consult many good models that would save money and reduce recidivism. Correctional administrators should give specialized probation and parole caseloads highest priority, as they hold promise for reducing the recidivism rates of offenders who are MR/DD.

7. Establish and Test Reentry Courts to Manage the Transition from Prison to Community. There are now close to 165,000 individuals residing in California's prisons, and over half of them will be returning to their communities in the next two years. We can quibble about the number of inmates who are developmentally disabled, but we know that many of them are. We also know that many of the nearly 80,000 California jail inmates have developmental disabilities. For all releasees, the process of reintegration is difficult. Their families may not be willing to accept them back, finding jobs and housing is difficult, and positive social contacts may have been broken. Such circumstances contribute to an offender's return to crime. Managing prisoner reentry when inmates have cognitive impairments is even more challenging. People with disabilities are less likely to have financial resources, marketable job skills, or suitable housing options—and they now have a prison record as well.

Policymakers are considering the concept of "reentry" courts for parolees generally, and this option seems even more ideal for parolees with disabilities. Such courts manage the return to the community of individuals being released from prison, using the authority of the court to apply graduated sanctions and positive reinforcement and to marshal resources to support the prisoner's reintegration, much as drug courts do (Office of Justice Programs 1999).

For offenders with cognitive disabilities, the reentry court must have at its disposal a broad array of supportive resources, including specialized job training, housing services, and substance abuse programs. In the drug court experience, judges and others have become very effective service brokers and advocates on behalf of participants. In a reentry court for people with disabilities, the judge and his or her "team" would need to be familiar with regional center services, independent living arrangements, job training programs, and disabilities generally. Personnel in the criminal justice system do not currently have this specialized training.

Reentry courts may provide a means to assure that a case management approach, taken by criminal justice staff who are knowledgeable about disabilities issues and services, and can assist offenders in the difficult reintegration process. With such courts, offenders nearing eligibility for release would be screened to determine their readiness and, if ready, would begin a process of preparation. Parole officers would work with prisoners inside prisons to match them with prospective employers, contact family members on their behalf, line up mental health and other services, and begin to reconnect inmates with the world they would soon join. Importantly, they would connect eligible inmates with disabilities to the appropriate regional center. After their release, the parole officer would oversee the parolee's linkages to work, family, and social services. Adopting a case management model, parole officers would assist parolees in their successful reintegration (Office of Justice Programs 1999).

As stated earlier, neither of the two systems currently responsible for handling offenders with developmental disabilities is prepared to do so. Regional centers generally are not equipped to handle criminal offenders, and the criminal justice system is not equipped to handle people with

developmental disabilities. The two systems are often at odds, leaving a vulnerable population with poor service delivery, increased victimization in custody, and what amounts to harsher sanctions.

A pairing of criminal justice and mental retardation services, similar to the successful pilot project of the South Central Los Angeles County Regional Center, would be a promising solution. If implemented correctly, the teaming of regional center and criminal justice services—perhaps within a reentry or mental health court—will not only save money, but will reduce recidivism by providing the supervision and programming this population needs.

Unfortunately, there is no state mandate to change how things are currently done. The State Council on Developmental Disabilities has funded pilot projects, which often show great promise but are not adopted by relevant state agencies after the pilot funding has ceased. The California Department of Developmental Services and the state's regional centers need to work together and assume primary responsibility for developing procedures and programs for people with MR/DD who get involved with the justice system. Until this happens, all solutions will be piecemeal and longer-lasting change will remain elusive.

Although there are no simplistic solutions to helping offenders with cognitive disabilities in the justice system, more knowledge and analysis would significantly influence the attention and priority that policymakers and criminal justice planners give to this topic and the program and policy changes they are willing to consider. The issue of offenders with mental retardation needs to be brought to the forefront of California policy attention.

There will probably always be some people with developmental disabilities who continue to sit in prison and jail cells, bewildered and unable to comprehend and negotiate correctional rules and conditions. But we hope the numbers decrease, and sufficient energy and analysis are devoted to considering alternative options. If a culture is measured by how it treats its weakest members, then the handling of people with cognitive disabilities in our criminal justice system reveals American justice at its basest. As Sobsey (1994) put it: "We must strive to make right what is currently so very wrong." Our respect for the human rights of *all* people and respect for our justice system demand no less.

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