

Report to the President

Dealing with Mental Retardation
in the Criminal Justice System



ii

President's Committee on Mental Retardation
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DISCLAIMER STATEMENT

Information contained in the Annual Report to the President: Citizens with Mental Retardation and the Criminal Justice System was researched, collected and analyzed by experts in the field of mental retardation, law and the criminal justice system for the Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System under contract with the U.S. Department of Health and Human Services, Administration for Children and Families, President's Committee on Mental Retardation.

The Annual Report to the President: Citizens with Mental Retardation and the Criminal Justice System summarizes the expressions of the research and opinions of the participants at the Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System and do not necessarily reflect the views of the President's Committee on Mental Retardation or any part of the U.S. Department of Health and Human Services.

The President's Committee on Mental Retardation has selected and adapted a number of recommendations presented at the Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System for inclusion in the Report to the President since they were considered to be informative and appropriate for consideration by the President. They help to provide a better understanding of the nature and scope of the problem and serve as an agenda for study and action.

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Report to the President

Citizens with Mental Retardation and the Criminal Justice System



1991



**U.S. Department of Health and Human Services
Administration for Children and Families
President's Committee on Mental Retardation
Washington, D.C. 20201**



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

AUG 19 1992

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am pleased to transmit to you the report of the President's Committee on Mental Retardation entitled Citizens with Mental Retardation and the Criminal Justice System. The report focuses on many important aspects of the law and mental retardation. It addresses recent and current legal issues and needs, including the role of Federal, State, and local mental retardation agencies, law enforcement agencies, the judiciary, and corrections.

The content of this report is a summary of the contributions of experts in the field of criminal justice and mental retardation who were participants at the Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System. The Forum was held on September 14-16, 1989, in Bethesda, Maryland. Co-sponsors of the Forum included the U.S. Department of Health and Human Services, the U.S. Department of Justice, and the U.S. Department of Education.

The President's Panel on Mental Retardation addressed the relationship between law and citizens with mental retardation over thirty years ago. The First National Conference on Legal Rights for Mentally Retarded Citizens was held in 1973 and the Second National Conference on Citizens with Mental Retardation and the Law was held in 1985. The President's Committee on Mental Retardation convened a number of conferences relating to law and the criminal justice system between these two major conferences. The present report provides a summary of current issues and recommendations on the subject of the criminal justice system, law and mental retardation.

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It is my hope that the information in this report proves useful as our nation works to develop strategies for the attainment of full citizenship and justice for all citizens with mental retardation.

Sincerely,

A handwritten signature in cursive script that reads "Louis W. Sullivan". The signature is written in dark ink and is positioned above the printed name.

Louis W. Sullivan, M.D.

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Preface

The President's Committee on Mental Retardation (PCMR) was originally established by Executive Order 11280 on May 11, 1966, to provide continuing advice to the President and to the Secretary of Health and Human Services concerning a broad range of topics relating to mental retardation. The membership of the PCMR includes the Secretary of Health and Human Services, who serves as the Chair of the Committee, the Attorney General of the United States, the Secretary of Education, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Director of ACTION, and 21 citizen members appointed by the President. The Committee is charged with submitting an annual report to the President concerning mental retardation, and any additional reports or recommendations as the President may require or as the Committee may deem appropriate.

In 1961, five years before the establishment of the PCMR, the President's Panel on Mental Retardation was created to assess the status of mental retardation in the nation. The Panel was instructed to submit a report to the President at the end of one year, which would identify major issues and include recommendations to "combat" mental retardation. Among many areas, the Panel identified numerous legal and human rights issues concerning citizens with mental retardation. The Panel submitted its highly acclaimed report to the President in 1962, outlining major issues with a set of recommendations for the nation to consider.

Based on the work of the Panel and the need for continuing assessment of the state of mental retardation in the nation, the PCMR was established.

The PCMR has monitored legislation, policies and procedures affecting the relationship between citizens with mental retardation and the law since its establishment in 1966. Although citizens with mental retardation have the basic rights to "Life, Liberty, and the Pursuit of Happiness," American society has frequently denied people with mental retardation full access to these rights. The intent of this Report to the President is to strengthen the awareness of legislators, public policy makers and the general public regarding this dichotomy and to ensure development and continued availability of Federally protected rights for citizens with mental retardation.

The information and recommendations contained in this Report are the result of the "Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System" held in Bethesda, Maryland, September 14-16, 1989. The Conference was sponsored by the PCMR, the National Institute of Justice and the National Institute of Corrections of the U.S. Department of Justice, the Office of Human Development Services of the U.S. Department of Health and Human Services, and the Office of Special Education and Rehabilitative Services of the U.S. Department of Education. The participants at the Forum included a selection of nationally recognized leaders and experts in the field of mental retardation, law, and the criminal justice system.

The focus of the Forum was to assess accomplishments and problems in the human and legal rights area since PCMR sponsored the following conferences: The First National Conference on Legal Rights for Citizens with Mental Retardation in 1973, the Second National Conference on Citizens with Mental Retardation and the Law in 1985, and several other conferences relating to legal and human rights and criminal justice between these years. In this report, PCMR considered current trends, defined a base for efforts in this area, and developed a scenario through and beyond the end of the century.

The Report includes recommendations by the conference participants regarding mental retardation, law enforcement, the judiciary, and corrections.

Albert L. Anderson

Albert L. Anderson, D.D.S.
Vice Chairperson
President's Committee
on Mental Retardation

Acknowledgements

The members of the President's Committee on Mental Retardation (PCMR) acknowledge Dr. Albert L. Anderson, Vice Chairperson, PCMR, and Martin S. Appel, former Chairperson, Subcommittee on Full Citizenship and Justice, for their leadership in convening the "Presidential Forum on the Offender with Mental Retardation and the Criminal Justice System."

The PCMR also wishes to give special acknowledgement to Richard Thornburgh, former Attorney General of the United States, for his contributions to the Forum. Special thanks to James K. Stewart, Director, Terry Simpson, Special Assistant, National Institute of Justice, and John E. Moore, Program Specialist, National Institute of Corrections, for their guidance and support.

In December 1987, Dr. George N. Bouthilet, Coordinator, Subcommittee on Full Citizenship and Justice, developed and proposed to the PCMR the original initiative to conduct a forum relating to the numerous and complex issues faced by citizens with mental retardation when they come into contact with various components of the criminal justice system. He served as project officer for both the planning and convening of the Forum. Also, he served as an editor for the PCMR Report to the President.

In addition, the PCMR is grateful to Ruth Luckasson, Associate Professor of Special Education, University of New Mexico, who provided consultation to the PCMR in the planning of the Forum.

The PCMR also thanks Dr. Ronald Conley, Special Assistant, Administration on Developmental Disabilities within the Administration for Children and Families, Department of Health and Human Services, who assisted the PCMR with the Forum and the preparation of the PCMR Report to the President.

The PCMR appreciates and recognizes the outstanding contributions made by all participants attending the Forum. The speakers, panel chairpersons, and paper presenters, as well as most of the attendees, are nationally known leaders and recognized experts in the field of mental retardation, law, and the criminal justice system. As a result, this Report represents a summary of the highlights of a highly successful Forum.

The PCMR further acknowledges former and current members, especially the members of the Subcommittee on Full Citizenship and Justice, who have contributed to making the Forum a success. In particular, the Committee wishes to recognize the support staff for their persistence and timely work in carrying out the necessary activities to implement the Forum. Special note is taken of the work done by Jim F. Young, former Acting Executive Director, PCMR.

Finally, the PCMR highlights the special contributions of the co-sponsors of the Forum: The Office of Human Development Services (now part of the Administration for Children and Families) of the U.S. Department of Health and Human Services, the National Institute of Justice and the National Institute of Corrections of the U.S. Department of Justice, and the Office of Special Education and Rehabilitative Services of the U.S. Department of Education. Their financial and technical assistance provided the means by which the Forum could be convened.

Sincerely,



Sambhu N. Banik, Ph.D.
Executive Director
President's Committee
on Mental Retardation

President's Committee on Mental Retardation November 1991

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**PROGRAM PARTICIPANTS
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ON THE
OFFENDER WITH MENTAL RETARDATION
AND THE
CRIMINAL JUSTICE SYSTEM**

Speakers

Conference Opening

Albert L. Anderson, D.D.S.
Vice Chairperson
President's Committee on Mental Retardation

Opening Statement

James K. Stewart
Director
National Institute of Justice
U.S. Department of Justice

Conference Overview

Martin Appel
Chairman
Subcommittee on Full Citizenship and Justice
President's Committee on Mental Retardation

Special Guest Speaker

The Honorable Richard Thornburgh
Attorney General of the United States
Department of Justice

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Professor of Special Education
University of Kansas

Law Enforcement

Captain Robert Martin
Commanding Officer
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The Judiciary

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Persons with Mental Retardation as Victims of Crimes

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CITIZENS WITH MENTAL RETARDATION

AND

THE CRIMINAL JUSTICE SYSTEM

The great majority of people with mental retardation reside in the community and engage in the same activities as other citizens. They live in apartments or houses, they work, they travel, they watch television, they attend sports events, they have social relationships, and increasingly they marry and have children. The majority of people with mental retardation are free to choose which activities they engage in, as well as when, where and with whom. And among those who require a degree of assistance, most retain some control over their activities, particularly over such matters as how they spend their leisure time and with whom they associate.

