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Correctional Service
Canada

Service correctionnel
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RESEARCH REPORT

COMMUNICATIONS AND CORPORATE DEVELOPMENT

Research Report

Persons With Intellectual Disability Who Are Incarcerated For Criminal Offences: A Literature Review

HV
6791
E5
1991

Canada

Research Report

**Persons With Intellectual Disability
Who Are Incarcerated For Criminal Offences:
A Literature Review**

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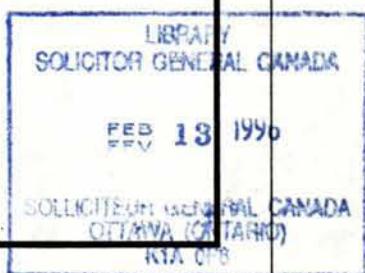
Persons With Intellectual Disability
Who Are Incarcerated For Criminal Offences:
A Literature Review

Research Report No. 14

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A report prepared under contract to:
The Research Branch
Communications and Corporate Development
Correctional Services of Canada

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EXECUTIVE SUMMARY

Introductory overview

- This review of the legal and criminological literature from the 1960's to 1990 pertaining to the incarceration of criminal offenders who are intellectually disabled, is essentially an overview of the history of discriminatory treatment of a class of persons who are as poorly equipped to cope with the correctional system as that system is ill equipped to deal with them.
- The employment of labels to categorize "mentally retarded offenders" creates negative expectations and stigmatizing perceptions which stand in the way of understanding the particular needs of individuals who make up this population.
- Because persons identified as intellectually disabled actually cover a broader range of functional abilities than is found in the rest of society, there can be no single habilitation "program" which will adequately prepare them for adjustment to the community.
- During the latter half of the period covered in this review, there has been an increasing focus on the human rights of persons with mental handicaps, prompting some consideration of disabled persons' entitlement to services appropriate to their special needs.
- The human rights movement has been accompanied by the "community living" movement, which is resulting in fewer persons with intellectual disability being institutionalized on account of their disability alone.
- There is some concern, but little evidence, that many individuals who are returned to the community from non-penal institutions have a high probability of becoming involved in criminal activity, and consequently ending up institutionalized once again, but this time in correctional facilities.

Identifying the population

- To determine the nature and magnitude of the problems that do exist, and to identify those who require and have a legal right to special treatment as offenders, it is necessary to have some acceptable means by which to "measure" intellectual disability in members of inmate populations.
- Such measurement has often been wildly imprecise, and will probably never be exact, because intelligence is not a single entity which can be represented accurately in the individual by a number, such as is assumed in the use of "Intelligence Quotients".
- Some researchers have found, especially among racially and economically marginalized and socially devalued groups, that the assignment of an I.Q. score may be more

dependent on sociocultural variables than on any of the factors which may be properly thought of as constituting intelligence.

- Measurement may be a necessary step, but it is never sufficient to enable those who design and provide correctional services with all the information they need in order to create the optimal habilitation activities for each individual.

Relationships between intellectual disability and criminal behaviour

- There was, early in this century, a widespread belief that persons having an intellectual disability were especially prone to engage in criminal activity, but such theories have been generally rejected for the past several decades.
- A more realistic appraisal is that the fact that persons with intellectual disability commit crimes may be accounted for in the same ways as that phenomenon can be explained in non-disabled groups.
- To the extent that the explanations of criminal behaviour include poverty, low self-esteem, and lack of personal success in both economic and social pursuits, we may expect a somewhat higher representation of persons with intellectual disabilities among criminal offenders simply because disabled persons are also more likely to have those other characteristics.
- While some authors point out that intellectual disability may be accompanied by impatience, frustration, poor impulse control, and inability to understand where to establish behavioural limits, at least some of these findings may reveal more about how a person with an intellectual disability has been treated in the past by others than about how such a disability inherently affects his or her own behaviour.
- The literature reveals no consistent pattern in which persons with intellectual disability are found to be more likely than other offenders to commit crimes of violence, or that they tend to commit crimes against the person more frequently than crimes against property.
- Uninformed perceptions of individuals who have been labelled with a term containing the word "mental" tend to be coloured by a suspicion that such persons have behaved or are likely to behave violently.
- Anticipation of dangerous behaviour, while largely unfounded, can result in a higher probability that a person with an intellectual disability will be convicted, that he or she will receive a custodial sentence, and that such sentences will be for longer periods and will be less likely to be shortened by parole.
- Many authors estimate that the percentage of prison inmates with intellectual disabilities is at least twice as high as it is in the general population. Within U.S. prisons the estimated incidence of intellectual disability generally falls between five and ten percent.
- Those with the most serious levels of disability, sometimes described as "severe" or

"profound", are generally less likely to commit crimes, and if accused of crimes are frequently found unfit to stand trial or not guilty by reason of insanity (i.e. lack of capacity for criminal intent).

- There is a tendency for judges to issue probation orders for some offenders whose intellectual disabilities are apparent, in the belief that their needs and interests can be better served in non-penal settings.

Impact of the prison experience

- Inmates who have intellectual disabilities are at serious risk of harm due to their special susceptibility in the correctional system to abuse, exploitation, manipulation, misunderstanding of what is expected of them, and inability to benefit from most existing rehabilitative programs.
- Being in prison is a much more devastating experience for most persons with intellectual disabilities than for others because of:
 - victimization and exploitation by custodial staff and by other inmates;
 - more disciplinary violations, with greater loss of privileges and less chance for early release;
 - lack of rehabilitative programs that meet their needs.

Habilitation of offenders with intellectual disabilities

- It is a myth that a person with an intellectual disability cannot improve his or her cognitive capabilities and behavioural self-management, but it is quite likely that such improvements will not occur in response to programs designed for the general prison population.
- The prison setting is one of the least productive contexts in which habilitation of persons with intellectual disabilities can take place, primarily because the experience of incarceration in an ordinary prison environment is so much more punitive for such inmates than for others.
- Likewise, institutions designed for persons with intellectual disability but who are not criminal offenders are equally inappropriate settings, chiefly because the non-penal residents of such facilities function at a much lower level than the average person with an intellectual disability who has been convicted of a crime. The needs and interests of these two groups of residents will be totally different, and the provision of appropriate services will require very different sets of staff skills.
- Habilitation is most likely to be realized in specialized facilities designed for offenders with intellectual disabilities, and in a true community setting.
- Programs that are effective are likely to be individualized.

- Most U.S. state correctional systems appear to rely on behaviour modification technology, although some habilitation based on didactic life skills training and supportive advocacy is also reported.

The right to habilitation

- The legal right to be provided appropriate habilitation services has been established in some American legislation and jurisprudence. These rights include both positive entitlements, such as the right to educational services, and constitutional liberty interests, including the right to be free from cruel and unusual punishment.

Research requirements

- Finally, the review explores some research questions which ought to be investigated in the Canadian context in order to determine as realistically as possible the magnitude of the problem of persons with intellectual disabilities serving criminal sentences in Canadian correctional facilities.
- Having determined the distribution of such offenders in this country's prisons, it is anticipated that they will be morally and legally entitled to more humane and effective services than are presently being made available to them.
- The proposals for additional research include suggestions for studies which will identify in some detail the designs and components of habilitation services which will more fully meet the needs of this particular sub-population of criminal offenders.

**PERSONS WITH INTELLECTUAL DISABILITY
WHO ARE INCARCERATED FOR CRIMINAL OFFENCES:
A LITERATURE REVIEW**

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**PERSONS WITH INTELLECTUAL DISABILITY
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INTRODUCTION

It can hardly be doubted that there is an almost universal negative response on the part of human beings towards other human beings who are perceived to be different. This is not to say that such attitudes are not sometimes mixed with more positive ones, but nonetheless, prejudice directed towards those who are different has always been a major component in social problems. Individuals and groups can overcome these negative perceptions and attitudes when they become informed and consciously replace them with tolerance and understanding. During the last half of the twentieth century, states have entered into this process by enacting antidiscrimination laws, so that citizens have obligations to act in ways which respect their fellow citizens' differences in racial or ethnic origin, sex, religion, and so on - the dimensions which have historically given rise to prejudicial behaviour and consequent injustices to women and minorities.

It has only been in the last quarter of the century that a similar awakening has begun with respect to discriminatory attitudes and practices arising from the perceived differences between persons who have various kinds and degrees of disability and other persons. In Canada, this awakening began with the inclusion of physical handicap as a prohibited ground of discrimination in human rights legislation at the federal, provincial and territorial levels during the 1970's. By the end of the 1980's, these enactments had been extended in all Canadian jurisdictions to include the protection of the rights of persons with mental disabilities as well. The crowning achievement in these legislative developments was the inclusion in 1982 of "mental and physical disability" as prohibited grounds of discrimination before and under the law in Section 15 of the Canadian Charter of Rights and Freedoms. Canada remains unique in the world in having a constitutional guarantee of equality rights expressly extended to persons who have disabilities.

"Mental disability" in the Charter refers to handicapping conditions of both an intellectual nature and those which manifest themselves in disturbance of a person's emotions, rationality, or behaviour. The focus in this review is on the former set of conditions, those variously identified by terms such as "mental retardation", "developmental disability", "mental handicap", and, in the not-so-distant past, "feeble-mindedness", "imbecility", and other words which are now more or less in disuse because they have come to be recognized as stigmatizing and dehumanizing. Terminology will be discussed more fully in the opening chapter, but, for now, it must be pointed out that language is a powerful but often subtle component in the perpetuation of discrimination. When one calls another person "mentally retarded", one is doing more than stating what one perceives to be a fact; one is setting in motion a process of categorizing and evaluating the individual in ways that involve many presuppositions, most of which may not be at all factual. This review deals more particularly with those persons who, in addition to having been labelled mentally handicapped, have also been adjudged to be criminal offenders.

The "offender" label is devastating in itself. It was obviously coined to describe persons whose behaviour is "offensive" to us as individuals and to society at large. But more than that, it evokes in us a sense of threat to our safety and well-being. When coupled with a description such as "mentally retarded", the sense that we are menaced by the presence of such a person in our midst is multiplied. Sensationalist crime reporters never hesitate to add impact to their stories by drawing attention to the so-called mental status, whether disabled or disordered, of suspects.

Along with the emergence of legislated protections of the human rights of persons with mental disabilities, the 1970s and 80s have also witnessed the beginning of what is called the community living movement. While only a minority of persons with intellectual impairments were ever confined to the large institutions built during the nineteenth and twentieth centuries to accommodate such persons, there were and still are many thousands of people who have been segregated from the mainstream of society and congregated in these non-penal but essentially punitive environments. For the past decade or more, governments have begun to see institutional "care" for persons purely because of their perceived mental disabilities as inappropriate and unnecessary, and an affront to their rights and dignity.

Due in part to political pressure exerted by the community living movement, these facilities now accommodate only about half the number of residents who were confined in them at their peak, some thirty or forty years ago, and sooner or later they will probably be closed entirely. One of the consequences of deinstitutionalization is that persons bearing the mental handicap label are being exposed to ordinary community situations. These may often be situations for which they are ill-prepared, especially when they have also been handicapped by the deprivations inherent in institutional confinement. It is conventional wisdom that thousands of people who were so closely supervised and controlled in the past that they would have had no opportunity to commit crimes are now much freer, and this liberty often includes the freedom to behave in ways that bring them into conflict with the law. Some formerly institutionalized persons may experience less social control in terms of direct staff supervision. They may also have occasion to come under the control of those who can influence them to engage in antisocial acts. Persons who have spent most of their lives in institutions are less likely than those who were never institutionalized to have sufficient natural support from family members and friends in the community. These are the people who are at particular risk of leaving one type of institution, only to find themselves sooner or later in another type - the correctional facility.

