

THE VERMONT DEFENDANT ACCOMMODATION PROJECT A Case Study

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This article describes the increasing use of the courts and the jails as “institutions of last resort” for multi-problem clients suffering the effects of mental retardation combined with other life challenges, such as mental illness, substance abuse, homelessness, and a history of physical and/or sexual abuse. The authors label these individuals as suffering from “Horrible Life Disorder” (HLD), and characterize them, for the most part, as lacking the comprehension necessary to navigate through the complexities of the court and probation systems. The article describes and evaluates the development of a program, within the Office of the Defender General of the State of Vermont, to (a) identify and accommodate such mentally retarded, HLD clients in the criminal justice system and (b) train public defense attorneys, judges, police, and probation officers to respond more effectively to the special issues of these citizens.

This article is a case study in the development of the Vermont Defense Accommodation Project (VDAP), in which we (the lead authors, Philip J. Kinsler and Anna Saxman) played major roles. It was originally designed to systematically make distinctive accommodations in the court system for criminal defendants with mental retardation¹ to better address the special problems of these individuals in the legal system (e.g., their cognitive limitations in understanding legal concepts and legal documents). As we worked in the VDAP with more and more retarded individuals, we were very surprised to find that quite a number of them had many other disorders and dysfunctions, such as mental illness; substance

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¹Throughout this article, the terms *mental retardation* and *developmental disabilities* are used interchangeably. The meaning of these terms is anchored in the definitions of “mental retardation” in the *Diagnostic and Statistical Manual of Mental Disorders*, (4th ed.; American Psychiatric Association, 1994).

abuse; homelessness; a history of physical and/or sexual abuse; a history of foster home placement; difficulty in school related to learning disorders, assignment to special education programs, and/or school dropout; and/or a history of relatively minor criminal behaviors. For us, this was a pragmatically crucial discovery. If we were to truly accommodate for retardation, we found we had to deal with all these other problems by taking a holistic approach to the defendants to whom we provided services. This then has become the theme of this article: the need for the justice system to become sensitized to the prevalence of these multi-problem, mentally retarded defendants, and the subsequent need to design accommodation programs for them with this in mind.

In our work with these types of multi-problem individuals, we have found it useful—from descriptive, heuristic, and other pragmatic points of view—to create the label *Horrible Life Disorder*, or HLD. The direct, nontechnical, somewhat sensational nature of this term is meant to capture the extreme plights in which many of our defendant clients find themselves.

The Courts and Jails as “Institutions of Last Resort” of the Mentally Retarded and the Mentally Ill

The National Perspective

Over the past 25 years, a number of national trends have significantly changed society’s response to persons with HLD, generally moving them from institutions for the mentally retarded and/or mentally ill to jails and prisons. A sample of relevant facts and associated statistical indicators reflecting these trends is listed in Table 1. As seen, they include: (a) the transfer of Federal responsibility to the states for providing mental health services to such individuals, without sufficient associated Federal funding, thus placing tremendous pressure on state budgets in providing services for those with mental retardation and/or mental illness; (b) the deinstitutionalization of such individuals to communities without proper housing and supportive programs; and (c) a dramatic increase in the states’ interest in and capacity for criminal incarceration. These trends have resulted in HLD individuals being free in the community, without adequate housing, mental health services, or other supports, until their problems drive them into criminal behavior, in which event they end up in the courts and jails. In other words, these are the “institutions of last resort” for individuals with HLD, as reflected in Items 4–8 in Table 1.

Increasingly, the criminal courts are asked to manage the mentally retarded because there are diminishing resources in other public systems. The mentally retarded individual is confronted with a very complex system that uses specialized language and concepts, which they are often unable to comprehend or manage. This lack of comprehension can lead to failures by these individuals to follow court procedures and orders, resulting in turn in a cycle of growing legal problems—not because of their defiance of the court, but because of their inability to understand and carry out the stipulations of the court. We present a more specific analysis of the plight of the mentally retarded individual within the court system below, in the section that presents our guiding conception of the Vermont Defendant Accommodation Project.

Table 1
*Facts and Indicators Linking the Increased Placement of Individuals With
 "Horrible Life Disorder" in Jails and Prisons*

Fact	Indicators
1. The Federal Government has transferred to the states responsibility for mental health expenditures.	Mental health expenditures have continued to shrink as a percentage of total national health care spending, from 8.8% of total health care spending in 1987, to 7.8% in 1997. The burden of paying for this care has increasingly shifted from the Federal level to state and local governments, who paid for "28% of behavioral health treatment in 1997, compared to only 13% of all health care services." ^a
2. There has been problematic deinstitutionalization of the mentally ill and retarded.	<p>A. The patient population in state and county mental hospitals has decreased from nearly 600,000 in the 1950s to less than 150,000 in 1995, while the number of persons in institutions for the mentally retarded declined from more than 200,000 to less than 100,000 during the same period.^b</p> <p>B. Many of the deinstitutionalized became homeless, with estimates of the percent of homeless who are mentally ill ranging from 15 to 30%.^c</p> <p>C. As an indication that serious mental illnesses (SMI) interferes with employment, an estimated 57% of adults with SMI were not employed in 1990 compared to 29% of the general population.^d</p>
3. Incarceration rates in jails and prisons have skyrocketed.	The incarceration rate in the United States has more than tripled since 1980. ^e
4. Mental health problems appear to have moved into jails and prisons.	<p>A. In 1998, 283,800 people nationally with mental illnesses were incarcerated in U.S. prisons and jails. This is four times the number of people in state mental hospitals throughout the country.^f</p> <p>B. More than 114,000 state prison inmates were on psychotropic medications as of June 30, 2000.^g</p> <p>C. Almost 19,000 prisoners are in 24-hr mental health confinement facilities within the prison system.^h</p> <p>D. Sixteen percent (179,200) of state prison inmates, 7% (7,900) of Federal inmates, 16% (96,700) of people in local jails, and 16% (547,800) of probationers have reported a mental illness.ⁱ</p>
5. An abuse and/or foster-care history is associated with later incarceration.	<p>A. Approximately 16% of male inmates and 57% of female inmates are reported to have suffered physical or sexual abuse or both in childhood.^j</p> <p>B. About 44% of men and 87% of women with prior abuse histories who eventually became incarcerated spent time in foster care.^k</p>
6. A substance abuse history is associated with later incarceration.	<p>A. Thirty percent of male and 70% of female prisoners grew up with a serious substance abuser in the home.^l</p> <p>B. Seventy percent of State and 57% of Federal prisoners report prior regular substance abuse.^m</p> <p>C. Thirty-seven percent of State and 20% of Federal prisoners report using drugs/alcohol at the time of their offense.ⁿ</p>

Table 1 (*continued*)

Fact	Indicators
7. A poor educational history is associated with later incarceration.	The jails hold disproportionate numbers of persons with poor educational histories. National statistics show that 14% of inmates have less than an 8th grade education, with an additional 29% having only "some high school." A further 25% report completing a GED (general education degree). Only 19% are high school graduates. ^o
8. Learning disability is associated with delinquent activity and incarceration.	Learning-disabled juveniles are 200% more likely to be arrested than non-disabled youths for comparable delinquent activity. They are 220% more likely to be found delinquent than nondisabled offenders. Once adjudicated, these learning-disabled youths will spend 2–3 times longer incarcerated and/or on probation. ^p

^aNational Expenditures for Mental Health and Substance Abuse Treatment, 1997, SAMSHA.

^bLevine, M. & Perkins, D. V. (1997). *Principles of community psychology: Perspectives and applications, 2nd Ed.* New York: Oxford University Press.

^cFischer, J. P., & Breakley, W. R. (1991). The epidemiology of alcohol, drug, and mental disorders among homeless persons. *American Psychologist*, 46, 1115–1128.

^dWillis, A. G., et al. 1998. "Mental Illness and Disability in the U.S. Adult Household Population." In *Mental Health, United States, 1998*, edited by R. W. Manderscheid and M. J. Henderson, 113–123. Rockville, MD: Center for Mental Health Services.

^eBureau of Justice Statistics, *Correctional Populations in the United States, 1997*; Prisoners in 2000; www.ojp.usdoj.gov/bjs/.

^fDitton, P., Bureau of Justice Statistics, *Special Report, Mental Health and Treatment of Inmates and Probationers*, July, 1999, NCJ 174463.

^gBeck, A., & Maruschak, L., *Mental Health Treatment in State Prisons, 2000*, Bureau of Justice Statistics Special Report, July 2001, NCJ 188215.

