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Legal Aspects of Mental Retardation

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THE CONSTITUTIONAL PRINCIPLE

In 1968 we will be celebrating the centenary of the adoption of the Fourteenth Amendment to the Constitution of the United States, whose first section provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sir Maurice Amos devoted one of six *Lectures on the American Constitution*, delivered in 1938, to the Fourteenth Amendment, and particularly to the "due process" clause that he considered at that time to be pre-eminent (Amos, 1938, pp. 99-122). This pre-eminence rested on the extent to which "due process" was invoked in the period between 1890 and 1940 and on the power of the interpretations given to it by the Supreme Court. For example, he notes that in a case involving freedom of contract, Justice Rufus Peckham, speaking for the Court, enunciated the principle that the liberty mentioned in the "due process" clause means

not only the right of the citizen to be free from the mere physical restraint of the person, as by incarceration, but the term is deemed to embrace the

right of the citizen to be free in the enjoyment of all his faculties; to be free to enjoy them in all lawful ways; to work and live where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned (Amos, 1938, pp. 113-114).

H. E. Willis, a contemporary of Sir Maurice, opined that "due process of law, better than any other Constitutional guarantee, gives the Supreme Court the opportunity to draw the line which ought to be drawn between personal liberty and social control" (Amos, 1938, p. 101).

The applicability of the principle of "due process" to laws providing for involuntary admission (commitment) of the mentally ill has long occupied the attention of state courts and of jurists, administrators, and psychiatrists. Indeed, in New York State a recent report by a special committee to study commitment procedures was published under the title, *Mental Illness and Due Process* (Association of the Bar of the City of New York, 1962). Another measure of the extent to which attention has focused on the "due process" aspect of management of the mentally ill or mentally retarded is found in the recent massive study by the American Bar Foundation, *The Mentally Disabled and the Law* (Lindman and McIntyre, 1961), approximately half of whose 400-odd pages are devoted to the procedures for and legal implications of admission and retention in mental institutions. Debate continues and it still is not agreed, for example, that notice and a hearing are essential parts of "due process" when liberty is curtailed through involuntary commitment.

Since 1950 the emphasis in appeals to the United States Supreme Court that invoke the Fourteenth Amendment has shifted from "due process" to "equal protection." The best-known case is, of course, school desegregation, but there are others, such as the Gideon case, in which it was held that "equal protection" means equal opportunity to be represented by counsel in a trial for a felony, and that an accused who cannot afford an attorney must be supplied with one by the court. This new focus has not, however, been applied with the same zeal to the rights of the mentally disabled, especially those with long-term disability.

For the vast majority of the retarded the issue of "institutionalization," for example, is merely an instance of the more fundamental question of choice of treatment and choice of residence and the locus of legal authority to make such choices. The preoccupation with "due process" in relation to physical restraint, such as incarceration, has been at the expense of attention to the right of the mentally retarded person "to be free in the enjoyment of his faculties, . . . free to use them in all lawful ways" and to receive the kind of protection that maximizes this freedom. It is time that, as is already being done in other fields, we examine more closely the impli-

cations of the principle of "equal protection" in our legal dealings with the mentally retarded.

The Constitution of the United States has validity and vitality today largely because it contains statements of principles that are recognized as having wide applicability and credence in today's world. The general concept of "equal protection" is readily accepted—the concept that the law itself must not distinguish arbitrarily between one man and another and that its administration and application must be equally impartial; this concept is also expressly incorporated in the California Constitution.

It has been said that the constitutional mandate of equal protection requires that "all persons . . . shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed" (Smith, 1955, pp. 105–106). It is easy to see that circumstances and conditions are never precisely the same and, indeed, the major body of case law revolves around an analysis of what is "essentially" alike or comparable in two manifestly different situations. Moreover, even in comparable situations, the principle of "equality before the law" is, in practice, meaningless unless the persons to whom it is applied are themselves substantially equal in their ability to discharge duties imposed and to utilize rights accorded by the law in question. As the *Report of the Task Force on the Law* of the President's Panel on Mental Retardation notes,

Usually the law takes for granted a minimum "normal" set of personal characteristics in the population. But it must have means for recognizing when and where that assumption is invalid. It must also say what is to be done in a case where the departure from the norm is very great. It is in these areas that mental disability presents its greatest difficulty for the law (President's Panel, 1963, p. 1).

There is, of course, nothing novel in the idea that all persons are not, in fact, equal in ability to comply with the law or to take advantage of the rights it gives. What is new (or undergoing renewal) is the determination to find and use social instrumentalities to achieve a better balance. How good must such a balance be and how much effort is justified to achieve it? An attorney with many years of experience in private practice and public affairs has said,

. . . in areas where law has undertaken, traditionally, and necessarily under the Constitution, to deal with people on an objectively equal basis it has achieved this goal through the age old science of classification To classify in the strict sense, you start by identifying certain criteria as the basis for your determinations. These criteria must bear a rational and logical relation to the primary objective of the law or program. Then as you proceed to apply these criteria in individual cases, you will identify, in terms of these criteria, a group whose treatment under the law or program

will faithfully carry out the authorized objective. The crux of this method lies in comparing the criteria of exclusion or inclusion with the actual objectives of the law or program (Smith, 1955, pp. 110-111).

