

Coming out of the Darkness: America's Criminal Justice System and Persons With Intellectual Disabilities in the 20th Century

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I was born in 1927. That was the year Charles Lindbergh flew to Paris and Babe Ruth hit 60 home runs. These high points remain vivid in my memory. Later, however, I became aware of two other happenings that plunged hundreds of my human brothers and sisters into a terrible dark and dismal slough of despondance.

In 1927, Hitler wrote *Mein Kampf* (*My Struggle*). In it he called for the cleansing of the human stock of the world. He cried out for the building of a super race. He wrote:

The right of personal freedom recedes before the duty to preserve the race. The demand that defective people be prevented from propagating equally defective offspring is a demand of the clearest reason and if systematically executed it represents the most humane act of mankind. (1927/1971)

Also in 1927, United States Chief Justice Oliver Wendell Holmes wrote a ruling in the case of *Buck v. Bell*. In it, he claimed that persons with intellectual disabilities were “a sap on the strength of the state.” He did not, however, call these individuals “intellectually disabled.” He called them “imbeciles.” Unlike Hitler, he did not aim for their execution; rather, he called for sterilization as a method for stopping the breeding of such persons.

Justice Holmes was influenced by a core of powerful academic leaders in the early 1900s: Carl Brigham, Charles Davenport, Henry Goddard, Madison Grant, Harry Laughlin, Lothrop Stoddard, Lewis Terman, Edward Thorndike, Robert Yerkes. Interestingly, all of them were of English origin. I feel strongly that the leader who most powerfully shaped the nation's thinking about persons with intellectual disabilities, and ultimately the ruling of Chief Justice Holmes, was Henry Goddard. He mixed his thinking about human beings with Gregor Mendel's laws for raising pea plants. According to Mendel, a single nasty gene could bring healthy pea plants down.

In 1912, Goddard published a best selling book, *The Kallikak Family*, in which he applied Mendel's laws on pea plants to the breeding of human stock.

He even coined a new word: *moron*. According to him, morons formed the real criminal class in America. Then, like Henny Penny who ran around screaming that “the sky is falling,” Goddard wrote profusely that our pure American bloodline—mostly English—would be so corrupted that our civilization would go down hill (pp 109–111).

We know better today. Latter-day researchers, including Stephen Jay Gould (1981) and J. David Smith (1985), showed that Goddard had been terribly wrong. Even so, it was out of this dark nadir that society and its criminal justice system had to climb.

Awful, Awful Early Prejudices

The statements like those of Hitler, Holmes, and Goddard unleashed a cascade of prejudice that even flowed into the classic literature of our time. A good example can be found in F. Scott Fitzgerald's *The Great Gatsby*. In it, upper crust Tom Buchanan mentions Goddard and says,

This fellow has worked out the whole thing. It's up to us who are the dominant race. . . . This is the idea that we are Nordics . . . and we've produced all the things that go to make a civilization—oh, science and art and all that do you see? (pp. 12–13)

Interestingly, as Goddard became recognized for his evaluations of persons with intellectual disabilities, he began to test immigrants coming into Ellis Island. His data showed that most of those coming from countries east and south of the Nordic regions carried that single nasty Mendelian gene. Fortunately, these immigrants from other countries rose up and defended themselves. Sadly, persons with intellectual disabilities and their parents who were already in the country could not do the same. As a result, terrible prejudices were unleashed against them:

- Doctors advised parents of so-called “defective newborns” not to take them home.
- Some ministers called on these parents and offered

to help them search their souls for sins they may have committed.

- Social workers vigorously pressured parents to give up kids with these disabilities. They became leaders of the bloodline cleansing furies of the day.
- Consequently, persons with these disabilities were sent to live out their lives in large, isolated institutions most often called “State Schools for Mental Defectives.”
- These institutions contained large rooms with acres and acres of beds; large day rooms filled with chairs and benches; and large, noisy dining halls filled with foul smelling odors and thousands of flies.
- The populations in state institutions ranged from hundreds to thousands. Willowbrook, on Staten Island, contained over 6,000 persons. The institution in Milledgeville, Georgia, lumped together persons with mental illness and intellectual disabilities for a total of 13,000 persons.

