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Richard L. Aynes

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NOTES

BEHAVIOR MODIFICATION: WINNERS IN THE GAME OF LIFE?

O'Brien smiled slightly. . . . "Did I not tell you just now that we are different from the persecutors of the past? We are not content with negative obedience, nor even with the most abject submission. When finally you surrender to us, it must be of your own free will. We do not destroy the heretic because he resists us, so long as he resists us we never destroy him. We convert him, we capture his inner mind, we reshape him. We burn all evil and all illusion out of him; we bring him over to our side, not in appearance, but genuinely, heart and sole. . . ." ¹

DR. B. F. SKINNER, Harvard's noted professor and psychologist, and perhaps the most famous advocate of "behavior modification," ² saw the hope of such scientific social engineering as creating a "technology of behavior" ³ in order to effectuate control.

While aspirations to exercise such control of men's minds were somewhat novel, it took only until 1962 for the Bureau of Prisons to become actively interested in the possibilities. In that year Dr. James V. Bennett, who was then Director of the United States Bureau of Prisons, presided over a seminar on corrections which was attended by psychologists and wardens alike. Dr. Bennett, shared the feeling attributed to many social scientists that because the federal prison system had control over thousands of prisoners it offered "a tremendous opportunity" ⁴ for experimentation. He urged the participants to take the initiative in activating their own behavior modification programs.

What I am hoping is that the audience here will believe that we here in Washington are anxious to have you undertake some

¹ G. ORWELL, 1984, 210 (1961 ed.).

² N.Y. Times, Feb. 26, 1974, at 16, col. 1. Cf. TIME MAGAZINE, April 1, 1974, at 5, where Dr. Skinner indicates that he is given too much credit for many of the programs developed and that he advocates only those forms of behavior modification which are based upon positive rewards.

³ B. SKINNER, BEYOND FREEDOM AND DIGNITY 5 (1971). See also the statement of Dr. James McConnell, Professor of Psychology of the University of Michigan:

I believe the day has come when we can combine sensory deprivation with drugs, hypnosis, and astute manipulation of reward and punishment to gain almost absolute control over an individual's behavior. . . .

Quoted in Mitford, *The Torture Cure*, HARPER'S MAGAZINE, Aug., 1973, 24-25 [hereinafter cited as Mitford].

⁴ Mitford at 18, quoting from CORRECTIVE PSYCHIATRY & J. OF SOCIAL CHANGE, Second Quarter (1962).

of these things: do things perhaps on your own — undertake a little experiment of what you can do with the Muslims, what you can do with some of the sociopath individuals.⁵

Just how quickly social scientists and correctional officials would adopt Dr. Bennett's proposals was unknown. But it is now clear that in 1974, when law suits⁶ and legislative investigations⁷ brought behavior control programs to the public's attention, such programs were widespread, and adherents of behavior control programs were firmly entrenched in the bureaucracy of the correctional systems.⁸

It is because the officials who administer the penal institutions are firmly committed to "behavior control" as a method of penological reform⁹ that it is important to consider this "new approach" and all of its ramifications. It is to that end that this note will consider the extent and intensity of behavior control programs; the legal ramifications of such programs; and prospects for the future.

I. BEHAVIOR CONTROL AND BEHAVIOR MODIFICATION

The term behavior control refers to all systematic or scientific endeavors in which the goal or result is to use external means to alter a person's behavior and in which such alteration can be imposed without regard to the person's wishes. Different types of behavior control include the use of psychotropic (mind-altering) drugs, electrical stimulation of the brain by the implantation of electrodes, psychosurgery, and organic conditioning techniques.¹⁰ The scope of this discussion of behavior control will be limited to the last category,¹¹ which is most often termed "behavior modification" and which is the type used most extensively in the prison system.¹²

⁵ *Id.*

⁶ *E.g.*, *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974).

⁷ SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 93d Cong. 2d Sess., INSPECTION OF FEDERAL FACILITIES AT LEAVENWORTH PENITENTIARY AND THE MEDICAL CENTER FOR FEDERAL PRISONERS (Comm. Print 1974) [hereinafter referred to as REPORT]; *Hearing on Oversight Hearing Behavior Modification Programs in the Federal Bureau of Prisons Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings*].

⁸ *E.g.*, Norman A. Carlson, the director of the federal prison system has told a congressional subcommittee that behavior modification was an "integral part" of many prison programs and that it would continue to be used on inmates "whenever appropriate." N.Y. Times, Feb. 28, 1974, at 38, col. 1.

⁹ See generally the statements of Dr. Groder and Dr. Carlson, of the U.S. Bureau of Prisons, before the Congressional Subcommittee, *Hearings*, *supra* note 7.

¹⁰ For a summary of what these techniques involve and an introductory biography see Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Corrective Use of Organic Therapies*, 47 S. CAL. L. REV. 237, n.3-6 (1974) [hereinafter cited as Shapiro]. A comprehensive analysis of the issues involved in psychosurgery is presented in *Symposium: Psychosurgery*, 54 B.U.L.Rev. 215 (1974).

¹¹ This is not meant to suggest that the discussion herein is not applicable to other forms of behavior control, only that it does not specifically address itself to those questions.

¹² While many of the cases discussed herein are related to the use of drugs, it should be

Organic conditioning or behavior modification may be defined as any attempt to use positive or negative reinforcement in an attempt to change a person's behavior.¹³ In its more technical sense, it "is the *systematic* application of the psychological principles of learning theory to the process of encouraging people to change their behavior."¹⁴ (Emphasis added.) While similar techniques may be used in a minor way in a person's ordinary, day-to-day life,¹⁵ behavior modification is differentiated by the fact that it is "practiced systematically and analytically."¹⁶ The California Medical Facility at Vacaville provides an example of this systematic approach. The medical facility houses inmates who have been convicted of a felony and who have either developed mental illness subsequent to incarceration or who have been determined by the California Department of Corrections to have personality or psychological problems.¹⁷ One of the special programs conducted at Vacaville until 1970 was "anective treatment."¹⁸ The treatment itself is best described by a former patient/prisoner at California's Atascadero State Hospital:

[Harvey has just refused his nightly Thorazine "cocktail."]

"That's it Harvey," Harrison says. "Remember what I told you last time. They're just going to have to give you Anectine again."

noted that they are used either as a form of control or for purposes of aversive conditioning and therefore are not considered part of the treatment known as drug therapy.

¹³ See Clairborne, *Behavior Modification and Its Positive Aspects*, N.Y. Times, April 28, 1974, § 4, at 13, col. 1 [hereinafter cited as *Behavior Modification*].

¹⁴ Carlson, *Hearings*, *supra* note 7, at 4.

Its basic method of procedure is to arrange contingencies between the patient's behavior and the consequences of that behavior. A good consequence is typically referred to as a reward (positive reinforcer), while a bad consequence is viewed as something that is undesirable (negative reinforcer). The behavioral therapist is always on the lookout for these two kinds of consequences relative to a particular patient and purposely structures an environment so that behavior becomes the vehicle by which rewards are acquired or undesirable events terminated.

See Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616, 626 (1972) [hereinafter cited as *Conditioning*] quoting from H. SCHAEFER & P. MARTIN, *BEHAVIOR THERAPY* 5 (1969). Behavior modification may be further subdivided into three theoretical subcategories: classical conditioning, operant conditioning, and aversion therapy. Classical conditioning involves "learning" after which a conditioned stimulus will produce a conditioned response. Classical conditioning thus is concerned with strengthening or weakening behavior by its antecedents. Operant conditioning takes the opposite approach and reinforces or punishes conduct after it has occurred. Operant conditioning focuses upon altering behavior by its consequences. Aversion therapy is an attempt to cause certain behavior to stop by associating it with unpleasant consequences. It has been suggested that aversion therapy is nothing more than negative reinforcement under operant conditioning. For a more detailed discussion of these matters and references to scientific works see generally *Conditioning* at 628-31. See also Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405 (1970).

¹⁵ *Behavior Modification*, *supra* note 13, at 13; Carlson, *Hearings*, *supra* note 7, at 62.

¹⁶ *Behavior Modification*, *supra* note 13, at 13, col. 3.

¹⁷ For a fuller discussion see *Conditioning*, *supra* note 14, at 633-40.

¹⁸ The program was discontinued due to both a lack of adequate staff and proper subjects as well as possible adverse public reaction. *Id.* at 635.

Harvey goes limp. "No Mr. Harrison, don't give me that!" "I'm sorry, Harv, but you don't give us much choice."

. . . Burns prepares a Thorazine injection . . . [a]nd one morning soon they will take Harvey downstairs to an examining room, and strap him to the table. The doctors will drain Anectine from a vial while technicians wheel an oxygen tank closer. They will tell Harvey if he had behaved himself they wouldn't have to do this. The cotton ball will be cold on the tied vein, the needle inserted before he has time for a full breath or thought. Paralysis will sweep through him, pounding heart stilled, lungs unable to draw or burst, attempts at movements aborted. He will know he is dead as the doctor bends to softly warn, "Now, Harvey, you won't act up anymore, will you? It just doesn't pay. You know better than that. . . ." And before unconsciousness, before a blurred hand reaches for the tank, he'll revive, tingling with frightened life, no wiser from knowing the next dose will be larger.¹⁹

The accuracy of this account is substantiated by the statements of Dr. Arthur Nugent, chief psychiatrist at Vacaville, when he observed that the Anectine treatment gave the "patient" the feelings of suffocation and drowning, of terror and horror, and made him feel "as though he were on the brink of death."²⁰

Originally, sixty-four inmates were selected for the program. Those selected were considered "angry young men" who were destructive either to themselves or to other inmates and each "was found either inaccessible or unamenable to other therapies. . . ."²¹ The understanding was that prisoners were to experience "anectine therapy" if they committed certain prohibited acts which included violent attacks on others, self-mutilation, suicide attempts, sniffing toxic substances, or destruction of property.²² In all, 15 of the prisoners were finally given the treatment,²³ at least five of them without any semblance of consent.²⁴ An attempt was made to administer the drug as soon as possible after the inmate violated one of the prohibitions.

The distinctions between behavior modification as practiced at Vacaville and the "behavior modification" allegedly practiced by everyone in everyday life²⁵ are readily apparent. Though there is no identity be-

¹⁹ Opton, *Psychiatric Violence Against Prisoners: Therapy is Punishment*, 45 Miss. L. J. 605, 625-26 (1974) [hereinafter cited as *Psychiatric Violence*] quoting G. LIVINGSTON, *EXILE'S END*, 101-02 (1973). Cf. *Conditioning*, *supra* note 14, at 635-36 for an account by a member of the medical staff administering the program.

²⁰ Mitford, *supra* note 3, at 25-26. For a more detailed account see *Conditioning*, *supra* note 14, at 634-38.

²¹ *Conditioning*, *supra* note 14, at 634.

²² *Id.*

²³ *Id.* at 635.

²⁴ *Id.* at 634-35.

²⁵ *Hearings*, *supra* note 7, at 62. See also R. BLACKWOOD, *THE OPERANT CONTROL OF MISBEHAVIOR* (1970); Gray, Straubard & Rosenberg, *Little Brother is Changing You*, *Psychology Today*, March 1974, at 42-46.

tween the Vacaville program and other behavior modification programs, consideration of the objectionable features of the Vacaville program reveals five criteria upon which a given program of behavior modification can be judged.

The first consideration is the degree of "intrusion" into the individual's life. Such intrusion may be either physical or mental²⁶ and may include considerations such as a change in the individual's personality and life-style.

A second criterion is the degree of coerciveness involved. This is determined by such factors as the extent of physical intrusion involved, the duration of the effect, any side effects, and the degree to which an inmate can resist the effects of the technique.²⁷

The third consideration is how "dramatic" the change is. It involves an attempt to measure the length of time needed for the change to occur, and the "quantity" of change.

Fourth, the amount of risk must be considered. Risk includes not only the danger that the technique (or experiment) may fail, but also the mental or physical damage which the patient might suffer in that event. Equally as important, consideration must be given to the known or reasonably anticipated side effects.

Finally, there is the consideration of the ability to reverse the effect of prior modifications.²⁸ If the individual involved were to change his mind about the modification, or if a new scientific advance would demonstrate that a past assumption was incorrect, what would be the possibilities of restoring the individual to his previous condition?

By utilizing these criteria, one can make distinctions between the extremes. The "thank you" and smile of a salesclerk while possibly providing a "positive reinforcement" involves no intrusion into the individual's life, exerts no coerciveness, does not produce a sudden and dramatic change, involves little or no risk to the recipient, and whatever change it may have induced can be reversed with little trouble. Unfortunately, the same cannot be said for many of the programs instituted in correctional centers.

A. *Example or Abberation?*

Is the Vacaville program of "Anectine treatment" representative of nation-wide experimentation with behavior modification — or only an unfortunate but since discontinued incident? There is no easy answer to this question.

One of the major problems in attempting to evaluate behavior modification and its impact upon society has been that no one possesses an

²⁶ Shapiro, *supra* note 10, at 251, n.39:

"[I]ntrusiveness" is defined by reference to the effects of a therapy or procedure upon mentation and behavior rather than by reference to physical invasion of the person

²⁷ *Conditioning*, *supra* note 14, at 619.

²⁸ For a discussion of this problem, see Shapiro, *supra* note 10, at 263-65.

accurate picture of the number, contents, or results of such programs. In February of 1974, a spokesman for the Law Enforcement Assistance Administration (LEAA) estimated that it had funded at least 400 behavior modification programs, but at the same time admitted that the agency did not know exactly how many programs it had funded.²⁹ The situation is further complicated by the fact that behavior modification programs are funded not only by other federal agencies such as the Department of Health, Education, and Welfare (HEW)³⁰ but also by various state and local governments.³¹

Many of the existing programs may have been terminated on February 15, 1974, when both LEAA and HEW, in response to public and congressional pressure, announced a ban on the use of funds for programs involving behavior modification.³² Nevertheless, since the definition of what is and is not banned has not been specified and in light of statements by various federal correctional officials that they will pursue their programs,³³ it seems likely that many or most of the developed behavior modification programs will continue to exist in one form or another.