The percentage of people with mental retardation who live in the community, and the amount of control they have over their lives, has increased substantially over the last 30 years. This includes people at all levels of mental retardation, including people with severe mental retardation. Great advances have been made in our understanding of what people with mental retardation can accomplish and in the development of programs designed to assist them to integrate into society. The number of people with moderate and severe mental retardation living in institutions providing 24-hour a day oversight has greatly declined and the number of people with moderate and severe mental retardation who are employed in integrated worksites has greatly increased. Many people with mental retardation obtain competitive jobs.

The great majority of people with mental retardation are law-abiding and productive citizens and make appropriate choices in their activities. But, as with any other group of citizens, there is a small percentage who violate Federal, State, or local laws and who, in consequence, may face the prospect of being arrested, tried, and punished in the criminal justice system.

Because of the intellectual limitations of defendants with mental retardation, important and complicated issues arise that must be considered if the integrity of our system of justice is to be realized. Do they understand the nature and consequences of their acts? Are they able to meaningfully explain the circumstances surrounding their alleged offense to law enforcement authorities and to their lawyers? Was there a voluntary and reliable confession? Are they competent to stand trial? Can they

testify competently in court? Should they always be held fully accountable for their acts? What role should judges play to ensure the administration of justice? How should corrections programs be organized to facilitate their return to society if they are imprisoned? Under what circumstances should offenders with mental retardation be placed in diversion programs in the community rather than be incarcerated?

The solutions to these and other issues are particularly complex since there are wide variations among people with mental retardation in their intellectual development, the number, type, and severity of associated disabilities, their ability to understand and control their actions, to communicate, and to respond to habilitation programs. In consequence, the appropriate response of the criminal justice system will vary substantially among offenders with mental retardation. Some offenders will understand the nature of their crime and some will not. Some will be competent to stand trial and some will not. Types of punishment that might be appropriate for some will not be appropriate for others.

Only limited attention has been given to the special issues that may arise when people with mental retardation commit crimes. To begin to address these issues, the President's Committee on Mental Retardation (PCMR) sponsored a Presidential Forum on Offenders with Mental Retardation and the Criminal Justice System in September 1989. The Forum also addressed Criminal Justice System issues concerning people with mental retardation who may be falsely accused of, or who may become victims of, crimes. The term, defendants, will frequently be used in order to stress the point that not all people with mental retardation who are accused of crimes are guilty.

During the Forum, it was clear that the issues involving defendants and victims with mental retardation can be effectively resolved only through the cooperative efforts of the mental retardation and criminal justice systems. In consequence, a wide range of people with an interest in these issues were brought together at the Forum. Included among the participants were a State supreme court justice, a criminal court judge, a police captain, forensic specialists, state corrections specialists, county offenders program specialists, consumer advocates, lawyers, program managers, and scholars from the fields of law, mental retardation, and mental illness. A representative from the field of mental retardation and three representatives from the field of criminal justice (law enforcement, the judiciary, and corrections) were asked to set forth the issues from their particular points of view and to stress those matters which must be resolved if the areas they represent are to more effectively serve this population. At the end of the conference, they were asked to discuss what they believed they gained from their participation and what needed

to be done.

Subsequently, the speakers at the conference prepared papers on issues involving defendants with mental retardation as well as a paper on the difficulties that people with mental retardation who have crimes committed against them face when dealing with the criminal justice system, e.g., will their testimony be given full weight by the court? Will they be devalued as citizens? These papers were published in a book entitled The Criminal Justice System and Mental Retardation: Defendants and Victims.¹

FINDINGS

What are the more important observations about issues involving defendants and victims with mental retardation that can be gleaned from the Forum and the papers subsequently prepared?

Nature and Scope of Issue

The number of people with mental retardation who commit crimes cannot be ascertained with much confidence. Obviously, it is impossible to know if a crime was committed by a person with mental retardation unless the perpetrator is apprehended, tried, and convicted. Even if apprehended, the accused person is usually not identified as having mental retardation by the police, the courts, or even by his or her lawyer.

It is not until the defendant is convicted and sentenced to prison that systematic testing to identify the existence of mental retardation is conducted. Even at this point, there may be great uncertainty as to the accuracy of the diagnosis. Usually, a diagnosis of mental retardation is based on a test of intelligence. But individual test scores may be greatly affected by the type of test, the time at which the test is administered, the attitude of the prisoner being tested, and the existence of concomitant physical and mental disabilities. Two observations are critical.

First, rates of mental retardation reported for prisoners are often overstated. This is because prisoners are often administered group tests shortly after entering prison when they are likely to be frightened, hostile, or in a non-cooperative mood. In addition, prisoners who have substance abuse problems (e.g., alcoholism, drug addiction), emotional illnesses, other physical disabilities, or who are functionally illiterate will often score below their capabilities. When individualized tests are

¹Baltimore: Paul H. Brookes Publishing Co., 1991.

administered at a later time, average intelligence test scores are invariably higher.

Second, rates of mental retardation reported by Federal and State prisons vary widely because of differences in the types of tests administered, the time of testing, and other reasons. Based on available evidence from States that employed individualized Wechsler Adult Intelligence Scale - Revised (WAIS-R) tests for prison inmates, usually after a settling down period, it appears that the best estimate of the percentage of people in Federal and State prisons with mental retardation is two percent, about one-fifth of earlier widely accepted rates that were based largely on less sophisticated group tests. In 1988, this would amount to about 12,500 prisoners, an estimate that should be revised upward to about 14,000 persons currently because of the rapid growth in prison populations that has been taking place since that year.

Some people with mental retardation who commit or are accused of crimes are placed in residential facilities for people with mental retardation. It appears that at least five percent of the people in these facilities, or about 12,500 people, had previously engaged in activities that might be characterized as criminal or undesirable, e.g., they engaged in thefts or engaged in actions that injured others or damaged property, although most were not formally charged with committing a crime. Moreover, some people who are placed in institutions are there because of the fear that they may commit illegal or violent acts in the future. Other defendants with mental retardation are confined in local jails, in residential facilities for people with mental illness, or are placed in diversion programs in the community.

Relative to an estimated population of seven million Americans with mental retardation, PCMR estimates that about 26,500 are confined in Federal or State prisons or in residential institutions for people with mental retardation, which is not an inordinately high number of individuals compared to the rest of the population. Even if the estimate is doubled to allow for defendants placed in local jails and prisons or in other programs, it does not appear that people with mental retardation are involved in an unusual amount of criminal activities.

Nonetheless, the number is not insignificant and presents a challenge to the criminal justice system to assure that these individuals are accorded the same measure of justice as other Americans who commit crimes.

Characteristics:

- The majority of offenders with mental retardation in Federal or State prisons are male.

- **The percentage of prisoners identified as having mental retardation in Federal and State prisons who were Black tends to be much larger than their representation in the general prison population which itself tends to be disproportionate to their representation in the State population.**
- **The great majority of prisoners have mild mental retardation, largely (and obviously) because most people with mental retardation have mild mental retardation. Moreover, offenders with moderate and severe mental retardation are sometimes diverted to institutions for people with mental retardation. Nonetheless, there are persistent reports of people with I.Q.s below the 50-55 range being held in prisons.**
- **People with mental retardation should not be mistaken for people with mental illness, although some people with mental retardation may also be mentally ill. Unfortunately, this is a distinction that may not always be easily discernible or of immediate importance to the police investigating a crime.**
- **Some inmates with mental retardation have additional disabilities, e.g., mental illnesses or physical disabilities, which may greatly impede a diagnosis of mental retardation as well as greatly influence the types of habilitation plans that are most appropriate.**

Types of Crimes

The frequent claim that offenders with mental retardation tend to commit serious crimes is misleading. To begin with, this observation is usually based on data from Federal and State prisons which are likely to receive inmates who commit serious crimes. Less serious crimes frequently do not lead to incarceration. In addition, a cross section of inmates in Federal and State prisons would encompass more severe crimes, on average, than admissions to these facilities. Prisoners who commit less severe offenses will be released, placed on parole, or receive shorter sentences and be released earlier than prisoners who commit more serious offenses.

Frequently, people with mental retardation are followers, easily manipulated, and often used by others with more intelligence and/or experience. As examples, 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.

Reasons for Committing Crimes

Persons with mental retardation who commit crimes do not do so because of mental retardation. They commit crimes for the same complex reasons that other people may commit crimes - childhoods in which appropriate discipline and moral values were not instilled, inability to find jobs, friends and companions who encouraged them to commit crimes, exclusion from habilitation and training programs that would develop needed job skills, errors in judgment, and the like.

It cannot be emphasized too strongly that it is the family and community that usually teach values to people, including people with mental retardation. It is from these sources that people develop a sense of identity, learn right from wrong, gain cultural values, and acquire skills for interacting with other people. Many defendants with mental retardation come from broken or dysfunctional families and have poor community support. They may develop low self-esteem from performing poorly in school, the low expectations from family members, and the lack of support and encouragement from family and community. They seldom succeed at overcoming problems and often lack high self-regard.

Although it is often noted that mental retardation, in contrast to many cases of mental illness, is expected to be life-long in duration, it must be emphasized that with training and education, people with mental retardation can almost always be taught appropriate social values and be helped to obtain skills for working and living in the community.