What follows is a review of literature which has been published over the past twenty-five years or so on the circumstances of persons who have been labelled both intellectually handicapped and offenders, in particular those whose crimes have resulted in prison sentences.

I. Definitions and Descriptions: Identification of Persons with Intellectual Handicaps

A. Terminology

There are three levels at which the phenomenon of intellectual disability can be considered. Firstly, focus can be placed on the underlying organic anomalies or socio-psychological dynamics which interfere with one or more of the various functions

which can be subsumed within the general category of intellect (and it is very important to realize that "intelligence" is not a singularity, but a cluster of different but related activities which may go on at different levels of effectiveness in any one person). This focus on cause is assumed when the term "intellectual impairment" is used. We may not know the full nature of the physical or psychological mechanism which is affected, but we may assume that there is such a mechanism, and that its impairment has cognitively disabling effects.

Secondly, the focus can be on a given range of human activities that the individual is capable or incapable of doing. The inability to do things that can typically be done by most people is connoted by the word "disabled". There are certain things which most people are able to do that a person with a "disability" is unable to do, or that he or she does much less effectively. Only if the affected function is one which the individual would like to be capable of, or which would clearly be advantageous to the individual, does disability become an issue.

Thirdly, we say that a person has a "handicap" if the function in question is important within the social context in which the person lives. The expectations and standards set by the non-handicapped majority impose upon the individual with a disability a requirement either to "measure up" or to be labelled "handicapped".¹

The term "mental retardation" is very widely used in the literature reviewed in this paper. It may have remained popular because it is not limited to any of the above three aspects of the phenomenon it purports to describe. When it came into general use roughly midway through the present century, it was probably thought to be less stigmatizing than the terms it replaced. Particularly in Canada, however, there has been a movement away from labelling people "mentally retarded". It is a term which has popularly been used as a term of derision. The national organization formed during the 1950s to further the interests of Canadian citizens with intellectual disability changed its name in 1985 from "Canadian Association for the Mentally Retarded" to "Canadian Association for Community Living", primarily at the insistence of persons who knew from personal experience that being called "retarded" was damaging to them. It creates expectations of inferiority and inadequacy from which flow all manner of adverse responses to the individual.

This insight, coming from persons who were supposedly less capable of being insightful than other members of society, seems to be gaining ground in this country. In January 1991, a board of inquiry established under the Ontario Human Rights Code ruled that a woman had been subjected to harassment on the grounds of handicap contrary to the Code when her landlady called her "retarded". The landlady was ordered to pay the

¹ This differentiation in the implications of various terminology was outlined in International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease, World Health Organization, 1980.

complainant \$2,000 for injury to her dignity and self-respect.²

B. Definitions

Interestingly enough, the major organization of professional persons involved in the provision of services to people with intellectual disabilities in the United States changed its name as recently as 1988 from "American Association on Mental Deficiency" to "American Association on Mental Retardation". Notwithstanding this apparent failure to appreciate fully the negative impact of stigmatizing terminology, this Association is credited with having articulated the most widely used operating definition of the phenomenon of intellectual disability:

Mental retardation refers to significantly subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behaviour and manifested during the developmental period. (Grossman, 1983, p. 11).

"Significantly subaverage" is interpreted to mean having an Intelligence Quotient (I.Q.) which is approximately two standard deviations below the norm. Roughly 3 percent of the population would register in that range on standardized tests of intellectual ability. However, the definition also includes the requirement that the individual whose intellectual functioning is "significantly subaverage" must also have an "impairment in adaptive behaviour", which Grossman (1983) describes as

significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group. (p. 11).

These standards obviously change as the individual grows older and moves into different social situations. In particular, standards of learning may be much more demanding while the person is of school age, since learning is what schools are for, than later in life. This would mean that the definition might include a person during childhood, but perhaps not during adulthood. The definition also stipulates that the deficits in intellectual functioning and adaptive behaviour must be "manifested during the developmental period", which Grossman (1983) defines as prior to the individual's eighteenth birthday (p. 11).

If we accept the definition outlined above, then we must also accept a considerable degree of imprecision in our efforts to determine who is or is not intellectually handicapped, and in our attempts to discover how many individuals come within the definition in any given population, including the populations in the prison system. Even more important, we must recognize that the definition includes people of vastly differing

² In the Matter of the Human Rights Code and in the Matter of the Complaint by Ms. Karen Acquilina against Mrs. Stephanie Pokoi, alleging discrimination and harassment on the basis of handicap in accommodation, unreported Board of Inquiry decision, February 13, 1991.

levels of ability. One of the chief problems created by defining a subpopulation based on assessment of their reduced intellectual ability is that all members of the subpopulation come to be regarded as having the same difficulties and needs. As Haywood (1976) pointed out,

Retarded offenders do not constitute a class, just as mentally retarded persons do not constitute a class. ... There is more variability within a group of mentally retarded persons than between retarded and non-retarded persons. ... Mentally retarded persons are not alike, because mental retardation is not an entity. It is a collection of well over 200 syndromes that have only one element in common: relative inefficiency at learning by the methods and strategies devised for other people to learn. (p. 677, emphasis added).

The fact that persons labelled mentally handicapped vary enormously in their actual functional limitations is dealt with only partially by Grossman (1983) in his delineation of subcategories based on I.Q. ranges:

| Term | I.Q. Range |
|-----------------------------|----------------|
| Mild mental retardation | 50-55 to 70 |
| Moderate mental retardation | 35-40 to 50-55 |
| Severe mental retardation | 20-25 to 35-40 |
| Profound mental retardation | Below 20 or 25 |

(Grossman, 1983, p. 13)

Berkowitz (1982) estimated that roughly 30 out of every 1,000 would be assigned an I.Q. of 70 or lower. Of these, 25 would be classified as having mild mental retardation; 4 would have moderate mental retardation, and the remaining one would be either in the severe or profound range (p. 38).

The prison population cannot reasonably be expected to include a similar distribution of persons with varying levels of intellectual impairment as are found in the general population. Those whose functional abilities place them in the categories referred to as "severe and profound" handicap, while generally easily recognizable as having a disability, are very unlikely to present themselves to the prison classification system. They are far more likely, if ever charged with an offence (which is improbable in itself), to be found either unfit to stand trial or lacking the "criminal responsibility necessary to be held accountable for their actions," (Reed, 1989, p. 413).

It is not the purpose of this review to enquire into the disposition of those offenders who, because of the degree of their mental handicap, cannot be convicted of offences. Currently in Canada, a scheme for the management of such persons is mandated under

those sections of the Criminal Code (614 through 617) which provide for warrants of the Lieutenant Governor. There is a third circumstance in which a Lieutenant Governor's warrant may be issued, which is perhaps more germane to the focus of this review. Section 618 of the Code says that "a person who is ... mentally deficient or feeble-minded ... serving a sentence in a prison" may, by a warrant of the Lieutenant Governor of the province, "be removed to a place of safe-keeping". A similar provision, exercisable by the Governor General in Council, is found in s. 22 of the Penitentiary Act.

C. Measurement of intellectual handicap

The foregoing statistics are of questionable worth, in that they are derived by assigning a single numerical value to each individual's intellectual capabilities. That value in itself is not exact. The American Psychiatric Association (1987) admits that "Since any measurement is fallible, an I.Q. score is generally thought to involve an error of measurement of approximately five points; hence an I.Q. of 70 is considered to represent a band or zone of 65 to 75" (p. 28).

For practical purposes, much more must be known about those who enter the criminal justice system. Ellis & Luckasson (1985) point out that the administration of psychometric tests in the environment of a penal institution requires exceptional skill, if the results are to be treated as having both usefulness and reliability. These skills must include knowledge of the forensic sciences and sensitivity to the impact on the prisoner of the physical and social environment. The process of assessment should begin with a personal interview with the primary intention of creating rapport with the inmate (p. 487). Test anxiety tends generally to depress scores (p. 488), and the alien and threatening prison environment can be predictably detrimental to an accurate measurement with respect to anyone, but especially anyone whose capability of understanding the dynamics of the situation is under question.

Ellis and Luckasson (1985) argue for much richer feedback from the test process than a simple I.Q. score. In their view, data should also be gathered on personality factors, speech and language abilities, adaptive behaviour, moral development, and motor functioning. The assessment should, in other words, not only be numeric, but have a narrative component, particularly in reference to any potential which the examiner can detect which could lead to "the possibilities for effecting change in ... functioning". This kind of information should then be utilized in "designing an individualized habilitation plan" (p. 489).

Rowan (1972) raised an early warning that too much stock should not be placed in measuring intelligence as though it were an immutable quality born into each individual. Her assessment was that what is often identified as "mental retardation" is really symptomatic of "cultural and environmental deprivation" (p. 339). Brown and Courtless (1971) reported that prisons in the more economically prosperous states of the northwestern U.S. had a much lower percentage of inmates with mental handicaps than those in the depressed "East South Central States". This variation, reported to range from 2.6% in the northwest to 24.3% in the central southeast, was evidence for Santamour and West (1982) of "the operation of sociocultural variables in determining the percentage of mentally retarded offenders" (p. 9). They also cite studies showing that offenders who

have been labelled mentally retarded tend also to be significantly "handicapped" by poverty, lack of education and job training, unemployment, and heavy reliance on social assistance. Further, they reported that 89 percent were receiving welfare or welfare equivalent incomes at the time they were charged with offences (p. 31).

Santamour and West (1982) also say, "There is serious questioning of the value of I.Q. tests as indicators of mental retardation and of the meaning of the I.Q. score" (p. 9). McDaniel (1987) seems to have the assessment process in the right perspective when he writes, "Adaptive behaviour is in the forefront (and the target for remediation) with I.Q. serving only as an imperfect indicator" (p. 187). There are still those, however, who believe there is merit in administering even highly abbreviated tests, at least as an initial screen to detect persons with possible intellectual disabilities. Doss, Head, Blackburn, and Robertson (1986) advocated the universal use of either of two test instruments which take less than ten minutes to administer, but which apparently have been validated by correlation with scores attained on the much more cumbersome WAIS (Wechsler Adult Intelligence Scale). These quick tests are the Ammons Quick Test and the Kent E-G-Y Test (p. 59).

Notwithstanding the criticisms many people have of the use of test scores for prison classification purposes, the literature also contains many complaints that not enough testing (or at least not consistent enough testing) has been carried out. The court in the Texas class action case, Ruiz v. Estelle, was highly critical of the Texas Department of Corrections for not including in its intake procedures the administration of intelligence tests by which "low intelligence inmates could be easily identified from the beginning of their ... confinements" (p. 1344). McAfee and Gural, in their survey of Attorneys General in all the American states and territories, found a range of "I.Q. cut-off scores for legal definitions of retardation ... from 60 to 78", in addition to which, they reported, "... testing procedures are notoriously unreliable" (p. 5). Not one jurisdiction reported having a "statewide systematic identification procedure" (p. 8). The abstract of their article states that "... with few exceptions, identification of persons with mental retardation in criminal justice is neither systematic nor probable" (p. 5). The only conclusion that can be drawn is that persons whose intellectual impairment is obvious might be recognized, "whereas mild retardation might not ever be noted" (p. 8).