This leads us to the concept of a *legally significant difference*. A legally significant difference must be relevant to the objectives of the law in question, substantial, and defined by means of objective criteria. It is clear that we cannot have objectivity, let alone a practical system for administering justice, if every gradation of difference must be considered legally significant. Thus, any practical system of classification tends to make a continuum into a step-wise system. The question is how big may the steps be, how much latitude may be allowed between the objective criterion used and the actual characteristic that is relevant to the purpose of the law in question.

THE PRACTICAL ISSUES—EQUALITY VERSUS INDIVIDUAL DIFFERENCES

Age, a convenient objective index because it generally is verifiable without expert testimony or detailed individual examination, is a common criterion for classification. It is, for example, usually used as a rough measure of the equality of individuals and hence their equal right to perform certain specific functions. It is accepted that there are differences between a seven-year-old and a twenty-seven-year-old that are relevant to such issues as the right to drive a car, to marry, to make contracts, to decide whether or not he will submit himself to instruction, and so on. It is also recognized that the difference between a given seventeen-year-old and a given eighteen-year-old may not be significant; but since the legal discrimination is temporary and not usually far-reaching in its serious effects, precision in classification is permitted to yield to convenience. Classification by age is widely accepted, not only with respect to minority, but also with respect to "senior citizen" status, involving eligibility for social security and special welfare benefits.

The health field offers many parallels to these legal approximations. Only some of the Americans who travel abroad are not immune to smallpox, yet the Public Health Service requires that all be vaccinated within three years prior to re-entry. The risks of over-vaccination are considered negligible and the price in vaccine and time is judged insubstantial relative to the alternative of determining by other means who is and who is not immune. On the other hand, where the possible consequences are serious, more elaborate discriminatory procedures are justified and, indeed, required. Many states have adopted procedures for the mass screening of newborn infants for abnormally high blood-phenylalanine levels. However,

before a baby found "positive" by the screening method is placed on a low phenylalanine diet, more elaborate individual diagnostic procedures are employed. This is justified because of the substantial consequences (medical and financial) of placing a baby without phenylketonuria on the diet.

In the legal field, as in the medical, it is desirable to have simple and easily administered criteria that do not require the intervention of experts. Yet, the approximation or substitution of criteria (such as age for maturity or mental age for social competence) can be predicated on false assumptions and can lead to error and injustice. Where much is at stake in a critical decision, the chance of error must be narrowed to the minimum, even at some cost. In our society, which continues to respect the individual, such costs must be incurred even where the consequences of error are serious only to a single human being. It may be said that the court hearing or trial is the legal equivalent of the full and detailed diagnostic work-up that the physician undertakes only when the consequences of an incorrect judgment are great enough to warrant it. Some forms of mental retardation do have socio-legal consequences that are so serious for the affected individual as to justify this kind of scrutiny.

There is no law for whose objectives the differential classification of "mentally retarded" per se is significant. Contrary to popular opinion, there is no legal need for a universal statutory definition of mental retardation. On the other hand, there are a number of subgroups among the "mentally retarded," as clinically defined, whose differences from the general population are substantial, relevant to specific legal objectives, and capable of being established by reasonably objective criteria. Such groups should be defined in the statutes in terms specific to the purposes of a particular law. For example, the California education code defines "mentally retarded" to mean "all minors who because of retarded intellectual development, as determined by individual psychological examination, are incapable of being educated efficiently and profitably through ordinary classroom instruction" (California Education Code, Section 6901). This definition establishes a legally significant difference.

Many other legal provisions should and do differentially affect particular subclassifications of the mentally retarded, such as retarded adults incapable of productive work, or retarded children up for adoption. In 1964, the California Study Commission on Mental Retardation commissioned a survey of such laws in California (California Study Commission on Mental Retardation, 1964). Nineteen separate state codes were searched and more than twenty major topics covered. Some relate to programs; some to rights of the individual in relation to marriage, voting rights, insurance, sterilization, and defense against criminal charges. It would take a book to cover these topics adequately; therefore the remainder of this chapter will concentrate on one area, the general continuing protection and maintenance of an adult incapacitated by mental retardation.

Under this heading, three subtopics will be considered: incompetence, guardianship, and maintenance. These are of fundamental importance to any retarded adult whose condition is such as to impair seriously his ability to make constructive use of the power of choice, and to command for himself the "equal protection" that the Constitution guarantees to "all persons born or naturalized in the United States."

PROVISIONS RELATING TO GUARDIANSHIP AND INCOMPETENCE IN CALIFORNIA LAW

In California, as in most other states, guardianship is a legal relationship between a competent adult and a minor child, or between a competent adult and another adult who has been adjudicated incompetent. Under the California Probate Code, the term "incompetent" applies to any person who is unable, for any reason, to manage properly and take care of himself or his property unassisted, and by reason thereof is likely to be deceived (California Probate Code, Section 1460). A minor is anyone under age twenty-one. It follows that a mentally retarded child is protected formally by general laws, and one need not prove mental retardation or incompetence in order to secure for him the protection of guardianship. Section 1440 of the Probate Code permits the court to appoint a guardian for the person and/or estate of a minor "whenever it appears necessary or convenient," on petition of a relative or other person. The advantage of using such a provision for a retarded child when the natural guardianship of parents fails during childhood is that it avoids a premature determination of incompetence.