Identification

The identification of a person as having mental retardation is often delayed until after trial and sentencing. This delay may prevent the prosecution, the defense, and the judge and jury from giving appropriate consideration to the effects of mental retardation in determining competency, criminal responsibility, appropriateness of punishment, and suitable habilitation programs.

One reason for these delays is the limited understanding of mental retardation by many personnel in the criminal justice system. Another reason is the limited resources available to many courts for purposes of making a proper diagnosis. Forensic examiners are more likely to be trained in mental illness than mental retardation.

Another difficulty in early identification is that most defendants with mental retardation have mild mental retardation and their disability may not be immediately

apparent. In addition, they often do not want to be identified as having mental retardation and will attempt to conceal its existence. Still another problem is that the existence of other disabilities increases the difficulties of identifying people with mental retardation. On the one hand, these disabilities may be so overshadowing that they obscure the existence of mental retardation and may even prevent intelligence testing from taking place. On the other hand, if the individual is tested, the effects of these other disabilities may cause an artificially low score. It is extremely difficult to obtain reliable test scores on conventional tests from individuals undergoing an emotional crisis, with a learning disability, who have visual problems, or who have difficulty with hand coordination.

There are many technical problems in making a diagnosis of mental retardation, whether at the point of initial contact or at the time of imprisonment. All intelligence tests have limitations and can, at best, be considered an estimate of intelligence. One consequence of this is that intelligence test scores vary from test to test and, in some cases, the variation is substantial. And a further consequence is that an I.Q. measure which is a few points above or below (or even substantially above or below) the usual cut-off point does not constitute definitive proof that the individual has or does not have mental retardation. Considered and informed clinical judgment must be employed in order to make a diagnosis of mental retardation. The results of intelligence tests need to be supplemented by measures of adaptive functioning levels and by the past history of individuals with suspected mental retardation.

Understanding of Mental Retardation

One theme that repeatedly came up during the conference was that judges, public defenders, and police and correctional officers often did not understand mental retardation sufficiently. In fact, it was noted that the primary focus of police officers was usually on determining the nature of a crime and its perpetrator. In these circumstances, the mental status of an accused person is not always considered. The determination of mental disability and the appropriate disposition of the case is sometimes regarded as a matter that should be left to the courts. Fortunately, this attitude is changing.

In addition, apparently, there are still many people who do not understand that most people with mental retardation are self-supporting or nearly so and are worthwhile and productive members of society. Some people still attach a stigma to the term "mental retardation" - a stigma that may be greatly exacerbated when the label "offender" or "criminal" is added to it. Fear of these labeled individuals may affect the likelihood of a just and reasonable response when a person with mental

retardation commits a crime.

Conversely, at the Forum, it was repeatedly stated that the criminal justice system is unfamiliar to many people in the field of mental retardation. The criminal justice system may not be seen as a resource to assist people in the same way as education, employment, social service, and other programs for people with mental retardation.

Miranda Warning

A fundamental right in the American system of justice is that at the point at which a person is arrested, he or she must be notified of Miranda rights, i.e., the right not to answer questions and the right to counsel. This poses particular problems in the case of offenders with mental retardation. A rapid recitation of the Miranda warning, which contains a number of complicated provisions, may be dimly comprehended by the offender or may not be understood at all. This is particularly important since the offender may be so frightened by the police that he or she would be fearful of invoking the protections that are identified, particularly if they are not well understood. In addition, individuals with mental retardation are sometimes easily led and intimidated, and may have a desire to please the questioner, which makes them vulnerable when questioned by authorities anxious to resolve a crime.

In consequence, offenders with mental retardation may confess to crimes, or provide other information when it is not in their best interest to do so. In some cases, it was observed at the conference that persons with mental retardation confess to a crime, even though they did not commit it. Further, the information they provide is sometimes of doubtful accuracy, not because of an intent to deceive, but because of limited ability to observe, comprehend, and express themselves.

Since prosecution cases are often based primarily on confessions and information given by accused persons, a failure to utilize the rights provided by the Miranda warning can place offenders with mental retardation at a severe disadvantage and sometimes result in a miscarriage of justice.

Competence to Stand Trial

It is a well-established legal principle that an accused person should not be brought to trial if he or she is unable to understand the nature and purpose of the proceedings, or to consult with counsel and assist in his or her defense. There is reason to believe that insufficient consideration is given to this issue in the case of

defendants with mental retardation.

To begin with, there is limited, but convincing evidence, that most defendants with mental retardation are not identified as having mental retardation, or referred for an assessment of their competency to stand trial. The failure to identify accused persons is partly due to the limited resources available to most courts and partly to a lack of understanding of mental retardation that is found to be common among many prosecutors, defense attorneys, and judges. Another problem is that people with mental retardation sometimes attempt to prevent discovery of their disability. Still another problem is that most forensic evaluations for competence to stand trial focus on the interaction of mental illness and competence rather than the interaction of mental retardation and competence.

Accused persons with mental retardation who are not identified as having mental retardation are severely disadvantaged in arranging fair and appropriate legal representation. Their legal rights are less likely to be protected, and an appropriate and fair disposition of the case may not be made. They are unlikely to be aware of their right to remain silent or to refuse to answer incriminating questions. Lack of identification may be particularly widespread in cases involving minor offenses. These are the cases in which accused individuals are least likely to be represented by legal counsel and courts may lack both the resources and the interest to determine whether an accused person has mental retardation.

Even if a defendant is identified as having mental retardation, the adequacy of representation and the fairness of adjudication depends largely on the ability and inclination of the defense attorney to compensate for the client's limitations. The pressures to cut corners in criminal defense, especially for public defenders and court-appointed counsel working for a set fee, are well known. Frequently, as observed at the Forum, inadequate time is spent on the case and important facts are masked or distorted. Lack of familiarity with mental retardation on the part of the defense attorney can make matters worse. In consequence, lawyers may be providing inadequate representation to a large number of clients with mental retardation who require more skillful interviewing and counseling than they provide.

Note that it is not always in the best interest of an accused person to be identified as having mental retardation and declared incompetent to stand trial. Although an incompetent person may not be convicted, he or she may be committed indefinitely (without being tried for the offense) for the purpose of assessing the probability that competency can be effected in the foreseeable future and for making efforts to do so. In consequence, some lawyers prefer to plea bargain for a finite and known punishment rather than risk an indefinite commitment. One of the

perversities in the criminal justice system is that a person who is incompetent to stand trial may be better off if he or she is treated as competent to stand trial.

A final problem in establishing competency is that the issue of what constitutes competency itself is complex. Competency is a legal concept referring to an accused person's ability to understand the nature and purposes of the trial and an ability to assist counsel in his or her defense. A defendant with mental retardation is not necessarily incompetent for legal purposes. There are crucial judgmental issues involving how much understanding the accused person must have and how accurately and effectively he or she must be able to assist in the defense. Few people would want to convict and punish a person who is unable to understand the nature of the proceedings, the charges against him or her, the nature of the punishment, and who is unable to provide counsel with reliable information or to give coherent testimony. There is, however, a grey area, where defendants have varying levels of competency where conviction may or may not be considered appropriate. Moreover, defendants may be competent in some ways and not others. For example, in theory, a defendant may be able to assist his or her attorney and stand trial, yet not be competent to plead guilty because of imperfect understanding of the effects of pleading guilty and available alternatives.

Criminal Responsibility

The issue of criminal responsibility refers to the extent to which a person's impaired mental functioning may reduce the extent to which he or she should be held accountable for a criminal act. If, at the time of the offense, he or she had an impaired understanding that the act was wrong and that punishment could follow, or had an inability to control behavior, then he or she might not be held criminally responsible, depending upon circumstances.

Clearly, some people with mental retardation who commit offenses are aware that their behavior is wrong, can control their conduct, and know the consequences if apprehended. However, the degree to which people with mental retardation understand these issues, appreciate their importance, and can control their conduct varies widely. For example, some people with mental retardation are susceptible to being led by others, have a desire to please, and are impulsive. These are factors which may or may not be regarded as affecting the level of criminal responsibility. In cases where people with mental retardation have an impaired understanding of the wrongness of an act, or reduced ability to control their behavior, difficult issues arise in determining the extent to which the effects of mental retardation should be a defense.

Numerous legal tests to determine whether a person is criminally responsible have been devised. These tests are usually developed for people with mental illness and then utilized, inappropriately, for people with mental retardation. A major shortcoming of most of these tests is that they employ an "either/or criteria". For example, the American Bar Association recommends that a person should not be considered criminally responsible if, at the time of the crime, he or she was unable to appreciate the wrongfulness of the act due to mental retardation or mental illness. But what if the accused person could only partly appreciate the wrongfulness of the act? Should he or she still be accorded the same rigorous punishment as prescribed for individuals who fully appreciate the wrongdoing? Or what if the accused person did not appreciate the wrongfulness of the act because he or she was never taught that the act was wrong, not because he or she was incapable of understanding that the act was wrong.

Several remedies for this problem have been instituted or proposed, usually for persons with mental illness. In 12 States, verdicts of "guilty but mentally ill" can be rendered. In principle, this would lessen the punishment prescribed and assure that rehabilitation services are provided. In practice, such a verdict has provided little benefit to defendants and, in some cases, has caused harm. Such a verdict may still allow incarceration; in some States, involuntary commitment is automatic. One problem is that the imprisonment may last a lifetime rather than be the finite sentence that would otherwise be rendered. Another problem is that it appears that few individuals who receive this verdict actually receive needed treatment.