Alvin Bronstein of the American Civil Liberties Union estimates that about twenty states are currently using some form of behavior modification.³⁴ In addition to certain federal programs, information is readily accessible concerning the programs conducted in eleven states — California, Colorado, Connecticut, Indiana, Iowa, Maryland, Michigan, Ohio, Pennsylvania, Tennessee, and Wisconsin.

The state of California conducts behavior modification programs in at least three institutions: the California Medical Facility at Vacaville, the California Men's Colony, and the California Institute for Women (CIW). At the California Men's Colony the psychiatric staff uses the powerful drug Proxilin to control inmate behavior under the "novel diagnostic classification"³⁵ that the prisoners are psychotics who are repressing the symptoms of their psychosis.³⁶ CIW makes use of an Anectine

²⁹ Celsner, *Behavior Control Issue Unsolved*, N.Y. Times, Feb. 20, 1974, at 18, col. 1.

³⁰ See N.Y. Times, Feb. 5, 1974, at 54, col. 2, where it is indicated that HEW, through its National Institute of Mental Health, is funding several behavior modification programs dealing with juveniles. But NIMH has subsequently withdrawn its funding of such programs and has recommended that HEW do the same.

³¹ See *'Behavior Mod' Behind the Walls*, TIME MAGAZINE, March 11, 1974, at 74, for an account of a program currently being planned by the New England states.

³² N.Y. Times, Feb. 15, 1974, at 66, col. 1.

³³ *Hearings*, *supra* note 7, at 56.

³⁴ *'Behavior Mod' Behind the Walls*, TIME MAGAZINE, March 11, 1974, at 75.

³⁵ *Psychiatric Violence*, *supra* note 19, at 640.

³⁶ *Id.* Opton is quoting the following from CIBA FOUNDATION SYMPOSIUM, MEDICAL CARE OF PRISONERS AND DETAINEES, 17 (1973):

The prison officials at this institution [California Men's Colony] . . . have also created a new classification called "psychotic repression" meaning that the inmate is psychotic but he is repressing the symptoms of his psychosis It is apparent that the drug [Proxilin] is also used for control purposes — to undermine resistance and quiet chronic complaints.

treatment similar to that used at Vacaville³⁷ and also conducts an "Asklepieion" program similar to that developed by Dr. Martin Groder of the Federal Bureau of Prisons.³⁸

Colorado's program is designed to deal with incorrigible juvenile delinquents and is said to be run by the juveniles themselves.³⁹ The Connecticut program is conducted at the Correctional Institute at Semers, Connecticut.⁴⁰ It is voluntary and includes both hypnosis and shock treatment for convicted child molesters.⁴¹ Until a recent court decision, Indiana had made extensive use of the drugs Sparine and Thorazine at the Indiana Boy's School in an effort to "treat" those juveniles who were thought to be dangerous.⁴²

Recently, Iowa's use of Apomorphine at the Iowa Security Medical Facility was declared unconstitutional.⁴³ The drug was administered as an "aversive therapy" for infractions such as "not getting up, for giving cigarettes against order, for talking, for swearing, or for lying."⁴⁴ The drug had the effect of inducing vomiting which lasted from fifteen min-

³⁷ *Conditioning*, *supra* note 14, at 636-37, 639. See also text accompanying notes 19-26 *supra*.

³⁸ *Psychiatric Violence*, *supra* note 19, at 631.

³⁹ 'Behavior Mod' Behind the Walls, *TIME MAGAZINE*, March 11, 1974, at 75.

⁴⁰ See generally, Knight, *Child Molester Try 'Shock' Cure*, *N.Y. Times*, May 21, 1974, at 43, col. 1.

⁴¹ The program may be described as follows:

[T]he inmates are taught to associate objects or thoughts they fear — such as heights, insects, doctors, anything at all — with pictures and thoughts of children. At the same time, they are taught to associate pleasurable thoughts with pictures and thoughts of adults. *Id.*

The electric shock is administered by a hand-held "black box" — its current of one-half-a-milliamperes at 100 volts being produced by batteries, while the inmate views a slide of a naked child from a pornographic magazine.

The shock, when felt across the fingertips, produces no pain, but, instead, an unpleasant, tingling jolt and an immediate desire to withdraw from it. *Id.* at col. 2.

According to one inmate, "It doesn't hurt, but I hate it." *Id.* at col. 1. Mr. Wolfe, a psychologist who administers the treatment believes that it is quite effective:

The immediate effect is unquestionable. It knocks the hell out of their sexual fantasies and gives them a lot of faith in the technique. But the lasting effects are unclear. *Id.*

The initial results of the program reveal that 9 of the 15 repeat offenders who have been paroled have been "at least temporarily cured after completing the six week therapy course" *Id.* Of these 9, the longest had been free for nine months as of May of 1974 and no arrests have been made.

⁴² See *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) where the court indicated that it is "not persuaded . . . that the use of tranquilizing drugs is not 'punishment'."

Experts testified that the tranquilizing drugs administered to the juveniles can cause: the collapse of the cardiovascular system, the closing of a patient's throat with consequent asphyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, and drowsiness, hemotological disorders, sore throat and ocular changes. *Id.* at 357. (Footnote omitted.)

The drug was administered in common situations; for example, when the plaintiff's "nose began to bleed profusely and he began to vomit and 'holler for help.'" *Id.* at 356 n.8.

⁴³ *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973). The "therapy" was declared unconstitutional based on the cruel and unusual punishment clause of the eighth amendment.

⁴⁴ *Id.* at 1137.

utes to an hour.⁴⁵ It also produced temporary alterations in blood pressure and the heart.⁴⁶

The Intensive Program Center near Marquett, Michigan, subjects the prisoner to a "positive" behavior program similar to the federal Standard Treatment and Rehabilitation Training program (START).⁴⁷ This program begins with solitary confinement and allows inmates to "earn" better living conditions by their behavior.⁴⁸

In Maryland "defective delinquents"⁴⁹ are committed to Patuxent Institution for Defective Delinquents where they are given "treatment" and are not allowed to leave until they are cured.⁵⁰ While at one time Patuxent utilized aversion therapy⁵¹ in the form of electroshock,⁵² it currently makes use of a "therapeutic milieu"⁵³ in which an inmate gains privileges as a reward for good behavior.⁵⁴

Ohio's participation in behavior modification took place at the Chillicothe Correctional Institution where drugs were given to inmates in an effort to alter their "institutional behavior" and the "adjustment patterns" of sociopaths.⁵⁵ Pennsylvania, under an LEAA grant, is pursuing a multi-tiered, positive reinforcement program for juveniles.⁵⁶ In Tennessee, two suits have been filed against the Shelby County Penal Farm alleging that a prerequisite for participation in a work release program is the taking of Antabuse, a drug which induces severe and vio-

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ For a discussion of the START program see text accompanying footnotes 76-88.

⁴⁸ TIME MAGAZINE, March 11, 1974, at 74.

⁴⁹ A "defective delinquent" is defined in the MD. ANN. CODE art. 31B, § 5 (1971) as an individual who, by the demonstration of persistent, aggravated, antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual or emotional unbalance or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as to make it reasonably safe for society to terminate the confinement and treatment.

⁵⁰ Stanford, *A Model, Clockwork-Orange Prison*, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 71, col. 1.

⁵¹ See note 14, *supra*.

⁵² Stanford, *A Model Clockwork-Orange Prison*, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 72, col. 3. This program was abandoned because of adverse public reaction.

⁵³ *Id.* at 74, col. 3.

⁵⁴ Patients were required to attend weekly group therapy sessions. The core of the program is the "graded-tier" system which "provides rewards for socially acceptable behavior." *Id.* at col. 3. There are four tiers. The "patient" begins at the lowest tier and by his behavior works his way up, gaining more privileges as well as more obligations and responsibilities. Examples of such rewards are as follows: the fourth-level patients can stay up as late as they want; third level must be in bed by 11:30; second level must be in bed by 11:00; only fourth-level men get to have Sunday picnics with their families or other guests; fourth-level men have pool tables while third-level men only have ping-pong tables; finally, only those in the third or fourth level are eligible for parole. *Id.* at 74-75.

⁵⁵ N.Y. Times, Feb. 15, 1974, at 66, col. 1. The Chillicothe Treatment and Research Center was to close on September 5, 1975 due to space limitations. Cleveland Plain Dealer, Aug. 16, 1975, § B, at 2, col. 5.

⁵⁶ N.Y. Times, Feb. 15, 1974, at 66, col. 1.

lent illness whenever a drink of alcohol is taken.⁵⁷ Wisconsin, conducts a voluntary behavior modification program for sex offenders using electric shock.⁵⁸

While plans for future programs are largely unknown, the Governors of New England States, in a conference in February of 1974, agreed to tentatively support plans to build "a new joint facility for 'special offenders' that will depend on behavior modification, including the use of drugs to control disruptive behavior."⁵⁹

The federal government has also been involved in an extensive set of behavior modification programs. These programs comprehensively are more organized, and are considered to be less aversely oriented. The Bureau of Prisons first used formalized behavior modification programs in 1965 at the National Training School for Boys in Washington, D.C.⁶⁰ This program was designed to motivate the juveniles to participate in educational programs by offering cash rewards to those who would participate in the program.⁶¹ A similar token economy program was instituted at the Robert F. Kennedy Youth Center in Morgantown, West Virginia, when it opened in 1968.⁶²

A second behavior modification program was established at the Federal Penitentiary in Marion, Illinois in 1972⁶³ and was followed by a similar program at the Federal Reformatory at El Reno, Oklahoma in July of 1973.⁶⁴ According to Dr. Carlson, Director of the Federal Bureau of Prisons, the behavior modification program consisted of positive reinforcement wherein the prisoners earned greater privileges by their improved behavior;⁶⁵ members of the Federal Prisoners' Coalition who were placed in a segregation unit for refusing to participate in the program de-

⁵⁷ *Watson v. Hyden*, No. C-73-191 (W.D. Tenn., filed May 16, 1973); *Shelby County Penal Farm Inmates v. Hyden*, No. 73-192 (W.D. Tenn., filed May 16, 1973). These complaints are summarized as Nos. 10,368, and 10,369 respectively, in 7 *CLEARINGHOUSE REVIEW* 232 (August 1973).

⁵⁸ N.Y. Times, *supra* note 55, at col. 2. The Times describes the program as a voluntary one, which gives male inmates an "uncomfortable" shock from a one-and-a-half volt battery cell. The shock treatment is designed to help the inmates transfer their feelings of sexual attraction from children to adults.

⁵⁹ 'Behavior Mod' Behind the Walls, *TIME MAGAZINE*, March 11, 1974 at 75.

⁶⁰ *Hearings*, *supra* note 7, at 4.

⁶¹ Under this program they could use the money to purchase extra items such as snacks and clothing; additionally they were allowed to participate in special recreation such as pool and ping-pong. *Id.*

⁶² *Id.* at 4-5.

⁶³ *Id.* at 8. The program was instituted after a "major work stoppage organized by a group of inmates." According to the prisoners, the program was applied to agitators, suspected militants, writ-writers, and other trouble makers. Mitford, *supra* note 3, at 18. Initially 89 inmates were assigned to the unit. *Hearings*, *supra* note 7, at 8. Since that time, 93 offenders have been released or transferred to other institutions. *Id.* The average time in which a prisoner stayed in the control unit was nine months. *Id.*

⁶⁴ The program at El Reno was instituted as a response to several "major racial disturbances." *Hearings*, *supra* note 7, at 8.

⁶⁵ According to Dr. Carlson, prisoners in the control units were provided with "the same basic elements" as the other prisoners, but they were provided "in a closely supervised and controlled setting." Carlson, *Hearings*, *supra* note 7, at 8.

scribed it as an attempt to brainwash the participants by Chinese thought reform methods.⁶⁶

In an effort to gain perspective on the factual dispute between the Coalition and the prison officials, reference has been made to the 1962 conference of behaviorists and prison officials. One of the individuals who presented a paper at that conference was Dr. Edgar H. Schein. Dr. Schein advocated the use of brainwashing techniques utilized by the communists during the Korean War⁶⁷ indicating that the use of brainwashing should not be thought of "in terms of politics, ethics and morals," but rather in terms of the good effects these techniques could be used to accomplish.⁶⁸ His program was put forth to correctional officers in the following manner:

'My basic argument is this: in order to produce marked change of behavior and or attitude, it is necessary to weaken, undermine, or remove the supports to the old patterns of behavior and the old attitudes;' this can be done 'either by removing the individual physically and preventing any communication with those whom he cares about, or by proving to him that those whom he respects are not worthy of it and, indeed, should be actively mistrusted.'⁶⁹

One commentator has noted that the Prisoners' Coalition charge, which was based on a point-by-point comparison of Dr. Schein's paper with the Asklepion program at Marion, came to a "plausible" conclusion that the Marion program was an application of Chinese thought

⁶⁶ The Coalition was able to smuggle a report out of prison which was addressed to the United Nations Economic and Social Council. According to that report, the first step in the program is to sever the inmate's ties with all family and friends. He is put into isolation and deprived of mail and other privileges until he agrees to participate in the program. Once he agrees, the prisoner is moved to new living quarters where he is subjected to intense group pressure by the "prisoner thought-reform team." Mitford, *supra* note 3, at 18-24.

His emotional, behavioral, and psychic characteristics are studied by the staff and demiprofessional prisoners to detect vulnerable points of entry to stage attack-sessions around. *Id.* at 18.

During these sessions the inmate is worked upon — shouted at, ridiculed, etc. — to weaken his self-control, to make him emotional and controllable.

It is . . . driven in to him that society, in the guise of its authorities, is looking out for his best interests and will help [him] if he will only permit it to do so. Help him [to] be 'reborn' as a highly probable 'winner in the game of life' *Id.* at 24.