The Welfare and Institutions Code defines a mentally deficient person as one

- * who is not psychotic but who is so mentally retarded from infancy or before reaching maturity that he is incapable of managing himself or his affairs independently, with ordinary prudence, or being taught to do so, and who requires supervision, control, and care for his own welfare or for the welfare of others, or for the welfare of the community (California Welfare and Institutions Code, Section 5250).

When applied to an adult, this definition is a good working description of incompetence arising from mental retardation; it suggests the need for guardianship. It does not necessarily imply need for hospitalization. It is significant, however, that its location in the code indicates that it was drafted to delineate those who may be admitted (or committed) to California institutions for the retarded. In the past, institutionalization has been the poor man's guardianship. And where lifetime supervision and maintenance are needed, 95 per cent of us are poor men.

The concept of the institution as the primary resource for care and protection of the dependent retarded individual is reinforced by Sections 227 a and b of the Civil Code. These provide that when adoptive parents seek and secure vacation of an adoption proceeding on the grounds that the child they adopted had a pre-existing condition of "feble-mindedness," then the court *shall direct* the district attorney to have the child committed to a state institution for the mentally deficient. No provision is inclined for the appointment of a personal guardian to replace the parents whom such a child has twice lost or to secure means for community placement other than through the machinery of the institution. In theory, personal guardianship of such a child is not precluded by law, but the language of the Probate Code (Sections 1440, 1461, also 1402-1403) suggests that this is unlikely to happen for this or any other child without an estate unless someone who wants to be guardian will petition the court to act. Parents who wish to assure that any minor child will have a guardian in the event of their death will be well advised to so provide in their wills.

California's laws pertaining to general private guardianship of the incompetent adult already cover certain essential formal provisions not necessarily in use in all states. These include (in addition to the protections of "due process") the option to separate guardianship of the person from guardianship of the estate, with corporations, such as banks, being eligible only for the latter (California Probate Code, Section 480). Thus, an incompetent may have one guardian performing either or both functions or two guardians, each performing one function in complementary fashion. There is an express provision for restoration to competency at any point at which the ward develops ability to act for himself. Testamentary guardianship, through which a parent or prior guardian designates by will or deed that person preferred to succeed in the role of guardian, is recognized in California with respect to incompetents as well as children (California Probate Code, Sections 1462, 1402). It weighs heavily with but is not binding on the court. (Such an appointment, when made on behalf of an adult, must have been preceded at some time by an adjudication of incompetence.) There is no limitation on the power of any court to appoint a guardian to protect the interests of an incompetent person in a particular court action (California Probate Code, Section 1607). Admission to a mental institution does not constitute an automatic adjudication of incompetence, although, as indicated before, the definition of eligibility for admission to a state institution for the mentally deficient, if scrupulously observed, would certainly limit admission to those who are incompetent in fact, if not in law.

The option of providing only a guardian of property makes available one form of the "limited guardianship" that the Task Force on the Law saw as a desirable part of the legal spectrum (President's Panel, 1963, p. 25). It can be a useful device when a person of marginal ability has financial assets

that are beyond his capacity to manage. This occasionally happens to the mentally retarded, although with foresight on the part of parents such substantial resources can be diverted into trust arrangements under which title does not pass directly to the retarded person at any time.

Another form of *de facto* guardianship appears to be formally available in California law under the name of "conservatorship" (California Probate Code, Sections 1701ff, 1957). In most other states where this term is used, it applies only to property; but in California a "conservator" of person and/or property can be appointed by the court for an incompetent person, whether committed to an institution or not, or "for any other person incapable of caring for his person and/or property."

Although many states provide public guardianship for minors left without parents or appropriate private guardians, California is among an apparent minority of states that also provide public guardianship of incompetent adults in certain circumstances. Under a law originating twenty years ago, county governing bodies may establish such salaried positions. The official so designated *may accept* appointment as guardian of the person or estate, or both, of a minor or incompetent adult whose financial assets are small; he *may apply* for appointment as guardian of the person or estate of any county resident who is in a mental institution or is receiving public aid where it appears that guardianship is needed (California Welfare and Institutions Code, Sections 5175ff). I. Weissman *et al.* (1949, p. 57) found the Los Angeles county appointee was indeed managing affairs for and representing incompetent residents in business and legal matters. As pressures have increased, however, the public guardians' clientele has become more restricted (Welfare Planning Council, 1965, p. 29).