It has also been proposed that people with mental retardation may have diminished criminal responsibility. Such a verdict is not currently possible under the law in any State in the United States. However, when there is discretion in the severity of punishment, a judge may implement this principle de facto by opting for a less severe sentence that would be given if the individual did not have mental retardation.

As early as 1962, the President's Panel on Mental Retardation took the position that: "For such persons, imprisonment for the sake of punishment is never appropriate."² In effect, the goal would always be to habilitate the offender with mental retardation so that he or she could successfully return to the community.

²See Report of the President's Panel on Mental Retardation, 1962. The President's Panel on Mental Retardation existed for one year, 1961-1962. The President's Committee on Mental Retardation was authorized in 1966 and has continued since that time.

Forensic Services

Forensic services are the application of a body of scientific knowledge and principles to issues in the legal system. A major task of forensic services is the determination of whether a defendant is competent to stand trial and is criminally responsible. In the case of people with mental retardation, the forensic examination must first establish the existence of his or her disability, and then must make a determination as to his or her competency to stand trial. Forensic evaluations for this purpose are typically ordered by the courts at the request of the defense, the prosecutor, or the judge.

The adequacy of competence evaluations for defendants with mental retardation has been questioned on grounds that they are not carried out frequently enough and they are often inadequate. Consider the following data from Virginia. In 1987, there were 1500 forensic evaluations conducted to determine criminal responsibility and competency to stand trial. About 7.2 percent (108 persons) of the individuals evaluated were identified as having mental retardation. During the same time, 680 people admitted to correctional institutions were identified as having mental retardation. This indicates that approximately 550 to 600 individuals with mental retardation were arrested, convicted, and sentenced to prison and their disability was not identified until after imprisonment.

The Virginia data appear consistent with other studies. Data from six other States indicates that the percentage of persons identified as having mental retardation after undergoing forensic evaluation range from 2.5 percent to 7.3 percent with an average of 6 percent.

Despite their intellectual limitations, the majority of people who were identified as having mental retardation by forensic examination were judged competent to stand trial, i.e., able to understand the proceedings and to assist in the preparation of their defense. In the six States for which information is available, the percentage of defendants found to have mental retardation and who were recommended as incompetent to stand trial ranged from only 12.5 percent to 33 percent. As would be expected, the more severe the level of mental retardation, the less likely that a accused person would be assessed as competent to stand trial. In Virginia, 23 percent of defendants who were identified as having mild mental retardation were considered incompetent to stand trial as compared to 68 percent of defendants who were identified as having moderate mental retardation.

An even larger percentage of defendants identified as having mental retardation were also judged to be responsible for their actions, i.e., they understood

that their act was wrong and that they would be punished if apprehended. In Virginia, during a four year period, 88.6 percent of individuals identified as having mental retardation were recommended as criminally responsible. Other studies have reported even higher rates of criminal responsibility. In Virginia, this came to 94.0 percent of defendants with mild mental retardation and 66.7 percent of defendants with moderate mental retardation.

In the Virginia data for 1987, most people with mental retardation who were found competent to stand trial were also held to be criminally responsible. But the converse was not true. Fifty-five percent of people with mental retardation who were found not competent to stand trial were judged by the forensic examiner to be criminally responsible for their acts. Unfortunately, information is lacking regarding the disposition of these cases. How many, if any, were eventually brought to trial? What types of punishments, if any, were prescribed? And if there were punishments, how could they be justified if people were unable to stand trial?

Forensic examinations administered to people with mental illness or mental retardation are usually conducted by professionals in State or local departments of mental health and are focused on individuals with mental illness. In many cases, the forensic evaluators for people with suspected mental retardation are psychiatrists and/or psychologists who have received little training, and have little experience, in issues related to mental retardation. Thus, many evaluations are of questionable validity and have limited reliability. Unfortunately, the conduct of forensic evaluations in the public sector often does not include consultation with mental retardation experts.

Sentencing

The sentencing of an offender attempts to balance the sometimes conflicting goals of punishment, rehabilitation, protection of the public, confinement of offenders considered dangerous, and public acceptance of the sentencing decisions. Prior to 1975, most States established maximum and minimum sentences and judges had considerable discretion between these limits. Since then, there has been a move to standardize prison sentences and limit the judges' discretion and in some cases to eliminate or restrict parole releases. Unfortunately, the effects of mental retardation have not been regarded as a mitigating factor in sentencing many offenders with mental retardation who have been found criminally responsible and competent to stand trial.

The importance of rehabilitation versus other correctional goals varies in the minds of judges and jurors when setting or recommending sentences. However, the

likelihood that a sentence will give significant weight to a habilitation program for defendants with mental retardation is reduced for three reasons. First, there is a growing emphasis on punishment rather than rehabilitation for all offenders. Second, the effectiveness of rehabilitation for offenders is sometimes questioned despite the existence of a number of successful rehabilitation programs. Third, appropriate community-based correctional rehabilitation services are usually not available for offenders with mental retardation. This emphasis on punishment may be self-defeating if offenders are not prepared to make a living and cope with the stresses of life outside of prison. The great majority of prisoners are released back to the community.

An important element in formulating a sound response to the needs of offenders with mental retardation is a competent system of screening and evaluation prior to sentencing so that the suitability of alternatives to incarceration can be weighed, and the most appropriate disposition of the case effected. If the effects of mental retardation were consistently regarded as a mitigating factor when determining punishment, this would allow more emphasis on the use of probation and community programs.

Death Penalty

Although professionals, consumers, and others in the field of mental retardation may differ in the extent to which they believe particular individuals with mental retardation should be held culpable for criminal acts, and the extent to which the effects of their disability should mitigate punishment in individual cases, most people in the field believe that the death penalty is never appropriate.

The case of Johnny Paul Penry, a person with mental retardation convicted of a brutal murder and sentenced to death, can be used to set forth their arguments. Penry's case was appealed to the Supreme Court of the United States. The issue was whether the death penalty was an appropriate and constitutional punishment if the guilty person had mental retardation. A brief was prepared and submitted to the Supreme court as Amici Curiae by the American Association on Mental Retardation, the American Psychological Association, the Association for Retarded Citizens of the United States and eight other professional and voluntary associations knowledgeable about people with mental retardation.

The brief argued against the imposition of the death penalty for Penry and, by extension, to all persons with mental retardation in the United States. The arguments made against the death penalty are summarized as follows:

- **Mental retardation substantially diminishes people's ability to cope and function in the everyday world.**
- **The death penalty is reserved for defendants with highest "blameworthiness and moral culpability," factors which are necessarily limited in the case of a person with mental retardation.**
- **The death penalty is disproportionate to the degree of culpability of any defendant with mental retardation. The highest functioning individuals in the "mild" mental retardation category have, by definition, substantial cognitive and behavioral disabilities.**
- **Execution of a person with mental retardation serves no valid phenological purpose.**

It must be emphasized that the brief did not argue that all punishment is inappropriate - only that the death penalty is too extreme in the case of a person with mental retardation. The Supreme Court was not convinced by these arguments and on June 26, 1989 decided, by a 5 - 4 vote, that it has not yet been proven that imposition of the death penalty upon a person with mental retardation is a cruel and unusual punishment.

Correctional Facilities

It has been suggested that the sharp reduction in the number of residents in institutions for people with mental retardation that has occurred over the last 20 years, and is still proceeding, has caused some people to be sent to prison who would formerly have been placed in these institutions. In part, this is due to a lack of alternative appropriate community programs. It should be emphasized, however, that the estimated percentage of inmates with mental retardation in Federal and State prisons appears to be less than the prevalence of people with mental retardation in the general population.

There are a number of important issues concerning the imprisonment of people with mental retardation. There are, of course, the generic issues facing most correctional institutions of rapidly expanding populations, longer sentences, serious overcrowding, and rising costs. However, the more important issue concerns the usually inadequate or non-existent programs for rehabilitation and other services provided to inmates with mental retardation. It is estimated that less than 10 percent of inmates with mental retardation receive any specialized services. It is not surprising that prisoners with mental retardation often do not adjust well in prison

or do well in interviews with the parole board. Consequently, the inmate with mental retardation is apt to serve a longer part of his or her sentence before parole than other inmates, be more frequently punished, benefit less from habilitation programs, and be returned to prison more often than other parolees. Without such programs, the chances of offenders with mental retardation becoming law-abiding and productive citizens after being released from prison are greatly reduced.

A major cause of inadequate and inappropriate programs is a lack of resources and expertise with which to establish programs. In the long run, this may be "penny wise and pound foolish" if it leads to higher recidivism rates and more frequent and longer stays in prisons.

Another problem in developing appropriate habilitation programs is that correctional personnel have multiple missions. Security and order are clearly the first priority of wardens, prison guards, and most other prison personnel. Their decisions regarding how to achieve these security goals almost always take precedence over the training and habilitation activities and procedures urged by prison counselors and other habilitation personnel. Conflicts between these goals lead to staff tensions and impede habilitation programs. Habilitation is best considered as a full-time process involving all prison employees, not something that only takes place during predetermined periods of the day and involving habilitation personnel only.