⁶⁷ See Schein, *Man Against Man: Brainwashing*, 8 CORRECTIVE PSYCHIATRY & J. OF SOCIAL THERAPY, 90 (1962). It should be noted that Dr. Schein, in a letter to HARPER'S MAGAZINE, NOV. 1973 at 128, contends that he did not advocate these techniques, but merely described them. Portions of the letter are reprinted in *Psychiatric Violence*, *supra* note 19, at 629 n.135, where it is convincingly argued that Schein did in fact advocate such techniques. The commentator concludes: "Although the present writer is relieved to learn that a distinguished psychologist wishes to take a clear stand against use of Chinese-type thought reform methods in American prisons in 1973, he is unable to find any evidence that Dr. Schein took a merely neutral stand in 1972." *Id.*

⁶⁸ *Id.*

⁶⁹ Mitford, *supra* note 3, at 18. Compare this view with the account given by the prisoners, summarized *supra* note 66.

reform.⁷⁰ While he drew no conclusion as to the correctness of the allegations, he found it significant that in testimony before a congressional committee, Dr. Groder, Program Coordinator of the Federal Bureau of Prisons, made no attempt to refute the charges.⁷¹

Further, the same commentator's analysis of Dr. Groder's written description of Asklepieion led him to conclude that it was clear that

the very ambitious aims of Chinese thought reform — to 'unfreeze' the prisoner's former organization of beliefs about himself (*i.e.*, to degrade his self-concept, to shatter his personal identity), to 'change' his personality, and to 'refreeze' the new beliefs into his new personality — are included in the Asklepieion program.⁷² (Footnotes omitted.)

While Dr. Groder maintains that these ends can be obtained with less drastic and violent methods than those used by the Chinese, it seems evident that his program lends itself to "distortion into Chinese-style, violent verbal assaults . . . and if restraints are loosened, to violent physical assaults as well."⁷³ Indeed, one such incident has already occurred in a similar program.⁷⁴ Nor can much hope be held out that the prison authorities involved will use self-restraint.⁷⁵

A third approach to behavior modification in the Federal Prison system is the controversial START program which was first utilized in the Medical Center for Federal Prisoners at Springfield, Missouri.⁷⁶ START began in October of 1972 as a "demonstration project"⁷⁷ designed to

⁷⁰ *Psychiatric Violence*, *supra* note 19, at 630.

⁷¹ *Id.*

⁷² *Id.* at 631.

⁷³ *Id.*

⁷⁴ For an account of this occurrence see *Psychiatric Violence*, *supra* note 19, at 631.

⁷⁵ Consider, for example, the following account of the START program at Springfield: The START program prohibits prisoners from expressing opinions when, in the guards' judgment, 'such expression interferes with the orderly operation of the program.' On February 3, 1973, Albert Gagne attempted to return legal papers to Edward Sanchez. A guard, perhaps conscious that such papers could indeed interfere 'with the orderly operation of the program' ordered Gagne not to return Sanchez's papers. Gagne did not comply, and he alleges that when he walked a few steps further he was seized and beaten by four guards, thrown into his cell and teargassed while inside. According to his affidavit, he and four other prisoners who verbally protested these proceedings 'were then placed on our stomachs with feet shackled to the bed frame and hands handcuffed behind our backs. We remained shackled until Monday, February 5, 1973. During this period I refused to eat because I would have been forced to eat dog-style. Additionally, I was forced, because of the refusal of the guards to release me, even for short periods, to void my bodily wastes upon myself, the bed and floor.' (Footnotes omitted.) *Id.* at 637-38.

⁷⁶ REPORT, *supra* note 7, at 1. In light of the controversy generated by the START program it seems worth considering whether the subcommittee's statement that it visited the Medical Center "because the problems and conditions existing there seemed to be typical," is actually true, or only political justification for the publications of the results of their inquiry. *Id.*

⁷⁷ *Hearings*, *supra* note 7, at 5.

deal with "those few, but highly aggressive and assaultive, inmates who are found in any correctional institution. . . ."⁷⁸ According to Dr. Carlson, the program is a system of positive rewards, under which the "offender" is granted more privileges as he attains "a higher level by his adjustment."⁷⁹

In spite of the controversy these programs have generated,⁸⁰ and the fact that many of the programs involved have been suspended, Dr. Norman Carlson has stated that the Bureau of Prisons has "no plans to discontinue the use of behavioral modification techniques. . . ."⁸¹ While Dr. Carlson disaffirmed any intention to begin other START programs when he was before the committee of the House of Representatives,⁸² he has been quoted elsewhere as having said: "We're going to start programs in all of our penitentiaries' segregation units. Only they won't have titles that carry such emotion."⁸³

In the fall of 1974, the Bureau opened the Federal Correctional Research Center at Butner, North Carolina. The Center was originally named the United States Behavioral Research Center but this name was changed on the ground that it was misleading.⁸⁴ Nevertheless, the insti-

⁷⁸ *Id.* The program was applied only to those offenders who met the following criteria:

1. Will have shown repeated inability to adjust to regular institutional programs — not just minor offenses;
2. While he may have an escape history, will have repeatedly displayed other maladaptive behavior;
3. In terms of personality characteristics, will be aggressive, manipulative, resistive to authority, et cetera;
4. Will have had experience in an adult penitentiary;
5. Will be transferred from a sending institution's segregation unit;
6. Generally, will have a minimum of 2 years remaining on sentence;
7. Will not be overtly psychotic (such individuals are appropriate referrals to the medical center's psychiatric program); and
8. Will not have participated in START program previously. *Id.*

Overall 99 offenders were given consideration for the START program. Applying these criteria, 26 were selected, but four were later removed "when it became evident that they did not meet the selection criteria." *Id.* at 5-6.

⁷⁹ *Id.* at 5. The program at Springfield is said to consist of at least four levels. At the first level the inmate is allowed out of his cell for only two hours a week — for exercise and twice a week for showers. The remaining time he simply sits in his 6 x 10 foot cell, locked behind the steel door whose small window may be covered with paper to black out all light. In one case it was alleged that an inmate was kept in segregated confinement for 42 straight days with his window covered. *Id.* at 10. After twenty consecutive "good days" the inmate is promoted to the second level where he is allowed to eat his meals out of the cell, enjoy one and one-half hours of recreation, and to work three hours a day. As his behavior improves he earns additional privileges and finally may reach the fourth level — "graduation" back into the ranks of the general prison population. For a more detailed account of the program — especially concerning limitations on access to religious services, reading material, freedom of expression, and a description of continuous surveillance and the search and seizure procedures — see *generally* Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974). A similar hierarchy of promotions was used at the Federal Penitentiary at Marion, *Psychiatric Violence*, *supra* note 19, at 636-37.

⁸⁰ See note 7 *supra*.

⁸¹ *Hearings*, *supra* note 7, at 56.

⁸² *Id.*

⁸³ TIME MAGAZINE, March 11, 1974, at 75.

⁸⁴ *Hearings*, *supra* note 7, at 48.

tution still plans to include the "Behavior Research Unit" which will be designed to house approximately 200 prisoners.⁸⁵ The programs to be run in the Behavior Research Unit will include one based upon the controversial program at Marion, and the warden of the Center will be Dr. Martin Groder who was in charge of the Marion program.⁸⁶

The Center is to have a twofold mission: to treat and diagnose the mental disorders of offenders as well as to test and evaluate programs aimed at improving correctional effectiveness.⁸⁷ Furthermore, Butner is only the first such institution to be constructed. The Bureau's plans include at least several of these facilities, including additional ones on the West Coast and one in the Midwest to serve the needs of offenders in those parts of the country.⁸⁸

It can therefore be concluded that behavior modification has been utilized in a variety of forms both in state and federal prisons. In spite of the controversy, both state and federal officials seem intent upon pursuing new and more expansive programs of behavior control. It therefore becomes important to consider the social and legal consequences of pursuing such programs.

II. LEGAL PROTECTIONS

Because the use of behavior modification has been so widespread, and because the ultimate effects which are attributed to it are so great, public controversy over its use has been heated to say the least. The result has been a continuing debate — a professional battle between lawyer and psychiatrist, congressional investigations, law suits, proposed legislation, and a ban on the use of federal funds to support such programs.

To put this controversy in proper perspective, it must be remembered that in large part the continuing debate concerns only what should be — not what is. The role of the behaviorists and the use of behavior modification is firmly limited and defined by the current legal system. To the extent that there have been abuses it is because these limits have been overstepped. But those legal protections still exist and with enforcement provide adequate protections against the abuses charged to the behaviorists.

The first of these protections is substantive: it is derived from the first amendment and limits the use of behavior modification to certain small groups of individuals. The second protection is procedural: it is derived from due process and the equal protection clause of the fourteenth amendment and is designed to insure that no one is wrongfully forced to participate in behavior modification against their will. The third protection is also substantive: it is derived from the eighth amend-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Carlson, *Hearings*, *supra* note 7, at 7.

⁸⁸ *Id.* at 15.

ment and protects those whose behavior is to be modified by prohibiting certain forms of behavior modification.

A. *The Rights Against Involuntary Treatment*

Many federal prison officials and behaviorists take the position that once an inmate has been committed to their care they have unlimited discretion to determine how that inmate will spend his period of confinement. In the view of Roy Gerard, Assistant Director of United States prisons, involvement in behavior modification programs is "part of the consequence of committing a crime. You've automatically volunteered. . . ." ⁸⁹ Similarly, one advocate of behavior modification in prisons brushed aside the consideration of any constitutional protection by concluding that it should be assumed that

a felony was clear evidence that the criminal had somehow acquired full-blown neurosis and needed to be cured, not punished. . . . We'd probably have to restructure his entire personality. ⁹⁰

Unfortunately — or fortunately — the issues cannot be settled in such an easy manner. One of the fundamental objections to the use of behavior modification is that although the clinical language may speak of behavior, the processes used are really designed to alter the ability of the individual to formulate his own alternatives. ⁹¹ The goal may well be to control "behavior," but the key to that control is the mental process. By associating certain physical conditions with the mental activity, or by putting so much stress upon the nervous system as to make it possible to remold the thinking process, behavior controllers have and continue to "tinker with the mind." ⁹² The concepts of free will, individual independence, and mental integrity are a basic part of the heritage and philosophy upon which our society is based. Thus, these values are protected by numerous and overlapping constitutional protections. The most important of these protections is based upon the first amendment right to free expression ⁹³ and the rather ubiquitous right to privacy, both of which provide a separate and independent right against involuntary treatment. ⁹⁴

⁸⁹ TIME MAGAZINE, March 11, 1974, at 74.

⁹⁰ Mitford, *supra* note 3, at 25.

⁹¹ Heldman, *Social Psychology Versus the First Amendment Freedoms, Due Process Liberty, and Limited Government*, 4 CUMB.-SAM. L. REV. 1, 2 (1974) [hereinafter cited as Heldman].

⁹² Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973). *Conditioning*, *supra* note 14, at 635-36 quoting A. MATTOCKS & C. JEW, ASSESSMENT OF AN AVERSIVE TREATMENT PROGRAM WITH EXTREME ACTING-OUT PATIENTS IN A PSYCHIATRIC FACILITY FOR CRIMINAL OFFENDERS (unpublished study).

⁹³ U.S. CONST. amend. I.

⁹⁴ For a general discussion of the right against treatment see *Conditioning*, *supra* note 14, at 653.

1. *The First Amendment and "Mental Integrity"*⁹⁵

The first amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for redress of grievances."⁹⁶ These rights indicate an intention to protect the freedom of expression that "free men" can generate and this has recently been interpreted to extend to the protection of a mental patient against psychosurgery. In the widely discussed case of *Kaimowitz v. Department of Mental Health*,⁹⁷ the court found first amendment protection against the "impermissible tinkering with the mental processes."⁹⁸ The rationale was that the freedom to express ideas is meaningless without the freedom to generate ideas.⁹⁹ This is consistent with the view that the Constitution attempts to draw lines between governmental and individual rights and there are some areas which the government simply cannot invade. The limitations upon government action are instances in which it is up to the individual to determine, rightly or wrongly, what is in his own best interests without any interferences from the government. For example, in the various privacy cases of the Supreme Court¹⁰⁰ the essence of the decisions is that under our system of government certain decisions — such as when to start a family by marriage,¹⁰¹ when to expand that family by procreation,¹⁰² when to limit that family by contracep-

⁹⁵ See generally Heldman *supra* note 91; Shapiro, *supra* note 10, at 253-73.

⁹⁶ U.S. CONST. amend. I.

⁹⁷ Civil No. 73-19434-AW (Wayne County, Mich. Civ. Ct. July 10, 1973). This case is discussed and its relevant first amendment language quoted in Shapiro, *supra* note 10, at 258-59. The opinion itself is summarized at 42 U.S.L.W. 2063 (July 31, 1973). For a detailed analysis of the case and its implications see Case Comment, *Kaimowitz v. Department of Mental Health: A Right to be Free From Experimental Psychosurgery?* 54 B.U.L.REV. 301 (1974).

⁹⁸ This phrase was first used in Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) where the court reversed the district court's decision to dismiss the case for failure to state a claim, indicating that proof of the alleged use of aversive therapy at Vacaville "could . . . raise serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes." (Footnotes omitted.) For the latter proposition the court referred to Eisenstadt v. Baird, 405 U.S. 438, 452 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Roe v. Wade, 410 U.S. 113, 149-154 (1973).

⁹⁹ Civil No. 73-19434-AW at 35 (Wayne County, Mich. Civ. Ct. July 10, 1973). Similar statements appear throughout the opinion, *e.g.*:

A person's mental processes, the communication of ideas, and the generation of ideas, come within the ambit of the First Amendment. To the extent that the First Amendment protects the dissemination of ideas and expression of thoughts, it equally must protect the individual's right to generate ideas. *Id.* at 32.

Similarly, in Stanley v. Georgia, 394 U.S. 557 (1969), the United States Supreme Court noted that:

Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thought. *Id.* at 565-66.

¹⁰⁰ Cases cited notes 101-05 *infra*.

¹⁰¹ See generally, Loving v. Virginia, 388 U.S. 1, 12 (1966).