When a mental patient has substantial property, the Department of Mental Hygiene is more likely to be appointed as guardian of the estate, in the absence of any other guardian (California Welfare and Institutions Code, Section 6660). A large staff now is engaged within the Department in garnering and conserving the assets of patients. The objective of protecting the patient's interest is joined here with the objective of preserving the state's stake in the patient's liability for the cost of his care. Otherwise it would seem more reasonable to assign management of substantial estates to banks and fiduciary corporations. The members of the recent Mental Retardation Joint Agencies Project in Los Angeles recommended that the interests of less affluent patients also be protected and that the Department "develop procedures for the collection and administration of benefits that may be due patients but which are too small to be handled by the Guardianship Division." Amounts under \$500 are reserved for the patient's personal use without attachment for maintenance costs (Welfare Planning Council, 1965, p. 61).

Recently, in California as in other states, there has been increasing uneasiness about the propriety of nonjudicial appointment of "representa-

live payees" to receive social-security benefits or public-assistance payments on behalf of certain aged or disabled beneficiaries where the beneficiary is deemed (administratively) to be incapable of handling these small sums wisely and in his own best interest. In the absence of court review, such action can well be construed as denial of "due process." In California (as in a number of other states), this question has resulted in recent explicit statutory provision that a guardian be appointed for any applicant for, or recipient of, public social services who is incapable of managing his own affairs (California Welfare and Institutions Code, Section 103.9, 1963). This would, in theory, give some protection to the not inconsiderable number of adult retarded who are receiving disability assistance.

The foregoing eclectic description of the formal side of California law as it pertains to guardianship demonstrates that this state, at least, does not lack legislation. Yet it cannot be said to assure that those so identified receive the services required, to say nothing of those who fail to penetrate the barriers to identification. In the words of the state Study Commission:

Singly or together, however, these sections do not bring about a service which is available to every retarded person who needs it, nor do the statutes provide for coordination of the services needed by each individual. The Study Commission believes that public guardianship service should be available for every retarded person who needs it. . . . For mentally retarded persons, the greatest need on a continuing basis will be for someone equipped to carry out social management (Study Commission on Mental Retardation, 1965, p. 77).

In the closing hours of the 1965 session, the California Legislature enacted one of the alternatives suggested by the Commission when it added a new Section 416 to the Health and Safety Code. This will permit the Director of Public Health to accept testamentary guardianship of a mentally retarded person on the death of the parents or (other) guardian, if the state has assumed responsibility for providing care for the retarded person through one of the proposed new "regional centers." The purpose of this guardianship is to carry out recommendations of the center and to assure "continuity of care." New Jersey also enacted a new law requiring the Commissioner of Institutions and Agencies to provide "guardianship services" to selected mentally deficient adults in the absence of private guardians. (New Jersey Commission on Mental Health, 1961, p. 67).

Past history has indicated that adding one more public official to the list already entitled to accept guardianship responsibilities will scarcely go to the heart of the problem unless its true character is better understood and a new and more appropriate approach used. Since the issue of responsibility for continuing protection and supervision of the mentally retarded is common in most states, it may be reviewed in more general terms.

**GUARDIANSHIP OF THE PERSON—
LEGAL FICTION OR SOCIAL ASSET?**

Guardianship is an ancient institution. It was devised originally for the benefit of the mentally deficient and was later extended to all who are incompetent from whatever cause. Because we have entered an era in which recovery from mental illness often is relatively fast, we frequently can avoid the legal implications of the temporary incompetence that may be associated with some forms of mental illness. On the other hand, mental deficiency carries with it a prognosis of continuing incompetence. This is one of several implications of mental deficiency that differentiates it from mental illness. Since guardianship today is becoming, on the whole, less needed for the mentally ill and more widely needed for certain of the retarded, it is time to recast our concept of guardianship with the characteristics of the mentally deficient clearly in mind.

1. The condition of mental deficiency is not one with a rapid onset.
2. Because mental deficiency appears during minority, diagnosis need not be coupled with any legal emergency related to immediate care and control.
3. Predictions about the degree of impairment in ability to handle oneself and one's affairs as an adult frequently are unreliable in a young child, but can be made with greater confidence in late adolescence, especially when there has been a consistent history of retarded mental development and demonstrated social inadequacy.
4. Since the condition originates in childhood, the affected person will have had no experience in discharging adult responsibilities and, in particular, no recollection of the enjoyment of the rights and status of an adult. He is thus more likely to submit to an imposed authority and less likely to protest infringement of his rights.
5. The social inadequacies of the mentally deficient person are likely to be generalized and diffuse in contrast to the more focal irrationalities or delusions characteristic of some forms of mental illness.
6. The mentally deficient are less likely than the mentally ill to own property or have substantial financial resources, since they have no history of well-remunerated employment, seldom marry, and, if their parents are well advised, seldom receive direct gifts or legacies.
7. Because of the early origin and longer duration of his condition, the mentally deficient individual is less likely than other incompetent people to have close relatives (spouse, children, parents) who can continue to be concerned about his welfare as he himself ages.

It is, of course, recognized that certain forms of childhood psychosis give rise to the same conditions.