As a younger man, I worked in one of those institutions. It contained 250 expatriated children and youth. I worked hard because my conscience worked hard on me. I did the best I could to help care for these youngsters. For example, I could not enjoy my Thanksgiving and Christmas holidays with my family until I went early in the morning to the institution, walked onto every ward, shook the hand or gently patted each boy or girl, and called each one by his or her name. It did not amount to very much, but . . . that was me.

I recall the oft-repeated speech our superintendent gave to parents who were trying to decide whether or not to admit their children. It went something like this:

Mr. and Mrs. Jones, ours is an institution for children with mental retardation. We know all about mental retardation, and your son John belongs with us. So go on and live a good life with the rest of your family. John is in our family now.

Thinking back, I was puzzled by why so many of our residents were simply labeled with “Mental Retardation, Etiology Unknown.” That term *mental retardation* seemed to be the catchall term for all kinds of strange and misunderstood symptoms. We did not know about autistic spectrum disorders, or Asperger’s syndrome, or fetal alcohol syndrome, or fetal alcohol effect, or attention deficit disorders, or hyperactive disorders, or Williams syndrome, or hundreds of other syndromes we now have come to understand and respect in recent years.

By 1950, workers in the field were utterly bril-

liant in their abilities to remove children with intellectual disabilities from their parents and send them off to live in these out of the way, out of sight, out of mind human warehouses. They were expected to live there for the rest of their lives.

An Amazing Mid-Century Reversal

Something else happened in the 1950s. All over the nation, small groups of parents of children with these disabilities banded together. They began to fight for a better life for their sons and daughters. Their goals and spirit were so attractive that many of us who worked in the field joined them—and attitudes toward persons with disabilities began to turn around. Together, parents and workers fought to bring back hundreds from these far-off institutions. We fought for their right to live a full life in their own neighborhoods.

Was it a successful shift? Suppose that in 1959, I predicted to my institutional superintendent that by 2006, persons with intellectual disabilities would be living in their own apartments and homes; walking or riding in wheelchairs all over our neighborhoods; interacting warmly with so-called “normal” neighbors; going to their own neighborhood schools; working in regular jobs; riding buses, trains, and airplanes; enjoying meals in restaurants; sitting in the stands and cheering for their hometown baseball team; attending movies, concerts, and the regular services of their own religion; running and carrying Special Olympic torches with police officers; learning to speak for themselves; visiting neighbors who are sick; being valued and loved by others in the community; making their own neighborhoods more zestful because they live there; or becoming pains in the butt like some of our other neighbors; or *like it could happen to any citizen, they can be asked to come to the police station and answer questions about a crime that happened in their neighborhood*. If I predicted all that to my institutional superintendent back in 1959, he would have said I was insane.

Make no mistake, that awful penchant for pushing these persons out of society still lingers in the minds of some citizens; but what about law officials in the criminal justice system—the police, the judges, the prosecutors, the defense lawyers, the corrections officers, the parole officers? Are they making changes in the way they view persons with these disabilities? They are.

Improved Judicial Decisions

Before the 1950s, judges made most of the commitments. People with strange, misunderstood symptoms were paraded before them. Without getting to the bottom of their behavior and appearance, judges banged their gavels and committed these persons to life in institutions. Judges are not moving that quickly anymore. They are refusing to decide so rapidly. They are more empathetic in their decisions about what should happen to persons with intellectual disabilities who come before them.

Heightened Police Awareness

Those old, awful prejudices are being offset by myriad ways that officers of the law are being healthily exposed to persons with these disabilities. It is happening . . . in police academy discussions, in patrol roll-call briefings, in precinct meetings with local disability agencies, in meetings between disability groups and community policing officers, in discussions between disability agency executives and police chiefs, in regular problematic and friendly interactions on the streets, even the thousands of officers who engage in Special Olympics torch runs and athletic events most certainly profit from this healthy face-to-face exposure.