¹⁰² See generally, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

tion¹⁰³ or abortion,¹⁰⁴ what traditions the family will follow,¹⁰⁵ and what education system it will use for its children¹⁰⁶ — are all reserved for the family to make and the government is prohibited from substituting its own judgment. Since the government is prohibited from regulating the conduct of family members, it applies a fortiori that it cannot accomplish the same end by altering the person's mind.¹⁰⁷

There are, of course, other examples, but it seems sufficient to conclude that the first amendment protection is premised upon the principle that the individual will be free to generate his own ideas without government interference and that such protection excludes governmentally imposed behavior modification programs.¹⁰⁸

A corollary of the first amendment right to mental integrity is the existence of a constitutional

limitation on state action which would tend to "establish" any doctrine or ideology, much as we now have an anti-establishment clause, as well as a free exercise clause, with respect to religion.¹⁰⁹

A very plausible argument can be made that the anti-establishment clause was applied only to religion.¹¹⁰ An advocate of such an ideological anti-establishment clause finds its roots clearly in the first amendment itself and not as part of an "unenumerated right" under the ninth amendment.¹¹¹ Support for this position can be found in a variety of decisions which use almost every conceivable constitutional basis to preclude the state from attempting to enforce its opinion.¹¹² In sum, the

¹⁰³ *Eisenstadt v. Baird*, 405 U.S. 438, 461-64 (1972) (White, J., concurring).

¹⁰⁴ *Roe v. Wade*, 410 U.S. 113, 152-56 (1973).

¹⁰⁵ See generally *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁰⁶ See note 105, *supra*.

¹⁰⁷ See Justice Douglas' concurring opinion in *Doe v. Bolton*, 410 U.S. 179 (1973) where he indicates that in matters of privacy affecting family determinations the standard is the compelling state interest test, but that in the "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality*" there can be no substitution of the state's judgment, even when there is a compelling state interest, because these rights are "absolute, permitting of no exceptions." *Id.* at 211.

¹⁰⁸ For a more detailed discussion of first amendment arguments see Shapiro, *supra* note 10, at 255-73. If the "right" is phrased in terms of self-determination, as previously discussed, and analyzed in terms of privacy, then such protection might also be considered a "ninth amendment" right. Another first amendment protection may be offered in the clause dealing with freedom of religion. *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971) (a mental patient had the right to refuse psychotropic drugs on the basis of religious beliefs). *Contra*, *Smith v. Baker*, 326 F. Supp. 787 (W.D. Mo. 1970) (allegation that the drug Prolixin had been administered over inmate's religious objection did not state a claim upon which relief could be granted).

¹⁰⁹ Heldman, *supra* note 91, at 18. The bulk of the author's article is an elaboration upon this concept. Though Heldman is apparently unconvinced by his own argument, see generally at 25, this commentator is more easily persuaded.

¹¹⁰ *Id.* at 35.

¹¹¹ *Id.*

¹¹² The principal cases cited for this proposition are *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) where the Court said at 511:

protection against the establishment of an ideology was set forth by Mr. Justice Jackson when he identified as one of the highest principles of our constitutional system the fact that

no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion or force citizens to confess by word or act their faith therein.¹¹³

2. *The Right to Privacy*

The Supreme Court has found the roots of a right of privacy in the first amendment,¹¹⁴ the fourth and fifth amendments¹¹⁵ in the penumbras of the Bill of Rights,¹¹⁶ in the ninth amendment,¹¹⁷ and in the concept of liberty guaranteed by the fourteenth amendment.¹¹⁸ This right of privacy is essentially the right to exist without governmental interference — to be able to erect certain sanctuaries, whether they be a home or an individual's mind, into which the government cannot intrude without consent. In essence, the right of privacy is "the right to be left alone . . . ;"¹¹⁹ a right which has been characterized as "a keystone of our legal philosophy" and as "one of the most cherished ideas of our form of democracy."¹²⁰

The right of privacy has been one basis for the existence of an inmate/patient's right against treatment. For example, in *Runnels v. Rosendale*,¹²¹ the Ninth Circuit held that a prisoner had a "constitutionally protected right to be secure in the privacy of one's own body"¹²² when no consent to surgical treatment had been given and when the state had not demonstrated a compelling state interest.¹²³

In our system students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Epperson v. Arkansas, 393 U.S. 97 (1968); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). See also Terminiello v. Chicago, 337 U.S. 1, 4-5, where the court, per Justice Douglas, rejected the "standardization of ideas either by legislatures, courts, or dominant political or community groups."

¹¹³ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

¹¹⁴ Stanley v. Georgia, 394 U.S. 557, 564 (1969).

¹¹⁵ Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); Boyd v. United States, 116 U.S. 616 (1886); see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹¹⁶ Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

¹¹⁷ *Id.* at 486-87.

¹¹⁸ Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

¹¹⁹ Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) *quoted with approval* in Stanley v. Georgia, 394 U.S. 557, 564 (1969).

¹²⁰ State v. Siegel, 292 A.2d 86, 88 (App. Md. 1972).

¹²¹ 499 F.2d 733 (9th Cir. 1974).

¹²² *Id.* at 735.

Similarly the right of privacy has been held to offer protection against surgical attempts at behavior control, even when it is argued that consent is present. Thus, in *Kaimowitz v. Department of Mental Health*¹²⁴ the court concluded:

There is no privacy more deserving of constitutional protection than that of one's mind. . . .

Intrusion into one's intellect, when one is involuntarily detained and subject to the control of institutional authorities, is an intrusion into one's constitutionally protected right of privacy. If one is not protected in his thoughts, behavior, personality and identity, then the right of privacy becomes meaningless.¹²⁵

This concept of "mental privacy" embraces at least two separate concepts. First, the individual is deemed to be secure in the ability to keep thoughts private. This privacy not only protects the dignity¹²⁶ of the individual, but also provides the necessary shield behind which an individual can assess information,¹²⁷ experiment with thought, and consider alternatives necessary to make reasoned decisions. In that aspect the right of mental privacy has special application to the compulsory behavior therapy and control which compel the individual to begin the process by revealing all about his thoughts and past life. Since the Supreme Court indicated that an individual has "the right to be free from state inquiry into the contents of his library,"¹²⁸ it should apply a fortiori that he should also be free to prevent inquiry into the contents of his mind, especially when that inquiry is an effort not to acquire facts and information but rather is an attempt to discover his beliefs, thoughts,

¹²⁴ Civil No. 73-19434-AW (Wayne County, Mich. Cir. Ct., July 10, 1973).

¹²⁵ *Id.* at 38-39; Shapiro, *supra* note 10, at 226. Compare this view with *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974), where the court held that a prisoner had a constitutionally protected right to be secure in the privacy of his body such as would prevent major surgical procedures without either his consent or a compelling state interest.

¹²⁶ Professor Bloustein, in contending that the tort of invasion of privacy is based upon one overriding principle has argued as follows:

The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts

I contend that the gist of the wrong . . . is not the intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality. Eavesdropping and wiretapping, unwanted entry into another's home may be the occasion and the cause of distress and embarrassment but that is not what makes the acts of intrusion wrongful. They are wrongful because they are demeaning of individuality and they are such whether or not they cause emotional trauma.

Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L.REV. 962, 973-74 (1964).

¹²⁷ See generally Shapiro, *supra* note 10, at 274.

¹²⁸ *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

personality, and character in an effort to remold him. Further, such mental privacy is also beneficial to and necessary for the protection of the fundamental interest of privacy as it is guaranteed in other areas such as marriage, procreation, birth control, and other matters of family life.

The second aspect of mental privacy is that the state is prohibited not only from observing a person's thoughts, but also from tinkering with them. This aspect is part and parcel of the first amendment concepts of mental integrity and self determination and is premised upon the belief that just as the state may not proscribe certain behavior by legislation, neither may it proscribe the same behavior by thought control.

The importance of these protections — the right under the first amendment to mental integrity and the right of privacy of thought — are that they provide limitations upon whom behavior control can be exercised. They offer substantive constitutional protection which prohibits the use of coercive behavior modification on the general population, or even upon prison inmates without a showing of something more than simply that it is within their best interests.

There are of course several problems which have not yet been addressed. One of these is how much must be shown before a prisoner will be subjected to behavior control against his will. On one hand, the Ninth Circuit has suggested that the state can overcome the right against treatment only by showing a compelling state interest.¹²⁹ On the other hand, Justice Douglas, while acknowledging that the compelling state interest test is the proper one when considering freedom of choice in basic decisions of one's life, adopts an absolutist view in regard to the "autonomous control over the development and expression of one's intellect, interests, tastes, and personality."¹³⁰ Irrespective of which view is taken, it seems clear that there are substantive constitutional protections for inmates¹³¹ and that coercive behavior control is limited either in its totality or at least to those who meet certain standards higher than simply being incarcerated.

3. *Procedural Protections*

In at least three instances prisoners have invoked the equal protection clause of the fourteenth amendment to prevent their transfer from prisons to mental institutions without guarantees of the same rights which protect a citizen from civil commitment, *i.e.*, without a hearing and the right to present evidence on the issue of the inmate's mental illness and need for treatment.¹³² While early attempts to accomplish the same goal

¹²⁹ *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974).

¹³⁰ *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

¹³¹ There would also be a substantive due process test, at least insofar as the state would have to show that its action was not arbitrary and capricious and that it was in some way related to a permissible government objective.

¹³² *Baxstrom v. Herald*, 383 U.S. 107 (1966):

For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable

under the due process clause were ineffective,¹³³ the Supreme Court's recent decision in *Wolff v. McDonnell*¹³⁴ indicates that due process rights are applicable to any prisoner facing any "major change in the conditions of confinement."¹³⁵ Certainly a change from a prison to a mental institution would be such a change.

One would assume that prison officials would not be allowed to evade the safeguards established by the Supreme Court simply because they brought the mental institution to him, rather than vice versa. Indeed, the language of *Wolff* seems quite clear and its instruction to penologists is unmistakable: participation in any mental health program, including any form of behavior control must begin with procedural protections to determine that the prisoner should in fact be subjected to such a program. This was precisely the decision reached by the Federal District Court of Missouri in *Clonce v. Richardson*.¹³⁶ That case involved the START program at Springfield, Missouri. The court held as a matter of law that

a prisoner transferred into START, or into a behavior modification program like START, which, on the facts, involves a major change in the conditions of confinement is entitled, at a minimum, to the type of hearing required by the Supreme Court's opinion in *Wolff v. McDonnell*.¹³⁷

Further, the court held that such was the law in spite of the argument by the government that the program was "treatment" and not punishment, and that it was for the prisoner's benefit. In disregarding that argument, the court indicated that intent was "not a relevant factor in the determination of the due process question involved."¹³⁸

The benefits of such procedural protection were also observed in another "therapeutic" case dealing with juvenile procedures, *In re*

basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other commitments. *Id.* at 112-13.

See also *Matthews v. Hardy*, 420 F.2d 607 (D.C. Cir.), *cert. denied*, 397 U.S. 1010 (1969); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969). For a discussion of these cases and the general considerations in transfers from criminal to mental institutions see Hart, *Prisoner Transfer to Mental Institutions, Right to Equal Protection*, 49 N.D.L.REV. 815 (1973).

¹³³ Hart, *supra* note 132, at 825.

¹³⁴ 418 U.S. 539 (1974).

¹³⁵ *Id.* at 571-72 n.19.

¹³⁶ 379 F. Supp. 338 (W.D. Mo. 1974).

¹³⁷ *Id.* at 348.

¹³⁸ *Id. Accord*, *Negron v. Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974) where the court noted that the use of isolation cells for punishment was a "serious step" which must be surrounded by due process safeguards and that the "[u]se of seclusion as 'treatment' is, in this court's view, no less serious a step." *Id.* at 542. See also the court's opinion at 542 where, when speaking of due process regarding solitary confinement, the court indicated that "[p]ersons in a treatment setting are entitled to no less." See also *Psychiatric Violence*, *supra* note 19, at 622 where the author concludes that prison psychiatrists are primarily functionaries of the disciplinary system of prison and consequently their therapies should be subject to the same judicial safeguards as any other punishment.

Gault,¹³⁹ in which the Supreme Court noted that good intentions are not enough and that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."¹⁴⁰ Thus, not only is the number of individuals subject to behavior modification limited by substantive constitutional protections, but those who are subject to it are guaranteed normal procedural protections to prevent arbitrary, discriminatory, or simply mistaken assignment.

4. *The Eighth Amendment*

Whether in articles and discussion, or in the courtroom, prison officials and behaviorists alike maintain that their programs are really "treatment," not punishment, and therefore are neither a concern of the judicial system nor within the purview of the eighth amendment.¹⁴¹ While some courts have accepted such sophistry,¹⁴² a careful analysis will reveal that any attempt to differentiate constitutional protections upon that basis is naive, if not disingenuous. Constitutional distinctions between treatment and punishment cannot depend merely upon the label one attaches to the action. A vengeful execution of an inmate for his violation of a prohibition against lying would hardly be justified simply because someone decided to call it treatment, any more than would the label "administrative penalties" be effective in abolishing safeguards that normally accompany sentencing.¹⁴³

Any differentiation must rest upon some factual foundation, but the difference cannot be the consequences of the actions: the vomiting is the same whether amorphine is used for "treatment" or "punishment" purposes. "[T]he difference between a violent punishment and a medical treatment lies not in the act itself, but in the intent of the actor."¹⁴⁴ An

¹³⁹ 387 U.S. 1 (1967).

¹⁴⁰ *Id.* at 18.

¹⁴¹ The essence of this argument has been summarized, albeit in a different context, by Wexler, *Therapeutic Justice*, 57 MINN.L.REV. 289, 303-04 (1972) [hereinafter cited as *Therapeutic Justice*].

Where the state's aim is not to punish but to assist by providing therapy, there is no need for an adversary process because all parties have the best interest of the deviant at heart. And, the argument continues, the criminal law safeguards have no place in a therapeutic proceeding, for they serve only to "criminalize" the process and further stigmatize the subject, and they are simply unnecessary impediments to achieving the central goal, which is to help the deviant actor. The most extreme conclusion, of course, is that the entire question is simply a medical or scientific matter, and that the courts have no business at all meddling in these need-for-hospitalization decisions.