^hBeck, *ibid.*

ⁱU.S. Department of Justice. 1999. Bureau of Justice Statistics. *Special Report: Mental Health and Treatment of Inmates and Probationers*. Ditton, P. J. Washington, DC: NCJ.

^jHarlow, C., *Prior Abuse Reported by Inmates and Probationers*, Bureau of Justice Statistics Selected Findings, April 1999, NCJ 172879.

^kHarlow, *ibid.*

^l*Id.*

^mDitton, *ibid.*

ⁿDitton, *ibid.*

^oCorrectional Populations, *ibid.*

^p*Understanding Adolescents*, ABA Juvenile Justice Center Publication (2000).

The Vermont Response

More and more, there have been a variety of responses by the criminal courts to the problem of the mentally retarded and mentally ill. For example, certain jurisdictions have developed mental health courts.² In these courts, individuals diagnosed with a mental disorder and arrested for a nonviolent misdemeanor such as loitering or creating a public nuisance can be court-ordered to receive mental

²Seattle, [//www.cityofseattle.net/courts/comjust/mhoverview.htm](http://www.cityofseattle.net/courts/comjust/mhoverview.htm); Broward County Florida, <http://www.browarddefender.com/mcourt.htm>.

health treatment rather than jail time. The State of Vermont does not have a mental health court. Though the two lead authors would have liked to help create both such a court for persons with mental illness only, and a separate program for mentally retarded individuals, time, resources, and political realities did not make this possible. Instead, prior legal precedents described below created an opportune time to develop a program focusing on mentally retarded clients. An additional reason for choosing this focus was that we knew of no state court programs that had specifically focused on the mentally retarded, as did the present project; and we believed that creating such a program would help to publicize the forensic needs of mentally retarded individuals and encourage other jurisdictions to develop similar programs.

In Vermont, the Office of the Defender General (ODG) provides representation for indigent criminals and juveniles. During the last eight years, in keeping with the national trends cited above, attorneys and investigators in the ODG have noticed a dramatic increase in the numbers of mentally retarded and mentally ill clients coming into the criminal justice system. Data were gathered from the Department of Corrections concerning the extent of the problem. Focusing on young people (22 and younger), the data showed that about 95% of the young people incarcerated in Vermont are high school dropouts. Forty-eight percent of these defendants have a history of receiving special education services. Most clients have received several additional types of social services, in particular, child abuse protection and mental health services. Fifty-five percent (55%) of the young male public defender clients had received prior mental health services, and 27% had received special education services.

National statistics confirm the very high percentages of disabled youth found in jail in Vermont. The Office of Justice Programs issued a Juvenile Justice Bulletin reporting that “studies of incarcerated youth reveal that as many as 70% suffer from disabling [psychological] conditions.”³ A recent study of juvenile detainees in Illinois found that nearly two-thirds of the boys and three-quarters of the girls met diagnostic criteria for one or more psychiatric disorders (excluding conduct disorders).⁴

These disturbing numbers, coupled with the personal experiences of the public defender attorneys, led the ODG to look closely at its caseload state-wide across all age groups. The ODG’s review indicated the problems mentioned above: defendants with mental retardation not having the capacity to fully comprehend the expectations of an overcrowded system, nor the capacity to comply with complicated conditions of probation, resulting in a growing spiral of legal problems. Specifically, the review by the ODG led to the finding that defendants with mental retardation and the other types of life problems described above accumulated a greater number of (a) probation violation complaints, (b) violations of conditions of pre-trial release, (c) motions to withdraw from poorly understood plea agreements, and (d) post-conviction challenges. The emotional and financial

³Burrell, S., & Warboys, L., *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, July, 2000.

⁴Teplin, L., Abram, K. M., McClelland, G. M., Dulcan, M. K., & Mericle, A. A. (2002). Psychiatric disorders in youth in juvenile detention. *Archives of General Psychiatry*, 59, 1133–1143.

cost to both the defendants and to the justice system as a whole appeared to be very compelling.

A crucial Vermont legal precedent in 1993: State v. Lockwood. One example of this dilemma reached the Vermont Supreme Court in *State v. Lockwood*.⁵ Gerry Lockwood's IQ was calculated as 66. He was unable to read, to reason abstractly, and could not handle his own finances or other decisions; and a guardian had been appointed for him. He had been found to have "no understanding of the concept of a contract or any of the implications involved in entering a contract."⁶ He had little understanding of time and mathematical computations. He thought a proposed sentence of 3 to 8 years meant 38 years. Nevertheless, Mr. Lockwood was found competent by the court to enter a plea. He was placed on extremely complex conditions of probation and supervision. Predictably, he was soon found to have violated his probation conditions. In the appeal of his violation, counsel argued that Mr. Lockwood was unable to understand the specific and subtle conditions required by the probation officer. The Vermont Supreme Court, in a divided opinion, found that he was able to understand and comply with those conditions.

In a lengthy dissent, Associate Justice Denise Johnson argued for a heightened scrutiny of pleas by mentally retarded criminal defendants. Relying on the literature and science as outlined particularly in two articles^{7,8}—one in a law review and one in a sociological journal—Justice Johnson demonstrated "that legal doctrine is not yet equal to the challenges posed by persons with serious mental disabilities." She noted the criminal justice system's "lack of attention to the unique needs of mentally retarded defendants."⁹

The ODG's office recognized this lack of attention, as well as its own affirmative duty to provide reasonable accommodations to clients with disabilities under the Americans with Disabilities Act. In consultation with other stakeholders within the Vermont government, the ODG initiated a federal grant application to address the identification and accommodation of mentally retarded defendants within the criminal courts. The application was successful and the resulting grant formed the basis of the "Vermont Defendant-Accommodation Project" (VDAP).

The Guiding Conception of the VDAP

The VDAP grew initially from a collaborative effort between ODG and one particularly important "stakeholder," the Equal Access Subcommittee of the Vermont Supreme Court. The two lead authors were involved in developing a guiding conception for the project (Atty. Saxman as project manager, and Dr. Kinsler as consulting psychologist). In this venture, we began with certain explicit assumptions, and other assumptions surfaced as we tried to work our way through difficulties. For example, and of particular importance, we began this project

⁵*State v. Lockwood*, 632 A.2d 655, 160 Vt. 547 (1993).

⁶*Id.*

⁷*Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

⁸*The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY, 4119 (1990).

⁹*Lockwood*, 160 Vt. at 576.

believing we were going to serve the mentally retarded per se, and then we discovered over time and experience that the project needed to focus more broadly on survivors of HLD.

In general and most importantly, the initial development of the project was guided by legal due process concerns for fairness and reliability. The criminal justice system rests on a belief in reasoned decision-making. Criminal defendants are offered choices—to take a plea agreement or go to trial, to testify in their own defense or not, to agree to follow certain probation conditions or remain incarcerated—and they must accept the consequences of the choices they make.

As a society, we do not believe in imposing consequences on people who do not comprehend what they are doing. Thus we require that defendants be competent to stand trial, so that they can understand the legal process as they participate in it. A suspect is given information about his rights to silence and counsel in Miranda warnings, so that he can choose intelligently whether to speak to the police or to call an attorney. We engage in plea colloquies to ensure that a defendant understands the constitutional rights he waives when he pleads guilty. It is a fundamental principle of the criminal justice system that people must be competent to make relevant decisions relating to pre-trial and trial proceedings. In legal terms, a person's choices must be "knowing, voluntary and intelligent." The system breaks down when the defendant does not have ability to understand the written Miranda warnings or the language in the plea agreement.

Mentally retarded defendants are particularly at risk of making unreliable and uninformed choices, which could have disastrous consequences for them. Many defendants are doomed to failure in the legal process because of their inability to comprehend the written information in probation conditions, or their inability to comply with complex conditions. This inability can often be perceived as willful defiance by the criminal justice system and they are punished for such failure. As the Office of the Defender General came in more frequent contact with retarded persons, it became important to identify these defendants and to provide accommodations to achieve fair outcomes for these citizens.

A Vermont murder case, *State v. Gambel*, highlighted the issue. Judge Paul Hudson was unwilling to accept a guilty plea without assurances that the defendant, who was retarded, understood what he was agreeing to. To serve as a support person and translator for this defendant, Judge Hudson appointed a psychologist, who spent hours during the plea colloquy to ensure the defendant's understanding of the proceedings. This was the initial paradigm for the "cognitive facilitator" model adopted by the VDAP program.

