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COMMENTARIES

BEHAVIOR MODIFICATION: LEGAL LIMITATIONS ON METHODS AND GOALS

C. Benjamin Moya*
Roberta Achtenberg**

I. The Nonscientific Manipulation of Behavior

It is often assumed—in both the professional and popular literature—that behavior modification is a creature from 1984¹ that has arrived too soon. This misconception overlooks the fact that behavior modification is in reality characteristic of life itself.² All living creatures modify their behavior in response to physical and social influences from their environment and have done so since time began. Man also modifies his behavior in response to the forces and influences of his environment.³ Additionally, men modify each other's behavior by interacting with each other and by building social institutions whose functions are to limit and thereby control the behavior of men to promote the common good.⁴ Schools, churches, and military training camps are but a few examples.

Widespread aversion to the scientific manipulation of behavior with its capacity for taking man unwillingly or unknowingly “beyond freedom and dignity”⁵ has caused us to overlook the equally important and much more pervasive manipulation of human behavior by informal, nonscientific methods.⁶ This oversight has permitted nonscientific manipulation of behavior in the name of therapy, rehabilitation, criminal punishment, or education, with little social scrutiny and without clearly articulated goals.⁷

Suppose a trained behavioral scientist with a “depraved heart” were in charge of a modern juvenile justice system and proposed to treat those adjudged delinquent by positively reinforcing antisocial conduct and punishing socially conforming conduct. Suppose further that this scientist decided to use peer group approval as the positive reinforcer and peer group disapproval as the punishment. A hue and cry would of course arise from all segments of the community over both the objectives of the “treatment” program and the methods proposed to achieve those objectives. Yet as a society we have unwittingly put

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1 See G. ORWELL, 1984 (1949) for a fictional account of the horrors of a future society in which human beings become indistinguishable from machines.

2 See, e.g., B. F. SKINNER, BEYOND FREEDOM AND DIGNITY 1-32 (1971) for a classic—if somewhat extreme—exposition of the thesis that much of human behavior is the product of social or environmental conditioning.

3 *Id.*

4 *Id.* at 30-33, 38-40, 115-25, 135-82.

5 The phrase was first coined by B. F. Skinner in his classic book on behaviorism, see note 2 *supra*.

6 See text accompanying notes 8-21 *infra*.

7 See text accompanying notes 8-14, 16-19 *infra*.

such a "treatment" program into effect in many—probably most—of the juvenile systems in this country.

In 1966, an article appeared in a professional journal that received little attention outside a small circle of psychologists.⁸ It described a series of behavioral studies conducted in a detention home for delinquent girls. After carefully observing the daily activities of the residents, the authors concluded that the peer group rather than the staff provided the most effective behavior modifiers.⁹ The delinquent peer group generally provided "massive schedules of positive reinforcement for deviant behavior and negative reinforcement or punishment for socially conforming behavior."¹⁰ Overwhelming positive reinforcement existed for rule breaking, criticizing adults and adult rules, behaving aggressively, and doing things "for kicks."¹¹ Compared with the reinforcement provided by the staff, peer group reinforcement was much more frequent, consistent, and effective in producing behavioral change.¹² Adult staff members tended to reinforce indiscriminately and therefore ineffectively. They appeared more concerned with conforming behavior to custodial or security requirements than with improving social attitudes.¹³ The net effect (however unintentional) of confinement was to convert juvenile offenders, including truants and runaways, into severe criminal offenders.¹⁴

Similarly, persons committed to institutions for the mentally ill find they are often reinforced for socially dysfunctional behavior.¹⁵ An extreme example is the conditions at Partlow State Hospital in Tuscaloosa, Alabama, immediately prior to the decision in *Wyatt v. Stickney*.¹⁶ Reciting the findings of a prior hearing the *Wyatt* court described the hospital as a "warehousing institution . . . wholly incapable of furnishing [habilitation] . . . and . . . conducive only to the deterioration and debilitation of the residents."¹⁷ The most comprehensive testimony on prevailing conditions at Partlow was furnished by an expert witness who testified that the environment tended "to develop behaviors which would interfere with successful community functioning."¹⁸ He found the conditions "dehumanizing" and declared that they fostered parasitism and helplessness among the residents.¹⁹ In short, the patients of Partlow were being subjected to behavior modification that proceeded unaware of or indifferent to the actual behavioral traits being reinforced.

These reports are significant because they demonstrate in behavioral terms what many already knew or suspected: our detention facilities frequently maintain and intensify the very attitudes and behaviors for which individuals are

8 Beuhler, Patterson & Furniss, *The Reinforcement of Behavior in Institutional Settings*, 4 BEHAVIOR RESEARCH & THERAPY 157 (1966).

9 *Id.* at 162-63.