During 7 years of teaching a segment on intellectual disabilities in a Connecticut police academy, I found the recruits hungry to learn every thing they could about these persons. Even so, the most poignant moments in the course came when individual officers were invited to give debriefings regarding their previous experiences with their own relatives or neighbors who had these types of disabilities.

Diminishing False Confessions

Improved interrogation techniques are on the rise. A recent survey was completed for persons with intellectual disabilities who confessed to murders, rapes, burglaries, and arsons that they did not commit (Perske, 2005): After revisiting their cases, 39 were judged to be actually innocent; almost half were exonerated by DNA tests; most of the false confessions were received more than 10 years ago; most exonerations, however, came only recently when their cases were reopened; in all 39 cases, a defense lawyer was not present during the interrogations; 5 more cases will be placed on the list as

soon as the courts rule; and the list grows larger with every coming year. Consequently, both we who work in the field of intellectual disabilities and officers committed to catching and convicting serious felons are much sharper at the job of getting true confessions than ever before.

The Electronic Recording of Custodial Interrogations

Today, pitched battles are taking place in courts and legislatures over this issue. One side argues that judges and juries have a right to see and hear for themselves what actually went on in an interrogation room. The other side argues that the cost of equipment and the extra manpower needed will make it impossible. Both sides have valid points that must be considered. Some early outcomes that have occurred, for example, are that presently, 7 states have legislated or court-ordered such recordings (Alaska, Illinois, Maine, Minnesota, New Jersey, Texas, and Wisconsin). Police agencies chose to participate in a national survey on electronic recording. The survey reported that 238 law enforcement agencies in 38 states now record custodial interrogations (Sullivan, 2004).

Misunderstood Responses

Today, many law officers are advancing their common-sense skills in understanding unorthodox responses that some persons give during an interrogation. The first to actually list and explain some of these responses happened in 1985 (Ellis & Luckasson, 1985). Some 11 years later, an attempt was made to add to that list (Perske, 1994). This list included relying on authority figures for solutions to everyday problems, the desire to please persons in authority, the inability to abstract from concrete thought, watching for clues from the interrogator, bluffing greater competence than one possesses, an all-too-pleasant façade, abhorrence for the term *mental retardation*, a quickness to take blame, trying to tell the interrogator what he wants to hear, and exhaustion and surrender of all defenses with a willingness to say anything that might help a suspect get out of that long-hours-in-a-pressure-cooker situation.

Interestingly, these earlier lists of misunderstood responses only scratch the surface. For example, Detective Dennis Debbaudt, the father of a son with autism, now conducts “roll-call briefings”

in police stations across the country (Debbaudt, 2002). What follows are only a few of many diagnostic behaviors and characteristics: autism may or may not be physically obvious; persons may be non-verbal or have limited speech, avoid eye contact, prefer to be alone, lack fear of real danger; are apparently insensitive or highly tolerant to pain; have difficulty in expressing needs; do not use gestures; have unusual responses to lights, sounds, or other sensory input; seek sensory stimulation, including heavy pressure; have difficulty interacting with others; try to avoid touch; exhibit sustained, unusual repetitive actions; laugh or giggle inappropriately; have an inappropriate attachment to objects; spin or twirl objects; exhibit finger, arm, or wrist flicking; rock back and forth; and echo words and phrases.

Those who work with persons having fetal alcohol syndrome and fetal alcohol effect are creating another long list. For example, psychologist Norgard (2006) has listed all of the idiosyncrasies she observed while raising an adopted son who suffered from fetal alcohol syndrome caused by a heavy drinking birth mother (2006). Her long list of descriptions included distinct facial and cranial features, living for the moment, inability to plan ahead, impulsive physical explosions, and inability to learn from past experiences.

Every disability group is becoming skilled at describing responses from the people they serve that law officers might misunderstand. The more the officers understand them, the more professional they will become.