In many situations in the United States, validated test results are necessary in order to determine whether an individual has a legal entitlement to particular services. For example, a federal statute known as Public Law 94-142 mandates that everyone under twenty-one years of age and who qualifies as a handicapped person must receive appropriate educational services (Denkowski, Denkowski, & Mabli, 1983, p. 197).

There are, in short, conflicting arguments about the best way to identify persons with intellectual impairments when they enter the prison system. The identifying instruments should not be relied upon as infallible or as providing all that it is necessary to know about the individual. On the other hand, identification is crucial if persons with disabilities are to be spared from the particular harm which can befall them while incarcerated and obtain those services to which they may be entitled by law. Chapter IV will focus on the prison experience of such persons, and Chapter V on measures that can be taken to alleviate the consequences of incarceration, which are appreciably more punitive and damaging for

those with intellectual disabilities than for the general inmate population.

Ideally, according to Billingham and Hackler (1982), testing will have been carried out much earlier in the criminal justice process than the day on which the convicted person arrives at the penitentiary (p. 343). They argue that the results should be available to guide the actions of everyone from the investigating police officers to the trial judge. If such information came with the offender to the prison intake process, there would at least be an initial indication of a situation which requires special consideration, and hopefully additional assessment, bearing in mind that no one's measurements ought to be trusted implicitly, and that nearly everyone's need to be expanded upon to provide insights into the individual's capabilities and needs, and not just a sterile numerical value.

D. Intellectual impairment vs. mental illness

It is important to distinguish between intellectual impairment and what is usually referred to as mental illness. Ellis and Luckasson (1985) express the distinction in this way:

Mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn. ... Most mentally retarded people are free of mental illness. (p. 424).

They stress the fact that mental illness is frequently temporary, cyclical, or episodic, whereas a developmental disability remains relatively constant through life, although the deficits in adaptive behaviour which combine with reduced intelligence to define such a disability are usually amenable to improvement through appropriate services and positive relationships.

"Dual diagnosis" is a term used when an individual is found to have both an intellectual impairment and mental illness. It is not surprising that there are persons who manifest both types of problems. While the intellectual disability may be innate, it often leads to so many frustrations and deprivations that the person has difficulty maintaining emotional stability. Garcia and Steele (1988) estimated that thirty percent of the inmate population who have intellectual impairment also exhibit symptoms of mental illness (p. 817). It is frequently difficult to identify persons, especially when they have the third label of "offender" attached to them, who are both intellectually disabled and emotionally disturbed. Luckasson (1988) maintains that "the mental retardation may partially mask the mental disorder" (p. 354).

French (1983) said that there is a relationship between long-term institutionalization and emotional instability, especially after release. He maintained that behaviour is so totally controlled by the social situation in an institution that

... disorders may become latent. ... Untreated, these symptoms and disorders are likely to resurface ... as these individuals come into contact with new stressors such as those associated with sudden deinstitutionalization, social isolation, and exposure to the criminal justice system (p. 59).

French was also of the view that the trauma of becoming involved in the forensic environment can produce "anxiety neuroses and adjustment disorders among emotionally disturbed ... mentally deficient clients" (p. 60). Power (1969) wrote: "The frustrations inherent in imprisonment may evoke transient schizophrenic symptoms, paranoid delusions, or hysterical exhibitionism" (p. 87). These theories have to be questioned, however, in view of the fact that Power's data were derived from a sample of inmates who had been referred in a British prison for psychiatric examination. Presumably some of them could have been both intellectually and psychiatrically handicapped before they entered prison.

It does, however, seem reasonable to expect that there can be a loss of emotional and behavioural control both because of the withdrawal of constraints to which the person has become accustomed while living in a non-penal institution, and because of the imposition of unfamiliar and threatening rules and expectations in the forensic situation. Luckasson's (1988) chapter deals extensively with the particular needs of the dually diagnosed offender.

McAfee and Gural (1988) point out that the legal protections which are provided in the criminal justice system tend to be designed with the psychiatrically involved offender in mind. Sometimes there is a belief that these protections will be equally appropriate and available to a person with a developmental disability, but such is often not the case (p. 5). For example, they found that many American jurisdictions deprive such accused persons of the defence of diminished culpability by restricting it to those who have been diagnosed as mentally ill (p. 6).

II. Relationships Between Intellectual Impairment and Criminal Behaviour

A. Propensity for criminal acts

1. Early twentieth century prejudices

In the early part of the twentieth century, several highly respected authorities not only believed that persons with intellectual disabilities were prone to engage in criminal behaviour; they expounded the theory that such persons actually comprised virtually the entire offender population. Henry Goddard, who served a term as president of what is now the American Association on Mental Retardation, went so far as to write, in 1915,

... the moron ... is a menace to society and civilization; ... he is responsible to a large degree for many, if not all, of our social problems (quoted in Ellis & Luckasson, 1988, p. 418).

Although he later retracted his extremist statements, Goddard was not alone. He quoted W.E. Fernald, also a one-time president of AAMR, as saying, "It has been truly said that feeble-mindedness is the mother of crime, pauperism and degeneracy" (quoted in Kindred *et al.*, 1976, p. 307). Earlier, Fernald had written, "Every imbecile ... is a potential criminal" (Ellis & Luckasson, 1985).

Terman, one of the pioneers of intelligence testing, was motivated at least in part by an apparent wish to isolate and control those who scored at the lower end of the scale because of what he believed to be their inherent proclivity for crime. He wrote in 1916:

There is no investigator who denies the fearful role played by mental deficiency in the production of vice, crime, and delinquency. Not all criminals are feeble-minded, but all feeble-minded are at least a potential criminal. That every feeble-minded woman is a potential prostitute would hardly be disputed by anybody.

(Quoted in Craft, 1985, p. 51).

Ellis and Luckasson quote Terman as saying, "The feeble-minded [are] by definition a burden rather than an asset ... because of their tendencies to become delinquent or criminal" (p. 418). Luckasson (1988) credits this unquestioned belief that intellectual impairment causes crime as contributing the primary motivation for societal actions which grossly violated the human rights of thousands of people for over half a century by segregating them in massive institutions and subjecting them to sexual sterilization without their consent (p. 355).

Power (1969) seems to have at least partially subscribed to the early twentieth century point of view well into its second half. (He described one of his "patients" as a "sexually perverted psychopathic dullard", p. 91). His view was that "a proportion of these individuals are morally perverted and therefore constitute a potential danger to the public". However, on the same page he admits that "subnormal individuals ... are less frequently involved in lawbreaking" than persons without mental disabilities (p. 87).

Luckasson (1988) wrote:

The revisionist view of criminality and mental retardation, popular by 1950, was that mental retardation had no relationship to crime. ...
The modern analysis of the relationship ... admits of some complexity. While mental retardation cannot be said to cause criminality, we may have previously both overemphasized (during the historical period) and underemphasized (during the revisionist period) some connections between the two (pp. 355-6).

She went on to map out a realistic middle ground in which it is possible to recognize certain factors which may lead an individual to violate the criminal law, such as "impaired ability to analyze", and consequently the "inability to recognize crime" (p. 356).

There is perhaps not a great deal of justification for a belief that there has been a complete about-face from the views of seventy-five years ago, even during Luckasson's "revisionist" period. Knowledgeable people have spoken with less and less of a prejudicial attitude as time passes, but there is still a very significant degree of prejudice revealed in stigmatizing language ("retardates", "mongols", and the like),

and in a "services" mentality, rather than an inclusion/support mentality.

2. Factors which may be associated with criminality

Some authors have reflected on the possibility that what may appear to be an innate propensity for criminal behaviour among persons labelled mentally handicapped could more properly be characterized as anti-social behaviour as a consequence of the repeated experience of rejection and failure (Allen, 1968, p. 23; Garcia & Steele, 1988, p. 814). Regardless of whether a person has an intellectual disability, experiences which isolate, alienate, and create a self-concept of hopelessness cannot be expected to instill respect for the rules by which society operates. It ought not to be presumed that persons with intellectual impairments inevitably attract to themselves such negative reactions from their peers. Power (1969), for instance, is somewhat over-broad in his assertion that criminal behaviour may result because "mentally subnormal males after puberty ... are usually aware that they are unattractive to members of the opposite sex" (p. 90). One doubts whether he had any clear evidence either that such young men are generally unattractive to women, or that they are more likely to agonize about their unattractiveness any more than most adolescents do.

Arguably, persons having developmental handicaps do often have greater difficulties because there are more factors, such as peer rejection and ridicule, which jeopardize their ability to adjust socially (French, 1983, p. 58). These factors, obviously, cannot be "blamed" on their disability. If they react by resorting to criminality, who can say that a significant number of non-handicapped persons would not do the same. As Stephens (1982) wrote,

... it should be stressed that the situations that will cause a non-retarded person to act criminally will also cause a mentally retarded person to act this way" (p. 100).

Allen (1968) wrote, "... retardation is neither an inevitable, nor is it ever the sole, cause of anti-social behaviour" (p. 23).

It is Bright's opinion (1989) that "intellectually disabled people are no more likely to commit offences than non-intellectually disabled people" (p. 933). What they are more prone to do is to fail to take steps to avoid apprehension and arrest if they are associated with an incident that attracts the attention of law enforcement officers. Nor are they likely to be proficient at constructing alibis or deflecting blame onto someone else. In fact, Brown and Courtless (1971) found that such accused persons were much more likely than others to be convicted because of self-incrimination (cited in McAfee & Gural, 1988, p. 10).

French, as recently as 1983, under a heading which reads "Criminal proneness of the mentally deficient and pseudoretarded", wrote, "... concern has surfaced concerning the potential dangerousness and victimization of those mentally ill and mentally retarded clients unceremoniously dumped into society with minimal or no followup care". While he goes on to state that there is recent evidence that "these

individuals were not significantly more dangerous than were their social counterparts not labelled criminally insane, emotionally disturbed, or mentally deficient", he suggests that there may be a certain type of "criminal proneness" associated with mental disability. This factor he identifies as the "serious adjustment problems" which persons experience after having been institutionalized in non-penal facilities for years, if not decades (p. 57). In short, the factors which contribute to criminality on the part of persons labelled mentally handicapped are likely to be found to exist in the manner in which such persons have been treated by society, rather than in their inherent nature as persons with disabilities.

3. An objective view

There has never been any reliable evidence to support the contention that persons with intellectual impairments are more inclined to commit criminal acts than non-handicapped persons. Ellis and Luckasson point out that mental handicap

... may co-exist with criminality. It may also inhibit criminal behaviour, as with a person who is profoundly retarded and so physically involved (i.e. disabled) that he requires assistance with every movement, but mental retardation will rarely, if ever, cause criminality (p. 426-7).

Biklen (1977) wrote,

In the absence of research to indicate a positive correlation between mental retardation and criminality, we must discount such a relationship (p. 82).

Craft (1985) suggests that any correlation between mental handicap and crime could well be accounted for in terms of the relationship between both phenomena and "poor conditions of child-rearing" (p. 51). His findings, however, led him to the conclusion that "the prevalence of offenders among the mentally handicapped is little more than in the general population" (p. 56).

Craft (1985) also provides evidence that outdated opinions about a causal relationship between intellectual impairment and criminality may have arisen because of errors of measurement in the prototype versions of intelligence tests. "The results of early tests", he wrote, "depended mainly on educational prowess, whereas later tests measured practical abilities ..." (p. 51). Figure 1, (on the next page) taken from data contained in a table in Craft's chapter (p. 52) shows a remarkable increase in the average I.Q. obtained by administering the various generations of intelligence tests to prison inmates between 1931 and 1950.