¹⁴² *Knecht v. Gillman*, No. 72-63-1 (S.D. Iowa 1972) (since treatment was not punishment it could not be cruel and unusual), *rev'd*, 488 F.2d 1136 (8th Cir. 1973); *Peek v. Ciccone*, 288 F. Supp. 336-38 (W.D. Mo. 1968) (allowing injection of Thorazine against the prisoner's will because it was treatment); *In re Owens*, No. 70J 21520 (Cook County, Cir. Ct. Juv. Div., July 9, 1971).

¹⁴³ As the court recognized in *Knecht v. Gillman*, 488 F.2d 1136, 1139 (8th Cir. 1973), "neither the label which a state places on its own conduct nor even the legitimacy of its motivation can avoid the applicability of the Federal Constitution."

¹⁴⁴ *Psychiatric Violence*, *supra* note 19, at 608. "When a medical procedure is done at the request of a patient and for his benefit, it is a treatment. When the identical procedure

attempt to make constitutional differentiations on the basis of intent is specious because the distinction between treatment and punishment, from an historical perspective, has "lacked meaning from the beginning. . . ." ¹⁴⁵

To demonstrate the truth of this proposition it is necessary to consider the history of the prison movement. The modern prison, with its emphasis upon segregation of prisoners, was born only in the early 1800's. ¹⁴⁶ It was invented not out of despair but rather "in the exuberant belief that it was the ultimate solution to the problem of criminality." ¹⁴⁷

The hope of the reform movement was that the behavior of the prisoners would be modified. It was felt that the prison would become a "house of penance" ¹⁴⁸ in which prisoners, given sufficient opportunity to read their Bibles and to think about past sins, would repent. ¹⁴⁹ It was thought that solitary confinement would

leave a deeper remembrance of horror on the mind of the culprit [s]olitude, complete and entire solitude should be left to do its effectual work. ¹⁵⁰

The program of the 19th century reformers parallels that of the behaviorists in many ways. Both seek to isolate prisoners from family, friends, and news of the outside world in order to prevent interference with reform programs and the prisoner's progress. ¹⁵¹ Just as Dr. Skinner

is done against a person's interests or will, it is either a battery, if lacking legal sanction, or a punishment, if imposed by legal authority." *Id.*

¹⁴⁵ *Id.* at 619. *E.g.*, the tortures of the Inquisition were rationalized as being solely for the benefit of the accused. For a convincing argument on this point see *Id.* at 611.

¹⁴⁶ Rothman, *The Invention of the Penitentiary*, 8 CRIM.L.BULL. 555 (1972) [hereinafter cited as Rothman].

¹⁴⁷ *Id.* at 555.

¹⁴⁸ Ford, *The Bar's Responsibility for Prison Reform*, 34 ALA. LAW. 356, 359 (1973).

¹⁴⁹ *Id.*

¹⁵⁰ Schwitzgebel, *Limitation on the Coercive Treatment of Offenders*, 8 CRIM.L.BULL. 269-70 (1972), quoting GRAY, PRISON DISCIPLINE IN AMERICA 37 (1847).

¹⁵¹ *E.g.*, Rothman, *supra* note 146, at 571:

The institutions rigorously attempted to isolate the prisoner both from the general community and from his fellow inmates. To fulfill the first charge, they severed almost every tie between the prisoner and his family and friends, and even attempted with some degree of success to block out reports of outside events.

. . . .
New Jersey officials, for example, complained bitterly in 1830 that prisoners know too much about public events. Convinced that "discipline is interrupted by a knowledge in the prison, among the convicts, or almost everything that is done abroad," they unhappily reported that inmates were learning through newspapers and conversations what was happening at the state capital, especially in regard to prison matters.

Maine's prison commissioner in this period, future presidential candidate James Blaine, was also certain that "information upon events of current interest, and glimpses of the outer world have a tendency to unsettle the convict's mind and render his [sic] restless and uneasy." Distressed to find magazines and newspapers circulating in the state's congregate prison, Blaine charged officials to work still harder at 'separating the convict from all association with the world at large' at banishing external influences from the penitentiary. The thick

assures modern critics that his techniques are interested only in controlling behavior and not minds, reformers of the 1800's believed that even if the prisoner did not become an honest man in prison, at least he would have "contracted honest habits" ¹⁵²

Another similarity is that both groups of reformers believed that their efforts in prison would have great import for society as a whole. While the behaviorists may be reluctant to publish their larger goals, those of the 1800's were not so bashful.

Proponents described the penitentiary as "a grand theatre, for the trial of all new plans in hygiene and education, in physical and moral reform." The convict "surrendered body and soul, to be experimented upon," and the result Boston Prison Discipline Society insisted, would benefit not only the custodial institutions like almshouses and houses of refuge, but also "would greatly promote order, seriousness, and purity in large families, male and female boarding schools and colleges." ¹⁵³

Similarly, the Reverend James B. Finley, chaplain of the Ohio penitentiary concluded that

[c]ould we all be put on prison fare, for the space of two or three generations, the world would ultimately be the better for it. Indeed, should society change places with the prisoners, so far as habits are concerned, taking to itself the regularity and temperance and sobriety of a good prison," then the grandiose goals of peace, right, and Christianity would be furthered. "As it is," concluded Finley, "taking this world and the next together . . . the prisoner has the advantage." ¹⁵⁴

The purpose of this historical diversion is two-fold. First, it demonstrates that "punishment" has always been thought to be "treatment." ¹⁵⁵ Second, it also demonstrates that behavior modification is neither an aberration of the correctional system, nor a "revolution" in treatment. Rather, it is merely a methodological variation of the theme developed by the 19th century reformers — that men's behavior could be "modified" by the manipulation of their environment. ¹⁵⁶

wells [sic] that surrounded the penitentiary were not only to keep the inmates in, but the rest of the world out. *Id.* at 573.

¹⁵² *Id.* at 580.

¹⁵³ *Id.* at 560.

¹⁵⁴ *Id.* at 561, quoting J. FINLEY, MEMORIALS OF PRISON LIFE 41-42 (1851).

¹⁵⁵ Thus, even though 19th Century reformers thought that prison life would be "therapeutic" in nature, that is, that it would cure the individual, it was still recognized that the methods of cure were somewhat limited by the eighth amendment's prohibition against cruel and unusual punishment. The same rationale applies with equal force to modern day cures.

¹⁵⁶ As the crime rate continued to rise, it became apparent that the "reform" movement had failed. The history of prisons has largely been a history of escalation — escalation of input and escalation of involvement in the prisoner's life. Each new reform may be seen as an outgrowth of the failure of the preceding reform. It typically responds to

Further evidence that the distinction between punishment and treatment is spurious is found in the reactions of psychiatrists and prisoners themselves. One commentator who has examined the role of psychiatrists in prison — including the attempts to institute behavior modification and to use drugs for treatment purposes — has concluded that psychiatrists are “first and foremost functionaries in the disciplinary power structure of the prison bureaucracy.”¹⁵⁷ Indeed, the psychiatrist has been labeled the “successor” of “the brutal guard” — “[b]oth men work toward the same goal: to produce a model prisoner, quiet and passive, who answers when he is spoken to and does what he is told.”¹⁵⁸ This view seems to be confirmed by the prisoners who often refuse to accept the treatment in good grace, and who have resorted to disturbances,¹⁵⁹ sit-ins,¹⁶⁰ and have often refused to participate in such programs at all.¹⁶¹

Many courts have been quick to recognize that even psychiatric styled treatment may be punishment.¹⁶² Perhaps the most reasoned opinion is that of the Ninth Circuit in *Knecht v. Gillman*,¹⁶³ where the court traced the history of litigation under the eighth amendment and concluded that “the mere characterization of an act as ‘treatment’ does not insulate it from eighth amendment scrutiny”¹⁶⁴ Noting that the label a state places on its own conduct does not avoid the applicability of the Federal Constitution, and that the prohibition against cruel and unusual punish-

this frustration by “escalating input,” i.e. by devoting more resources to reforming the prisoner. At the same time this new intensified effort unusually intrudes, to a greater degree than the last reform upon the prisoner’s autonomy and privacy. From this perspective, behavior modification becomes nothing more than a methodological variation upon an age-old theme of prisoner rehabilitation.

¹⁵⁷ *Psychiatric Violence*, *supra* note 19, at 623 citing, Visotsky, *Adequacy of Treatment and Provisions for Methods of Assuring Adequacy of Treatment*, in *THE MENTALLY ILL AND THE RIGHT TO TREATMENT*, 63 (Morris ed. 1970).

In mental institutions the bureaucratic needs of the institution for passivity, obedience and submission take precedence over the therapeutic needs of the patients for development of autonomy, initiative and self-control. Nevertheless, the therapy-as-punishment “armamentarium” of psychiatry is pressed into service for the institution’s anti-therapeutic purposes: “Obedience to aides and conformity to the culture of the hospital was rewarded; deviance was punished through the denial of privileges and through more active sanctions such as physical punishment, physical restraint, electroshock, hydrotherapy, and transfer to less desirable areas of the hospital. *Id.*”

¹⁵⁸ Morgan, *Entombed*, N.Y. Times, Feb. 17, 1974, § 6 (Magazine), at 21, col. 1. See also *Psychiatric Violence*, *supra* note 19, at 632 in which the commentator classifies prison psychiatrists into three major roles: the compliant accomplice, naive dupe, and pressured subordinate.

¹⁵⁹ Stanford, *A Model, Clockwork-Orange Prison*, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 79, col. 1.

¹⁶⁰ *Id.*

¹⁶¹ REPORT, *supra* note 7, at 10.

¹⁶² E.g., *Negron v. Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972). But note the court’s rejection of the punishment-treatment distinction was not accompanied any analytical explanation.

¹⁶³ 488 F.2d 1136 (8th Cir. 1973).

¹⁶⁴ *Id.* at 1139.

ment has been applied in a variety of different situations, the court concluded that the determination of the applicability of eighth amendment protection depends upon the facts of the particular case.¹⁶⁵

In the final analysis, the eighth amendment concepts are closely linked with the first amendment determinations of dignity and self-determination and as Justice Brennan observed: "[t]he primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."¹⁶⁶ The eighth amendment protections thus erect a substantial barrier against the use of certain types of behavior control.

III. BEHAVIORISM AND THE EXPERT

At the center of much of the controversy over the use of behavior modification is the role that the expert should play in such a program. That role is largely defined by the preceeding legal protections which the individual enjoys. To the degree that there is friction between the advocates and opponents of behavior modification, it results from the attempt of behaviorists to avoid the legal constraints imposed on their role as scientists versus the opponent's attempt to legally define and limit that role. In the final analysis the issue is "who shall modify whom, and when."¹⁶⁷

As behavior modification programs exist today, they are largely run by psychiatrists or psychologists and the "[g]oals of management or staff are imposed on inmates."¹⁶⁸ The question has been raised by Dr. Thomas Szasz, Professor of Psychiatry at New York's Upstate Medical Center, whether such power should be vested in the hands of the psychiatric profession.¹⁶⁹ Dr. Szasz answers that question negatively, indicating that it amounts to an abuse of power and the use of a policy of "define and rule."¹⁷⁰

The response of behaviorists has been that the decision regarding the proper and effective use of behavior modification is essentially a medical/psychiatric decision and that cumbersome and restrictive legal considerations should not be allowed to interfere. The general thesis is that

¹⁶⁵ *Id.*

¹⁶⁶ *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). See generally Forman, *The Cruel and Unusual Punishment Prescription: "Evolving Standards of Decency,"* 19 LOYOLA L.REV. 81 (1973); Granucci, "Nor Cruel and Unusual Punishment Inflicted:" *The Original Meaning*, 57 CALIF.L.REV. 839 (1969).

¹⁶⁷ Gray, Graubard & Rosenberg, *Little Brother Is Changing You*, PSYCHOLOGY TODAY, March 1974, at 42.

¹⁶⁸ N.Y. Times, Feb. 26, 1974, at 16, col. 1, quoting Dr. Martin Groder of the U.S. Bureau of Prisons.

¹⁶⁹ Stanford, *A Model, Clockwork-Orange Prison*, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 71, col. 2.

¹⁷⁰ *Id.* at col. 3.

the people with the best data about the best decisions to be made at this time are the behavioral scientists, not the government, and not the image makers on Madison Avenue.¹⁷¹

The argument for behavioral scientists' use of this decision-making power thus has at least two bases: an implicit belief that the behaviorist intends good towards his subject¹⁷² and a belief in the expertise of the behaviorist to find the best solution.

In regard to the first proposition, it was discovered long ago that evil as well as good men are well armed with "good intentions."¹⁷³ Indeed, it has been said that "[t]o do evil a human being must first of all believe that what he is doing is good"¹⁷⁴ Such is the strength of this belief that the mere profession of an intent to confer good upon another has been viewed as a matter of suspicion.¹⁷⁵ Indeed, many of the protections and limitations contained in the documents of government are designed to protect citizens against the benevolence of their fellow citizens.¹⁷⁶

¹⁷¹ Heldman, *supra* note 91, at 12, quoting Dr. A. Jack Turner, Research Director of the Huntsville Project, Huntsville-Madison County (Alabama), Mental Health Center.

¹⁷² Cf. A. HUXLEY, *BRAVE NEW WORLD REVISITED* 28 (1958):

Who will mount guard over our guardians, who will engineer the engineers? — the answer is a bland denial that they need any supervision. There seems to be a touching belief among certain Ph.D.'s in sociology [and psychology and psychiatry] that [they] will never be corrupted by power. Like Sir Galahad's, their strength is as the strength of ten because their heart is pure — and their heart is pure because they are scientists and have taken six thousand hours of social studies.

¹⁷³ A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 168, 173 (1974):

If only it were all so simple! If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them.

The trouble lies in the way these classic evildoers are pictured. They recognize themselves as evildoers, and they know their souls are black. And they reason: 'I cannot live unless I do evil ' But no; that's not the way it is!

¹⁷⁴ *Id.* at 173.