The emphasis on security in prisons is enhanced because, at times, the prisoners themselves may appear aggressive and uncooperative. In consequence, there may be little incentive or interest in making the extra effort that is needed to provide habilitation and training programs to this population.

In fact, the ability to survive in prison may require aggressive behavior which amplifies poor behavior rather than encouraging good behavior. It is not uncommon for certain prison inmates, especially those with mental and physical impairments, to be abused or victimized, have their personal property stolen, be forced to perform sexual acts, and be compelled to violate prison rules. Some inmates learn to cope by being the abusers rather than the abused. Others become perpetual victims.

To be effective, habilitative services in correctional institutions must vary in accordance with individual needs, circumstances of the offenders (nature of crime, how long before release, disability, etc.) and must be supported by the entire staff, not just counselors and treatment personnel. In some ways, line staff are more important than treatment staff since they spend more time with inmates and are often more alert to problem behaviors. Unfortunately close cooperation is

infrequently achieved and program staff may feel isolated and unsupported in prisons. "Burnout" among prison staff becomes almost inevitable.

Because limited prison resources and expertise often preclude the establishment of multiple programs, most programs for prisoners with mental retardation are operated at the maximum security level since all inmates at all levels of security risk can be placed there. This causes many of the inmates in these programs to be placed in unnecessarily restrictive arrangements.

Despite these problems, excellent examples of prison programs for inmates with mental retardation have been developed in a few States. These programs typically involve line correctional officers as well as habilitation personnel, offer individualized programs, and focus on developing life skills training through special education, vocational activities, recreation, and case management.

Children in juvenile detention facilities fall under the protection of Public Law 101-476, the Individuals with Disabilities Education Act (IDEA), which requires that all children with disabilities be given a free appropriate public education. It appears, however, that this requirement is rarely met in the case of youth with mental retardation who are imprisoned.

Community-Based Programs

For many offenders, the most effective correctional programs are usually those provided in community (diversion) programs rather than in prison settings. This avoids the negative consequences of imprisonment and immediately initiates the rehabilitation process. Community programs for offenders with mental retardation can take many forms, e.g., they can require that the offender with mental retardation stay in a supervised residential facility, or they can place the offender on probation on condition that he or she participate in a special program, or utilize some other form of diversion program.

There are a number of outstanding community programs for offenders with mental retardation. The one characteristic that these different programs always have is that they are based on an individualized plan. These programs have demonstrated that, through special programming and assistance, offenders with mental retardation can be taught to adopt prevailing social values and be enabled to acquire vocational and other skills that help them to work and live in the community.

The Lancaster County, Pennsylvania joint mental retardation and criminal justice system program has been frequently cited for outstanding performance in the provision of services to offenders with mental retardation. This pioneering program has been in existence over 10 years. The program has had a recidivism rate of only five percent, which is less than one-tenth of what might be expected without such a program. From the onset, a critical feature of this program was close and ongoing cooperation between criminal justice and mental retardation personnel. In fact, the first priority in the development of the Lancaster model was to train criminal justice personnel in the characteristics of people with mental retardation and in the many issues involving offenders with mental retardation. In order for the program to work effectively, it is essential that all members of the criminal justice system understand these issues and the most appropriate way of dealing with them. Similarly, mental retardation professionals were trained in the operations and requirements of the criminal justice system.

The Lancaster model assumes that most adults and juveniles with mental retardation, particularly among individuals with mild mental retardation and no additional disabilities, can and should learn to be responsible citizens and be accountable for their actions. To teach offenders with mental retardation to be responsible citizens, the Lancaster program provides education, training, counseling, and other services that are incorporated in an individualized plan designed to meet the needs of each client.

Despite the success of the Lancaster and other programs in assisting offenders with mental retardation to change their behavior, similar programs are not generally available for offenders with mental retardation who could benefit from them. Consequently, most offenders with mental retardation are imprisoned or institutionalized because of the lack of alternatives. Often the community mental health and mental retardation programs are unaware of, uninterested in, or are overwhelmed by the special needs of offenders with mental retardation.

Another reason why offenders with mental retardation may not be placed in appropriate community programs involving prison alternatives is that judicial or correctional authorities do not realize that these individuals can benefit from such programs.

A final problem is that there is too little research on methods of habilitating offenders with mental retardation.

Prevention

The most effective habilitation strategy would be to instill the values and knowledge into people with mental retardation that would avert any need or temptation to commit crimes. It follows that the most effective prevention programs are those initiated at an early age. The Lancaster, Pennsylvania, program has developed a prevention strategy that consists of holding classes for special education students to instruct them on laws and the reasons for them. They are also provided information on arrest procedures, the detention center, placement facilities, the responsibilities of citizens to obey the law, and the consequences of breaking laws.

The administrators of the Lancaster program believe that individuals with mental retardation break the law because of low self-esteem, the influence of more experienced and knowledgeable peers, and a lack of knowledge of the consequences of their actions. The Lancaster program for rehabilitation and treatment is designed to eliminate these causes of criminal behavior.

Service System Problems

The combined efforts of the criminal justice system and the service system for people with mental retardation are required to resolve issues involving offenders with mental retardation, i.e. to protect their constitutional rights, to assure that punishment is appropriate, and to prepare them for eventual return to society.

There are, however, many problems and barriers to effective cooperation and coordination between these systems.

- Lack of specialized community services: There is a shortage of resources and personnel to work with offenders with mental retardation. This imposes major barriers to effective habilitation and may cause an offender with mental retardation to be imprisoned or institutionalized for lack of a suitable alternative.
- Lack of Coordination: Defendants with mental retardation often fall through the cracks and receive inappropriate services because neither the criminal justice system nor the mental retardation system wishes to take primary responsibility for them. Most mental retardation programs are reluctant to assume responsibility for an individual with apparent mental retardation when he or she is apprehended by police officers. At the same time, criminal justice programs often expect

mental retardation programs to provide the needed services or intervention. Workers in both systems often do not know how to deal effectively with the offender with mental retardation or how to involve the other system.

Confidentiality

In one jurisdiction, it was reported that when the police attempt to determine whether a suspect had been previously placed in a residential or treatment facility, facilities will sometimes refuse to divulge that information on the grounds that it is confidential. This sometimes makes it difficult for the police to arrive at a disposition of the case.

Advocacy Programs

Many defendants with mental retardation do not have access to advocacy programs. There are, however, scattered examples of outstanding programs. For example, some units of local Associations for Retarded Citizens have instituted programs for offenders with mental retardation. The American Association on Mental Retardation has taken on a national leadership role in the education of professionals in mental retardation on issues involving defendants with mental retardation.

State Protection and Advocacy programs for people with developmental disabilities are logical sources of advocacy for people with mental retardation and a number have established programs for this purpose. In principle, defendants with mental retardation should be able to obtain help from Protection and Advocacy agencies to assure that their rights are protected, that they are adequately represented in court, and that they are helped to obtain appropriate services. Protection and Advocacy agencies should also be involved in arranging for independent evaluations, and perhaps challenging the findings of evaluations, when people accused of crimes have mental retardation. However, the resources available to Protection and Advocacy agencies and other advocacy programs are limited and can meet only a small proportion of the need.

Training

Repeatedly, it was stated at the Forum and in the papers subsequently prepared that neither the field of mental retardation nor the criminal justice system has enough people able to deal with the problems of offenders with mental retardation. People qualified in one system generally have little training or

experience in the other or much understanding of it. For example, Shilit, in 1979³, found that 90 percent of lawyers, judges, and police officers in New York State had no training in mental retardation. Subsequently, New York State undertook an initiative to improve the criminal justice system for people with mental retardation.

Few States have training programs for the police, judges, lawyers, and correctional officers regarding the problems posed by defendants with mental retardation. The major barriers to training are a lack of resources with which to develop and provide training programs and a tendency by both the mental retardation and the criminal justice systems not to regard offenders with mental retardation as a priority area.

Scattered efforts to expand training in the area have been made. Developmental Disabilities Planning Councils have funded a number of special projects in this area. As examples, the New York State Planning Council funded 21 projects dealing with issues concerning offenders with mental retardation and made this a priority area. The Nebraska Planning Council funded the development of the Individual Justice Plan. The Arizona Planning Council funded the development of A Guide for Law Enforcement Officers.

University Affiliated Programs (UAPs) are a potentially important resource for the development of training materials and the provision of training in this area. However, UAP efforts are limited. In a 1989 survey of UAPs, 13⁴ reported that they had been involved in some training efforts concerning offenders with disabilities during the previous three years. Some of these UAPs had training materials available, but these materials did not appear to be well-known, even among other UAPs. These 13 UAPs planned to continue their activities in this area and three other UAPs planned to initiate training efforts.

Victims

Inevitably, some Americans with mental retardation become victims of crime. In fact, the nature of their disability may make them especially vulnerable because of impaired judgment, deficits in adaptive behavior, and accompanying physical disabilities. In addition, they are vulnerable because they frequently live and work

³Shilit, J. (1979). "The Mentally Retarded Offender and Criminal Justice Personnel." Exceptional Children, 46, pp. 16-22.

⁴40 UAPs, out of 54 which were sent questionnaires, responded.

in high crime areas, lack knowledge of how to protect themselves, and sometimes have limited knowledge or ability regarding ways to seek protection from courts and law enforcement officers.