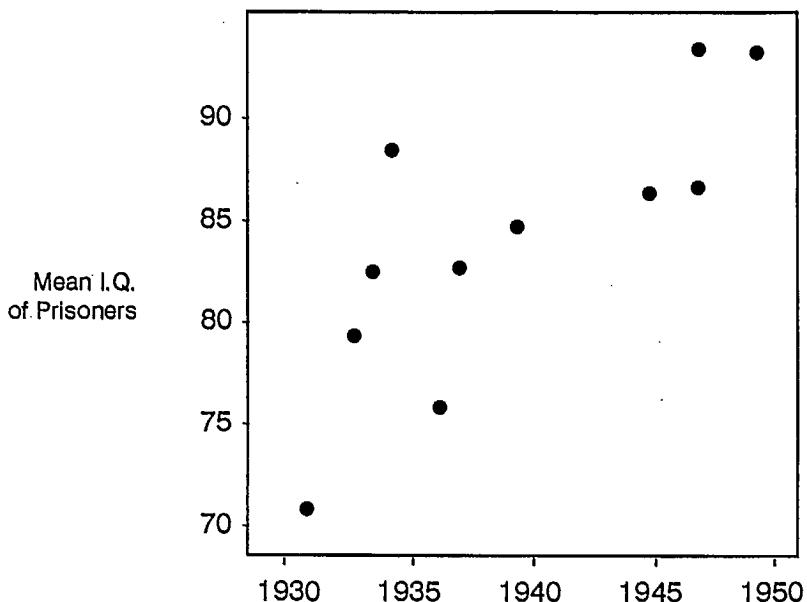


Fig. 1. Mean I.Q. of Convicted Prisoners between 1931 and 1950

The best evidence seems to be that there is no inherent tendency for persons with intellectual impairments to commit more crimes than other members of the general population. To the extent that it can be said that crime is "caused" by poverty, social isolation, and frustration over repeated failure, it is clearly true that many persons who are handicapped have more than their fair share of these experiences, and some may be drawn into criminality as a consequence.

French's (1983) passing reference to the "victimization" of persons who have intellectual impairments (p.57) is a reminder that society really faces a more serious criminal justice problem in the crimes committed by non-handicapped persons against those with disabilities, rather than the other way around. Wolf Wolfensberger wrote,

Today, of course, we know that most retarded adults make an adequate adjustment in the community, and that they are more likely to be the victims rather than the perpetrators of social injustice.

(Quoted in Kindred, et al., 1976, p. 306).

B. Types of crimes committed by persons with intellectual impairment

Some researchers have attempted to answer the question whether there are certain types of crimes which persons who have a mental handicap are more likely to commit than other crimes, and whether there are differences between these patterns of criminal activity and that of those offenders who have not been labelled mentally handicapped. One of the difficulties in trying to understand the statistics on criminal activity which

various authors have published is that there are no consistent categories of crimes used in their various analyses. (We may also wonder, of course, if there have been consistent criteria applied in determining who qualifies as a mentally handicapped offender). In addition to the difficulty in trying to reach conclusions about the meaning of such fundamentally incomparable data, some researchers took their statistics from prison populations and others from broader offender groups. It is highly likely that incarcerated persons present very different offence profiles than those who remain in the community.

Some researchers (Boslow & Kandel, 1965; Garcia & Steele, 1988; Steiner, 1984) use only two categories: crimes against persons and crimes against property. Boslow & Kandel came to the conclusion that "In both our retarded and non-retarded populations, we see the same ratio of 60 percent offences against persons as contrasted with 40 percent offences against property" (p. 648). Garcia and Steele (1988) reported virtually the same findings had been observed by Kentucky correctional officials: 63.1% of persons identified as developmentally handicapped had committed crimes against persons and 36.9% crimes against property (p. 819). (As a matter of interest, Boslow's and Kandel's estimate that 60 percent of crimes generally are offences against persons and 40 percent offences against property do not correspond to current statistics in Ontario. An appendix to a recent decision in the Ontario Court (General Division) showed that the ratios were 37.4 percent offences against persons and 62.6 percent offences against property - R. v. Fortin (1991), 75 O.R. (2d) 733, at 751).

Steiner's (1984) findings were almost exactly the opposite to those suggested in the research noted above, and almost exactly in line with the current statistics about general crime rates in Ontario: 63 percent of those offenders labelled mentally handicapped had committed crimes against property and 38 percent against persons (reported in Garcia and Steele, 1988, p. 819). (Often the percentages do not total an even 100 because some had committed crimes in both categories). A Florida study, also cited by Garcia and Steele (p. 851) was in line with Steiner, in that 37 percent had offended against persons, but only 43 percent had committed a property offence alone. Twenty percent had committed both types of offences.

However, the most widely quoted statistics about crime rates among incarcerated persons with developmental disabilities are those of Brown and Courtless (1971), who reported that 57 percent of inmates with I.Q. scores of 55 or less had committed crimes against persons, which they said was more than double the percentage found among the general inmate population. They in turn appear to have derived their figures from much earlier (and highly suspect) sources.

Allen (1968) examined data recorded early in this century by W.E. Fernald, in which it was shown that inmates of Massachusetts prisons who had I.Q.s of less than 55 were more than twice as likely to have been convicted of assault and more than three times as likely to have been convicted of homicide as were those in the over-all prison population (p. 24). Recall the evidence that an I.Q. of 55 measured before 1930 could very well be at least twenty points higher if measured by less culture biased tests developed since. Aside from the issue of errors in measurement, Allen maintained that these data ought not to be regarded as proof that persons with developmental handicaps are more prone to crimes of violence than other offenders. He thought it was more likely that handicapped persons are

more highly represented in these categories because they are "more easily apprehended, more prone to confess, more likely to be convicted, and will probably be incarcerated longer than the non-retarded offender" (p. 25).

Stephens (1982) reported that the offences most frequently committed by persons with mental handicaps were breaking and entering and burglary. He said that 38 percent of the cases involve those crimes (p. 99). Power (1969) must once again be taken with a grain of salt when he says, "Subnormals are fascinated by cars and seem to derive great satisfaction from driving at high speeds" (p. 92). He is somewhat less amusing, however, when he says, "Subnormals may cunningly take advantage of children for homosexual purposes" (p. 89). He also maintains that "subnormals have a relatively low tolerance for frustration and tend to react with physical violence to real or imagined wrongs" (p. 92). This statement begs the question whether "subnormals" are not subjected to a great deal more frustration as a result of being treated in ways which can be inferred from the practice of labelling them in offensive ways.

Dubienski (1973) gathered the only Canadian statistics on the crime patterns of offenders with intellectual handicap which seem to appear in the literature. His data were derived from the intake files of 1,067 inmates admitted to the Stoney Mountain Penitentiary in Manitoba between 1966 and 1971. He used an I.Q. of 89 or lower as his criterion of which prisoners were mentally handicapped, which is much higher than the usually accepted criterion of I.Q. = 69 or lower. (If he had used the more widely accepted cut-off point, he would only have had ten inmates to study). Dubienski's categories were considerably expanded in comparison with the studies examined above. His findings are summarized in Table 1. It should be noted that the data set out in Table 1 were drawn from the records of only 127 inmates, all but ten of whom were questionably mentally handicapped by ordinarily accepted standards. On average, it would appear, each subject in this study had been convicted of close to two offences. If we reduce Dubienski's categories to the two discussed above (omitting the drug and alcohol and forgery convictions), we find that 57.2 percent of the offences were against property and 42.8 were against persons (p. 445).

Table 1

Offences Committed by Inmates Assigned I.Q.'s of 89 or Lower
Incarcerated in Stoney Mountain Penitentiary - 1966-1971

| Type of Offence | Number Committing Offence | Frequency in Percent |
|------------------------------------|---------------------------|----------------------|
| Breaking & entering | 56 | 22.5 |
| Theft | 52 | 21 |
| Assault | 48 | 19.5 |
| Escape attempt or parole violation | 37 | 15 |
| Sexual assault | 20 | 8 |
| Homicide | 15 | 6 |
| Forgery or uttering false document | 11 | 4.5 |
| Possession of a dangerous weapon | 6 | 2.5 |
| Drug or alcohol offence | 3 | 1 |
| TOTAL | 248 | 100 |

Aside from statistical analyses, it is also possible to approach the question of the types of offences which persons with intellectual impairments will more probably commit (if they commit offences at all) on the basis of understanding their capacities and challenges. Ellis and Luckasson, for example, speculate that

Less intelligent offenders have fewer internal controls and thus commit impulsive crimes that do not involve preparation, planning, and delayed achievement of the criminal goal (p. 427).

Luckasson (1988) suggested that the condition of intellectual impairment "affects the types of crimes to which people have access, their ability to resist crime, and their ability to recognize crime" (p. 356). French (1983) wrote that, especially if they are also affected by emotional disturbance, persons with intellectual handicaps may resort to aggression, including sexual assault, and arson (p. 59).

Santamour and West (1982) suggest that persons with intellectual impairment are more likely to receive prison sentences for crimes of violence because prosecutors and judges regard them as inherently dangerous, whereas if they commit crimes against property they stand a better chance of being placed on probation (p.17). In other words, if there is a tendency to commit crimes on impulse, there is probably also a tendency for the process to treat such an individual as being prone to such crimes, and therefore he or she is likely to receive a custodial sentence, and that sentence is likely to be longer and less likely to be shortened by parole. It is impossible to know which factors, those internal to the behavioural anomalies of the individual or those imposed by the criminal justice

process, are most prominent in producing the statistics about types of crimes people who have intellectual limitations are more or less likely to commit.

C. Characteristics of offenders with mental handicaps

Aside from measurable deficits in intellectual functioning, there are certain characteristics which are observable and may assist correctional personnel in understanding that a particular inmate may have a disability. This ought not to be taken to mean that much stock should be placed in the statement one sometimes hears, that so-and-so "looks retarded". The characteristics described in the literature are not visual, but behavioural, and in some cases the tip-off is found in the behaviour of other persons towards the individual who has a handicap.

Before examining some of the suggestions in the literature that offenders who have an intellectual disability are readily distinguishable from other offenders, it should be pointed out that MacEachron (1979) found that there were more similarities than differences between mentally handicapped inmates and those not so labelled in terms of their social characteristics. Buser (1987) wrote that "In most cases, mildly handicapped inmates are indistinguishable from the rest of the prison population" (p. 18).

In American prisons, according to Santamour and West (1982), inmates with intellectual impairments tend to be somewhat older, on average, than other inmates, and they are also more likely to be found among the black population of correctional facilities (p. 18). Black people are generally overrepresented in U.S. prisons, but are twice as overrepresented among those who are labelled mentally handicapped. This phenomenon could be explained, at least in part, by the use of culturally biased tests of intelligence. For Canadians, this statistic raises the question of whether Native inmates tend to be especially overrepresented when those with developmental disabilities are singled out.

Santamour and West (1982) list several personality traits which they say are particularly characteristic of inmates who have an intellectual handicap:

- low frustration tolerance
- inability to delay gratification
- poor impulse control
- low level of motivation
- anxiety to be accepted
- demanding of attention
- easily persuaded or manipulated

Stephens (1982) elaborates on the last characteristic in these words:

Mentally retarded individuals tend to be followers, easily led by others. ... Since they often do not understand the full consequences of their acts, they can be talked into doing things that others would not do (p. 99).

Santamour and West said that mentally handicapped persons' desire to be accepted may cause them to assume the prison culture even more readily than other inmates (p. 30).