Ideology — that is what gives evil-doing its long-sought justification and gives the evildoer the necessary steadfastness and determination. That is the social theory which helps to make his acts seem good instead of bad in his own and others' eyes, so that he won't hear reproaches and curses but will receive praise and honors. That was how the agents of the Inquisition fortified their wills: by invoking Christianity; the conquerors of foreign lands, by extolling the grandeur of their Motherland; the colonizers, by civilization; the Nazis, by race; and the Jacobins (early and late) by equality, brotherhood and the happiness of future generations. *Id.* at 174.

¹⁷⁵ E.g., H. THOREAU, *WALDEN* 55 (Signet ed. 1964):

If I knew for certain that a man was coming to my house with the conscious design of doing me good, I should run for my life . . . for fear that I should get some of his good done to me, — some of its virus mingled with my blood. No, — in this case I would rather suffer evil the natural way.

¹⁷⁶ Cf. Senator Sam Ervin, quoted in *TIME MAGAZINE*, April 16, 1973, at 11:

[T]he Constitution was made to guard the people against the dangers of good intentions. There are men of all ages who mean to govern. They promise to be good masters, but they mean to be masters. The Constitution was written primarily to keep the government from being masters of the American people.

As for expertise, behaviorists have generally misconstrued the nature of the function which experts fulfill in our society. An expert cannot impose his judgment upon another person, whether that person be a client or a patient. Whether the "expert" be a corporate attorney advising a client on merger; a broker analyzing the market; a surgeon prescribing methods of correcting an injury to the brain; or a behavioral scientist attempting to cure deviancy; the final decision regarding what action will be taken lies not with the expert but with the client/patient. The expert's role is limited to the gathering and analysis of information, to assessing the risks and probabilities of success, to weighing the benefits against the costs, to anticipating and planning for the unexpected, and to conveying to the client/patient his expert opinion and the factual basis it rests upon. But once this task is accomplished, the role of the expert in decision-making has come to an end.¹⁷⁷ The course of action is chosen by the layman.

Nor should there be any different system when the subject of behavior modification is incompetent to make the decision for himself. To the extent that these principles are followed, the behavioral scientist is accorded the same deference and respect, including the same "freedom from interference in his field of expertise," as other experts.

Nevertheless, complaints are often made¹⁷⁸ that other limitations are placed upon the actions of the behavioral scientist. These complaints also are founded upon a misconception of the role of the behaviorist. Unlike the 1940's when behaviorists were largely ineffective and also largely left alone, their new role in society — a role which they feel is too limited by law and social policy — is frequently not one of independent entrepreneurs in a new social science, but rather officers of the state or federal government, utilizing government funds and government power to conduct their research and experimentation, as well as to accomplish their ends. Indeed, federal money has even been used to popularize their political beliefs and to offer a rationale to justify techniques which others have found objectionable.¹⁷⁹

The behaviorist who increased his opportunities for research and for effectiveness by borrowing the centralizing power of government necessarily comes under the same restraints as others who use government power. Any other result would be contrary to established governmental institutions.

¹⁷⁷ A. SOLZHENITSYN, *THE CANCER WARD* 90 (R. Frank transl. 1968):

Why do you assume you have the right to decide for someone else? That's a fearful right and hardly ever leads to good. You ought to be afraid of it

¹⁷⁸ See generally Heldman, *supra* note 91.

¹⁷⁹ This was Dr. Skinner's *BEYOND FREEDOM AND DIGNITY* (1971) which was financed largely through grants from the National Institute of Mental Health of HEW. *Id.* at 2. What is most significant is that the book itself contained no new research, nor did it purport to add any new knowledge or concepts to the scientific data available. Rather, it was a "political" document in that it sought to justify and condone increased governmentally conducted behavior control and to offer reasons and rationales as to why that activity was "morally" permissible.

We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.¹⁸⁰

Because of this belief in the necessity of limited government it has traditionally been considered *prima facie* immoral for the government to attempt to substitute its judgment for that of its citizens.¹⁸¹ This is true whether the government is acting through the agency of a police officer, an elected official, a teacher, or a behavioral scientist.

Thus the limitations upon behaviorists stem from two separate principles. The first is that the expert's expertise does not extend into the area of decision-making — an area which is reserved for the layman. The second is anyone and everyone using the centralizing power of the government is subject to the same legal restrictions generally imposed upon the use of governmental power. The end product of these propositions is a society in which individuals, including prison inmates, enjoy both substantive and procedural protections against the imposition of behavior modification programs.

IV. FREE WILL AND THE BEHAVIORIST ARGUMENT

The conclusion that significant legal barriers do exist to prevent the widespread imposition of behavior modification programs in penal institutions does not end the controversy. The assertion that behaviorists are currently denied the role they are seeking in order to aid society does not foreclose discussion of whether those legal protections should be abandoned in favor of a system closer to that advocated by the behaviorists.

In large degree the debate as to what the "policy" toward behavior modification should be involves two related issues: the morality of the use of behavior modification against the will of the individual and the danger of potential abuse.

Insofar as the debate of future policy deals with morality, it begins with the traditional proposition that American political, legal and social

¹⁸⁰ *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Similarly it has been suggested that the premise of government that "the people retain the right to alter the government" has not and should not be reversed to give the government the "right to alter the people." Heldman, *supra* note 91, at 34.

¹⁸¹ See generally *Therapeutic Justice*, *supra* note 141, at 324. Wexler notes that this is true for a variety of reasons including the belief that:

- the state may not, in fact, know what is best for the individual;
- even if the state does know what is best, it may not be able to improve the situation;
- it offends one's dignity to have the state meddling in a person's personal life

Shapiro, *supra* note 10, at 253 begins with the proposition that "... it is *prima facie* (presumptively) immoral for the state to effect substantial changes in a person's mentation against his will."

institutions have been based upon a psychology of free will.¹⁸² Simply stated, this premise assumes that individuals can and should exercise choice concerning meaningful alternatives that exist in their lives and that any attempt by another individual or the state to substitute its own judgment would be *prima facie* immoral as a violation of the right to self-determination. Under such a view the use of any program of behavior control without the volitional consent of the individual being modified or without his continuous ability to withdraw from modification is considered contrary to normative standards of morality, a violation of limitations imposed by law, and a threat to the foundation upon which the political system is based.¹⁸³

Three separate propositions have been advanced in order to demonstrate the acceptability of behavior modification in the face of the free will premise. The more academic members of the behavior control advocates have, at one time or another, argued that the premise of free will is incorrect; men either are, or are about to be controlled, and behavior modification is therefore no more moral or immoral than the current system of control. Other advocates of behavior control, principally those directly connected with penal institutions have avoided the metaphysics of free will and have chosen instead to emphasize their viewpoint that behavior modification programs are not really evil in that they simply use methods of positive reinforcement. Similarly, it has been argued that the benefits outweigh any objectionable features.

A. *Free Will is Dead*

One of the postulates of a certain group of behaviorists is that there is no free will,¹⁸⁴ that every human being is controlled, and that such

¹⁸² *Therapeutic Justice*, *supra* note 141, at 289. For an interesting discussion of the free will concept and personal responsibility, see K. MENNINGER, *WHATEVER BECAME OF SIN* (1973).

¹⁸³ But it is true that the issues are difficult to state with clarity.

Since society has been controlling the behavior of the individual throughout history by providing and preventing opportunities for action and by manipulation of reward-punishment systems, it does not make much sense to argue that the control of one individual by another is in itself unethical. It is tempting to say that certain types of behavior control that are novel, efficient and easily identified — such as deliberate destructive brain surgery — violate the rights of the individual, particularly if they are performed against the wishes of that individual and are irreversible. But this is too easy a solution. Other types of behavior control, such as confinement behind bars, are carried out against the will of the individual, and these may also have some irreversible effects.

Quarton, *Deliberate Efforts to Control Human Behavior and Modify Personality*, 96 DAEDALUS 837, 852 (1967) quoted in Note, *Behavior Modification and Other Legal Imbroglios of Human Experimentation*, 52 J. URBAN L. 155, 156 (1974).

¹⁸⁴ E.g., B. SKINNER, *WALDEN TWO* 257 (1948: 1967 ed.).

Frazier: I deny that freedom exists at all. I must deny it — or my program would be absurd. You can't have a science about a subject matter which hops capriciously about. Perhaps we can never prove that man isn't free; it's an assumption. But the increasing success of a science of behavior makes it more and more plausible.

control ultimately rests in the hands of society.¹⁸⁵ Under this view the choice is not between freedom and control, but rather between a set of societal controls which are unproductive because they are capricious and unpredictable and a set of directed controls which would maximize the benefits both to the individual and society.¹⁸⁶

If it is still possible to live in a controlled society and continue to value privacy and dignity then one may well prefer the unproductive control of the invisible hand of society to the visible control of social engineers. Similarly, if society's control is exercised through a multiplicity of agents (church, government, media) then that fact in and of itself may offer the individual both sanctity and protection far superior to that provided by a monolithic set of scientific controllers.¹⁸⁷

Moreover, the premise that all men are controlled and that behavior modification can be used to benefit man and society are logically inconsistent. If all behavior is controlled by environmental and societal forces and if no men have "free will," then it is impossible for a group of behavioral scientists to independently determine what is good for society and then direct a program designed to steer society in that direction. On the other hand, if behavioral scientists do have the independence and free will to design and implement such a program, then it must be possible for other people to have similar independence and free will against which such a program will be imposed.¹⁸⁸

Cf. [O]ur members are practically always doing what they want to do — what they "choose" to do — but we see to it that they will want precisely the things which are best for themselves and the community. Their behavior is determined, yet they're free. *Id.* at 296-97.

¹⁸⁵ *Id.* at 105.

Frazier: . . . you have set up certain behavioral processes which will lead the individual to design his own "good" conduct when the time comes. We call that sort of thing "self-control." But don't be misled, the control always rests in the last analysis in the hands of society. *Id.*

¹⁸⁶ See generally B. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971) which devotes much time and energy to developing this argument.

¹⁸⁷ See also von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L.REV. 717, 747-48 (1972):

Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints (the only kind with which the law is concerned) would be fatally impaired unless the law provided a locus poenitentiae, a point of no return beyond which external constraints may be imposed but before which the individual is free — not free of whatever compulsions determinists tell us he labors under but free of the very specific social compulsions of the law. (Footnote omitted.)

¹⁸⁸ This position seems to be acknowledged by Dr. Skinner in his more recent writings, for he concludes that a "designer" of a new culture will "[t]o some extent . . . design a world he likes" B. SKINNER, *BEYOND FREEDOM AND DIGNITY* 164 (1971). The converse, that such a designer would impose his will upon other men, is also acknowledged in that the inhabitants of the designed society will like that society because they "have been taught to like it" *Id.* Another variation upon this theme is that behavior either can or is about to be effectively controlled, therefore it is "the duty of our society to attempt actively to control human behavior in such a way as to achieve the effects we consider desirable before some other group becomes more proficient at controlling behavior and directing it into paths we consider undesirable." Dr. Skinner,

quoted from C. TAYLOR, *THE BIOLOGICAL TIME BOMB* 157 (1968).

B. Positive Reinforcement

Many of the behavior modification programs are sought to be brought within a morally acceptable category by indicating that under the criteria outlined above they represent no threat to free will, since they offer only positive reinforcement. For example, in defending the START program Dr. Groder indicates that such programs are

basically humanistic, cooperative ventures which will stand or fall on their own results and outcome though they can be seen assuredly as at least doing no harm.¹⁸⁹

Similarly, Dr. Carlson has said that the Bureau of Prisons "never uses and does not countenance . . . any . . . form of aversive treatment. . . ." ¹⁹⁰ And again, Dr. Carlson has said that the programs such as START use "positive rewards for acceptable behavior, not the punishment for negative behavior."¹⁹¹

But such programs, utilizing "positive reinforcement," are open to serious criticism because many times the rewards are often "items and activity that basic principles of dignity — and of law — would demand as a matter of absolute, non-contingent right."¹⁹² Even when this is not the case, all too often the "rewards" are simply the returning of rights or privileges which have been taken away upon entry into the behavior modification program.

The START program provides a good example. Prior to entering the program the individuals are living in the prison community at large, enjoying normal prerogatives of prisoners: meals in a dining area with other prisoners; mail from friends and relatives; access to library facilities; perhaps work programs; certainly some form of recreation; and other such amenities of prison life. An infraction occurs — perhaps one of many in a long history of infractions — and the inmate is selected for the START program. But Dr. Carlson does not seek out the inmate and tell him that if he can adjust his behavior he will give him "positive reinforcement" perhaps in the form of a color television in his cell, or some other luxury. Rather, Dr. Carlson would throw the man into solitary confinement,¹⁹³ deprive him of all the normalities of life to which

¹⁸⁹ *Hearings, supra* note 7, at 13.

¹⁹⁰ *Id.* at 66.

¹⁹¹ *Id.* at 62.

¹⁹² *Therapeutic Justice, supra* note 141, at 297.

During this time, the patient learns that his meals, his bed, his toilet articles, and his clothes no longer are freely given him. He must pay for these with tokens. . . . These tokens pay for all those things normally furnished and often taken for granted . . . it costs one token to be permitted to go to bed, one token for a meal.

Id. at 298, quoting from Bruce, *Tokens for Recovery*, 66 AM.J. NURSING 1799, 1800-01 (1966).

¹⁹³ According to Opton, the base from which the START program began was "a base of privation that goes beyond that permitted under the Bureau of Prison's regulations . . ." But such conditions were tolerated because the regulations applied only to punishment, not treatment. *Psychiatric Violence, supra* note 19, at 637.

every other prisoner is entitled, and indicate to the prisoner, in no uncertain terms, that he would rot in that darkened, 4 by 6 cell unless he comes to his senses and agrees to volunteer for a program which will "make him a winner in the game of life."¹⁹⁴ Though such conduct may not be aversive therapy in its clinical meaning, it is most certainly not positive reinforcement.