There is little information on the frequency or the types of crimes committed against people with mental retardation. They appear to be especially vulnerable to physical and sexual assaults. Many are easy targets for being overcharged or short-changed or of being tricked into buying things they neither desire nor need. They do not always know how to protect themselves from thefts or other economic crimes. People with mental retardation have even been victimized physically, sexually, and in other ways while undergoing habilitation services or while in residential care settings by staff or other residents.

Crimes against people with mental retardation are frequently not reported. Those crimes that are reported are often classified as "abuse and neglect" rather than crimes. Failure to report crimes or misclassification of crimes has several causes. Some people with mental retardation would not know how to report crimes committed against them, or may be intimidated into not doing so. Another problem is that staff of human service organizations are sometimes loath to admit that crimes occur on the premises. Failure to report these crimes also reflects a lower concern by some people for the rights of persons with mental retardation than for the rights of other citizens.

Some aspects of suspected victimization of people with mental retardation require special attention. For instance, when should sexual encounters be considered assaults because of the impaired judgment of one of the individuals?

When people with mental retardation become victims, the criminal justice system encounters difficult problems, some of which parallel the problems that exist when people with mental retardation are the accused. Among the critical problems are:

- How to determine if a crime was committed, particularly if the victim is unable to accurately and completely describe the crime or identify the criminal.
- How to assist a victim with mental retardation in prosecutions.
- How to assure that testimony of a victim with mental retardation can be presented in court and taken seriously, even if he or she cannot withstand the pressure of cross-examination as well as other people.

- How to assure that the victim with mental retardation is not devalued so that crimes against him or her are somehow considered less important than if committed against another individual.

These issues are critical. If crimes against people with mental retardation are not dealt with in a serious way, this not only devalues people with mental retardation, but increases the likelihood of future victimization.

RECOMMENDATIONS

After careful consideration of the issues raised at the Presidential Forum on Offenders with Mental Retardation and the Criminal Justice System, the President's Committee on Mental Retardation submits the following recommendations to the President of the United States for his consideration and possible follow-up actions. PCMR also urges members of the U. S. Senate and House of Representatives, State governors, State legislatures, city mayors, county commissioners, and the heads of departments and agencies at all levels of government to give strong consideration to these recommendations. PCMR believes that implementation of these recommendations will improve the quality of justice and services to people with mental retardation, and to promote measures that will increase the number of law-abiding and productive Americans.

National Focus

A Federal priority should be established to identify and implement ways of solving the problems and meeting the needs of defendants with mental retardation and of victims with mental retardation. A critical component of this priority would be to assure that program officials in various departments and independent agencies in the Federal Government be made aware of these needs and the steps that should be undertaken within their agencies. The Federal effort should involve collaboration and cooperation among Federal, State, and local agencies and private organizations that come in contact with people with mental retardation in the criminal justice system.

PCMR recommends that:

- An interagency committee composed of representatives of the President's Committee on Mental Retardation and the U.S. Departments of Justice, Health and Human Services, Education, and Labor be convened to develop and implement activities to improve due process and services

for people with mental retardation in the criminal justice system, and that this committee report back to the President on progress within three years from the date of establishment of the Committee.

- The interagency committee develop standards and guidelines regarding the rights of people with mental retardation in the criminal justice system.
- State Developmental Disabilities Planning Councils be encouraged to identify specific activities that are being undertaken in the State for people with mental retardation in the criminal justice system when submitting their comprehensive plans under the Developmental Disabilities and Bill of Rights Act. A report on these activities should be prepared.

Statistics

The amount and quality of information about people with mental retardation who are accused of committing crimes, and about people with mental retardation who become victims of crimes, should be improved. Reliable statistics on the frequency of crimes committed by people with mental retardation, the characteristics of these individuals, the types of crimes they commit, the punishment that was imposed, the habilitation services provided, and the effectiveness of these services should be collected.

In addition, in order to provide a basis for the development of appropriate habilitation and prevention programs, information regarding the underlying attributes of offenders with mental retardation should be collected. As examples, did they have a basic understanding that their behavior violated the law? Were they influenced by others to commit crimes? Did they engage in substance abuse? Did they commit crimes because of impulsive behavior? Were they victims of abuse and neglect? What type of homes did they grow up in? Did they encounter difficulty finding jobs?

PCMR recommends that:

- A national survey be funded to collect in-depth information on the attributes that lead offenders with mental retardation to commit crimes. This survey would encompass not only individuals with mental retardation who are in Federal or State prisons, but also those who are

in local jails, institutional care, and community programs. The survey should also encompass a sample of offenders with mental retardation who have recently been tried and sentenced, as well as offenders at other points in the criminal justice system, e.g., at time of arrest, at time of probation, or at time of initial incarceration. This would enable information to be collected shortly after the individuals were evaluated and would enable information to be collected from the judge, prosecuting attorney, defense attorney, and police and corrections officers concerning their attitudes about mental retardation, the nature of the evidence presented at their trial, the quality and effectiveness of that evidence, and other information. PCMR recommends that the U.S. Departments of Justice, Education, and Health and Human Services jointly sponsor this survey.

- The U.S. Department of Justice routinely collect information on the number of persons with mental retardation in Federal and State prisons. The method used in each prison to identify inmates with mental retardation should be specified.

Understanding of People with Mental Retardation:

It is critical that there be greater understanding of mental retardation and the issues involving defendants with mental retardation within the criminal justice system. The awareness of judges, prosecutors, defense lawyers, police and correctional officers, and others about the special needs of people with mental retardation and how to identify when such a condition might exist should be raised.

In addition to previous recommendations that would improve understanding, PCMR recommends that:

- National, State, and local associations in the field of mental retardation focus more attention on the issues involving defendants and victims with mental retardation at their meetings, through newsletters, and other means that they may have.
- National, State, and local associations encompassing officials in the fields of law enforcement, the judiciary, corrections, and in related specialties of the law and forensics increase their attention to this issue at their meetings, through newsletters, and other means that they

may have.

- At meetings of the above organizations where the issues of defendants or victims with mental retardation are discussed, representatives from both the fields of mental retardation and the criminal justice system be asked to participate and exchange views.

Research

Based on the background papers prepared for the Forum and the subsequent discussion, PCMR recommends that the Federal Government sponsor a vigorous program of research into the problems of people with mental retardation in the criminal justice system and the effectiveness of various approaches to deal with these problems. Among the areas in which research should be funded are the following:

- Projects to examine the effectiveness of due process through the criminal justice system for people with mental retardation.
- Projects to identify the risk factors which may cause people with mental retardation to commit crimes. The national survey described above should contribute heavily to this effort.
- Projects to develop criteria for identifying the likelihood of serious behavior problems among children with mental retardation and to develop improved procedures for teaching and fostering law-abiding behaviors and interactions.
- Projects to determine the availability, adequacy, and effectiveness of community support programs, both to prevent people with mental retardation from committing crimes, and to provide alternatives to prison for those that do commit crimes.
- Projects to evaluate the effectiveness of alternative dispositions of offenders with mental retardation.
- Projects to determine the dispositions of cases in which defendants with mental retardation were found

incompetent to stand trial.

- **Projects to determine the extent and appropriateness of habilitation programs in prisons and in the community.**
- **Projects to identify and evaluate methods, other than incarceration, to prevent and change unacceptable behaviors, e.g., counseling, community service, and restitution.**
- **Projects to identify the most effective methods of habilitating offenders with mental retardation and preventing recidivism.**
- **Projects to identify the extent and types of reported and unreported crimes against people with mental retardation, including crimes committed in residential facilities, crimes committed by service providers and other residents, and crimes committed by relatives. The project should assess the vulnerability of people with mental retardation to certain types of crimes. It should explore ways to decrease victimization and increase the ability to prosecute victimizers.**
- **Projects to determine the frequency and causes of false accusations and false or coerced confessions among people with mental retardation.**
- **Projects to determine the prevalence of physical and sexual abuse of inmates in prisons, both by staff and by other prisoners, and ways to prevent this abuse.**

PCMR realizes that some projects may encounter substantial technical difficulties, for example, the last two. In these cases, it may be desirable to fund studies designed to develop improved methodologies.

Identification

More consistency in defining and identifying offenders with mental retardation is needed. To this end, PCMR recommends that all Federal, State, and local correctional facilities adopt the testing procedures recommended by Spruill and May

(1988)⁵ that would give inmates time to adapt to the prison system before testing, administer a group test for screening purposes, and administer a follow-up individual Wechsler Adult Intelligence Scale (Revised) test or equivalent tests to all inmates tested who score below 85 on the group test. In addition, all persons with suspected mental retardation should be tested for levels of adaptive functioning and their developmental history should be obtained.

Forensic Services

Immediate and substantial efforts should be made to improve the quality of forensic services. Without such support to identify people with mental retardation, to assess factors which led them to commit crimes, and to identify the likely effects of alternative dispositions of a case, there is little prospect of protecting the constitutional rights of Americans with mental retardation or promoting their return to productive and useful community life.

In addition to providing training to forensic examiners, as recommended below, PCMR recommends that:

- State and local governments examine their laws regarding the procedures for conducting forensic evaluations for people with possible mental retardation and assure that professional examiners with knowledge and experience in mental retardation conduct evaluations. If needed, the forensic examiners should be able to draw upon outside expertise for consultation.
- States assure that experts knowledgeable in mental retardation are available to assist defense counsel alone. These special experts could assist the client and the defense counsel to make critical decisions concerning guilty or not guilty pleas, how to testify, etc. Although there are various methods of accomplishing this, the use of Protection and Advocacy agencies, when available, should be explored. However, the Protection and Advocacy option will not be available in many areas and other mechanisms must be considered.