Thus, the Vermont project started with a single case example of a successful intervention model, which had impressed many stakeholders—the judiciary, members of the legislature, prosecutors, and members of the defense bar. The VDAP aimed to implement this apparently successful service delivery model state-wide. In addition, we worked toward creating a larger conceptual map of assumptions and principles about the nature of the retarded population's involvement in the criminal justice system.

This conceptual map was based on the following assumptions about the criminal activities of the mentally retarded population—our starting population—that helped to guide the project.

First, some of the criminal behavior of mentally retarded defendants was

potentially due to reduced levels of supervision and support since de-institutionalization.

Second, some of the criminal charges faced by mentally retarded defendants were a matter of context and interpretation. For example, yelling and spitting within a hospital might be seen as a reason for medication adjustment or one-to-one counseling; while in front of the local convenience store, it may be interpreted as disorderly conduct.

Third, economic changes were making it increasingly difficult for a high proportion of Vermont's mentally retarded citizens to function as they might traditionally have done in the past, as relatively protected and tolerated farm hands or manual laborers. Lack of involvement in purposeful economic activity, and greater amounts of unstructured time, can certainly result in many more encounters with the police for drinking, driving under the influence, and other misdemeanor charges.

Fourth, mentally retarded citizens were especially vulnerable to confusion over the specific and formal requirements of conditions of pre-trial release and/or probation. For example, in Vermont, defendants are often subject to release or probation conditions requiring that they attend multiple appointments a week with various programs, such as alcohol counseling, mental health, and anger management services. Many mentally retarded defendants have trouble telling time, using a calendar, arranging transportation, or following a multi-step plan. The criminal justice system interprets lateness, the failure to keep these multiple appointments, and not following complex instructions as signs of willful defiance, and it punishes and incarcerates based on this assumption. Overall, then, given these vulnerabilities and the fact that almost 50% of actual jail time served in this country is due to violations of probation, parole, or conditions of release,¹⁰ it was especially important to ensure clear and easily understood explanations to enable mentally retarded defendants to comply with these legal conditions.

And fifth, following from the previous assumption, recidivism could be reduced if mentally retarded defendants were given conditions of probation that were clear and within their abilities. Recidivism could also be reduced if the probation officers and the judges understood the nature of the defendant's disabilities.

Based on these assumptions, it became apparent that we needed a multi-faceted approach to our service model. We had to devote ourselves to attaining four specific goals: (a) to identify retarded citizens who might need community supports within the court system; (b) to provide accommodations that would increase the client's understanding of the system and of any conditions imposed, and thereby reduce recidivism; (c) to recruit support from stakeholders that could facilitate or inhibit the program's identification and accommodation goals; and, as an extension of this last goal, (d) to provide training to persons with important roles in the system—such as judges, police, probation officers, and lawyers—to reduce their possible misinterpretations of the behavior of the mentally retarded and mentally ill, and to obtain their cooperation in providing accommodations. We determined that we had to do extensive community networking to prevent

¹⁰*Correctional Populations, ibid.*

scapegoating and to change the perceptions of these stakeholders. Identification and accommodation services were required by due process and fairness concerns; and community training efforts were required to recruit the support necessary to effectively deliver these services to retarded citizens.

VDAP Program Activities

Identifying and Allying With Stakeholders Through an Advisory Council

First, in order to begin the project, the VDAP looked toward creating a broad basis of support and understanding within the community stakeholders. The Office of the Defender General (ODG) created an Advisory Council made up of legislators; members of the Vermont Supreme Court and trial courts; representatives from the Department of Corrections and the Department of Developmental Disabilities and Mental Health; prosecutors; victim-witness assistants; State Police; mental retardation advocates; and potential consumers of VDAP. The Advisory Council was the means for creating communication among the stakeholders. Subcommittees were formed which addressed the issues of the mentally retarded in relation to the police, the courts, corrections, and youth educational facilities.

The Advisory Council was very successful in bringing together people and agencies who had previously only met in an adversarial setting. There began to be a greater awareness that people with mental retardation may be victims, witnesses, or defendants. We began to systematically look at the barriers to retarded defendants' participation in each component of the criminal justice system. For example, police training in this area was facilitated, and the Vermont Center for Crime Victim Services realized that many mentally retarded victims faced barriers to reporting and testifying about crimes.

Other members of the council became interested in whether standard documents used within the criminal justice system were in fact comprehensible to the defendants within that system. Could criminal defendants understand the documents they were given describing their conditions of pre-trial release or of probation? Were the programs within Corrections, and their documents and requirements, designed to be comprehensible to the prisoners placed within them? One such analysis is described below, and others are ongoing.

A Serendipitous Success

One member of the Vermont Supreme Court, Associate Justice Marilyn Skoglund, became interested in the reading levels required in court documents. Document analysis revealed that the conditions of probation and conditions of release documents used throughout the Vermont court system required a 12th-grade reading level. These are typically given to defendants of whom 95% never finished high school, and 48% received special education services. This was a recipe for failure at conditional release and probation. Justice Skoglund therefore revised the conditions so that they were aimed at an 8th-grade reading level. She also simplified the very complex "application for a public defender" form.

It has proven difficult to refine legal documents into even simpler form, though document analysis is ongoing. It would be advisable to try to achieve a

4th- to 6th-grade reading level to make these documents accessible to the typical criminal defendant. Court documents continue to need revision, and these ongoing revisions are an important product of the Advisory Council.

Formation of Evaluation Teams and Their Use in Training Stakeholders

We formed alliances with several psychologists with expertise in the mental retardation area. Dr. Sara Burchard, a professor of psychology at the University of Vermont, agreed to work with the program as a local evaluator of the VDAP project. Dr. Susan Culbert, a practicing psychologist with expertise in mental retardation, agreed to provide training and consultation. Other psychologists, including the lead author of this article, agreed to become part of the assessment teams. Using their expertise, the program began providing training to attorneys, judges, police, and correctional workers.

A seminar was held for all judges within the State of Vermont, at their annual training meeting. This Judicial Training Program included a segment on “Developmental Disabilities in the Courtroom” as well as a short introduction to the project. Judges were given practical information about the kinds of language that people at various IQ levels can comprehend, as well as awareness of how often mentally retarded individuals will “cover over” their disabilities by just answering “yes” when asked whether they can comprehend a form or a legal waiver. Judges were encouraged to ask defendants to explain back to the judge what they actually understand about procedures such as probation conditions or waivers of the right to trial. In at least one case in which the first author was involved, this procedure led the judge to suspend an ongoing plea colloquy when it became clear that the defendant would say he understood but had no actual comprehension. This case was later resolved through a community placement in a mental retardation facility (see the case of M.S., presented in greater detail within the individual case examples section of this article).

The interest in training has been ongoing. Over 40 correctional officers and probation officers attended a recent training program focusing on identification and accommodation of disabilities in the correctional system. A seminar on “Developmental Disabilities in the Family Court” was provided through the project to judges, social workers, and mental health workers in the Family Court.

For many of the participants in these seminars, the information on the difficulty of identifying persons with mental retardation or learning impairment from brief conversations was startling news. Most participants believed that they could identify persons with mental retardation through brief encounters. The Office of the Defender General (ODG) recognized and taught that identification of individuals with mental retardation is problematic. Many of the defendants who have mental retardation have succeeded for years in cloaking their disabilities for the brief time they spend with a public defender or judge. The VDAP staff has helped to communicate to service providers how people with disabilities often carry a deep sense of shame, and how they will go to great lengths to avoid appearing disabled. This has been important information to disseminate to the stakeholders, and this dissemination has begun to bring about changes in the way probation, corrections, and judges deal with mentally retarded clients.

Training for the public defender attorneys focused on identifying behaviors

that may mask mental retardation; and when a person was identified through psychological assessment, how that information could be used to help the client in the criminal case. One of the initial difficulties we again encountered was the attorneys' disbelief that there were clients who had significant cognitive deficits that the attorneys did not recognize. Eventually, most of the participating attorneys had the experience of seeing the borderline-level or mental-retardation-level IQ scores of a client that they were previously sure had a normal IQ. Those who participated are now more attuned to their clients' language and communication deficits.

Currently, in the second year of the program, we are seeing interesting developments in participating attorneys' awareness of the practical implications of disabilities on clients' lives. The sophistication of referral questions is increasing substantially. In the first year of the project, a typical referral question would be whether the person had a disability. Attorneys now routinely gather school records and the "individualized educational plans" or "IEPs" (used for special education students) of their clients, and ask questions such as "Does this person's language disability make them unable to comprehend the Miranda questions the police asked?", and "Can this person understand the waiver of rights in a plea agreement?"