It does not take a great deal of reflection to realize that many of the qualities listed by Santamour and West could just as easily apply to non-handicapped persons, perhaps especially (at least some of them) to offenders generally. While there is a danger that these descriptors take on the nature of stereotypes, to the extent that they are true, they may be of assistance to correctional personnel in identifying and understanding such inmates. The understanding required is primarily that such qualities are not inherently characteristic of persons because they have intellectual limitations, but rather because of the way they have been dealt with by their non-handicapped peers.

Although not confining himself to relationships within the closed society of the prison, Stephens (1982) wrote that

Many times (persons who are mentally handicapped) are the victims of name-calling and teasing, which leads to the resentment that causes the need to strike back (p. 99).

Such a reaction to verbal abuse may have triggered the behaviour that landed some individuals with intellectual impairment in prison in the first place. Once incarcerated, it is virtually certain they will experience it again.

Reed (1989) wrote, "Frequently the mentally retarded offender is a handicapped person who has little family or community support" (p. 414). Prison staff may observe that such inmates receive appreciably fewer visits from family and friends on the outside. Curiously, Santamour and West (1982) found that among former inmates, the only ones they ever knew to return to the prison to visit the inmates still incarcerated were those who had been labelled mentally handicapped (p. 30). Add to the stereotypes that persons with intellectual impairments are more committed in their relationships with other people.

III. Prevalence of Persons with Intellectual Impairment in Prison Populations

A. Evidence of overrepresentation

Estimating the magnitude of the problem -- i.e. the percentage or raw numbers of persons in the prison system who have intellectual impairment -- is very difficult to do. To begin with, there is no consistent practice of assessing people to determine their functional intellectual capacity when they are admitted to the system. Such measurement as is carried out has used imperfect instruments which give readings of only certain dimensions along which persons experience disability, certainly not the entire spectrum. Add to that the different criteria which have been used as cut-off points between handicapped and non-handicapped populations, and at best we can only expect to be able to get an impression of the presence within correctional institutions of a significant number of persons who have particular needs in relation to their intellectual handicap which ought to be accommodated both for their sake and for the sake of the society to which they will one day return.

Reed (1989) wrote, "The mentally retarded in the criminal justice system are relatively few in number" (p.411). How few? McDaniel (1987) wrote that, of the 450,000 inmates in

federal and state correctional institutions in the United States, "5 to 10 percent, or 22,500 to 45,000 of them, are retarded" (p. 184). Reed herself wrote, "The best estimate of most experts is that the adult mentally retarded offenders nationally comprise about 9-10 percent of the total number of inmates, or approximately 56,000 to 62,000 persons" (p. 411-12). Obviously they were not computing their percentages from the same population figures, unless that population had grown by nearly 50 percent in just two years.

Allen (1968) reported the results of a 1963 study of more than 200,000 offenders from all parts of the United States. This study was the source of the frequently quoted statistic that 9.5% of all inmates had I.Q.'s of less than 70. He also revealed that 1.6% were assessed at an I.Q. of less than 55 (p. 23).

Rowan (1972) estimated that fully one third of the American prison population "can be considered retarded when both intellectual disability and inability to function socially are taken together" (p. 338). She relied on a study conducted by the President's Commission on Law Enforcement and the Administration of Justice for the information that "almost 10% of the reported cases (in a national survey of federal and state prisons) could be classified as mentally retarded, and that 1.6% ... had I.Q. scores indicating moderate-to-severe retardation". Rowan's tripling of the 10% figure is presumably based on the definition of mental retardation as including a component of impairment in adaptive behaviour. She overlooked the fact that these impairments must exist concurrently with the intellectual impairment. If only 10% are intellectually impaired, then there cannot be more than that proportion who are "mentally retarded", and perhaps there could be fewer, although the fact that a person is incarcerated may suggest that his or her adaptive behaviour is somewhat less than effective. French (1983) and others appear to have concurred with Rowan, however. He wrote, "It is estimated that up to 30 percent of all offenders are afflicted with some degree of retardation" (p. 59). (See also Forget, 1980).

Harbach (1976) found that 28.6% of the inmates in Georgia had been assigned I.Q.'s of 70 or lower. This was compared to the then generally accepted level of 9.5% for the inmate population in the United States as a whole. Browning (1976) reported on a survey of 39,000 adult male prisoners, among whom it was found that 4.1 percent "were identified as mentally retarded and 13.9 percent as borderline" (Cited in Stephens, 1982, p. 99).

The court in Ruiz v. Estelle, a 1980 class action on behalf of all the more than 24,000 inmates of the Texas correctional system, heard evidence that

(I.Q.) scores of seventy or below were exhibited by ... 7.05%. ... Another ... 9.48% of the populations had I.Q. scores between 71 and 89. Expert witnesses agreed that approximately ten to fifteen percent of the inmates were mentally retarded. ... Eighty percent had less than seventh grade education (p. 1275).

Interestingly, Dubienski's (1973) study suggests that, at least in one federal penitentiary (Stoney Mountain in Manitoba), Canadian statistics are somewhat less devastating. There, fewer than one percent of the inmates had been assigned an I.Q. of 70 or lower. If the criterion were raised to I.Q.= 80, there would still have been only 3.7

percent (p. 445).

Papaleo (1985) and Bright (1989) have reported recent incidence levels for Australian prisons. Papaleo, after citing without criticism the United States' approximation of 10 percent of inmates having a mental handicap, writes that at least twice as many retarded persons are found in Australian prisons, per capita, than in the general population (p. 948). Presumably this would work out to about 5 or 6 percent, although he does not estimate exactly how many persons have a mental handicap in Australia. Bright, on the other hand, starts out by saying, "Whereas only 1 percent of the general population has an intellectual disability, it is estimated that up to 3 or 4 percent of the prison population is eligible for services in accordance with the IDPSA (Intellectually Disabled Persons Services Act, 1986)" (p. 933).

Doss, Head, Blackburn, and Robertson (1986), in their fervent wish to have all newly admitted inmates submit to a ten minute I.Q. test, relied on Blackhurst's (1968) estimate that as many as 55 percent of all persons in adult correctional facilities in the United States may be "mentally deficient" (p. 57).

Rockoff (1979) thought that the actual numbers of inmates with developmental disabilities had reduced because of better informed prosecutors, judges, and parole boards. As a consequence, persons who would otherwise have inflated the proportion of handicapped people behind bars are now receiving some support to maintain themselves in the community or perhaps other non-penal institutions. The other implication is that the individuals with a mental handicap who are left incarcerated are likely to be only mildly impaired, which may make it less probable that they will be detected as having any special needs (McAfee & Gural, 1988, p. 9).

Santamour and West (1982) suggest that the statistics on the percentage of inmates who have a mental handicap may be artificially inflated because such persons tend to remain incarcerated longer than their non-handicapped peers. They cite evidence that 42% of mentally handicapped inmates had served more than three years of their present sentence, whereas only 23.5% of those who were not labelled handicapped had been in prison that long. These figures may mean that persons with mental handicaps receive longer sentences in the first place and/or that they find it much more difficult to qualify for early release. This may be because they have a harder time completing training programs which are regarded as prerequisites for parole, or that they are more likely to commit violations of prison rules.

If one is asked how many inmates in Canadian prisons could be called intellectually impaired, the best answer is, "A significant number". There are certainly insufficient data presently at hand to provide a precise figure. The Canadian Centre for Justice Statistics (1990) reports that, on average, close to 30,000 adults were in federal and provincial custody in this country in 1989-90 -- 11,415 in federal custody and 18,140 in provincial custody (pages 121 and 136). If the median reported percentage in the American studies (5% to 10%, McDaniel, 1987) were taken as the best estimate of the incidence of intellectual disability in Canadian correctional facilities, it would mean that between 1,500 and 3,000 incarcerated individuals could be identified as having an intellectual disability.

There are several good reasons to use such a range as a working estimate. The best reason is that there is a need to identify a group which is particularly at risk of being harmed by the prison experience. Steps can be taken to provide programs and protections which will prevent such harm occurring. Put in more positive terms, this group will also present special challenges to those responsible for helping them to prepare for their return to the community. Identifying the population which ought to be offered such programs and protections will involve more than just administering an I.Q. test.

An attempt must be made to understand the unique needs and potentials of individual inmates in order to know what kind of program experiences are appropriate. Ellis and Luckasson (1985) call for an "individualized habilitation plan" (p. 489). Such a plan obviously calls for extensive assessment on a continuing basis. It is essential to know initially which inmates ought to be streamed into such a process. Chapter V will focus on the nature of such habilitation activities, and Chapter VI, on the question of whether there is, in Canada as in the United States and Australia, a legal entitlement to special programs designed to meet the needs of persons with mental disabilities. Where the state has a legal obligation, then the necessity of identifying with some precision the individuals to whom that obligation is owed becomes a pressing concern.

B. Deinstitutionalization: is the door revolving?

Recent conventional wisdom has it that the phasing out of institutions designed in the past for the non-penal confinement of persons identified as mentally handicapped is causing an epidemic of crime by those returning to the community. This expectation initially arose in connection with the release of persons formerly under civil commitment to psychiatric facilities, but it is frequently extended to include those who have been forced to reside in institutions because of intellectual impairment as well.

There is a certain logic behind this theory. Although crimes can be committed in institutions, the range of opportunities for criminal activity is fairly limited by the nature of institutional life, and particularly by the close supervision which is a dominant feature of that life. There are at least four reasons to predict that those released from institutions for persons with developmental disabilities will have a relatively high probability of becoming involved in criminal activity: 1) The outside world presents threats and difficulties with which they are ill-prepared to cope, and their attempts to do so may include actions which violate the law; 2) Exposure to the community includes exposure to anti-social elements in the community, and the criminal subculture may attract them because they are gullible and have difficulty distinguishing legitimate enterprises from the illegitimate; 3) The long experience of unjust confinement and repression in an institution may have built up in some individuals a hostility towards authority which will eventually manifest itself when they are no longer constrained by walls and staff; and 4) Poverty, which may drive some to crime out of a desperate attempt to have more money.

These hypotheses are suggested by some writers (Papaleo, 1985; French, 1983), but there is very little evidence that deinstitutionalization is either leading to a crime wave among former residents or that such persons are particularly prone to find themselves re-institutionalized in correctional facilities. Conceivably, the depopulation of facilities for persons with mental handicaps has not been going on long enough and has not involved

sufficient numbers to present a phenomenon which researchers have been able to analyze. On the other hand, the revolving door theory may be little more than an extension of the scare which greeted the deinstitutionalization of psychiatric patients.

IV. The Prison Experience for Persons with Intellectual Impairment

A. A particularly punitive environment

On March 5, 1990, Gordon Taylor died in a segregation cell in Kingston Penitentiary. He was forty years old, and was described as having "the intelligence level of an 11-year-old". He was incarcerated indefinitely after being sentenced as a dangerous sexual offender in 1982. The Toronto Star reported that there were marks on his body indicating that he had been beaten. At the time of this writing, an inquest was being conducted to determine the cause and other circumstances of his death (Toronto Star, February 11, 1991). Not very many inmates who have a mental handicap find the prison experience literally fatal, but the evidence in the literature is that a good many find their incarceration to be an extremely negative experience -- much more so than non-handicapped prisoners.