C. Beneficial Results

A third justification for the use of behavior modification is that it produces results — it cures inmates. Dr. James Bennett, one time Director of the United States Bureau of Prisons, has supported the use of behavior modification under the following rationale: "[i]f it could be shown empirically that hitting an inmate on the head with a hammer would cure him, I'd do it."¹⁹⁵ The assumption which Dr. Bennett and his successors have made is that behavior modification will be successful in curing inmates of their undesirable behavior and that the benefits of this cure far outweigh any of the criticisms connected with the treatment. Without considering the ends/means conflict implicit in this view, there are still important questions about the underlying assumption that behavior modification programs can be considered successful.

There is, of course, a wealth of literature attesting to the efficacy of various behavior modification techniques. One may go from specific examples, such as the classic study where a catatonic schizophrenic who had been mute for nineteen years was given gum as positive reinforcement and was, at the end of ten weeks, able to verbalize a request,¹⁹⁶ to the more general claim of Professor Davison, President of the Association for the Advancement of Behavior Therapy, that

literally thousands of neurotically incapacitated adults — including people fearful of driving in cars, flying in planes, enjoying sexual relations — have been taught to reduce their unwarranted anxieties so that their options about how to live have been greatly increased.¹⁹⁷

¹⁹⁴ See, e.g., Dr. Carlson's testimony, wherein he discusses "hard core" prisoners who do not want rehabilitation. "[T]hese 10 wolves, so to speak, may, 6 months or a year from now, or 2 or 3 years from now, get tired of that, decide that perhaps this has been a waste of their life, and a waste of their energy . . ." *Hearings, supra* note 7, at 61.

¹⁹⁵ Mitford, *supra* note 3, at 30. Of course even this would raise a further moral issue. "[I]s there any value . . . in virtuous behavior which is not based on moral effort and moral choice?" G. TAYLOR, *THE BIOLOGICAL TIME BOMB* 132 (1968).

¹⁹⁶ See *BEHAVIOR MODIFICATION: A SOURCEBOOK FOR PSYCHOLOGY AND EDUCATION* 10 (L. Cohen ed. 1971) which summarizes the various journal articles discussing this experimental success.

¹⁹⁷ Clairborne, *Behavior Modification and Its Positive Aspects*, N.Y. Times, April 28, 1974, at 13, col. 4. The journalist concludes that there

can be no doubt that this form of behavior modification works, at least some of the time. Pioneers such as Ivar Lovaas of the University of California at Los Angeles have taught self-control to children who previously had to be kept in strait-jackets to prevent them from mutilating themselves. *Id.* at col. 3.

Similar results have been reported from within the prison system. At Patuxent Institution in Maryland, the warden believed that the recidivism rate of 37%, compared with a national average of 80%,¹⁹⁸ indicated a high rate of success for their program of "positive reinforcement." Similarly, those administering the Anectine program at Vacaville claim success, based on the fact that 61% of the participants committed no proscribed act while in the program and citing a 27% decrease in the number of infractions of the general institutional rules.¹⁹⁹ Dr. Carlson, in evaluating the START program at Springfield, Missouri, presented reports indicating that ten of the nineteen participants had successfully completed the program and had been returned to the regular institutional program.²⁰⁰

Despite the claimed success, all of these results have been criticized. When the Patuxent report was presented to the American Psychiatric Association it was attacked for "methodological deficiencies."²⁰¹ The conclusions reached by the staff at Vacaville have also been criticized and at least one commentator has reached the conclusion that "no valid inferences can be drawn from this experiment."²⁰² Perhaps the most criticism has been of the START program. In contrast to Dr. Carlson's reports of success, others were not impressed.²⁰³ Chairman Kastenmeier of the House Subcommittee that investigated the program and visited Springfield concluded that, in the opinion of the Subcommittee, there was really only "one prime example of a success story. We interviewed the individuals involved, and thought that the others were less than successful."²⁰⁴ Apparently the inmates had a more strenuous opinion of the program, for they challenged various aspects of it in *Sanchez v. Ciccone*.²⁰⁵ As part of the investigation in that case the court appointed three experts to examine the program, two of whom found it studded with flaws.²⁰⁶

One of the major reasons for giving credence to the multitude of judgments against the success stories presented by the behaviorists is the traditional lack of objectivity in this type of experimentation and the methodological deficiencies which often accompany it.²⁰⁷ It seems

¹⁹⁸ Stanford, *A Model, Clockwork-Orange Prison*, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 84, col. 5.

¹⁹⁹ *Conditioning*, *supra* note 14, at 636-37.

²⁰⁰ *Hearings*, *supra* note 7, at 6.

²⁰¹ Stanford, *supra* note 198, at 84.

²⁰² *Conditioning*, *supra* note 14, at 637.

²⁰³ Chairman Kastenmeier, *Hearings*, *supra* note 7, at 16.

²⁰⁴ *Id.* Similarly, in their earlier inquiry, the subcommittee not only found the program lacking in success but also found "nearly half of [the inmates] refusing to cooperate at the time of our visit To the man, the inmates distrusted and were suspicious of the program." REPORT, *supra* note 7, at 10-11.

²⁰⁵ *Id.* at 11.

²⁰⁶ N.Y. Times, Feb. 26, 1974, at 16, col. 6. In spite of this criticism Dr. Carlson continued to defend the program declaring: "The program was not wrong I think the program was successful." *Hearings*, *supra* note 7, at 62.

²⁰⁷ See *Conditioning*, *supra* note 14, at 620.

rather curious that the psychiatrists and psychologists who are working on behavior modification in the prison system have neither made an attempt to conduct a controlled evaluation of their program, nor have produced any studies on their success by outside, non-related experts. This fact, in and of itself, should make one cautious in accepting the claimed successes of the various programs.

But even if the figures for "success" could be accepted, the conclusions to be drawn from such figures would still be open to debate. One of the factors which seems to permeate the entire behavior modification program is a strong middle-class bias. Evidence of this is apparent in a number of different circumstances. For example, in his prepared statement to the House Subcommittee one finds Dr. Groder talking of the "typical non-thinking tough guy thug . . ." ²⁰⁸ and about programs designed "[f]or those inmates who specifically avoid thinking . . ." ²⁰⁹ He is appalled by the "frighteningly stark" "depth of ignorance" of the general inmate population ²¹⁰ and explained to the Subcommittee that one of the hardest problems is dealing with inmates "whose education level is such that they have restricted contact with abstract thinking and multiple option problem solving . . ." ²¹¹ Equally revealing is his conclusion that while most of the inmates have committed what he calls social suicide, ²¹²

[s]ome incarcerated individuals, usually those with white-collar, selective service or other kinds of milder social infractions had not committed social suicide . . . ²¹³

The results cited by Dr. Groder seem to bear the same bias. In surveying the ten men who had gone through two years in the program at Marion, Dr. Groder counted eight successes and two failures. ²¹⁴ The six clinical graduates (*i.e.*, successes who continued in clinical work) have all made successful adjustment to middle-class cultural norms, and have become a computer programmer, researcher and administrator; executive director of a drug treatment halfway house; a training director for a Marion-type program; a psychiatric assistant; a drug program coordinator for a drug abuse program; and a program administrator for a narcotic addict rehabilitation program. ²¹⁵ Two of the six are out of prison, the other four are still incarcerated. Four of the men were black, the other two were white. The two nonclinical graduates (*i.e.*, successes who did not continue in clinical work) were both from definite middle-class backgrounds: a lawyer and a store owner who had been connected with

²⁰⁸ *Hearings, supra* note 7, at 34.

²⁰⁹ *Id.* at 39.

²¹⁰ *Id.* at 38.

²¹¹ *Id.* at 39-40.

²¹² *Id.* at 24, 38.

²¹³ *Id.* at 25.

²¹⁴ *Id.* at 34.

²¹⁵ *Id.* at 35.

organized crime.²¹⁶ The program's two failures were both black men who had been released from prison and had not been re-arrested, but whom Dr. Goder thought had failed to be cured.²¹⁷

From these results, two conclusions could be drawn. First, it might be assumed that the program could be successful only with individuals who are either middle-class or are aspiring to middle-class values.²¹⁸ Second, it might be assumed that the program was really successful with no one, but that middle-class oriented individuals have both the finesse and the willingness to "play the game" with Dr. Groder and his associates.²¹⁹ In either case the program would hardly be the type of "success" necessary to utilize the ends/means justification.²²⁰

Whether beneficial results really have been obtained, be it through positive reinforcement or aversion therapy, and at the possible loss of "free will" (if it does exist), remains yet to be proved. While the uncertainty continues the potential for abuse also continues.

V. POTENTIAL FOR ABUSE

Closely related to the issues concerning the morality of the coercive use of behavior modification is the concern that such a power has been and would be abused. It is of course true that every activity is subject to abuse. The advocates of behavior modification have taken this as their premise and extended their logic to conclude that actual or potential

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* Compare *Therapeutic Justice*, *supra* note 141, at 296:

[T]raditional "talk" psychotherapy . . . apparently works well with intelligent and educated neurotics, but is far from fruitful when used with inarticulate, lower class deviants.

with Comment, *The Impact of the Politicized Prisoner on the Prison System*, 4 CUM.-SAM.L.REV. 486, 497 n. 58 (1974):

[T]he group therapy programs . . . amount to little more than mental rape. Here the first lesson the inmate with any degree of awareness learns is that he must invent his "problems" Naturally, he also learns to scorn the therapist for his naivete if the therapist is taken in by the sham.

²¹⁹ Support of the latter view may be drawn from the experiences at the Maryland Institute for Defective Delinquents at Patuxent. See Stanford, *A Model, Clockwork-Orange Prison*, N.Y. Times, Sept. 17, 1972, § 6 (Magazine), at 71-72. It is often not a change of heart which will effect a prisoner's release; rather, the only requirement is the vocabulary and abstract reasoning ability to perform in the manner which is pleasing to the "trainers."

²²⁰ Another important consideration in determining the value of such a program is to consider from what perspective success is measured. There are of course "failures" along with the successes and it is not unlikely that the behavior modification technique may seriously damage such an individual. Similarly, such programs may have significant side effects upon all of its participants. For example, most of the positive reinforcement programs begin with solitary confinement and isolation from the outside community; the end result is not to restore the inmate to society, but only to make him docile so that he may be returned to the general prison population. In effect, these programs, like old penal theories, begin with the assumption that the prisoner's will and spirit must be broken. If this attempt is successful it may have adverse consequences since it seems likely that "people whose self-esteem (spirit) has been destroyed and whose will has been broken cannot readily earn a living and make a place for themselves in the outside world. . . ." *Psychiatric Violence*, *supra* note 19, at 621.

abuse does not, in and of itself provide a sufficient reason to scrutinize and regulate behavior modification programs. But a closer examination will reveal that such is not the case.

At the outset it must be recognized that there is some difficulty in determining exactly who should receive the "benefit" of having his behavior modified. The conventional answer is that such treatment should be available to anyone in need of help. But when the object of such treatment is to produce normality and when the standards of mental health are based upon majority norms this answer is far from satisfactory.

As Marshall McLuhan and Quentin Fiore have noted in their influential book *The Medium is the Message*:

The poet, the artist, the sleuth — whoever sharpens our perception tends to be anti-social; rarely "well-adjusted," he cannot go along with currents and trends.²²¹

Indeed, it is not uncommon for the "great men" of an era to be out of step with their contemporaries and as Thoreau said, "The greater part of what my neighbors call good I believe in my soul to be bad"²²²

On first impression the mere potential for abuse might not be considered disconcerting, especially since each of the major professional organizations involved in behavior modification has their own code of ethics to deal with the matter.²²³ It would not be unreasonable to assume that these codes of ethics are promulgated with the interests of the client/patient in mind and that they exist as a bulwark against potential

²²¹ M. McLuhan & Q. Fiore, *THE MEDIUM IS THE MESSAGE* 88 (1967). Further:

A strange bond often exists among antisocial types in their power to see environments as they really are. This need to interface, to confront environments with a certain antisocial power, is manifest in the famous story, "The Emperor's New Clothes." Well-adjusted courtiers, having vested interests, saw the Emperor as beautifully appointed. The "antisocial" brat, unaccustomed to the old environment, clearly saw that the Emperor 'ain't got nothin' on.' The new environment was clearly visible to *him*.

²²² H. THOREAU, *WALDEN* 12 (Signet ed. 1964).

²²³ For example, the American Psychological Association has adopted Principle 22, which provides that:

No psychologist in the employment of or working in collaboration or contract with a local, state or federal government will embark on or participate in any project or program involving clients or patients of the psychologist or his employers which has the implicit or explicit objective of

- a. imposing the community's norms or the social values of some particular groups on the individuals;
- b. strengthening any particular group, political party, or social class;
- c. strengthening or establishing any doctrine or ideology;
- d. enforcing conformity; or
- e. fostering the development of a homogenous society.

These and other relevant ethical cannons are reprinted in Lourens, *Skinner Versus Freedom: Concurrence and Dissent*, 4 CUM.-SAM.L.REV. 425, 436-39 (1974). See also *Therapeutic Justice*, *supra* note 141, at 317-18 where relevant portions of a "Position Statement on Involuntary Hospitalization of the Mentally Ill" (prepared by the American Psychiatric Association) is reprinted. (Note: these protections are procedural, not substantive.) For a discussion of the major codes of ethics and their effect upon research activities, see Note, *Behavior Modification and Other Legal Imbroglios of Human*

abuse. But unfortunately this is not the case. The professional self-policing has not only failed to prevent violations and abuses in treatment,²²⁴ but has also failed to provide after-the-fact disapproval when those ethical systems have been recognized as violated.²²⁵ While this abuse has a total impact upon the individual client/patient, it also has a direct impact upon the political system of society as a whole.