We believe we see increased sensitivity to disabilities in the various stakeholders described above, and we plan to continue training as one of the focuses of the project.

Identification, Assessment, and Accommodation of Mentally Retarded Defendants

The major objective of the project has been to identify, assess, and accommodate criminal defendants. The first step toward this goal was to create a simple screening device for identifying criminal defendants who had a substantial possibility of being mentally retarded. This was achieved by developing a short questionnaire for public defenders to use when interviewing all clients coming in to the three study cities at arraignment, which in Vermont is usually the first time that a defendant sees a public defender. Each defendant was asked a number of questions that tapped a history frequently associated with mental retardation, including: whether he (or she) was in "special education" classes in school and/or if he had had in school an "IEP"; whether he had ever received mental health and/or substance abuse services; and whether he had ever taken medication like Ritalin for "ADD" (attention deficit disorder) or "ADHD" (attention-deficit/hyperactivity disorder). Also the defendant was asked, "You may have to come back to court in 12 weeks. When would that be?" If the client answered "yes" to any of the history questions or couldn't explain when the 12 weeks would be, the public defender (a) identified the individual as needing more evaluation for retardation and (b) sent for records from the relevant schools and agencies mentioned in the "yes" items. Preliminary experience with the questionnaire revealed that attorneys found that it did not take long to use, and clients were willing to answer the questions.

It is important to ask clients directly whether they had an "IEP" when in school, as they are much better able to answer this question than when just asked

about “special education.” In looking at a 6-month snapshot of 583 people screened, 130 people answered that they had an IEP, whereas only 17 people answered that they had received special education services. The screening instrument is in the process of validation; but the screening data’s validity is supported by convergent information from other agencies in Vermont, which will be presented in the program evaluation section of this article.

Once a client’s records were obtained, they were reviewed by the second author (Anna Saxman), the project director who is an attorney with a special interest in mental disability law. If the records indicated learning impairment, mental retardation, or other significant disabilities, the records were sent to one of the participating members of the psychological team for assessment. The psychologist would review the records, and if they were comprehensive and current, would outline the nature of disabilities and recommend accommodations to be used in the courtroom as well as in designing the correctional programs. If the records were not current or, as was often the case, revealed a confusing picture about the individual’s disability, then the psychologist would test and assess the individual and write a report.

After receiving the report, the public defender assigned to the individual defendant would suggest accommodations to use in a variety of ways. The project’s expectation was that attorneys would use the information in all phases of the criminal justice system to guide their answers to questions about appropriate legal strategies in the case. For example, if the client had waived Miranda rights, was the client’s intellect and vocabulary sufficient so that he could intelligently and voluntarily waive those rights? If the client had conditions of release or probation that he was alleged to have violated, could he understand those conditions? And if the case appeared as if it would not go to trial, but rather would result in a plea agreement of some type, what type of sentencing plan could be devised that could address the client’s disabilities?

The role of the “cognitive facilitator.” The accommodations varied from case to case. One possible accommodation for people whose disabilities affected their communication and processing abilities was the appointment of a cognitive facilitator to aid them. The ODG recruited and trained people with backgrounds in special education or mental health to provide facilitation services in court and elsewhere. The role of a cognitive facilitator was to advocate for a series of accommodations for the mentally retarded clients in the courtroom. These accommodations included judges being asked to use simple language, granting frequent breaks so the facilitator could help ascertain how much the client was following, and slowing down the speed of significant events such as suppression hearings or plea colloquies, to ensure that the client understood. A “menu” of possible general accommodations was prepared to accompany the team evaluations to inform judges of general techniques that can facilitate client understanding. This menu is presented in Table 2.

The reactions of the attorneys to the cognitive facilitator role varied from grateful acceptance to rejection as unnecessary. The availability of cognitive facilitators may have had a paradoxical consequence in terms of the goals of the VDAP project. In performing competency evaluations, some of the State-hired forensic psychiatrists have now opined that a criminal defendant was marginally competent if he had the services of a cognitive facilitator.

Table 2

A Menu of Possible Accommodations in the Criminal Justice System

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1. Provision of a cognitive facilitator.
 2. And/or provision of a different or additional support person if available and appropriate.
 - (a) A mental retardation worker or counselor having some basic information about the progress of the case is assigned to it.
 - (b) The defendant can ask this person when the next court hearing is—or what is happening next—when the lawyer and cognitive facilitator aren't in touch with him.
 - (c) Also this person can assist in the schedule of getting the client to court or to probation.
 3. Court accommodations:
 - (a) The judge uses direct simple language.
 - (b) The judge asks the client open-ended questions to ascertain if the client is understanding, e.g., "Please tell me what (waiving that right) means to you."
 - (c) The cognitive facilitator checks in with the client to make sure the client understands. The defense attorney and prosecutor do the same as they deem necessary.
 - (d) There are frequent breaks, if necessary;
 - (e) The court slows down:
 - (i) The pace of the individual proceeding.
 - (ii) The progress of the case. The court should schedule extra time for cases involving mentally retarded defendants—especially if anything meaningful is occurring in court, such as a suppression hearing.
 - (f) The plea colloquy is revised.
 4. Probation conditions:
 - (a) They must be individually designed to address client's needs.
 - (b) Are the programs that the prosecutor wants the client to attend accessible to the client?
 - (c) Does the client have to read a lot of material?
 - (d) Can the client understand when he has to go for services and precisely what will be expected of him? For example, "attend mental health counseling to the satisfaction of your probation officer" is an elusive concept. Make Probation conditions concrete. For example, "Go to counseling until your probation officer says you can stop."
 5. Probation accommodations:
 - (a) The ideal cognitive facilitator goes with the client to the first meeting with the probation officer and explains the client's special needs, using the Team Report.
 - (i) The cognitive facilitator makes sure the probation officer understands what the client can and can't do.
 - (ii) If the probation officer is having trouble communicating or dealing with the client, he calls the cognitive facilitator or mental retardation worker first.
 6. Corrections accommodations:
 - (a) The team report must follow client into jail.
 - (b) Ideally, the defense attorney communicates with the jail caseworker about special needs.
 - (c) The facility has to make sure the client receives accommodations in programming.
 - (d) *Note:* The VDAP does not know exactly what programs are accessible for mentally retarded people in jail.
 7. A final note on *reading*. Many communications in the legal system are in writing, and current documents are often at the 12th grade level.
 - (a) Attempts are being made to revise reading levels.
 - (b) *Note:* Someone must be responsible for assisting the client in understanding these communications.
-

Table 3
Alternate Miranda Warning Form

-
1. You have the right to remain silent.
 “You do not have to talk to anyone. Tell me in your own words what I just said?”
 2. Anything you say can and will be used against you in a court of law.
 “What you say can get you in trouble. Tell me in your own words what I just said.”
 3. You have the right to talk to a lawyer and have him present at any time during questioning.
 “You can talk to a lawyer before you say anything else. Tell me in your own words what I just said.”
 “Your lawyer can be with you if you talk to anyone. Tell me in your own words what I just said.”
 4. If you cannot afford a lawyer, one will be appointed for you without cost.
 “If you cannot afford a lawyer, the judge will get you one for free. Tell me in your own words what I just said.”
-

In one case, a 14-year-old, mentally retarded juvenile with an IQ of 65, who read at a first grade level and whose special education teachers testified that he would acquiesce or fabricate an answer if he didn’t understand a question, was found marginally competent to stand trial by the state forensic psychiatrist because he had the assistance of a cognitive facilitator.¹¹ The juvenile entered a conditional plea to the charge reserving his right to appeal the competency finding. The Vermont Supreme Court held that there was sufficient evidence to find the boy competent, but that the court’s findings to support such a conclusion were deficient. In her dissent, Justice Skoglund, (joined by Justice Johnson) sharply criticized the “marginal competence” conclusion as resting on (a) the possibility that someone trained to work with the mentally retarded might somehow supply the missing abstract reasoning, and (b) “the myriad of obstacles to this juvenile’s rational capacity to assist in his own defense. . . .”¹² Upon remand to the trial court, the case was dismissed.

The cognitive facilitator concept has gained interest around the state, and the Vermont Developmental Disabilities Council has decided to hire a part-time coordinator to recruit, train, and schedule the use of these specialists. Family Court lawyers hope to be able to use the specialists in dealing with parents with mental retardation in the context of abuse and neglect cases.

Summary of Accommodation Strategies

The VDAP has attempted to implement accommodations at every stage in the criminal justice system.