The court in the Texas class action case, Ruiz v. Estelle (1980), put the situation very plainly: "Mentally retarded persons meet with unremitting hardships in prison" (p. 1344). The Ruiz judgment goes on to list the nature of those hardships:

- victimization
- exploitation (physical, emotional, sexual, financial) - injury
- disciplinary violations
- longer sentences, with less likelihood of parole
- lack of habilitation or other services to address their needs

In the words of Billinghurst and Hackler (1982), "(Prisoners with mental handicaps) are more heavily penalized than inmates of normal intellectual, emotional, and social skills" (p. 342).

B. Exploitation and victimization

Bright (1989) wrote these words, which are echoed by many authors whose work is reviewed here: "People with intellectual disabilities are often victimized in prison" (p. 934). Reed (1989) lists some of the insults which prisoners with developmental disabilities must absorb: they are "harassed, sexually assaulted, and taken advantage of in innumerable ways because they are easy targets" (p. 416).

According to Garcia and Steele (1988), other inmates are quick to detect signs of weakness in the person with a mental handicap, which greatly increases the likelihood that he will be taken advantage of (p. 835). Steiner (1984) wrote that, when the advantage sought by the non-handicapped inmates is sexual relations, the person with an intellectual disability may interpret the advances as signs that someone accepts and cares about him (p. 183). Obviously, this is not always the interpretation. A recent study by Smith,

Algozzine, Schmid, and Hennly (1990) found that inmates identified as mentally handicapped were disciplined much more frequently for violation of prison rules. They explained their findings in part as resulting from these inmates' reactions to the "verbal abuse, teasing, and general debasement in prison" (p. 180).

Santamour and West (1982) explain that, whereas the behaviour of an individual who is mentally handicapped may be maladaptive in the community, it is much more so in the subculture of the prison. As they become victimized by the more sophisticated majority of inmates, they also fall victim to unfairness at the hands of the prison administration (p. 29).

C. Impact of prison discipline

In addition to being the brunt of hostile, abusive, and exploitative behaviour from others, both correctional staff and fellow-inmates, prisoners with intellectual impairment are highly likely to run afoul of prison rules and consequently find their time behind bars both longer and harder than it would otherwise be. The court in the Ruiz case explained the predicament very simply: "Not understanding or remembering disciplinary rules, they tend to commit a large number of disciplinary infractions" (p. 1344). Billinghamst and Hackler (1982) wrote that prisoners with mental handicaps "have difficulty comprehending what is expected of them" (p. 341), and, as a result, are "likely to have a higher rule violation rate than other offenders" (p. 342).

Reed (1989) states that disciplinary infractions are not simply a result of the mentally handicapped inmate not knowing the rules; in response to their "frustration at being victimized" they "act out (and) pose continuous management problems for the correctional administration" (p. 416). Garcia and Steele (1988) also say that inmates who have a mental handicap may attempt to conceal it by not participating in prison activities. Unlike other inmates, they tend not to seek services or to strategize for early release (p. 835).

Smith, Algozzine, Schmid, and Hennly (1990) wondered whether the reports that inmates with intellectual handicaps receive more disciplinary punishments corresponded to reality, or were "inferred by attitudes and behaviour displayed toward them by prison staff and other prisoners" (p. 178). They carried out a study in a "large southeastern state", and found that, when matched with a comparison group of non-handicapped inmates of the same age, sex, and offence,

Inmates with mental retardation received approximately three times as many disciplinary reports for offences related to personal hygiene and non-compliant behaviour; they were reported for assaulting inmates or correctional personnel more than twice as often as non-retarded inmates (p. 179).

The main consequence is that they then tend to serve a greater portion of their original sentence behind bars because they have difficulty accumulating the "good time" required to be granted parole. Also, they may have difficulty measuring up to the standards expected in prison training programs, success in which is also taken into consideration in the parole process. Not only that, but their usually limited record of employment, instability of residence (in and out of other institutions), and lack of a secure

circle of family and friends in the community often make the granting of parole excessively risky (Billinghurst and Hackler, 1982). McDaniel (1987) found that offenders identified as mentally handicapped serve "on an average, two to three years longer than other inmates for the same offence" (p. 187).

The impact of their violations of prison rules is not just felt by persons who are intellectually disabled in terms of having to serve more time. They are also likely to spend more of that time in segregation cells (Ruiz v. Estelle, 1980, p. 1344). Buser, Leone, and Bannon (1987) reported that not only did inmates with a mental handicap spend more time in segregation than other inmates (more than three times as much in a Maryland study); they were also denied educational services while in segregation to which they otherwise had a legal right under federal law (p. 18).

D. Consequences for prisoners with intellectual disabilities

In the words of Buser, Leone, and Bannon (1987), there is a "more punitive fit (for inmates who are handicapped) within the system than occurs for non-handicapped individuals" (p. 18). Billinghurst and Hackler (1982) summed up the prison experience for many persons with intellectual disabilities:

They often serve longer sentences for the same type of crime and serve harsher sentences in terms of victimization, which may necessitate their being put into solitary confinement or into units for the mentally sick for their own protection. ... Both situations are detrimental to their already negative self-image and minimal social skills, and reduce the likelihood of a successful return to society (p. 342).

Ellis and Luckasson (1985) express this in another way:

It is well documented that mentally retarded people, institutionalized without proper habilitation, will regress and lose vitally important life skills they previously possessed (p. 482).

Santamour and West (1982) wrote that the "negative impact (of imprisonment) is much greater than its impact on the average inmate" (p. 30). What they had in mind was not simply impact at the time of incarceration, but the lasting impact of having struggled to learn adaptive behaviour in the context of prison life, only to find that those behaviours have to be unlearned when the day finally comes for their release.

The evidence is that most prisoners with intellectual handicaps are, by an insidious identification process, "singled out" for an extra allotment of everything negative that the experience of incarceration has to offer, but are, at the same time "simply lost in the system, where their usual lot is abuse, exploitation, and frequent punishment" (Ruiz v. Estelle, 1980, p. 345). It should be pointed out that the Ruiz court ordered extensive measures to alleviate the desperate plight of the Texas inmates with mental handicaps, as that plight was proven in evidence in 1980. One would hope that the situation in that State, as well as in other jurisdictions, is not as bleak now as it was a decade ago, but research data accumulated since Ruiz (McAfee & Gural, 1988, for example) does not provide a

great deal of cause for such hope.

V. Habilitation of Offenders with Intellectual Disabilities

Although "rehabilitation" has been the focus of controversy for many years in the general field of penology, it must be addressed from a fresh perspective when we are dealing with the problems associated with offenders who are identified as intellectually impaired. Some initial comments may be useful. Almost universally, we find that researchers and writers in this special area of concern use the word "habilitation" for the obvious reason that most offenders with mental handicaps have never been "habilitated" in their lives, so cannot be "rehabilitated".

Secondly, as Santamour and West (1982) point out, there is a danger that people will rule out the possibility that any meaningful habilitation can be achieved for such offenders, because we have been told so often that intelligence is a fixed characteristic of every individual (p. 21). People assume that, since one's I.Q. cannot be changed (which is untrue) then nothing about one's adaptive behaviour, including cognition and reasoning ability, can be changed either. This is manifestly untrue. People learn at varying rates, depending on many factors, including motivation. The habilitation task is to try to help the individual select those areas of personal development which are most appropriate, promising, and interesting to him or her, and to provide the most advantageous setting, habilitation model, and program that can be devised.

A. The physical and social context for habilitation

1. Prisons

Carson (1989) argues that the criminal process is not only designed to administer punishment to offenders; it is also designed to protect accused persons from wrongful conviction. His point is that, if a person with an intellectual disability is diverted from the ordinary correctional stream into some form of confinement in a non-penal facility designed to serve handicapped individuals generally, he or she will lose some of the legal protections guaranteed to prisoners, including the right to release after a predetermined period of time (p. 87).

Some writers maintain that, in the interests of "normalization", prisoners who have intellectual disabilities ought to remain in the regular correctional situations along with non-handicapped inmates (Garcia & Steele, 1988, p. 858). The extension of the principles of normalization into the prison setting is by no means obviously advantageous, and may well be disadvantageous. While inclusion of persons with disabilities in ordinary community activities, such as school, work, recreation, and so on has been demonstrated to assist them in learning and growth and to assist others in developing attitudes towards them which recognize valued roles in society, prisons are inherently outside the scope of what is meant by "ordinary community". Here, inclusion, for a mentally handicapped inmate, has been shown to be manifestly more punitive than it is for non-handicapped prisoners. As Santamour and West point out, placing a person with a mental handicap in a "normal" prison setting does not mean that the person will face the same conditions and demands as his or her fellow inmates, but much more difficult ones (p. 28). Hayes and Hayes (1988), however,

suggest that there are some mentally handicapped prisoners who prefer not to be identified as such by being placed in special programs. They prefer to survive as best they can in the prison mainstream (p. 1185).

McDaniel (1987) implies that the regular prison environment can be an appropriate rehabilitative setting. Although he acknowledges that "normal" experiences and opportunities do not exist for anyone who is incarcerated, he maintains that "normalization requires that ... mentally retarded offenders have the opportunity to be integrated personally into the general prison population and ultimately into society" (p. 186). However, if incarceration works hardships on such inmates out of proportion to those intended for the punishment of offenders generally (and the evidence seems to be that this is the case), then such a position must be untenable. Reed (1989) wrote that "The Ruiz decision established the right to separate quarters in order to protect mentally retarded inmates from 'abuse' and 'exploitation' by other inmates" (p. 422. See also Ruiz, 1980, at p. 1345). The court itself wrote that those inmates who are intellectually disabled "are subjected to a living environment which they cannot understand and in which they cannot succeed" (p. 1346).

2. Facilities for persons with mental handicaps

Bright (1989) says that in Victoria, Australia,

Where an intellectually disabled person held in custody ... is at significantly greater physical, mental, or emotional risk than a non-intellectually disabled prisoner, an application can be made for the transfer of the person from prison to a ... residential institution as a "security resident" (p. 938)

Papaleo (1985), also an Australian, wrote that "where deprivation of freedom is considered unavoidable in the interests of the community, preference should be given to security sections of 'retardation facilities'" (p. 951).

It is questionable that mentally handicapped persons who have been convicted of crimes ought to be placed in general institutional settings with those who have not. Because of the trend towards deinstitutionalization, these facilities have already returned a significant number of their higher functioning former residents to the community. According to Ellis and Luckasson (1985), as long ago as 1982 a study of the populations of institutions in the U.S. revealed that nearly half of the remaining residents were "profoundly retarded" (p. 476). By now the concentration of those with very low levels of intellectual functioning must be well over fifty percent. By contrast, we have already observed that persons with intellectual limitations who are sentenced to incarceration tend to be at the upper end of the range of functional abilities which are still regarded as indicating a disability. They would have virtually no needs or interests in common with those non-offenders with whom they would reside, and certainly the facility staff would be unlikely to have skills appropriate to both of these quite different groups. Santamour and West (1982) put it very convincingly:

Retarded persons in correctional settings are very different from

persons receiving treatment in institutions for the mentally retarded. Those in prison are more intelligent, more sophisticated or "street wise", and better able to mask their limitations. ... When placed in institutions for retarded persons, they victimize the other residents and disrupt routine. ... Accordingly, it is generally accepted in the field of retardation that the choice of residence for rehabilitation and training of the offender is some place other than existing state institutions for the mentally retarded (p. 29).

Garcia and Steele (1988) have recently joined the chorus rejecting the placement of intellectually disabled offenders in state institutions operated primarily for non-offenders (p. 846).