Recently the American public has become quite sensitive to the charges that the Soviet Union has used its mental institutions as care-takers for its political and intellectual nonconformists. The news media has presented the view that Soviet scientist Zhores Medvedev was confined in an asylum because he had a split personality which was demonstrated by the fact that he "expressed . . . the need to combine scientific work . . . with publicist activities . . ."²²⁶ Similarly, Aleksandr Solzhenitsyn was said to have been labeled an "abnormal schizophrenic" since he sought "only to find sores and cancerous tumors. He notices nothing positive in . . . society."²²⁷ The response was one of outrage. Newspaper editorials decried the spread of the "Serbsky disease"²²⁸ — so named because of the Moscow Serbsky Institute, which is the mental health unit to which many alleged political prisoners have been sent. Further, the Judiciary Committee of the United States Senate held hearings concerning psychiatric practice and abuse in the Soviet Union.²²⁹

²²⁴ E.g., The commitment of "hippies" to mental institutions solely because of their unconventional life style or beliefs, *Therapeutic Justice*, *supra* note 141, at 295, citing, *In re Sealy*, 218 So. 2d 765 (Fla. App. 1969); Wexler, Scoville, et al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ.L.REV. 1, 20 (1971); the cases of individuals who were committed for "abnormal spending habits" when they attempted to enjoy their estates rather than pass it on to the heirs, *Therapeutic Justice*, *supra* note 141, at 295, citing, Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676 (1964); the young woman "patient" who was controlled through "aversive stimuli" by shocks from an electric cattle prod, *Psychiatric Violence*, *supra* note 19, at 619 n. 87.

²²⁵ Consider the instance of the psychiatrist from California, working as a volunteer in a Vietnam mental hospital. He found their major problem was a lack of a desire to work. But it was only after the use of electroconvulsive treatment and eventual threats of total starvation that he was able to force his already malnourished patients to work as forced laborers in the vulnerable outposts of the United States Special Forces. *Psychiatric Violence*, *supra* note 19, at 623-24. As one commentator has correctly noted, the true significance is not that one individual would use force to make mental patients work; rather, the real significance is in the reaction of other members of the profession and what that reaction reveals about the standards of ethics and morality. The result was not censure or sanction, but rather the publication of his article describing his "success" in the official journal of his professional association. Further, the article was reprinted in a textbook whose purpose is to illustrate progress in the field of behavior modification and to "begin suggesting new tactics for the prevention of behavior problems." *Id.* at 624.

²²⁶ *Exile for Dissenter*, TIME MAGAZINE, Aug. 20, 1973, at 37.

²²⁷ MORROW, Book Review, TIME MAGAZINE, Jan. 7, 1974, at 80.

²²⁸ The Cleveland Press, Nov. 27, 1973, § A, at 8, col. 2: "In all the long dismal annals of man's cruel repression of other men, there can be few worse crimes."

²²⁹ *Hearings on Abuse of Psychiatry for Political Repression in the Soviet Union Before the Senate Subcomm. on Internal Security of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

Yet similar activities are being conducted in the United States and little if any outcry has arisen. While it is true that the liberty and freedom of the nonconformist and dissenter usually does not depend upon political decisions and psychiatric justification, once the individual becomes an inmate of a mental or penal institution the parallel becomes clear. The obvious political motivation of behaviorists may be seen in their attitude and action toward the Black Muslims. The Muslims enforce a type of discipline and morality upon the adherents of their sect which results in an organized, nonviolent, noncriminal life. By their religious belief the Muslim's have demonstrated an ability to make the exact type of "conversion" in an inmate's behavior which behaviorists claim they are trying to make. But, instead of being warmly received as contributors to the reduction in crime and recidivism, the Muslims are considered prime for behavior modification programs.²³⁰ Obviously the goal is something more than law abiding prisoners — and that something more is a political and social outlook which is acceptable and desirable to the behaviorists. The end result is that disagreement and conflict are settled not by argument and persuasion, but by the use of coercive behavior control techniques.²³¹

The extent to which such factors are fostered and maintained by the professional organizations of behaviorists is illustrated by the experience of David Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia. In 1972, Chief Judge Bazelon was appointed

²³⁰ See, e.g., comments of Dr. Bennett at text accompanying notes 4-5, *supra*.

²³¹ Political repression has been closely connected with the use of behavior modification. Skinner has openly advocated that behavior control techniques be used to "prevent disaffection or defection." B. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971). The prisoners at Marion alleged that the program there was targeted against agitators, suspected militants, writ-writers, and other trouble-makers. Further, the proposed program of the New England Governors has been criticized by M. Dumont, Assistant Commissioner for Drug Rehabilitation of the Massachusetts Department of Mental Health. In that plan, 35% of the men identified as "special offenders" had been so labeled at least in part because of their political projects. Dumont therefore saw a "dangerous possibility that political activists, organizers, and protesters in prison will be seen as special offenders who require massive and highly professional forms of control." *Psychiatric Violence*, *supra* note 19, at 636 n.160, citing, 6 *SCIENCE FOR THE PEOPLE* 43 (March 1974). Nor can there be any comfort from the fact that "professionals," in the role of psychiatrists and psychologists, are involved. Their disciplines and the use of the damning label "mental illness" have a long history of political repression in our own United States. Consider:

- A 19th century doctor advanced the "medical theory" that blacks suffered from two diseases peculiar to their race: "drapetomania" and "dysaesthesia Aethiopsis." "Stripped of medical rhetoric, drapetomania described a syndrome of a Negro slave escaping from his white master, while dysaesthesia Aethiopsis described a slave's behavior in neglecting his work!" *Therapeutic Justice*, *supra* note 141, at 295.
- Dr. Benjamin Rush, the "father" of American Psychiatry believed that forms of insanity included "anarchia" (an excess of passion for liberty) and "revolutiona" (opposition to the American revolution). *Psychiatric Violence*, *supra* note 19, at 611-12.
- Consider also Mark, Sweet, & Ervin, *Role of Brain Disease in Riots and Urban Violence*, 201 J.A.M.A. 895 (1967) wherein it is suggested that, in part, urban riots may have been caused by "brain dysfunctions in the rioters who engaged in arson, sniping, and physical assault."

by the Trustees of the American Psychiatric Association to an Ad Hoc Committee on the Use of Psychiatric Institutions for the Commitment of Political Dissenters.²³² The purpose of the committee was to investigate reports of the misuse of psychiatry emanating from the Soviet Union. At the suggestion of Chief Judge Bazelon the Trustees of the Association arranged for funding and hired a team of researchers for an additional project: an in-depth inquiry into the use of psychiatric discipline in institutions in our own society.²³³ At the last minute the APA disbanded the Ad Hoc Committee, dismissed the researchers, and sent the matter to another committee for consideration. In the words of Judge Bazelon:

Our committee agreed that what we experienced was the ranks of organized psychiatry defensively drawing together, there was to be no scrutiny, even by insiders — even they might be foxes guarding the henhouse.²³⁴

The ultimate result is that abuses of a most serious nature can and do occur. The good intentions and codes of ethics of the professional associations have not provided an adequate set of protections and it therefore becomes necessary to at least maintain the legal protections as a source of prohibiting the abuses.²³⁵

VI. WHAT THE FUTURE HOLDS

Behavior control does not exist in prison alone. As behaviorists are fond of pointing out, everyone daily attempts to influence, reinforce, or change the behavior of other people. Further, the systematic application of behavior modification has been applied in society at large not only in dealing with chronic psychotics,²³⁶ narcotics addicts,²³⁷ alcoholics²³⁸ and juvenile delinquents,²³⁹ but also in wider contexts such as education in the public schools²⁴⁰ and even in entire communities through

²³² *Psychiatric Violence*, *supra* note 19, at 639 n.174.

²³³ *Id.* quoting from Miller, *APA: Psychiatrists Reluctant to Analyze Themselves*, 181 *SCIENCE* 246, 248 (1973).

²³⁴ *Id.*

²³⁵ This is not intended to say that the psychiatrists or psychologists are in need of regulation by the law any more than any other profession. Rather, it is intended to show that society cannot allow any profession, no matter how good its intentions are, to become a law unto itself.

²³⁶ *Therapeutic Justice*, *supra* note 141, at 298, citing T. AYLLON & N. AZRIN, *THE TOKEN ECONOMY: A MOTIVATIONAL SYSTEM FOR THERAPY AND REHABILITATION* (1968).

²³⁷ *Id.*, citing Glicksman, Ottomanelli & Cutler, *The Earn-Your-Way Credit System: Use of a Token Economy in Narcotic Rehabilitation*, 6 *INT'L J. OF THE ADDICTIONS* 525 (1971).

²³⁸ *Id.*, citing Narrol, *Experimental Application of Reinforcement Principles to the Analysis and Treatment of Hospitalized Alcoholics*, 28 *Q.J. STUDIES ON ALCOHOL* 105 (1967).

²³⁹ *Id.*, citing Schwitzgebel, *Limitations on the Coercive Treatment of Offenders*, 8 *CRIM. L.BULL.* 267 (1972).

²⁴⁰ Gray, Straubard & Rosenberg, *Little Brother Is Changing You*, *PSYCHOLOGY TODAY*, March 1974, at 42, where it is indicated that one of the authors has been using behavior modification on an experimental basis in the public school for over nine years.

social service programs.²⁴¹

It has been emphasized time and time again that there is a belief that behaviorism is still in the experimental state of development,²⁴² and that it is in the same relative position as was physics in the 1940's.²⁴³ If this is true then prisons²⁴⁴ become even more important as the laboratories where extensive experimentation is taking place and from which the techniques learned in the prisons can be expanded and applied to society as a whole. It therefore becomes important in what manner prison behavior modification is handled.

Accordingly, certain elements of the controversy over behavior modification must be put in perspective. Initially, it seems that much of the controversy is a result of the misconception of behaviorists regarding the role of an expert in our society. This is not to conclude that behaviorists are incorrect in regard to what their role should be — even though this commentator believes that such is the case; rather, it simply means that as long as the political system of the country continues in its present legal form the omnipotent position to which behaviorists aspire will be denied them.

Secondly, the ban on the use of federal funds for behavior modification programs was theoretically unnecessary. As the preceding discussion indicates, there already exist significant safeguards to protect individual rights. The constitutional protections found in the first amendment right to mental integrity and the right of mental privacy severely limit the number of individuals upon which behavior modification can be performed. Due process and equal protection rights establish procedures which would guarantee fairness and accuracy in determining those few persons who could be subjected to behavior modification against their will. And the eighth amendment provides substantial limitations upon the actual forms of behavior modification which could be used upon those subjected to such a program.

This is not to imply that the behavioral scientists are right in their outcry that the termination of federal funds is regressive or anti-scientific.²⁴⁵ For the use of government funds, both for research and to pay the salaries of researchers, is government conduct which invokes not only legal protections designed to prevent the abuse of government power, but also political accountability under which the people or their

²⁴¹ For a description of the community wide program at Huntsville-Madison County (Alabama) Mental Health Center, see Heldman, *supra* note 91, at 9.

²⁴² G. TAYLOR, *THE BIOLOGICAL TIME BOMB* 20 (1968).

Every science has a natural curve of development. At first it is burdened with erroneous pre-scientific beliefs and poses its problems wrongly; progress is slow. A slow gathering of carefully observed facts is the indispensable preliminary to the forming of generalizations. Then, as insight is obtained, first in one sub-section, then in another, progress becomes more rapid.

²⁴³ Chorover, *The Pacification of the Brain*, *PSYCHOLOGY TODAY*, May 1974, at 59.

²⁴⁴ And other "total institutions" such as mental institutions.

²⁴⁵ See such statements which were made by the American Psychological Association upon learning of the impending ban of the use of federal funds for behavior modification. *N.Y. Times*, Feb. 15, 1974, at 56, col. 2.

representatives can decide upon the proper use and purpose of such funds. It is hardly the same to deny government participation in research as it would be to proscribe all such research itself.²⁴⁶

On the whole the ban seems to provide a needed breathing space. The unquestioned objectivity of science has been largely discredited,²⁴⁷ and its neutral results have recently been recognized as sometimes involving greater risks than any conceivable advantage.²⁴⁸ Further, questions have been raised as to the ability of our society to absorb increasing units of change.²⁴⁹ The alternatives in dealing with behavior modification range from a ban on all "brain modification" to a reaffirmation of the system which existed prior to the court decisions and the ban on the use of federal funds. In between are questions of whether experimentation should be allowed, and if so whether it should be conducted on a piecemeal basis or under the direction of some master plan. If it is decided that some form of additional control is necessary then it will have to be determined whether such controls should limit the research itself or only the dissemination and application of the findings.²⁵⁰

Although the various proposed laws²⁵¹ regulating behavior modification have much to recommend them, it would seem that we should not be too anxious to adopt them post haste. With the ban and the constitutional protections currently in existence there is time to prepare a more thoughtful, reasoned choice. Society now has a chance to engage in anticipatory law: to think out, discuss, and decide the moral and ethical problems which are a result of behavior modification and to design the necessary legal system to accomplish the desired goals. Thus, a pre-packaged set of laws could not be developed, complete with alternatives for possible future developments. To the extent that problems can be anticipated and their solution agreed upon, there will not only be less uncertainty as to our future, but also less chance of unconsciously abandoning values and traditions which we hold dear and wish to maintain.

RICHARD L. AYNES

²⁴⁶ This has been suggested by a number of legislators, both in state and federal government.

²⁴⁷ *Conditioning*, *supra* note 14, at 620.

²⁴⁸ Restak, Book Review, N.Y. Times, March 31, 1974, at 27, 31.

Scientific advance and its attendant technology only comes about in response to social constraints and social demands. Ideology not "truth" is the necessary determinant of scientific directions. Darwinian evolution, for instance, "both mirrored Darwin's own capitalist society and provided a biological justification for the continuance of just that capitalism."

See also M. McLuhan & Q. Fiore, *THE MEDIUM IS THE MESSAGE* 24 (1967):

In an electric information environment, minority groups can no longer be contained — ignored. Too many people know too much about each other. Our new environment compels commitment and participation. We have become irrevocably involved with, and responsible for, each other.

²⁴⁹ A. TOFFLER, *FUTURE SHOCK* (1971).

²⁵⁰ C. TAYLOR, *BIOLOGICAL TIME BOMB* 24 (1968).

²⁵¹ These are collected in Shapiro, *supra* note 10, at 239 n.2 and Apps. I-IV, 339-56. See also the excellent Therapeutic Bill of Rights proposed by Kittrie, which is reprinted in Lourens, *Skinner Versus Freedom: Concurrence and Dissent*, 4 CUM.-SAM.L.REV. 425, 437 n.54 (1974).