At arrest and questioning. The development of the Alternative Miranda Warning Form (see Table 3) increases the suspect’s understanding of their constitutional rights at the earliest stage of legal proceedings.

In court. These are described in Table 2, e.g., having the judge use direct simple language, and asking the client open-ended questions to ascertain if he or she is understanding.

¹¹*In re J. M.*, (May 2000), *slip op* at 5.

¹²*Id.* at 12 (Skoglund, J. dissenting).

In plea agreements. This would ideally include discussion of the proposed plea with the cognitive facilitator and a review of whether the person can comprehend the consequences of the plea.

In probation. Specially designed conditions of probation with simplified language have been used with success. It is crucial that requirements be specific and behavioral. An example is presented in Table 2, Item 4D.

In sentencing. Accommodations in sentencing may include judicial involvement in ordering certain programs, or accommodations within programs. For some clients, having the cognitive facilitator accompany the client to the first meeting with the probation officer may help inform the officer as to the client's limitations.

Case Studies Illustrating the Process and Results of the VDAP Program's Services

Three cases in which the first author (Philip J. Kinsler) was actively involved are presented below. They concretely illustrate the manner in which all the elements of the VDAP program functioned as a whole, together with the ways in which the program impacted on individual, retarded, HLD defendants.

The Case of R.R.: A Combination of Substance Abuse, Family Dysfunction, Mental Disorder, and Intellectual Limitation

Many would dismiss R.R. as merely an alcoholic and a professional thief. He came from a family that was "legendary" in the community: one could always find a brother or uncle in the local jail for alcohol abuse, domestic violence, or theft related actions.

Mr. R. came to the attention of the project through his public defender, Atty. Kate Moore. She called in the lead authors (Philip J. Kinsler and Anna Saxman) because Mr. R. had refused to speak to Atty. Moore about his case for more than a month. He was mute, appeared sad and lonely, and was at times tearful. He had been arrested for a home intrusion after he entered an occupied home and tried to steal electronics to sell in exchange for alcohol. The occupants heard him, the male member of the couple confronted Mr. R., and a physical fight ensued. In this fight, handfuls of Mr. R.'s hair were pulled out of his scalp. About a third of his head was a red, raw, bald spot. He had received special permission to wear a bandanna over it so that he would not be mercilessly teased by the other inmates, leading to fighting. Physically, he was a skinny, narrow-faced man, perhaps five feet three tall and weighing about one hundred thirty pounds: an easy target for persecution in prison. Atty. Moore reported to Dr. Kinsler that a guard had said that Mr. R. was "crying over a stuffed animal" in relation to an incident that had occurred in prison.

It was unclear whether the presenting issues were depression, regressed behavior, inability to cope intellectually, or simple refusal to cooperate, with attempts to feign mental illness or cognitive disability.

Dr. Kinsler and Atty. Saxman consulted and determined a face-to-face evaluation was required. The evaluation was conducted at the regional jail, as Mr. R. was considered too dangerous to be out on bail. The examination was replete with poignant moments. When Dr. Kinsler met him initially, he asked what R. liked to

be called. Mr. R. replied he didn't care. Dr. Kinsler insisted that every person had a right to decide this. Mr. R. lifted his head, previously hanging down without eye contact, and said "Mr. R." He had always previously been called "Little R.," a diminutive and somewhat insulting name for a 33 year old. He sat up a bit straighter and began to make eye contact.

He told Dr. Kinsler that he was refusing to talk to his attorney because he couldn't, as he was "too upset." It turned out he was upset about the fact that not one single individual from his family had remembered his birthday while he was "in the joint." So, he was sitting on his bunk cuddling with the first stuffed animal he had ever owned, a Christmas gift from jail volunteers. A guard took it away from him as contraband. He became withdrawn and emotionally volatile in his behavior, varying from rages to tears to elective mutism.

Intellectual testing revealed a Full Scale IQ of 78, with practical reading and math skills measured by the Kaufman Functional Academic Skills Test at approximately 60 (a number that is interpreted in the same way as an IQ score). Mr. R. was clearly eligible for the project and required services for the typical combination of problems that characterized the client group: limited cognitive abilities and skills, sequelae of severe family dysfunction, and personality and mental illness issues.

In the case of Mr. R., we were able to deliver a number of accommodations. An informal negotiation meeting was held with the prosecutor, the judge, the defense counsel, and the senior author. A report had already been prepared and presented to those at the meeting. The judge agreed that a person could not be found competent to stand trial if they refused to talk to their attorney. The prosecutor would not conclude that Mr. R. was in fact incompetent, but he was willing to admit that the issue was "fairly raised" in the law. This allowed the judge to order an extensive examination at the State Hospital.

At the State Hospital, Mr. R.'s inability to regulate emotion and manage distress were seen as target symptoms along with his alcoholism. He was enrolled in a specialized "dialectical behavior therapy" (DBT)¹³ program with support and consultation from a DBT team member to aid him in working with the material. Dr. Kinsler conducted a further exam within the State Hospital after Mr. R. had been through two sequences of the DBT program, along with the attendant supports provided by the psychology staff of that hospital. Mr. R. proudly showed Dr. Kinsler carefully completed and simple but effective work in the DBT handbook. Mr. R. was proud of what he had learned and said that no one had ever thought to teach him skills to manage his emotions. He was now ready to talk with his attorney and accept a plea bargain that would involve intense substance abuse counseling and cognitive-behavioral therapy. This plea was accepted by all, and Mr. R. continued to function successfully in the treatment program.

This case exemplifies the need for a program to undergo continual reassessment of its guiding conceptions and methods of enacting these. In the case of Mr. R., the intervention needed was providing both cognitive support services and extensive mental health services via emotion regulation training. At each

¹³Linehan, M. *Cognitive-behavioral treatment of borderline personality disorder*, 1993, Guilford Press, New York.

stage we had to consider our case formulation, the resources available, and the personalities of the parties concerned. This particular solution was made possible as a result of the cooperation of this particular client, this particular judge, and this particular prosecutor. At the outset of the project, we believed we would provide a standard package of cognitive translation services, which would be implemented in every case. However, we have had to re-assess this assumption at every stage, and we have almost never delivered what we believed was the “standard package.”

It became evident that rather than providing “cognitive translation,” our clients, who were multi-problem individuals, required extensive case-management rather than any one standard approach to accommodations. This point is also illustrated in the case of M.S., below.

The Case of M.S.: A Combination of Brain Injury, Cultural Deprivation, and Criminal Justice

It is not the authors’ intention to bring forward only cases that might arouse the sympathy of the reader. It is our intention to point out that very few of the criminal defendants we have been involved with over the years have been people without a history of physical abuse, neglect, parental substance abuse, and chaotic family lives. Mr. S. was typical of such a person, whose life of pain and multiple abuses led ultimately to prison.

We first became involved with Mr. S. as a juvenile. He was a Romanian orphan, brought over from one of the notorious institutions often featured on television. He had been there almost from birth, through to age 15. He was adopted, along with two female children from the same institution, in the first wave of America’s empathy for the plight of Romanian orphans under the Ceausescu regime. Within a year of arriving in America, Mr. S. was charged with fondling one of his adoptive “sisters” multiple times, sometimes accompanied by physical threats. He also argued with his adoptive parents to the point of physical confrontations over doing his homework. He was referred to the project team with aggravated felonious sexual assault and domestic assault charges. He had been out of Romania some 18 months.

Research into the records received prior to his adoption suggested an IQ of 75, obtained on a culture-free, non-verbal IQ test. There were also reports that he had been struck repeatedly in the head as a child. His adoptive parents had given up on him and turned him over to the State of Vermont; he was residing in a group home for “adolescent sex offenders,” while awaiting legal resolution of his cases. He had already received a “psychosexual evaluation” suggesting he required “sex offender treatment.”

When Mr. S. was evaluated by Dr. Kinsler, he and his team found a young man with an extremely poor command of either English or Romanian. On the K-BIT, he achieved a Vocabulary (verbal, “crystallized” intelligence) IQ of 40 ± 8 , at the Lower Extreme, below the first percentile. His Matrices (nonverbal, “fluid” intelligence) IQ was 73 ± 10 , at the 4th percentile, in the Well Below Average range. Composite IQ was 53 ± 7 , within the 1st percentile, in the Lower Extreme. On the K-FAST, he achieved a practical Arithmetic score of 65. This is in the 1st percentile, at the Lower Extreme of the population. His Reading score

was 61, below the 1st percentile, also in the Lower Extreme. His Composite Functional Academic Skills score was a 61, below the 1st percentile. There was a 95% probability that his true academic skills fell between 55 and 69. He was barely functioning in the English language. He was truly a young man with very few intellectual resources or skills that he could use in an unfamiliar court system. In addition, he had severe interpersonal difficulties and a tragic past to cope with.