⁵The mentally retarded offender: Prevalence rates based on individual versus group intelligence tests. Criminal Justice and Behavior, 15(4), 484-491.

Sentencing

The effects of mental retardation should always be taken into account when making assessments as to competence to stand trial, criminal responsibility, the severity and type of punishment, the establishment of habilitation programs, and when making decisions as to probation and parole. People with disabilities must at times receive special consideration in order to ensure protection of their rights and to ensure equal opportunity to benefit from services.

PCMR recommends that:

- **In accordance with the American Bar Association Criminal Justice Mental Health Standards, Federal, State, and local courts always consider mental retardation and its impact as a possible mitigating factor and also consider the effect of alternative dispositions of a case, e.g., confinement, probation, etc., on the individual with mental retardation.**

- **The disposition of any case involving a person with mental retardation always be based on an Individualized Justice Plan which takes account of the advice of both mental retardation and correctional experts. The individualized plan should set forth the methods and resources needed to rehabilitate incarcerated individuals with mental retardation along with the due process protections required to assure implementation by responsible officials. The service plan should include educational, vocational, and life-skills objectives necessary to assist the probationer to acquire the skills necessary to avoid further criminal activity and assume a productive role in the community. This applies to cases that are diverted from prison, cases that enter prison, and cases that are placed on parole from prison.**

- **There be a strong presumption that community correction and probation programs are preferable in the case of offenders with mental retardation.**

- **Capital punishment be prohibited for persons with mental retardation. It already is prohibited under the laws of**

some States and pursuant to the Federal Anti-Drug Abuse Act of 1988 (P.L. 100-690, section 7001 (1)). (This Act permits the imposition of the death penalty for killings committed in pursuance of a continuing criminal enterprise, but prohibits a death penalty from being carried out upon a person with mental retardation). PCMR recommends that all States enact such legislation as promptly as possible.

- Federal Sentencing Guidelines be modified in order to give greater flexibility to judges in determining the type and extent of punishment that is appropriate for people with mental retardation who have been convicted of crimes.
- "Guilty but mentally retarded" verdicts which provide a basis for indefinite imprisonment not be utilized.
- Offenders with mental retardation not be sentenced to any program that does not have a habilitation program that would be suitable to their needs.

Correctional Programs

It is imperative to recognize that most individuals in correctional facilities will eventually be released and that they must be prepared to become law abiding, productive, and relatively independent upon leaving prison. Steps should be taken to improve services in Federal, State, and local correctional facilities.

PCMR recommends that:

- Existing correctional facilities be assessed to determine if all inmates with mental retardation are placed in programs that are appropriate and in accordance with an individualized plan. In cases where the programs are non-existent or inappropriate, PCMR recommends that authorities be urged to develop or improve programs. Programs should be established which meet the needs of inmates in different categories, e.g., minimum security inmates with short sentences, maximum security inmates with life sentences, inmates in protective custody.

- The extent and appropriateness of the efforts of State correctional education programs to meet the public education requirements of the Individuals with Disabilities Education Act (P.L. 101-476) be assessed.

Community Based Programs

Whenever possible, offenders with mental retardation should be put on probation and placed in community habilitative programs to assist them to be effective citizens.

PCMR recommends that:

- Specialized and intensive probation, supervision, and support services be developed and made available to all offenders with mental retardation placed in community programs.
- State vocational rehabilitation programs be strongly encouraged to serve offenders with mental retardation who have been convicted, while in prison or in a community (diversion) program and after they have completed their sentences.

Prevention

PCMR recommends that all students with mental retardation should be provided with instruction that explains their rights and responsibilities as citizens, the consequences of breaking the law, and what to do and who to call for assistance if they become involved with the criminal justice system.

Service System

Both the criminal justice system and the service system for people with mental retardation are composed of a large number of public and private programs. Offenders with mental retardation may come into contact with numerous programs in both systems. Steps should be taken that will enable and encourage these programs to work in a more cohesive and coordinated way to achieve the goals of individualized plans for offenders with mental retardation. Recommendations made elsewhere to establish individualized plans and to conduct joint training for people

from these two systems are essential steps in meeting this goal.

In addition, PCMR recommends that:

- State and local governments be encouraged to establish new, or charge existing, agencies to be responsible for coordinating the efforts of programs for people with mental retardation and the criminal justice system. For example, New York State has a Bureau of Forensic Services within the State administering agency for mental retardation and developmental disabilities services. The Lancaster County, Pennsylvania program, described earlier, is a good example of a joint effort between the two systems.
- State and local governments initiate efforts to achieve more integration of the mental retardation service delivery system with the criminal justice system. They should assure that mental retardation professionals are utilized to identify and screen persons suspected of having mental retardation at the time of apprehension. They should also develop procedures to ensure that the two systems cooperate in determining the disposition of cases and carrying out habilitation plans. Among other measures, these programs need to develop meaningful interagency agreements which facilitate development of an array of services extending from alternatives to incarceration to community-based living for persons who have been released from prison.

Training

There is an urgent need to greatly upgrade the training of individuals in the criminal justice system in the issues involving people with mental retardation. The types of training needed will, of course, vary by occupation. The police need to be trained to be alert for indications that a person might be mentally retarded, how to meaningfully describe Miranda rights, and how to question people with mental retardation. Lawyers, judges, and probation and correctional officers need to appreciate the factors that may cause a person with mental retardation to commit a crime or to confess to a crime he or she did not commit. They need also to consider the appropriateness of the sentence for convicted persons with varying levels

of mental retardation. People in the forensic professions, particularly psychiatrists and psychologists, need training in identifying mental retardation and understanding the interaction between mental retardation and legal issues. They also need to learn where they can obtain consultation from people with specialized knowledge of mental retardation. In addition, mental retardation experts need to be trained to provide forensic services.

In general, attorneys without specialized training cannot effectively represent clients with mental retardation in the majority of cases. Judges, probation officers, or parole officers cannot generally make an appropriate disposition of the cases of these individuals without specialized knowledge. A simple reading of the Miranda rights to a suspect unable to understand these rights can become a vehicle for severe abuse of police power.

PCMR recommends that:

- A national project, perhaps through the University Affiliated Program(s) be funded to identify and disseminate information on existing training materials in the area of people with mental retardation in the criminal justice system. In addition, the project should assess the use of, and the effectiveness, of this material, and periodically update and improve on it.
- Universities and colleges be encouraged to systematically integrate materials on issues related to defendants with mental retardation into their curricula. This will help prepare general educators, special educators, psychologists, psychiatrists, social workers, lawyers, and others for future work in this area.
- Training programs be established to meet the needs of different groups, e.g., judges, prosecutors, defense attorneys, police officers, probation and correctional officers, forensic examiners, and others. Issues involving offenders with mental retardation should be made a mandatory part of continuing legal education programs for judges and lawyers.

- Training programs be established for mental retardation service providers to learn about the criminal justice system and how they can work with the correctional justice system to more effectively serve people with mental retardation.
- A Federally funded study to review and improve training programs designed to assist individuals with mental retardation to protect themselves and avoid becoming victims be initiated. The study should identify the different ways to provide training, e.g., in schools, as part of an orientation for admission into all categories of day and residential care, e.g., group homes, specialized foster care, supported apartment living, and include training that will help people with mental retardation understand their rights as citizens.

Victims

Federal, State, and local governments should explicitly take action to assure that perpetrators of crimes against victims with mental retardation will be charged and punished as vigorously as they would be if the crime were committed against a person without mental retardation. In addition, these governments should assure that victims with mental retardation are accorded the same redress in court as any other American.

PCMR recommends that:

- People, including employees of service providers, be encouraged to report crimes committed against people with mental retardation.
- People who report crimes against people with mental retardation not be penalized by being fired, denied promotions, or denied jobs. This is particularly important in the case of crimes committed against people with mental retardation in residential facilities or day programs.

- A national system be implemented to assist service providers to screen applicants for jobs working with people with mental retardation to assure that they do not have a previous record of victimizing people .
- Victims with mental retardation be provided specialized victim assistance services. These services should include counseling, advice as to possible court actions, transportation to court, escort to court, special accommodations (such as hearing aid devices in court), follow-along services so that the victims understand court scheduling and proceedings, help with arranging medical treatment, and alternative dispute resolution services.
- All courts should recognize the unusual difficulties that people with mental retardation may have when testifying in court and adopt procedures to assure that their testimony is presented as fully and as accurately as possible. In some cases, this may require that the information be obtained in a specialized manner by persons trained in the area of mental retardation. It is absolutely critical that this testimony not be devalued because the victim is mentally retarded.

Concluding Observation

Implementation of the above recommendations would represent major steps forward in assuring that defendants and victims with mental retardation are accorded fair and appropriate treatment in the criminal justice system.

The stakes, in terms of justice and equity for defendants and victims with mental retardation, are high.