3. Specialized facilities

Notwithstanding these rather obvious reasons not to consider "sentencing" offenders with mental handicaps to the same institutions occupied by non-offenders, the American Bar Association's Criminal Justice Mental Health Standards recommends that as an option. Ellis and Luckasson (1985) reject that recommendation, saying that "... the better approach is to create new programs specifically designed to address their needs" (p. 484). Lottman (1976), on the other hand, studied specialized treatment facilities and came to the conclusion that they incorporated the worst elements of both civil and criminal institutions (p. 47).

Dubienski (1973) concluded his study of persons with intellectual impairments in the Stoney Mountain Penitentiary in Manitoba by calling for the development of "special institutions ... for the rehabilitation of all mentally disordered offenders, including the retarded, in a custodial atmosphere" (p. 450). He did not make it clear whether it was his intention to suggest that a single facility could appropriately deal with the needs of offenders having psychiatric disorders and those with intellectual disabilities. The differences between the two types of conditions are such that there would hardly be any advantage to those with intellectual impairment to be in such special facilities as opposed to being in the penitentiary.

Menolascino (1975) comes out strongly in favour of "special handling in classification and diagnosis, treatment, and prerelease planning and parole" for persons identified as developmentally handicapped (p. 61). He maintains that such offenders certainly do not belong in facilities which deal with mental health problems, because they are not mentally ill. They do not belong in service settings designed for intellectually handicapped non-offenders, because these services do not have appropriate staff or security, and the other persons receiving their services would be placed at risk. Finally, he writes that "programs available in the correctional setting are totally inadequate and in many cases inappropriate for application to retarded persons" (p. 62).

4. The community

Not surprisingly, many authorities hold that the best context in which to offer

habilitative services is the community (Santamour & West, 1982, (p. 23). Hayes and Hayes (1988) stress the importance of maintaining (or in some cases building) the connection between the offender and ordinary community and family supports. They believe the setting which best satisfies the requirements of both security and habilitation are

Community-based hostels and "half-way" accommodation, staffed by custodial personnel expert in the field of protection both for the vulnerable or ill offender and the community (p. 1192).

However, as Reed (1989) points out, if the person with an intellectual handicap has been convicted of a particularly serious offence involving violence, community placement may be unacceptable, at least to those who live in that community (p. 416). Denkowsky *et al.* (1983) reported that "one community residential program was disbanded in response to local pressure" (p. 202). There are, however, legal barriers to such discrimination.

B. Models and approaches to habilitation

Stephens (1982) compares the "justice model" of corrections with the "treatment model". The justice model concentrates on retribution, with the expectation that the painful consequences of crime will deter both the offender and other would-be offenders. The treatment model, in Stephens's words, is based on the belief "that the offender and society can best be served by changing the convicted offender from a lawbreaker to a law-abiding citizen" (p. 125).

None of the authors reviewed here would apply a strict justice model to offenders who have intellectual disabilities. The distinctions found in the literature are in different models of treatment or habilitation which are at least implicitly espoused. These various models are not as obviously in opposition to one another as are the justice and treatment models described above, although there are some quite fundamental distinctions which can be made. Some may feel that it is legitimate to pick and choose from among the habilitation models which are offered in the literature.

Certainly the model based on individualization is not mutually exclusive of any of the other models discussed here. Virtually every program described in the literature provides highly individualized treatment. According to Bright (1989), the State of Victoria, Australia, makes provision for a "Justice Plan" to be prepared for the court when a person with an intellectual disability is charged with an offence. The Justice Plan, which is drawn up by representatives of the social services administration, specifies the "services which are recommended ... to reduce the likelihood of the person committing further offences" (p. 934). Although it is not clear how the phrase "further offences" is appropriate before the individual has been tried and convicted, the basic notion of formally addressing an accused person's special needs as a person with a disability from the beginning of the process is a good one.

A more fundamental distinction in treatment approaches may be described as that between what might be described as the behavioural, the didactic, and the advocacy

models. The behavioural model is based on the belief that behaviour can be changed by arranging contingencies which will reward desired behaviour and punish unwanted behaviour. This is typically carried out by means of a "token economy" in which the person undergoing habilitation earns privileges by exhibiting desired behaviour and loses privileges by exhibiting unwanted behaviour. The person designated to carry out the treatment makes the decisions about what behaviour should be changed and what the acceptable behaviour is. The didactic model is based on the belief that a person with an intellectual disability has failed to learn important skills, and that failure has led either directly or indirectly to his or her becoming an offender. The key to habilitation, then, is to teach or otherwise assist the person to acquire those skills which will make it possible to adapt to life in the community. The advocacy model attempts to give as much control as possible over his or her situation to the person whose behaviour must change. It is based on the belief that a person will essentially habilitate himself or herself if it is demonstrated that he or she has the capability of doing so. It concentrates on helping the individual to achieve a sense of personal competence and self-determination. Any one person can hold all of the beliefs which underlie these three approaches to habilitation, and some consciously try to integrate the different approaches in their programs.

"Habilitation of MR (sic) offenders is and will continue to be guided extensively by the principles of behavioural psychology". This was the conclusion of Denkowsky, Denkowsky, and Mabli (1983, p. 200), drawn from their survey of programs (or absence of programs) in the fifty American states. Typically, such behavioural principles were being implemented in the form of a token economy, frequently linked with other "more specific interventions" (p. 200). Garcia and Steele (1988) also endorse behaviour modification: "It is clear that the successful programs for retarded offenders rely primarily on behaviour modification techniques in treatment and training" (p. 849). They maintain that reinforcement schedules are used in every state except Washington. These techniques are used primarily to help clients acquire "wanted behaviour", but there is also a "response cost" for maladaptive behaviour (p. 855).

McDaniel (1987) wrote that the fundamental task of the habilitation enterprise is to try to enhance the feeling of self-worth:

It is suggested the program do everything in its power to prevent mentally retarded offenders from feeling or appearing worthless. Because they probably come to prison feeling rejected, unimportant, and incompetent, the program should try to replace these negative feelings with positive ones in as many life areas as possible (p. 186).

Here, the word "program" must be extended to cover the entire experience of being detained. There is no point in focussing on building self-esteem during habilitation "sessions", however frequent or lengthy they may be, only to have these efforts undermined by the interactions between intellectually disabled offenders and their peers and custodians during the rest of the day. McDaniel goes on:

Clearly, the program must strive to reduce or prevent this vulnerability by building positive self-concepts and reducing the number and sources of stigma (p. 186).

Although it is difficult to conceive of traditional behaviour modification techniques as having a contribution to make to such a process, McDaniel seems to place most of his stock in that form of intervention.

The elimination of stigma must include as a major component the changing of the behaviour of other persons so that they treat the individual who has an intellectual disability with warmth and respect. Then too, true self-esteem would seem to require inculcating a notion that the person "chose" to make changes in the way he or she behaves, rather than the changes being brought about by schedules of reinforcement. There may not be mutual exclusivity between behavioural and advocacy approaches, however. Surely the best reinforcers are found in human interactions which value and support the individual.

Recently, advocacy has begun to be recognized as a critical factor in assisting persons with disabilities to take advantage of rehabilitative programs. Gelman's (1986) article describes an advocacy system for offenders with developmental handicaps. An advocate can assist an inmate to assert his or her own views about what services are most needed and appropriate. Having done so, he or she can benefit from the service, but will also benefit from being treated as an individual with some right to self-determination. In addition to changing his or her behaviour, the intellectually handicapped offender can learn independence and self-respect. These are surely essential elements of real habilitation.

Jania Reed (1982) wrote about the "Offender Advocate Program" in South Carolina:

Many individuals in the criminal justice system have handicapping conditions that prevent them from asserting their rights and/or returning to the community as productive citizens. The offender advocate has initiated a process of changing attitudes and practices that for generations have ignored the legitimate needs of handicapped individuals (p. 304).

C. Program descriptions

There are several specialized habilitation programs for offenders with intellectual handicaps in the United States. South Carolina is reported to have a facility known as the Habilitation Unit for the Developmentally Disabled Offender. Deemer & Conine (1984) wrote that this unit (in which we are told that the "average participant" has an I.Q. of 55) adheres to ten "essential program elements" (pp. 30-31):

- 1) Selection of participants who have at least two "areas" of "limitations", such as self-care, capacity for learning, or social and emotional adjustment;
- 2) Initial orientation and assessment over a thirty day period;
- 3) Individual rehabilitative plan, outlining objectives and strategies for meeting them;
- 4) Special education;

- 5) Life skills training;
- 6) Adult work activity;
- 7) Counselling;
- 8) Inmate paraprofessional assistants (12 non-handicapped inmates who each share a room with a program participant and assist the handicapped inmates with their learning and work activities);
- 9) Treatment and review committee;
- 10) Release planning.

Program element number 8), inmate paraprofessional assistants, is the only item which stands out in this list as unusual. Unfortunately, Deemer and Conine do not elaborate on that point or on its perceived effectiveness.

Menolascino (1975) strongly favours specialized treatment for offenders with intellectual disability. Such an approach, through "early identification of (the offender's) emotional problems (if any) and the degree of retardation, promotes a more realistic view of his rehabilitation needs" (p. 61). He goes on to list the essential ingredients of the ideal specialized program:

Special education and vocational training, ... half-way houses ... for the transition from a correctional institution to the community, buttressed by a strengthened system of parole officers whose special training in the management of retarded offenders stresses compassion, acceptance, and hope (p. 61).

Such a system, he maintains, would capitalize on "the relationship between an individual and his environment" to produce "socially acceptable behaviour". It would have to include "prevention, advocacy, and treatment", and would "impose architectural [presumably walls and bars] and program guidelines until the individual can be helped to develop internal controls" (p. 64).

Reed (1989) is enthusiastic about the Georgia program, which includes "identification, evaluation, individualized treatment plans, specialized inmate educational and work programming, and transitional follow-up services" (p.431). The identification process is elaborate, beginning with screening by means of the Culture Fair Intelligence Test, verified by the WAIS, to select those inmates scoring at or below an I.Q. of 70. There is considerable emphasis on the transition from the program to the community. The participants begin the program as residents in eleven special units on the grounds of state correctional facilities. At any one time, however, only about a quarter of those involved are so confined. Reed stresses that there is no gap between the prison progam and those in the community after release (p. 433).

Reed (1989) points out that habilitation programs for offenders with developmental

handicaps are somewhat beyond the scope of the expertise of most service systems designed for handicapped persons who are not offenders. Because of these shortcomings, some correctional authorities believe that they have an obligation to establish their own community-based programs. One such program is known as Special Offender Services, which operates in Lancaster, Pennsylvania, and is a joint effort of the state departments of probation and mental retardation. Program staff do not just intervene in the lives of the offenders who participate in the program; they also systematically train people involved in community services and in the criminal justice system to be more sensitive and supportive of the participants. Reed reported that the recidivism rate among program participants has been about four percent since its inception in 1980, "compared to a rate of around 60 percent nationally" (p. 439). More recently, Dolores Norley, a Florida attorney who is internationally respected for her work in connection with intellectual disability and criminal justice, said that this program has achieved a phenomenally low recidivism rate of less than one percent (Personal communication, November, 1990).

VI. Legal Rights to Habilitation

A. Implications of legal equality: the right to be treated differently

Allen (1968) wrote that "to receive treatment appropriate to his condition (is) an effectuation of the legal concept of 'equal justice'" (p. 27). He was anticipating by more than twenty years the ruling of the Supreme Court of Canada in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 21, that equality is not achieved simply by treating everyone the same. Governments are permitted, and may even be required, to make distinctions in their actions towards different individuals and groups, when treating everyone in the same way would result in some receiving less benefit, or indeed experiencing greater disadvantage. There is enough evidence in the literature to the effect that ordinary prison conditions cause exceptional hardship to inmates who have an intellectual disability, that it can be argued that imprisonment without special efforts to remediate such hardship amounts to a violation of their equality rights.