With regard to his early history, he said he was of mixed Roma (Gypsy) and Romanian extraction. He never saw his family until he was 15. His earliest memories are of the Siret Institution, where he remembers being 3 years old and “in basement rooms with other kids.” He never met his mother or father. A social worker to whom he was close “showed him his mother when he was 15.” His adoptive parents told him that his parents had 12 children and that his dad had run away.

He told us he was “beaten a lot,” “thrown in a tub and beaten bloody, blood from my nose” by “big kids.” He did not tell staff because he “never trust them . . . think they lie.” He was repeatedly sexually abused himself. “Somebody teach him” when he was 9 or 10 years old. They would “touch him” or “put in the back penis” or “put in the mouth.” He was “many, many times” touched for someone’s pleasure. If he resisted he was “sometimes beat up, sometimes leave alone.” Sometimes he would go along with it “because there’s nothing else to do,” no way to resist. Other times he would just go along with it as a way of filling time. He shrugged when talking of this, as if it was just the way it was.

The major focus in this case was not the provision of cognitive translation of court matters to the client, but rather the translation of the cultural and cognitive limitations of the client to the system to try to obtain a fair result. Dr. Kinsler wrote two reports over a period of more than a year that the cases against Mr. S. were pending, describing Mr. S.’s language, cognitive, and cultural deficits. He opined that Mr. S. was not competent to stand trial according to the Dusky standard. Neuropsychological testing was obtained that documented likely frontal lobe brain damage. School records were obtained showing that after two years of instruction in English, Mr. S. was still reading at a Grade 1.9 level, with a 3rd-grade level being the goal of his IEP. A Romanian translator explained to us that if there was no biological relationship between Mr. S. and the adoptive sister, they would not be considered “related” in Romania. It became clear that Mr. S. was re-enacting behaviors that had been done to him. Articulating this pattern did not excuse, but did help to explain his coercion. Mr. S. received extensive education in appropriate sex roles within the residential program.

Dr. Kinsler also functioned as a cognitive facilitator when this matter finally came up on a negotiated plea agreement that Mr. S. wanted to take despite a very poor understanding of the process. The agreement would enable Mr. S. to serve the shortest possible sentence. Dr. Kinsler and Mr. S.’s lawyers had competing roles. The attorneys were trying to achieve acceptance of the plea because this was what the client wanted. At the same time, Dr. Kinsler was endeavoring to make Mr. S.’s limitations clear to the judge.

Dr. Kinsler attended the sentencing hearing along with the attorneys, a guardian for Mr. S., and representatives of the institution where Mr. S. lived. During the plea colloquy, the judge requested Dr. Kinsler’s input. Dr. Kinsler asked the judge to have Mr. S. explain back to the judge something he had already

said “yes” to understanding. Mr. S. was completely unable to explain what waiving the right to trial meant, and he sheepishly turned to Dr. Kinsler and his lawyers for help. It became clear to the judge that Mr. S. did not really comprehend what he was saying, and the judge halted the plea colloquy.

A month later, the State and the Defender General formulated a resolution in which all charges against Mr. S. were dropped, and he would be placed in a community facility for mildly retarded adults and receive careful community supervision.

The project served here not as originally intended, but rather in making the court aware of the defendant’s cognitive limitations, trying to obtain a legal result for the client that addressed these limitations. As in the case of Mr. R., our conclusions in the case of Mr. S. suggested the need to focus more on a case planning and case management model rather than simply providing a translation service for mentally retarded defendants.

The Case of Ms. C.G.: The Sequelae of Trauma in the Life of the Mentally Retarded

Ironically, the state women’s prison in Vermont is located on the grounds of the old State Hospital. Ms. G. was incarcerated there on charges of burglary, forgery, and marijuana possession. At the time of the alleged offenses, she was living in a motel with a man more than double her age, who had long criminal history of “uttering forged instruments.” Ms. G. reported that this man would “take her SSI checks” and “always complain about money.” She insisted that it was her idea to steal and cash checks from a neighbor, but that once she did so she was “handing D . . . hundred dollar bills.” She told the examiner that “it was her responsibility to give him money . . . my mother always supported all my fathers.”

The project team was brought in to assess Ms. G.’s need for a cognitive facilitator and courtroom and probation accommodations, and to make treatment planning recommendations that were sensitive to the interface between her cognitive issues and the “fallout” from her life history. She provided us with the following account of her family background, which was largely confirmed through documentary records.

Ms. G. reported that she grew up in a chaotic and multiply abusive family. Her mother had a chronic problem with alcohol and drug abuse and with “going to the bars.” Her mother became involved with men from the same lifestyle. Throughout her childhood, Ms. G. was exposed to intense and repeated family violence. She reported seeing her mother “punched, slapped, kicked” on a “daily basis.” She said she saw her mother “smashed in the face with bottles.” She learned to “pretend it was a nightmare, [to] pretend it was a bad dream.” The children often did not go to school “because my mom was too embarrassed by all the bruises and black eyes to take us.”

As if this was not an abusive and neglectful enough beginning, when Ms. G. was eight years old, she was repetitively sexually abused over a two-year period by a neighbor and friend of her stepfather. This man also abused other neighborhood children. The police became involved, and they came to Ms. G.’s home, informing the mother what had happened to her daughter. Ms. G. remembered that

her mother became enraged at her. Her life was so horrid that she “set fire to a highchair for one of her dolls and put it under her bed, hoping to burn to death.” She was 9 or 10 years old.

To Ms. G.’s great credit, she and one other child from the neighborhood were able to stand up to the grueling court process adjudicating the sexual abuse. Though the “case went on for years,” eventually the “man went to jail for 20 years.”

Not surprisingly, Ms. G. has a long history of psychological struggles. In addition to chronic suicidality, she has suffered from flashbacks, nightmares, extreme agitation, and self-harm, clawing her face at night during flashbacks. She has a history of choosing older, highly exploitive men. Ms. G. also has multiple cognitive deficits.

She was evaluated in another state in 1997 and found to have a Verbal IQ of 73, a Performance IQ of 72, and a Full Scale IQ of 72 on the WAIS-R, all in the 2nd to 3rd percentile. She was also diagnosed with a developmental reading disorder. In addition, she had very significant adaptive behavior deficits. She was unable to manage her own money, and her mother would have to choose what she needed when they went shopping. The mother also had to do Ms. G.’s laundry. Ms. G. has not been able to hold a steady job, and she has felt overwhelmed when she has tried such roles as working at Burger King or in a sheltered workshop.

The team’s evaluation assessed both cognitive and trauma-based symptoms. The TSI [Trauma Symptom Inventory¹⁴] indicated that Ms. CG suffered from severe trauma symptoms; her highest peak was on the dissociation scale.

The cognitive testing occurred after a grueling day for Ms. G.: she had had an upset with other inmates; her cell was moved, triggering feelings of insecurity; and she had just recounted the extremely upsetting family history summarized above. She appeared childlike and regressed through the cognitive testing and was highly self-critical. She would say “I must be stupid” when she did not answer correctly. She was accompanied to the testing by a support person; this person spontaneously asked, “Was she in a child state while she was taking those tests?” Her behavior was seen as quite suggestive of dissociative processes, with these behaviors dramatically affecting her intellectual results.

Ms. G. obtained a verbal, “crystallized” IQ of 50 on the K-BIT; her non-verbal, “fluid” IQ was 40; and her Composite IQ was also 40. On the K-FAST she scored 55 on Functional Math, 55 on Functional Reading, and 51 on a Composite of her academic skills. All these results are below the 1st percentile. The examiner expressed the opinion that “these were considerable underestimates of her intellectual potential, which appeared from prior testing to be in the low 70’s, but were representative of her functioning under significant emotional stress, at which times she functions much more like a moderate to severely retarded person. The combination of mental health and developmental disability issues sometimes leads to extremely low level intellectual functioning. She is, however, capable of functioning at the borderline level with appropriate supports, pacing, and accommodations.”

¹⁴Briere, J., Trauma Symptom Inventory, Psychological Assessment Resources, Odessa FL, 1995.