Banning the Execution of Persons With Mental Retardation

Exactly 75 years after Chief Justice Holmes' ruling, the Supreme Court banned the execution of persons with this disability. It happened on June 20, 2002, in *Atkins v Virginia*. The basic question in the hearing was, Does the execution of persons with mental retardation violate the evolving standards of decency that mark the progress of a maturing society? The High Court voted 6 to 3 that it does. In his ruling, Justice John Paul Stevens, made seven powerful points. He

- claimed that disabilities in reasoning, judgment, and control of impulses kept them from being as morally culpable as others who commit capital crimes,
- cited a long list of “diminishing capacities” ac-

quired before age 18 that could keep them from being the “worst of the worst” for whom the death penalty is reserved,

- declared that persons with this disability may deserve punishment, but to execute them would be excessive and unfair,
- recognized a “consistency of change” in death penalty states. For example, from 1988 to 2001, 8 of these death-penalty states voted for such a ban on their own,
- said that executing these persons would not “measurably advance the deterrent or retributive purpose of the death penalty,”
- recognized that many of these persons have often been coerced into confessing to murders they did not commit, and
- declared that such executions violate the 8th Amendment that forbids cruel and unusual punishment.

Before the *Atkins* ruling, a survey showed that 44 persons with mental retardation were executed from 1976 until the *Atkins* ruling (Keyes, Edwards, & Perske, 2002). Since *Atkins*, there has not been a single person with this disability who has been executed. Of course, a number of convicts did suddenly claim to have mental retardation, but the legal system seems to be working reasonably well in discerning whether they do.

Unfortunately, this ruling applies only to those who can be labeled with *mental retardation* according to earlier judgmental and legislative beliefs. It by no way protects the wider spectrum of persons with intellectual disabilities. Even so, that powerful phrase about our nation's “evolving standards of decency that mark the progress of a maturing society” has struck a powerful chord in the hearts of many workers in both legal and disability circles. It will not go away easily, despite the negative fireworks that “originalist” Justices Antonin Scalia and Clarence Thomas hurled at it in their dissent of the ruling in *Atkins*.

Consequently, the argument now focuses on whether the United States Constitution should be frozen according to thinking at the time of its writing or whether it is a living and growing document. The legal answer will not come easily. It is interesting, however, that the March 1, 2005, 5 to 4 ruling in *Roper v. Simmons* banned the execution of persons under the age of 18.

It is equally interesting that Justice Anthony Kennedy's ruling was based so strongly on that fa-

miliar “evolving standards of decency that marks the progress of a maturing society” phrasing that some legal experts have called it “Atkins’ twin.” I hope I can live long enough to read that phrase in many more Supreme Court rulings.

Legal and Disability Groups Together

I grew up in a big city with police officers around me during my teenage years. One of those officers chose to be a close mentor. He became the finest father figure I ever had. When I reached adulthood, Bob Swanlund hired me to work in his crew in the Communications Division of the Colorado State Patrol. I worked there until certain critical incidents sidetracked me into the disability field.

Consequently, my experience flavors a dual view. First, I possess a deep respect for good law officials who work with passion to keep their neighborhoods tranquil and secure. After all, when most of us are running away from danger, they must rush toward it. Second, I am moved by the passion of some workers who stand up for persons with disabilities who cannot defend themselves. Workers with passion, *real* passion, can envision breakthroughs that ordinary workers will not even begin to discover.

Unfortunately, working groups in both law and disability tend to break off small pieces from the larger all-encompassing issue. They take them and their funding and go off by themselves. They work hard, but sometimes they become so focused on what they are doing on their own turf that they often refuse to take seriously what people are doing in other camps.

I believe that these cluster bombs of light that illuminated the landscape of the 20th century are the result of both good law officers and good human service workers who, through great amounts of arguing, finally came to see eye-to-eye. Neither side can claim they created these breakthroughs without the other.

One cannot help but wonder what eye-to-eye victories will be reported at the end of the 21st century.

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