Less than a third of the children who might be identified for one purpose or another as mentally retarded grow up to be mentally deficient adults. A marginally disabled group is composed of those whose ability (as adults) to handle the ordinary decisions of daily living and the modest sums they may earn appears sufficient to justify leaving these responsibilities in their hands, preferably supported by good counsel from a capable relative or qualified agency. Although retarded, these persons would not be considered mentally deficient.

From the point of view of education and planning ahead, prognostic indicators in childhood and adolescence are important. From a strictly legal point of view, it is usually immaterial whether a child is considered mentally deficient or not, as long as he is a minor, since long-term incapacity to manage one's affairs has legal significance primarily for the adult. The natural guardianship of parents is to be preferred for the minor retarded child, as for the normal child. A judicial substitution of another guardian, public or private, should be made in either case only when circumstances make it necessary to replace parents in this function. Where guardianship of the person of one child rests in two distinct and independent agents—for example, a parent and a public guardian—a basic conflict in authority arises. Such a conflict may remain latent, as was the case in many instances under the Minnesota guardianship program, but should be avoided (Thomson, 1963, p. 176). Those under parental guardianship should have equal access to other services, public and private, including counseling, care outside the home, and continuing evaluation, as do those under judicially created private or public guardianship. The World Health Organization Joint Expert Committee has emphasized this point (World Health Organization, 1954, p. 39).

Since all children enjoy the legal protections of minority, it is fortunately possible, in most instances, to postpone giving judicial recognition to mental disability until late adolescence, when predictions of social viability can be made with greater accuracy. Recent experiments with voluntary admission of retarded children to California institutions rest on this view. However, the legal problems associated with attainment of majority must be understood and anticipated. An adult must be presumed legally capable of directing his own life unless and until adjudicated otherwise. It is sound to approach the years of chronologic maturity with this presumption, but it is unsound not to challenge it in the face of contrary evidence, whether out of delicacy, inertia, or misplaced notions about individual liberty.

It is true that many mentally deficient adults live for years as dependent or semidependent members of their families, without the formal protection of guardianship. Parents frequently assume the functions of guardian of the adult person without any judicial procedure. This omission produces an ambiguous situation and leaves the retarded person vulnerable on two counts. In the first place, there is a hazard in encouraging the assumption by

one adult of an attitude of control over another, except when the justification for this relationship has been impartially reviewed and sanctioned and when, in fact, the sanctioning authority has considered not only the need for protection but the qualifications of the protector. Secondly, by postponing the formal enunciation of the need for such protection, parents leave the retarded adult exposed at such time as the informal parental supervision is interrupted. By seeking judicial recognition of the retarded adult's incapacity and securing appointment of himself or another suitable person as guardian of the person of the adult and establishing a relationship with a person or agency that can provide at least transitional continuity in an emergency, the parent can obviate these situations.

Over the years there has been a great reluctance on the part of parents and others to institute proceedings for the determination of incompetence and appointment of a guardian for a variety of reasons. Where substantial property must be managed, the question cannot be evaded, and, partly for this reason, the property issue has largely obscured the primacy of guardianship of the person as a positive protection. Since the retarded less frequently acquire wealth, guardianship is less frequently sought for those among them who are indeed mentally deficient. Guardianship of the person, no less than of the property, requires a commitment of time, thought, and action (not always conveniently timed) on the part of the guardian. If the ward lacks property, private guardianship is a labor of love, a fact that again militates against its use.

Another deterrent arises from the antiquity of the legal concept of incompetence and accretions of use in many jurisdictions. As the Bar Foundation study revealed, the prohibitions associated with incompetence are by no means clearly defined (Lindman and McIntyre, 1961, Chapter 8). Perhaps it was partly to clear the slate and start fresh that California enacted its conservatorship law alluded to earlier, since the conditions in which it may be applied appear to be substantially the same as those that define incompetence, and the conservator's powers are at least as great as a guardian's. Nevertheless, the Los Angeles study group thought conservatorship was to be preferred as a way of providing supervision and guidance for the retarded adult, so that he "may lead as normal a life as possible" (Welfare Planning Council, 1965, p. 60). It should be stressed, however, that the appointment of a conservator may follow only after a judicial determination that the retarded person is in need of such supervision. Thus the nuisance and embarrassment are not likely to be eliminated by a change of name.

All these factors tend to hide the positive uses of guardianship for the individual who does in fact need it. As Smith has observed,

. . . the stigma attached to the finding of incompetency upon which the service of guardianship has been conditioned, and indeed the nature of the

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proceeding itself, have all combined to blind us to the role which this legal institution is designed to play. The emphasis has been upon the legal establishment and declaration of incompetency and not upon maintaining legal capacity and providing the individual with the means of expression and protection (through guardianship) (Smith, 1955, p. 137).

Attitudes and "the nature of the proceeding itself" can be considerably improved, but efforts to short cut "due process" by formalizing or eliminating the careful review of the circumstances in each individual case are scarcely the answer. Although incompetence creates a condition analogous to minority, it is not so readily verified. The objective criteria are not simple or easily applied. Moreover, since for the individual in question the consequences of a wrong decision (either way) are serious, it is necessary to give adequate attention, including expert evaluation of social as well as medical factors, to determinations in individual cases. Since a modification in the exercise of liberty is involved, "due process" must be observed.