QUOTES

"As is true in most areas of disability rights law, equality does not necessarily mean equal treatment. In other words, persons with disabilities must at times be treated differently from others in order to ensure protection of their rights and to ensure equal opportunity to benefit from services. Persons with mental retardation cannot be 'processed' exactly like others who come in contact with our criminal justice system, because, for them, it may be a system they do not understand or a system that does not understand them." Richard Thornburgh, Attorney General of the United States. Speech given to the Presidential Forum on Offenders with Mental Retardation and the Criminal Justice System. September.15, 1989.

DEFENDANTS WITH MENTAL RETARDATION:

MS. MESSINGER-ROCKOWITZ: I was watching a videotape in which a man with mental retardation was giving a very, very damaging confession to four police officers. It was clear that each of those officers knew that he was a person with mental retardation and had an understanding of how that mental retardation was directly leading to this confession, and were, in fact, manipulating him on the basis of his mental retardation into giving a very damaging confession.

MS. RAVENEL: Limmie was 26 years old in June of 1987. He had been convicted of killing his neighbor. He was sentenced to death. Limmie sat on death row for two years before anybody realized that he was mentally retarded.

One thing I realized was that the judge and the solicitor had absolutely no understanding of what mental retardation was. The Judge thought Limmie was a poor Black farmer. The solicitor felt that the reason that Limmie hadn't learned how to read was that he didn't try hard enough in school. Limmie was smiling shyly and was totally unaware that he had been resentenced to death.

SERVICE SYSTEM FOR DEFENDANTS WITH MENTAL RETARDATION:

MR. SUNDRAM: With the exception of a small percentage of offenders who have committed truly serious crimes, and for whom the correctional system is probably the only appropriate place, many of the other offenders with mental retardation who come into the criminal justice system do so because the other social supports have broken down and there aren't any alternatives available other than jail.

DR. PETRELLA: They are not going to recover in a maximum security mental health forensic facility. They are not going to get appropriate training. They languish in these facilities for lengthy periods of time because their condition doesn't change.

PROFESSOR BONNIE: In Virginia, once the person is into the forensic services system, apparently methods are not readily available to get them into the civil side; in part because there aren't secure placements within the mental retardation services system.

THE POLICE

CAPTAIN MARTIN: If a violent crime is committed, this is not the time that the police are going to sit down and administer tests to find out whether this person is functioning at the mental retardation level. In fact, a uniformed field officer is more likely to be talking to victims and witnesses.

MIRANDA WARNING

PROFESSOR BAROFF: I have been struck, in the cases I have been involved with, as to how extraordinarily distorted understanding of their Miranda warning has been for people who have confessed to crimes - some of whom have been charged with first degree murder, and some of whom are on death row.

JUDGE EXUM: I think the courts are very concerned with whether people who waive their Miranda rights do so knowingly and understandingly.

MR. BURR: In death penalty cases and in many serious felony prosecutions, confessions have several consequences. If they are complete confessions and found to be credible by the police, they cut short further police investigation. They will cut off consideration of other suspects. They will cause the police to shape the evidence around the person who has confessed. In death cases, if there is a confession, it is the center piece of the State's case.

People with mental retardation don't usually have the ability to argue with the police on their understanding of their Miranda rights. It seems to me that issues concerning the knowing and understanding of Miranda warnings are major and have not been addressed to any major extent by the Courts.

PROFESSOR ELLIS: I think there is independent value, and the Courts have held that there is independent value, in the right to counsel and the right to be free from coerced, self-incriminatory statements that are independent of guilt or innocence. People with disabilities are the ones least likely to be able to exercise these rights. I come across cases in which factual innocence after conviction, in both capital and noncapital cases, is a real question. Invariably, these cases involve confessions or guilty pleas.

EVALUATION

DR. PETRELLA: No one likes to say that the emperor has no clothes, but in reality, many psychiatrists and clinical psychologists don't know a lot about mental retardation, don't consider it very carefully in forensic evaluations, and don't do a very good job of documenting it.

JUDGE RICHARDSON: In Massachusetts, we are looking at the question of how to deal with defendants with mental retardation. What I envision happening is that we are not going to be able to afford to have a truly expert forensic evaluation for persons with mental retardation. What we are going to be able to do, I think, is to train the mental health forensic team to be alert to, and recognize those indicia that would lead one to think that they may be dealing with persons with mental retardation. In these cases, they would involve local regional people in carrying out a further evaluation.

MS. NORLEY: The courts seem to be as intimidated as the rest of us are by doctors and think that they will have the answers, and that is not always true.

JUDGE EXUM: The competency issue, particularly with respect to the guilty plea, is troublesome. I recall when I was on the trial bench that a young defendant wanted to plead guilty. He was represented by counsel. I was going through all of the questions that trial judges ask to ensure that the defendant understands the plea. The trial judge must make sure that the defendant understands what he is doing when he enters his guilty plea, that he understands that he is waiving certain rights, particularly the right to trial by jury. I asked this defendant if he was willing to waive his right to a jury trial. He said, "Yes, your honor," and waved his hands. Nobody suggested, nor did it occur to me, that he might be mentally retarded.

LEGAL COUNSEL:

MR. BURR:I think that the client population that we are concerned with is poor people who must rely on public defenders or court appointed counsel. Almost invariably, my colleagues in that part of our profession don't expect much of their clients. We don't expect them to be very verbal or to give a lot of information.

MR BURR:if lawyers do what they are supposed to, which is to investigate their cases, they will inevitably learn something about their clients which is highly relevant to the issue of mental retardation. Their client's school history is an extraordinarily reliable indicator. This information requires very little work and almost no lawyers do it.

MR BURR:defense counsel must have assistance from experts not publicly known by the State or the court to whom they can turn and talk and who will conduct an evaluation. There is a case from the Supreme Court, *Ake v. Oklahoma*, which was decided in 1985, which said that as a matter of due process, in a death penalty case, where mental health is an issue in a trial, an indigent defendant is entitled to have state-paid assistance that is not public and that is not available to the court or to the prosecutor.

MS. NORLEY: One trouble with public defenders is that they don't stay on the job very long.

MS. DEMOLL: We have court appointed public defenders who get paid \$50.00 a case. They have almost no resources with which to develop a case. We haven't had much success in getting training programs on agendas at State Bar Conferences.

POLICY CONSIDERATIONS

DR. PETRELLA: My experience has been that there is not a lot of interest or attention for offenders with mental retardation and that most policy makers would prefer that this issue go away.

MR. WHITE: I think that there is great hope for diversionary programs because of prison overcrowding. In addition, it is cost effective. It costs \$15,000 in a county prison while it only costs \$1,000 to be in our program.

SENTENCING

PROFESSOR ELLIS: The sentencing guidelines for Federal judges have a provision for departures downward from the fixed levels that would otherwise apply for what is called "diminished capacity" as a result of a mental condition that might help explain the offense. But unlike other departures in the guidelines, that provision is not available to people with mental retardation or mental illness who have committed a violent offense.

MR. FINN: Last year we intervened in over 35 cases where a person was well on the way to being deemed incompetent to stand trial and committed to an institution. We asked the courts to entertain a more informal disposition or a probationary outcome with the client agreeing to participate in a plan of services. In more than half of the cases we were successful in arranging such dispositions which provided client services in more appropriate settings, and were much more therapeutic for the individuals.

MR. BURR: I am confident that in every death penalty State where a poll was conducted, you would get two-thirds to three-fourths of the people agreeing that they did not want the death penalty for people with mental retardation.

JUDGE RICHARDSON: Every time I order somebody committed the Master lets somebody out the back door. That is ridiculous. Therefore, I look for an alternative disposition other than incarceration. When somebody has a particularly unique situation, a disability of some type, mental illness, mental retardation, and if this has been brought to the attention of the judge, many of us will follow what the Federal courts do automatically - defer sentencing to another day, ask our probation officer to investigate the matter, and come back with a presentence report. If you can educate a judge to the nature of the problem, and the alternatives, I think that judge, no matter how stony hearted he or she may be, is going to opt for the alternative.

PROFESSOR ELLIS: Fewer than two percent of the people who are convicted of capital murder are sentenced to death. Far fewer are executed.

VICTIMS

PROFESSOR TURNBULL: I recall a State court which, in the few cases of criminal prosecution brought against the caregivers at the local institution, had great difficulty in finding that they had committed any crimes, even when it was perfectly

clear that they had very serious crimes committed against people who were institutionalized. Referring to victims, he once said: "Well, you know, they are retarded. They can't really feel pain."

PROFESSOR ELLIS: In both capital and non-capital cases, there are questions of aggravating and mitigating circumstances. One thing that might usefully be thought of as an aggravating circumstance is where the perpetrator has selected his or her victim because of the vulnerability of that victim due to disability. In particular, where the perpetrator has fiduciary or custodial responsibility for that victim, it seems to me that is the sort of circumstance that legitimately draws outrage that ought to be considered as an enhancement in punishment.

MS. DEMOLL: The Protection and Advocacy Systems have a clear mandate to investigate incidents of abuse.

PROFESSOR ELLIS: Most communities now have, both in their law enforcement and their health provision systems, a rape intervention and crisis team that assists both law enforcement and helps victims cope with the traumatic consequences of those crimes. There is no reason to think that the people who are running those operations have learned what they need to know about people with mental retardation to be able to adopt their services to their needs.

PROFESSOR ELLIS: One of the things that we have not done sufficiently in our special education curriculums is to adapt and develop elements of the curriculum that would help people with mental retardation avoid becoming victims of crime.