In the United States there have been several judicial decisions which have extended to inmates with intellectual disabilities a constitutional right to rehabilitative treatment. In the Texas class action case, Ruiz v. Estelle (1980), the trial court laid down stringent requirements. That decision went to appeal, but before the appeal was heard, the parties settled the dispute. That settlement was then endorsed by the court in a consent decree. According to Ellis and Luckasson (1985),

The consent decree required ... that defendants identify mentally retarded and other special needs prisoners, evaluate their needs, provide individualized treatment and placement plans appropriate for such prisoners' needs and assurances for their implementation (p. 482).

B. The right to be free from cruel and unusual treatment or punishment

The holdings in Ruiz were based primarily on the Eighth Amendment prohibition of "cruel and unusual punishments". The corresponding provision in section 12 of the

Canadian Charter of Rights and Freedoms is, if anything, broader in its coverage, in that it forbids the state to inflict cruel and unusual treatment as well as punishment, but it has not been considered judicially in the context of a challenge to the imprisonment of persons with intellectual disabilities. There may be some analogies to be drawn, however, from a 1989 decision that it was cruel and unusual punishment contrary to section 12 to detain a prisoner who tested positive for the presence of the AIDS virus (R. v. Downey (1989), 42 C.R.R. 286 (Ont. Dist. Ct.)). This case involved issues of the use of segregation, lack of specialized skills among correctional personnel to deal with the prisoner's needs, and adverse attitudes and actual cruelty on the part of prison staff. All of these experiences correspond to those of inmates with intellectual disabilities. The remedy ordered by the Ruiz court was that such inmates be furnished with the "unusual accommodations" they need and "adequate living conditions, protection from physical harm, and medical treatment", all of which were unavailable to them if they continued to be "forced to fit into a mold constructed for persons of average intelligence" (Ruiz, p. 1345).

An earlier U.S. judicial decision declared that inmates with intellectual disabilities "need to be, according to any humanitarian concept, identified and placed in an appropriate environment" (Alabama v. Pugh, 438 U.S. 781 (1978), reported in Reed, 1989, at p. 421). The trial judge was of the opinion that correctional authorities must

identify those inmates who, by reason of ... mental retardation, require care in facilities designed for such persons, and arrangements shall be made for the transfer of such inmates" (Pugh v. Locke, 406 F. Supp. 318, at 333).

There were, however, according to Reed, "no specifics of the kind of treatment or programming to be given to the mentally retarded ... included in the holdings" (p. 421).

C. The right to equality in education

In the United States a federal statute guarantees the right to an education at public expense to all "handicapped children" (Public Law 94-142). This law must be observed in all correctional facilities with respect to inmates under 21 years of age (McAfee & Gural, 1988, p. 6). Apparently this legal obligation rests on the state education departments, and not on the correctional authorities (Reed, 1989, p. 419). There is, of course, no such federal law in Canada, since education is under the exclusive jurisdiction of the provinces and territories. There is, however, a question as to whether section 15 of the Canadian Charter of Rights and Freedoms may have created a right to education appropriate to the needs of persons with intellectual disabilities as an "equal benefit of the law". This question has not as yet been answered by any Canadian court. A subsidiary question is whether the right would expire at age twenty-one (as in the U.S.) or when the inequality has been rectified to the extent that it is reasonably possible to do so.

The court in Ruiz v. Estelle (1980) did not go so far as to say that there was a right to educational services for inmates with intellectual disabilities who were beyond the age of 21 years. However, the Texas Department of Corrections has interpreted the consent decree to mean that there is such an entitlement. According to Cohen (1985), all mentally handicapped prisoners in Texas now receive "special education programs, occupational therapy, and coping skills development", with incoming prisoners "uniformly tested and

screened, and, if retarded, ... placed in an Intellectually Impaired Offender Program and housed in special units" (p. 72).

In Guthrie v. Evans, 93 F.R.D. 390 (1981), a consent decree stipulated that there was a right to rehabilitative educational services for prisoners with intellectual handicaps in the Georgia prison system, regardless of age, under the combined impact of federal Public Law 94-142; Title V, Section 504 of the federal Rehabilitation Act of 1973, and state legislation guaranteeing educational rights. A year later, the United States Supreme Court ruled in Youngberg v. Romeo, 457 U.S. 307 (1982) that the Fourteenth Amendment right to equal protection of the laws meant that all persons in confinement, whether criminal or civil,

**had constitutionally protected liberty interests (guaranteeing them)
reasonably safe conditions of confinement, freedom from unreasonable bodily
restraints, and such minimally adequate training as reasonably might be
required by these interests (p. 307).**

A more recent New York State decision, Soule v. Cuomo, No. 85-CV-596 (N.D.N.Y. July 15, 1986), held that "mentally retarded inmates are entitled to participate in educational programs", but "stopped short of holding that any particular type of educational programming for retarded inmates was required based on the liberty interest" (Reed, 1989, p. 428). Reed (1989) summed up the impact of the various judicial pronouncements as assuring the

... humanitarian requirement that mentally retarded offenders are entitled to specialized treatment designed to protect their vulnerability and to fulfill the special needs that arise from their handicap (p. 429).

It was her view that "the prison programs in the states of Georgia and Texas are the best illustrations of the relationships among the law, mentally retarded offender rights, and programs" (p. 430).

Offenders identified as developmentally handicapped may be at special risk of receiving indeterminate sentences as "dangerous offenders". This option is available to the courts through s. 753 of the Criminal Code of Canada. Santamour and West (1978), though they approve of the courts having the authority to sentence offenders to serve indefinite periods of time, argue that there should be a requirement that each such case be reviewed periodically in order to ensure that rehabilitative services are being provided, and to hear evidence as to whether they are having the desired effect (p. 182). Mayer (1989) argues convincingly that "lack of rehabilitation is a constitutional violation ... where an inmate has been indefinitely incarcerated until he can show evidence of his rehabilitation" (p. 271). For other reasons, the inmate with special needs who is serving a fixed term ought to be recognized as having a right to habilitation so that he or she will be as well prepared as possible for release into the community.

VII. The Need for Research into the Existing Canadian Situation and Program Development Requirements

The foregoing information is revealing and in many ways disturbing. On the basis of the published material, we can form certain fairly reliable general conclusions about the unacceptable social and personal cost of incarcerating offenders who have an intellectual disability. By far the greater part of the literature which has here been surveyed, however, was written by researchers in other countries, particularly the United States, about the situations which prevail in those countries. There is a serious dearth of information about the circumstances of prisoners with intellectual disabilities in this country and about the services which are available to them.

Needham and Hart (1991), in their survey of offender rehabilitation programs in Canada, prepared a 46-page directory of "organizations, facilities, and programs" identified in the process of organizing and conducting regional workshops in 22 centres across the country in 1990. Of the 240 listings in the directory, only one, Independent Counselling Enterprises of Edmonton, listed "mentally handicapped" persons among its target groups. Although these were all rehabilitation agencies outside of the provincial or federal prison systems, the fact that the needs of offenders with intellectual disabilities are seemingly so ignored in such community settings leads to serious questions about the extent to which those needs are being addressed within the nation's prisons, as well.

It is the purpose of this final chapter to propose that the answers to those questions should be sought in a systematic manner, and with as little delay as possible. The research that is required to provide such answers can be categorized under the headings of (a) nature and magnitude of the problem in Canada, (b) existing service options which are proving to be the most effective (both in Canada and abroad), (c) entitlement of offenders with intellectual disabilities to habilitation under Canadian law, and (d) improvements in the quality and availability of services required to fulfill the legal and moral obligations that Canada and the provinces and territories owe them.

A. Nature and magnitude of the problem in Canada

A primary research requirement is to ascertain what steps are currently being taken to identify offenders with intellectual disabilities as they enter the correctional system. Presumably this exercise will reveal that some data are available, such as those presented by Dubienski in relation to Stoney Mountain Penitentiary in 1973. It will also be necessary to determine whether there is sufficient consistency of identification procedures and instruments to make it possible to construct national profiles and to compare statistics and program efforts from one region to another.

In addition to identification, the research will enquire into the data maintained by prison classification offices on types of offences committed by persons with intellectual disabilities, length of sentences, time actually served, indicators of the impact of the prison experience, habilitation programs offered, and pre-release planning. It will also be important to gather information about the backgrounds of such offenders: what services they received, if any, before commission of a crime and between apprehension and sentencing. Other pre-sentence experiences, particularly with the criminal justice system,

should also be examined.

Special attention ought to be given to whether these inmates had resided in non-penal institutions and whether their relocation to the community had any role to play in their subsequent criminal activity. The research should also consider the involvement of Native offenders who have intellectual disabilities. Outcome data, such as parole applications and grants, quality and availability of community services after release, and recidivism rates, will also be very important to obtain.

B. Service options

This phase of the research will essentially ask what is being done about the problems being faced and posed by prison inmates who have intellectual disabilities. The foregoing literature review identified some programs in the United States and Australia which show promise of a more humane and effective way to treat such persons, but the literature is not especially generous with details of what is done in such programs. Contacts will have to be made with those who designed them and those who are now operating them to determine more precisely what their components are and whether they have evolved since appearing in the literature. Conceivably there will be new programs to which researchers can be directed which have not been reported in the journals.

No reference was found in the literature to any existing programs designed for intellectually disabled inmates while incarcerated in Canadian prisons. It will be important to focus this phase of the research both on the existing Canadian situation and on approaches being taken in other countries. It will also be useful to examine and compare programs in correctional facilities with those offered in the community as alternatives to imprisonment or as follow-up services after release.

As well as identifying those services which are offered specifically to inmates with intellectual disability, the research must examine the ways in which the effectiveness of such programs is being measured and reported, and the interactions between program and policy in correctional services.

C. Entitlement to habilitation under Canadian law

The legal precedents arising from litigation involving the rights of inmates with intellectual and other disabilities examined in Chapter VI were all American. It was suggested that provisions in the Canadian Charter of Rights and Freedoms which parallel certain amendments to the United States Constitution could mean that similar results would be obtained in the Canadian courts. However, such predictions need to be examined more critically in the light of the specific wording of the Charter and of judicial interpretations emerging from Canadian courts. It is also necessary to consider the implications of the statute law of Canada and the provinces and territories, especially human rights legislation, which now includes prohibition of discrimination on the grounds of mental handicap in all Canadian jurisdictions. This legal research will assist government representatives to assess the obligations owed by law to individuals with intellectual disabilities who come within the criminal justice system.

D. Program development requirements

The final phase of the research which is urgently needed in Canada will be to identify the changes that are necessary in order to bring the quality and quantity of services available to offenders with intellectual disabilities up to the standards dictated by the law and by the collective social conscience of the nation. Such a prescription to cure the ills which currently exist in this area will be based on the legal interpretations of what people are entitled to and on objective appraisals of the efficacy of the evolving service options. It will also involve contributions from citizens who have special qualifications to pronounce on the needs of persons who have intellectual disabilities. Such qualification may arise through professional training and experience or through committed advocacy on behalf of people who have been devalued. More particularly, it exists among people who have themselves had the experience of being labelled mentally handicapped. Such people have helped non-governmental associations to recognize better pathways to justice, and they can also help governments to do the same.

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