The dilemma of "due process" in this instance is twofold. It shares in the practical difficulty that arises whenever a significant number of people must be admitted to a legal "class" by criteria that are not easily verified. This situation is additionally complicated by the constitutional requirement that an adult may not be deprived of his right to run his own life or handle his own funds, small or large, except with the sanction of the courts. With the increasing number of aging persons, some proportion of whom do need protective services, the dilemma of providing meaningful court review without unreasonable expense and burden on the courts is receiving more attention, as shown by the provisions on protective payments added to the Social Security Act in 1965 by Public Law 89-97. The issue is equally important for the adult mentally deficient; for although their number is smaller, it is growing; and the period of their dependency, both social and economic, is more prolonged.

Even "due process" does not dispose of the problem of "maintaining legal capacity and providing the individual with the means of expression and protection." An attorney can, of course, represent an individual, including an incompetent one, in legal matters. A good trust company, if appointed as either trustee or guardian of the property of an incompetent usually will discharge its duties faithfully and efficiently. It is through guardianship of the person, however, that the individual achieves at least a substitute means of personal expression. The guardian makes the kinds of personal decisions on behalf of his ward that the ward ordinarily would make for himself, including choice of residence (halfway house, family care, state hospital), choice of physician, and the like. One of the most important responsibilities of a guardian of the person of a mentally deficient individual is to decide how much to consider the ward's apparent wishes and how much to permit him to choose for himself. This same important kind of

geon who amputates and fits the prosthesis, but does not assume any responsibility for the patient's rehabilitation following surgery.

The social worker or agency and even the physician working with the retarded adult and his family may, on the other hand, err in the opposite direction, applying "rehabilitation" without first taking care of the "surgery." The modern social worker has been trained to shy away from the use of "authority" and does not always recognize that the assumption of responsibility for managing the life of another adult person without a clear authority vested in law can be subversive to the structure of a free society. Moreover, when no one person has been assigned such authority, there can well be conflict when several informally assume it. "Going to court" is like "going under the knife"; no one approaches it lightly, but there are times when it is irresponsible to avoid the issue.

Parents of mentally deficient children, confronted with the question, "What will happen to my child when I die?" may tend to think of guardianship in more positive terms, but terms that too often revolve around "pie in the sky." Some want the authority of "guardianship" without judicial intervention or sanction. They want to determine for themselves whether their adult child should remain a child at law. They may also confuse "guardianship" with income maintenance. Many parents are seeking some sort of device that will guarantee an adequate lifetime income for their retarded son or daughter, regardless of inflation or life duration. Their expectations that such an income can be bought without pain by the parent earning \$15,000 a year or less could be realized only by insurance companies that are either magicians or philanthropists. Professional people who do not do the arithmetic often foster these misconceptions about the fiscal realities.

These financial concerns are real and almost universal. It is likely that less than 5 per cent of families can set up, through insurance or investment or trust or any other mechanism, a life income for their retarded son or daughter that confidently can be expected to meet reasonable expenses without reliance on outside sources. A partial approach to this problem has been made under the social-security system, but its deficits have to be made up out of permanent- and total-disability assistance, old-age assistance, or public-institution appropriations for all but a few who survive immediate relatives. Burdens so great that no insurance company will underwrite them cannot be sustained except by public subsidy. One day we may arrive at ways of recognizing this that are less painful to parents than at present. It only makes it worse that the anxiety about reasonable maintenance frequently distracts the attention of parents (and their attorneys) from an even more fundamental issue, even less recognized by society—the basic issue of guardianship: who is going to make important week-by-week or year-by-year decisions on behalf of the mentally deficient person?

Parents also sometimes confuse guardianship with trusteeship. Present laws in most states permit the placing of money in trust to be used for the

benefit of designated beneficiaries (whether retarded or not) under circumstances delineated by the person establishing the trust. Such funds are not subject to the same liens or restrictions in management as might be placed against property that the beneficiary owns in his own name, and for which a guardian of the estate will have to be named. When parents are in a position to place sufficient funds in trust, a bank can be named as trustee with instructions to make available part or all of the proceeds to the guardian of the person, to be used by the guardian to implement his discretionary decisions. This may be well worth doing even when the funds available fall considerably short of assuring full maintenance. However, when funds are small, costs of establishing an individual trust are disproportionately high.

