COMPETENCE, PATERNALISM, AND PUBLIC POLICY
FOR MENTALLY RETARDED PEOPLE

ABSTRACT. This article examines two currently disputed issues regarding public policy for mentally retarded people. First, questions are raised about the legal tradition of viewing mental competence as an all-or-nothing attribute. It is argued that recently developed limited competence and limited guardianship laws can provide greater freedom for retarded people without sacrificing needed protection. Second, the question of who should act paternalistically for retarded people incapable of acting for themselves is examined. Rothman's claim that special formal advocates are the best representatives for retarded people is discussed and criticized. It is argued that parents, professionals and legal advocates should share decision-making authority on behalf of those who are incompetent.

Key words: Mental retardation, Competence, Paternalism, Guardianship, Advocacy, Autonomy.

1. INTRODUCTION

Because of their diminished intellectual capacities, mentally retarded people are sometimes unable to make important decisions and require the assistance and protection of others. Social principles regarding competence and paternalism may, therefore, have a significant impact on their lives, influencing both who makes basic life choices and how such choices are made. Despite the potential value of such social and legal principles for mentally retarded people, their needs were largely neglected by the United States legal system for most of this century [8]. The one Supreme Court decision regarding the retarded before the 1970s, *Buck v. Bell* (1927), upheld the practice of involuntary eugenic sterilization. This decision, according to Michael Kindred, is representative of a general legal attitude which dismissed the retarded as unworthy of serious consideration [8]. Inspired at least in part by the civil rights movement for blacks and other minorities, however, a significant awakening of legal activity on behalf of mentally retarded people occurred in the 1970s. Numerous instances of inadequate residential care, treatment and education were challenged through class action lawsuits; in response, courts and legislatures established new standards for the care and education of retarded people.

Despite great improvement in our provision for retarded people in recent years, many difficult issues remain to be settled. (Several very recent court decisions have, in fact, been viewed as hostile to the interests of the retarded [6, 8]). From a conceptual point of view, one problem is the difficulty of formulating general policies and principles for a population as heterogeneous as that of retarded people. That is, even impaired intellectual functioning, one characteristic
which retarded people share, varies widely — from mildly retarded persons capable of independent living to profoundly retarded individuals lacking the most basic self-help skills. To be effective, then, principles and policies for retarded people must be adaptable to very different situations and needs.

In this paper, I will focus on two currently disputed issues regarding public policy for the mentally retarded. I will first challenge legal policies that treat mental competence and incompetence as mutually exclusive and exhaustive alternatives. Second, I will criticize a recent claim that formal advocates are the best representatives of retarded people. Both of these cases, I will argue, oversimplify the situation and needs of retarded people. I will suggest examples of more complex and flexible alternatives which can be tailored to the particular circumstances of different individuals.

2. INCOMPETENCE AND GUARDIANSHIP

In his recent article 'Paternalism and the mildly retarded', Daniel Wikler examines the justification for denying full citizenship to mentally retarded people by declaring them incompetent [19]. He points out that decisions about competency involve a trade-off between two fundamental values, freedom and (paternalistic) protection from harm. That is, declaring a person incompetent denies him a wide range of freedoms, but protects him from harms caused by his inability to make fundamental decisions with minimal adequacy. Wikler argues that even if mental capacity or intelligence is a continuous endowment always admitting of 'more' and 'less', we can draw a non-arbitrary line between competence and incompetence, since only a certain amount of intelligence is necessary to perform key life tasks. He then notes that the level of difficulty of these key life tasks is largely socially determined. Though they could be made simpler and thus render many retarded people fully competent, simpler conventions would be less useful for people of average or above average intelligence. The choice between changing social practices to make them safe for retarded people and denying them freedom to act in a riskier environment is, Wikler concludes, ultimately a matter of distributive justice.

Wikler's claim that social practices could be made simpler to allow retarded persons to participate in them suggests one promising approach to reconciling the values of autonomy and protection. His argument, however, assumes that competence, unlike intelligence, is an "all-or-nothing" property, "so that all standing above it are equally endowed and all falling below it are unendowed" ([19], p. 384). I believe that abandoning the simple competent-inacompetent dichotomy will offer other ways to reconcile autonomy and protection. In a footnote, Wikler himself acknowledges the value of a notion of "selective