Tragically, it became clear that cognitive support services were only a small part of what Ms. G. needed. A “community wrap around,” “integrated services,” or “combined retardation and mental health case management” strategy was necessary, as is true for so many of our cases. In this particular case we suggested the following:

1. The use of cognitive facilitator for court proceedings, and provision of the standard menu of possible accommodations for the judge.
2. Dr. Kinsler attended a hearing in which Ms. G.’s disabilities were explained to the court and put on record in terms of required accommodations associated with the Americans with Disabilities Act. Thus, required accommodations were a matter of testimony that accompanied Ms. G.’s case to the Department of Corrections.
3. Ms. G. was recommended to a residential “Basic Life Skills” program. As the State Department of Corrections refused to admit a female to this program, insisting it was designed only for males, an “equivalent” set of services in the community was developed. This included:
 - (a) Referral to Adult Protective Services, the agency that aids retarded adults.
 - (b) Recommendation for and provision of supervised housing.
 - (c) The provision of trauma sensitive treatment, including medications such as “SSRI’s” (e.g., Prozac, Zoloft) that aid with posttraumatic symptomatology.¹⁵

What resulted was essentially “creative probation,” a set of services designed to provide cognitive, mental health, housing, and life-skills supports. It was only through provision of an integrated group of services that we believed Ms. G. could succeed in community placement. These services, however, did not work out as planned. Ms. G. was too needy for the standard community placement, and she was soon rejected and returned to jail.

Subsequently, Ms. G. chose to return to a neighboring state and to serve her probation there. We transmitted the required coordinated services plan to the probation department in the neighboring state. We can only hope that the carefully crafted package is being implemented at that site.

Summary Themes in the Three Cases

The three cases described above amply illustrate points made in the introduction to this article, as follows.

First, the criminal justice system is the repository of multi-problem persons whom society has often failed to provide for in other ways.

Second, the state is incarcerating substantial numbers of disabled citizens as a result of often misinterpreting symptoms of their disabilities as antisocial behavior.

Third, our mentally retarded or challenged clients need more extensive services than cognitive interpretation of legal matters. They need intensive case

¹⁵Yehuda, R., Marshall, R. & Giller, E. L. (1998). *Psychopharmacological treatment of post-traumatic stress disorder*. In P. E. Nathan & J. M. Gorman (Eds.), *A guide to treatments that work*, pp. 377–397. New York: Oxford University Press.

management that combines housing, sheltered employment, substance abuse, mental health, and life-organization services.

Fourth, the criminal justice system is not primarily dealing with “bad,” antisocial people. The defendants in this system are, in fact, most often the survivors of abuse in the previous generation.

Fifth, in each of the cases discussed, different aspects of the consequences of abuse and neglect are presented. This suggests that correctional services would be well served by attending to and delivering services focused on the effects of lifetime abuse, rather than just on external and overt behaviors. Teaching self-calming and self-soothing techniques could go a long way towards reducing recidivism.

Program Evaluation

To date, the VDAP project has focused on program development. This has involved creating policies and procedures for service, providing outreach and education of stakeholders, and accumulating clinical experience with many cases. A formal program evaluation has been postponed due to a beginning focus on putting the program into place and implementing it. We initially applied for funding for a 2-year period. We believed this would be sufficient to introduce accommodations and change attitudes within the state court system. This turned out to be a drastic underestimate of the time required to change a social system. Funding indeed ran out after a 2-year period. As a result, conducting project evaluations, making suggested accommodations, and drafting disabilities-sensitive sentencing recommendations was seriously reduced due to lack of funding. After this occurred, we began to receive multiple requests for these evaluations and recommendations from judges and lawyers. In effect, demand for the project’s “product” increased in its absence. We have therefore applied for continuation funding for an additional 2-year period, focused on providing the case-management services that the three cases described above have illustrated are necessary. We have received preliminary indications of at least 1-year continuation funding, and we shall conduct formal program evaluation during that time.

Our plan for formal program evaluation includes the use of both quantitative and qualitative data to monitor systematically and rigorously the types of clients whom we serve, how well the processes of the program work, and what outcomes we have achieved. In developing a program evaluation design, in addition to statistical group data, we plan to include representative case studies to inform and enrich our interpretations of the quantitative data. As illustrated in the three case studies in the above section, we have found case studies to concretely capture the essence of the program, bringing together all its different facets to assess and accommodate particular defendants.

The basic results that we have documented to date are described below.

The Multiple Problems of Our Clients

The VDAP program’s admission criterion has included only defendants with substantial cognitive disability. The solely mentally ill are screened out. Persons with ADHD and other learning disabilities have been screened in. Most of these

individuals have IQ's either in the Borderline or Mild range of mental retardation. In practical terms we could not tell the difference between persons who initially appeared as having "only" low IQ, who would usually end up being individuals with HLD, and those whose diagnoses initially were ADHD and multiple learning disabilities, who would usually emerge as HLD when we looked carefully into their lives.

To quantify some of the multiple problems of our clients, we analyzed 580 people of all ages who were screened by the project during a six month period. Our results show that 25% had prior special education services or an IEP, 42% had a prior mental health history, and 26% were already on probation for another offense. Confining the data to public defender clients between the ages of 13 and 19, we find that 27% of males had received special education services, and 55% of those had received mental health services. For females, 54% had received special education services, and 17% of those had received mental health services.

The Representativeness of Our Clients

The clients with whom the VDAP has been involved are a sample of the population of all defendants seen by the ODG. It is thus important to assess the representativeness of the VDAP project's statistics. We are planning a series of empirical studies to assess this. To date there has been one relevant study involving all young males aged 13–19 involved with the ODG. Conducted by the Vermont Department of Developmental Disabilities and Mental Health, the study found that 27% of these ODG clients had received special education services, within 2% of the screening percentage found by the VDAP for the same category of subjects. While just one piece of data, this figure does suggest that the VDAP clients might well be representative of all ODG clients.

Dropout Rates

One of the most revealing statistical findings was that almost two-thirds of persons who were project-eligible did not stay with the VDAP project after the arraignment phase. Many of these people were facing "minor crimes," such as driving with a suspended license. The clients chose to settle these kinds of issues as quickly as possible, rather than waiting for the public defenders to gather school and mental health information, perform screening, and suggest services. The longest delay came from the schools. A request for the client's most recent IEP and psychological assessment could take weeks. This delay is unacceptable for clients and the criminal justice system.

In contrast to the dropouts, the 36% of clients who remained and completed the project assessments were often charged with more numerous offenses or, in some cases, had come back a second time after failing on probation.

Feedback From the ODG Lawyers

The public defender attorneys in the Office of the Defender General were surveyed for qualitative feedback on their experiences with the VDAP. There

were many positive reactions. Here are some of these¹⁶: “It was the best thing I have ever done in my legal career”; “the project is essential to justice in Vermont”; “it was really helpful”; “we had successful outcomes using the evaluations”; and “we identified people we wouldn’t have without it.” When these lawyers did employ the VDAP’s information to seek accommodations, the successful accommodations included: “helping make program decisions about clients”; “giving people with mental retardation work crew instead of probation”; “getting defendants into services with the local mental health agency as part of a plea agreement”; “dropping charges”; “specially tailored and simplified conditions of probation”; “educating the probation officers about a client’s disability so that he wouldn’t found in violation for disability-related behavior”; and “arranging for clients to have cognitive facilitators.”

On the other hand, there were critical comments also, alerting the program to ways in which it needs to be improved. These comments included: “Sometimes I was afraid to use the information I had acquired from the evaluations because I thought it could work to the client’s disadvantage”; “when I did use the information, sometimes I wasn’t sure how to use it most effectively”; “the Department of Corrections needs to work more closely with us instead of fighting us”; “in our county, the prosecutor fights every case, even the obviously incompetent cases: we have to work to educate the judges about our clients and work with special educators and psychologists to do it”; and “since some of the clients fell between two service delivery agencies—the services for the developmentally disabled and the services for the mentally ill—it would be great if there was greater crossover between these two.” Finally, one of the lawyers said: “We need to continue this project, but we need a social worker badly, for much of the work with the people identified under the grant ended up being social work, e.g., getting clients hooked up with the mental health agency or substance abuse treatment. Having community support would make the system work better.”

A Preliminary View of Overall Accomplishments and Challenges

In our intense involvement in the VDAP project, we (Philip J. Kinsler and Anna Saxman) believe that while to date the project has achieved some very important preliminary accomplishments, it also continues to have major challenges. Some of these—both the positive and the negative—build upon the feedback from the public defender attorneys that we reviewed above. Our views are presented below. We want to emphasize that these preliminary conclusions are based upon our experiences and perspectives as two individuals who are highly invested in having the VDAP project succeed. With this as a caveat, we do believe that our views are important as a guide to process and outcome hypotheses to be later tested when we conduct our formal program evaluation.