One solution to this problem, a kind of communal trust fund, has been initiated by the Massachusetts Association for Retarded Children. It is called the MARC Retardate Trust. This is a corporate body with a self-perpetuating board of trustees interlocked with the Board of MARC itself. A parent may become a "mutual member" by paying an annual fee of \$5.00 or by a lump sum payment of \$1,000 or a bequest of \$2,000. In return the Trust assumes (on the parent's death) a benevolent interest in the welfare of the retarded person who becomes a "participant." A representative of the Trust will keep track of him, so to speak, visit him, and advise relatives. If the total resources permit, the Trustees may at their discretion make some modest expenditures on the participant's behalf out of the Trust's accrued pooled funds. In addition, they will manage on an individual basis, for the benefit of a named beneficiary, any amount in excess of \$10,000. The MARC Retardate Trust does not, however, undertake to act as guardian either of the person or property of a mentally deficient person, although it will offer advice and consultation to private individuals or banks who may be so named. Established in 1960, the MARC Retardate Trust has now accumulated sufficient funds to warrant the part-time employment of a person with social work skills to carry out the responsibilities it has assumed vis-à-vis the retarded sons or daughters of deceased "mutual members." These now number several dozen, both in public institutions and in the community. The California Study Commission on Mental Retardation has recommended that the California Council for Retarded Children organize a similar trust, and the Maryland Association already has done so (Study Commission on Mental Retardation, 1965, p. 77).

It is, of course, legally possible to set up nonprofit, nonpublic continuing corporate bodies or agencies to perform personal guardianship services, apart from or in addition to the legal, moral, and fiscal responsibilities of a trustee or guardian of estate. Questions of stability and continuity arise, however, unless all wards are fully funded. A lesson can be learned from the experience and attitude of voluntary child welfare agencies. Late in the nineteenth century private child protective agencies were developed that were legally empowered to assume responsibility for the guardianship of

* children. Today these agencies are still actively exercising short-term protective functions, but shy away from assuming responsibilities for long-term care and supervision of children, especially legal guardianship, even though there is definite assurance that the responsibility will terminate in eighteen to twenty years, or less. It seems, a fortiori, unlikely that private agencies or organizations can be expected to assume a major role in longer-term guardianship of the mentally deficient.

Precisely because it does not provide guardianship or guarantee maintenance, participation in the MARC Retardate Trust is within the means of many conscientious parents of the mentally deficient. It does not, of course, cover the like needs of the mentally deficient whose parents have not the forethought to invest in it. It leads us once again to an apparent need for some public participation in this arena. There are two major reasons why this issue of guardianship of the person and of the public role therein are of growing concern. First is the expected increase in numbers of adults who may require it. In the past, mortality among the mentally deficient had been relatively high, and for those who have reached adulthood, society has offered one instrumentality of protection—namely the residential institution. A quasi-guardianship role has been played for these people in most states over the years by the superintendents of institutions, and indeed admission to institutions has often been sought by parents for their adult mentally deficient children in order to assure them this protection. Thus, the past availability of residential care has cloaked the more fundamental issue of protection for all the mentally deficient.

At the present time there are between 80,000–100,000 mentally deficient adults in residential institutions and a comparable number of similarly handicapped people who are not in institutions but who are receiving social-security benefits as the dependent adult children of persons insured under the Social Security System who have either died or retired. The discovery of these seriously retarded people came somewhat as a surprise following the enactment of the 1957 Social Security Amendments (U.S. Social Security Administration, 1963). We can only guess, therefore, how many more mentally deficient adults there may be whose fathers either were not covered under Social Security or have not died or retired. One thing we do know, however, is that their number will begin to grow in the next few years at a very rapid rate. The count of youths turning twenty-one each year will increase about 50 per cent in the next four years. The proportion of those who should be found to be mentally deficient will certainly not be less and probably will be considerably more than in the past, because those who will reach twenty-one in 1967 will represent the vanguard of the generation that has benefited most from antibiotics and other medical advances. Thus, on a numerical basis alone, we will be hard put to provide protection for these adults in the classic pattern—by placing them in full-time segregated residential communities of their own, under expert supervision.

Fortunately, contemporary thought does not favor such an oversimplified approach. Although specialized facilities for the twenty-four-hour-a-day care of mentally retarded children and adults certainly will continue to be needed, and probably in increasing capacity, the future appears to hold a much more flexible array of living, working, and leisure-time arrangements for many of the mentally deficient, as well as for those with a less marked degree of mental retardation. These changes were noted and abetted by the President's Panel. As physical custody and control become less complete, both the legal authority and the social service of guardianship will become increasingly more important.

The exciting thing (and the second reason for renewing attention to guardianship) is that real choices are now more frequently presented for the retarded or mentally deficient adult. It is therefore imperative that the latter be provided with a "legal personality" authorized to make these choices in his best interest. Thus there is today increasing need for the service of guardianship to be available independent of institutionalization. In addition, there is reason to advocate that even when a person is in residential care he should have a guardian who is not part of or subordinate to the apparatus of the care, training, or treatment that he is receiving.

It is not enough, however, simply to designate some public official as "public guardian" by statute. As we have already stressed, guardianship is a personal relationship and depends on some degree of continuity and active partisanship, as well as authority. Such guardianship should, therefore, be exercised and implemented by individuals who have a continuing responsibility for a limited number of specific wards. A person having other direct service responsibilities to the ward should not be deputized as his guardian. Public guardians should be salaried, on a full- or part-time basis, and should have some training and experience related to the social problems of the mentally retarded, but the service should not become over-professionalized. In short, what is called for is a public guardianship program. Such programs are available in some European countries, but in the United States, only Minnesota has demonstrated what it means to provide an active guardianship for mentally deficient persons outside institutions (Minnesota Department of Public Welfare, 1959 and 1965).

Minnesota's fifty-year-old program is now undergoing review and renewal (Levy, 1965; Minnesota Department of Public Welfare, 1959 and 1965). Greater recognition will be given to the guardianship function performed by parents, with less enthusiasm for early commitment to state guardianship of children who have parents active in their behalf. Priority for admission to other state services, both residential and nonresidential, will not be given to persons under state guardianship to the exclusion of other retarded persons. The need for counseling to parents will not in itself be sufficient cause to request authority over the retarded child. Judges, at-

torneys, and professional workers in mental retardation will seek closer agreement on the extent and kind of impairment of adaptive behavior associated with degrees of subnormality of measured intelligence that justify the "surgery" of commitment to state guardianship. It might be added this will continue for some time to be an art rather than a science.

Despite some healthy criticism, the Minnesota guardianship program remains a remarkably vigorous institution that has brought peace of mind to many parents and helped to maintain as many socially inadequate retarded persons outside public institutions as in them. The essence of its success lies not in its now somewhat antiquated framework of law, or even in its original legislative intent, but in the implementation of the service of guardianship. The sense of responsibility that goes with the authority of guardianship was developed with purposefulness through the difficult periods of depression and war as well as in the more optimistic recent decade by the director of the state's Bureau for Mentally Deficient and Epileptic, Miss Mildred Thomson, and her dozens of caseworkers in the offices of the county welfare boards, one of whom succeeded her in 1959 at the close of her thirty-year leadership (Thomson, 1963). If there is one lesson to be learned above all others from the Minnesota experience, it is that state guardianship can be given meaning only by the hard work of a sufficient number of qualified and conscientious people whose careers reflect that continuity of concern that the retarded require.

California will now venture into this intricate field, filled as it is with new needs and new potentials, to be followed, no doubt, by other states. Creative administration of the new legislation can develop it into an instrument of service to individuals that not only will result in better use of our social resources for the care, training, productive activity, and leisure time of the mentally retarded, but also will contribute in some measure to redressing the inequality before the law that mental deficiency inevitably creates and implies.

Equal protection for the unequal will remain a far from attainable ideal for the foreseeable future, especially when, as with mental subnormality, we have an infinite variety of inequality and a basic contradiction between normal modes of "liberty" and the devices available to shore up "equality." Yet, we would be less than true to our traditions as a nation if we did not seek to include within the benefits of our expanding social doctrines those least able to claim their rights for themselves.

SUMMARY

The twin guarantees of the Fourteenth Amendment, "due process" and "equal protection," apply to mentally retarded citizens as to others. A considerable body of statutory and case law as well as scholarly discussion

centers around the meaning of "due process" applied to involuntary admission to and detention in mental institutions and to situations in which a person may be deprived of the control of his property (but not its benefits) because of mental incapacity. The doctrine of equal protection has been less well developed as it affects the mentally disabled, among whom the mentally retarded are in particular need.

"Equal protection of the laws" cannot be confined to the courtroom, but must encompass devices by which the mentally retarded are assisted to enjoy the liberties and opportunities of a democratic society. For those who, as a result of the character and severity of their mental disorder, are unable to exercise with reasonable prudence the freedom of choice that is their birthright, "equal protection" can be more nearly achieved by deputizing a guardian of the person to exercise the right and responsibility to make choices on behalf of the disabled one.

Although all states have some legislation on this subject, few have recognized the necessity of assuring that effective guardianship is available to the quarter-million or more adults who may be expected to need it. For this aim, a program of public guardianship is required to supplement the private sector. In either case, more emphasis must be placed on the service of guardianship, the actual exercise of individual choice on behalf of an individual person who happens to be too retarded to exercise it himself. Social management of the mentally deficient adult in the community or residential facility, using the authority of guardianship constructively and creatively to extend the options made accessible to him and to assure continuity of concern, has been one of the neglected forms of service to the retarded. The development of such services is especially needed now, as new opportunities and especially alternatives to institutional living are expanding, even as the number of adults who are severely and profoundly retarded can be expected to increase rather sharply after 1968. There are real legal, social, and administrative obstacles and dilemmas to be tackled, but they cannot be allowed to prevail against the justice of enabling the retarded to share more fully in the egalitarianism of our times.

NOTE. The long-neglected subject of the mentally retarded and the law is now the subject of much active research. At the National Law Center of George Washington University, Washington, D.C., a detailed empirical study, focused specifically on the mentally retarded, was initiated early in 1965, under the direction of Professors Richard C. Allen and Elyce Zenoff Ferster. It will cover such topics under civil law as marriage, sterilization, contractual relations, and commitment, and under criminal law as validity of confessions, right to trial, capacity to stand trial, disposition of retarded defendants, whether tried or not, as well as other aspects of the problem of securing equal justice for the unequal. Additional studies are under way under other auspices in the District of Columbia and in California. In addition, a number of states have set up "task forces"

on the law as part of the current emphasis on comprehensive state planning in mental retardation. All these activities may be expected to extend the literature significantly in the next few years.

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