First, we believe the project has been moderately successful in raising consciousness among the stakeholders about mental retardation issues. Public defender attorneys are making more sophisticated referrals. Judges are more aware of mental retardation issues, and, as shown in the case of M.S., are willing

¹⁶Note that while the feedback quotes cited below, *taken from what the lawyers wrote and said*, there has been some editing of them for clarity.

to interrupt proceedings to obtain professional advice about the level of developmental interference with legal comprehension.

Second, there has been an important spill-over in competency determinations in the Vermont courts. This has taken two directions. One, mentioned above, has been the unfortunate tendency for some judges and state psychiatrists to opine that a person of very limited intellect could be declared competent if they have the services of a cognitive facilitator. However, there has also been an opposite tendency to acknowledge clearly and quickly the meaning of intellectual limitations upon competency. Dr. Kinsler has recently completed multiple evaluations of persons with IQ's in the high 50's to mid 60's with lifelong mental retardation services. In response to his reports, increasingly the state examiners are assenting to findings of incompetence in these cases, and the cases are becoming resolved through provision of intensive community supervision through non-hospitalization orders. There is a greater sense of cooperation among experts in trying to plan a coordinated approach for the individual defendant rather than engaging in the typical battle of the experts.

Third, there is state-wide interest in using cognitive facilitators in work with the developmentally disabled.

Fourth, we now believe that our original service delivery model was too narrow. It has become clear that a case management approach is essential: provision of cognitive translation services is only one element in a broad accommodation model.

Fifth, we believe that we have failed to address adequately certain institutional resistances in the VDAP program's efforts to reform services for the mentally retarded—in particular, where provision of such services has budgetary consequences for State agencies. We have not been as successful as we had hoped in working collaboratively with the Department of Corrections in modifying their service delivery to this population. Provision of special education services within the educational programs in prisons, individual consultation with prisoners who cannot understand therapeutic programming, and providing tutoring and abuse services are all expensive. They also require a paradigmatic shift towards viewing prisoners as persons with a multiplicity of problems, rather than just as “bad actors.” If we are successful in expanding project services, we shall have to look towards far greater collaboration on these issues.

And sixth, the project has been too narrowly focused on persons with issues identified to be “cognitive.” In fact, we find that more than 60% of our clients have received mental health and child protection services. We believe that we now need to expand the eligibility criteria so that persons who have primarily mental health issues should at least pass the first “screening” step. Future re-orientation to a case management model will assist persons with a combination of intellectual, mental health, and child abuse challenges.

Implications of VDAP's Findings

Implications for the Courts

Our data showing that clients often suffered with multiple disabilities are important for the following reasons.

First, the person who is emotionally disturbed in addition to having cognitive

disabilities will have more trouble succeeding in the criminal justice system. This system expects people to be able to read, to understand oral directions, to reason abstractly, and to be able to act in a controlled and responsible manner without special assistance.

Second, the person with multiple disabilities has greater difficulty in accessing services in Vermont because someone with a low IQ who is also mentally ill often falls between two service delivery systems. If the person has an IQ of 72, he is not eligible for mental retardation services. If the same person accesses community mental health services, often these services are not designed for people with low IQs and learning disabilities.

Third, many of these individuals have been abused. Mentally retarded individuals are often targets for abuse, and some have never been in therapy to help deal with the abuse. A few have sexually offended not long after having been abused themselves. Recognizing these issues, the Vermont Department of Developmental Disabilities and Mental Health has recently applied for and received a grant from the Bureau of Justice Assistance to educate law enforcement, correctional, and court officials about best practices for community supervision of sex offenders with mental retardation. The Office of the Defender General will be collaborating on this project.

Fourth, there has been a lack of education and educational advocacy for multiply disabled clients. Most of the adolescents screened into the project who remain under age 22 are high school dropouts. Therefore, many are still eligible for educational services under the Federal IDEA (Individual with Disabilities Education Act) statute, but no one has advocated for their educational needs. Once in the criminal justice system, the Vermont Department of Corrections assumes responsibility for their education. However, a recent audit of the educational services in Department of Corrections reveals that many facilities do not have adequate special education services, if they have any special education services at all.

Implications for the Criminal Justice System

The VDAP has widespread implications for the criminal justice system as well as for our schools and our social service, retardation, and mental health service agencies. About half of the young people who are appearing in the criminal justice system have learning disabilities and emotional disabilities. A high percentage of them are high school dropouts. The significance of these numbers for our communities and schools should not be overlooked. What is going so wrong for these young people? Where are the safety nets to identify and help these juveniles before they commit crimes? A coordinated system of safeguards to identify young people at risk is needed. A collaborative system involving schools, mental health agencies, vocational rehabilitation, and the courts is an important next step. The Vermont Office of the Defender General seeks to provide a safety net by providing social workers in its offices who can identify these young people and their disabilities.

The cost to the system of prosecuting individuals with multiple disabilities is enormous. Given that their disabilities will often result in failure in the system, they are frequently caught in the revolving door of justice: placed in jail, then out

on probation, then back in jail. In some counties, 45% of the project people seen in the VDAP were already on probation when they were charged with new criminal behavior or violations of probation. Cost–benefit studies comparing court procedures and jail time compared to the proactive, diversionary programs described above are in order. It is very possible that the latter will in fact cost states less than dealing with individuals with multiple disabilities using the court procedures now in effect.

Many of the programs required by corrections were developed without regard to reading level or mental retardation. It will be difficult indeed for many of the disabled defendants to participate and succeed in those programs.

Without a project to identify these individuals, many would still be languishing in jail. Many others like them are in jail, from counties that are not project sites. It is easy to overlook persons with mental retardation in a system where the only questions asked a defendant can be answered yes or no, without any assessment of whether the defendant truly understands the question. Prosecutors and judges have limited time or interest to respond on an individual basis to defendants. Prosecutors are elected and judges are subject to retention by the legislature every six years. The media highlighting of a case in which a defendant can be perceived as receiving a light sentence can create serious problems for these participants. The standard options of plea agreements and sentences are all that is available in a system where the participants are pushed to move cases quickly.

The public defenders are in the best position to identify and advocate for clients with disabilities. Unfortunately, many of the offices are understaffed. With additional resources, social workers in the public defender offices could make an enormous contribution in identifying and advocating for disabled clients.

The best approach is to focus on early identification of disabilities in both the educational and criminal justice systems and to collaborate with the schools to work on why so many special education students are dropping out and finding their way into the criminal justice system.

Implications for Psychology

The VDAP project implies certain opportunities and directions for psychological training, research, and service provision. Among the implications are as follows.

First, despite the lack of “glamour” associated with HLD clients, there is an urgent need to train psychologists to work with these clients.

Second, there are research opportunities with important social ramifications within correctional services. Current correctional models sometimes emphasize cognitive-behavioral therapeutic work requiring extensive, often written homework assignments, which are clearly inappropriate for people with language and reading disorders. When clients do not produce effective documents, they can be seen as “non-compliant.” It would be useful to determine what alternatives may exist to reliance on written work. It seems likely that a service delivery system focused on identifying very concrete behavioral triggers and alternative, highly specific responses would have significant potential. We are trying to begin

implementing such a system through the project by the development of “trigger flash cards” to use with clients.

Third, given that such a significant amount of service for mentally retarded persons is being provided in prisons, it is necessary for psychology training to attempt to establish clerkships, practicum sites, and perhaps even formal internships within correctional settings.

Fourth, psychology may have an expanding role to play in combination with legal practice. We are now looking into placement of a mental health professional within each local division of the Office of the Defender General, to aid with problem identification and conceptualization and with wrap-around treatment planning.

Fifth, as is true of persons with severe mental illness, it appears that for prisoners, effective case management comes before delivery of other services. This could and should become a part of psychological training.

Conclusion

We began this article by describing national trends in which the courts have become institutions of last resort for multi-problem citizens. We believe that through the Vermont Defense Accommodation Project, we have begun to develop a useful model to help such citizens in the complex world of the criminal justice system. We have also been able to help some individual mentally retarded citizens to achieve better outcomes within this system, as was concretely illustrated by the three case studies that we reviewed above. We look forward to further service provision and program development in this area, guided by feedback from formal and comprehensive program evaluation studies of the VDAP planned in the near future.

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