10 *Id.* at 157.

11 *Id.* at 158.

12 *Id.* at 164.

13 *Id.* at 161.

14 *Id.* at 158.

15 *E.g.*, A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION 261 *et seq.* (1969) [hereinafter cited as BANDURA].

16 344 F. Supp. 387 (M.D. Ala. 1972).

17 *Id.* at 391.

18 *Id.* at 391 n.7.

19 *Id.*

institutionalized.²⁰ Institutions which control many or most of their residents' reinforcers cannot avoid significantly affecting their behavior.²¹ The central issue is not whether the behavior of those who are detained can or will be subjected to modification by the state but what behavior modification should be permitted. The realization that behavioral control inevitably occurs in such settings helps us to deal less emotionally and more effectively with the crucial social issue of who decides what behavior should be modified, as well as the objectives and methods of that modification.

II. The Scientific Manipulation of Behavior

A. *The Selection of Goals and the Scientific Method*

Before discussing recent technological advances and the resulting "science" of human behavior, it is necessary to consider an oft-stated but frequently ignored maxim: the scientific method is an excellent way to discover the means to achieve individual or societal goals, but science alone cannot tell us what goals to pursue. This limitation, pointed out in contemporary times by G. E. Moore,²² is valid not only with respect to the physical sciences²³ but also with respect to the social sciences in general and the behavioral sciences in particular.²⁴ As Carl Rogers urged in a debate with B. F. Skinner, any scientific endeavor requires a prior subjective choice of the value that the scientific work is to serve.²⁵ This value choice, which brings the scientific work into being, always lies outside the endeavor itself and cannot be part of the science involved in that endeavor.²⁶ For example, if an educator desires to impart knowledge of the "three R's," behavioral science can provide information on how to best attain this objective. If, on the other hand, the educator regards problem-solving ability as the goal of education, the scientific method offers means by which to cultivate and reinforce this ability. Should the educator, however, wish to determine the better or more desirable approach, the scientific method cannot help him unless he supplies a third value, by reference to which he can assess the two competing values. If the educator is concerned with college success, the scientific method can determine which type of early training best facilitates the achievement of that objective. In each case, however, the goal or value determining the direction of a given scientific endeavor must lie outside that endeavor.²⁷

²⁰ See also notes 16-19 *infra* and accompanying text.

²¹ Compare T. PARSONS, SOCIAL STRUCTURE AND PERSONALITY 129-54 (1964) (analysis of schools as institutional environments capable of effecting large scale behavioral change in those subject to the system).

²² G. E. MOORE, PRINCIPIA ETHICA 19 *et seq.* (1903); see also A. J. Ayer, *Critique of Ethics*, in READINGS IN ETHICAL THEORY 391 (W. Sellars & J. Hospers eds. 1952); C. D. Broad, *Some of the Main Problems of Ethics*, in READINGS IN PHILOSOPHICAL ANALYSIS 547 (H. Feigl & W. Sellars eds. 1949).

²³ J. CONANT, MODERN SCIENCE AND MODERN MAN 66-67, 80-111 (1952); Kuhn, *The Structure of Scientific Revolutions*, in LAW, LANGUAGE AND ETHICS 622, 624 (W. Bishin & C. Stone eds. 1972).

²⁴ Rogers & Skinner, *Some Issues Concerning the Control of Human Behavior: A Symposium*, 124 SCIENCE 1057, 1061-63 (1956).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

B. Behavioral Engineering: Toward A New Technology

Recent advances in social learning theory and the applied technology of behavior modification suggest that given a properly controlled environment behavioral engineers can influence the frequency, intensity, and duration of specified target behaviors for individuals and social groups.²⁸ Moving from the laboratory²⁹ to controlled environments³⁰ and finally into community settings,³¹ while simultaneously progressing from rats³² and lower primates³³ as experimental subjects to children,³⁴ adults,³⁵ and entire social systems,³⁶ behavioral psychologists have developed a potent technology for behavior change and control.

Though the application of learning theory to achieve behavioral change often provokes heated attack, the principles employed are scarcely new. Indeed, as noted earlier, the reason for the effectiveness of behavior modification is that it uses—in systematic fashion—strategies as old as man himself.

Efforts to control inappropriate adult behavior to achieve compliance with legal, religious, or community norms have historically focused on developing and refining elaborate forms of coercive control.³⁷ In behavioral terms, this forms a strategy which shapes behavior by negative reinforcement or punishment. It is premised on the principle that individuals will learn to avoid negative consequences—punishment, sense of guilt, social ostracism—and avoidance of unpleasant stimuli.³⁸ An example of a social institution operating on this principle is the criminal justice system, which uses the threat of penal sanctions to deter socially undesirable behavior.

This method of behavior control, however, has frequently failed to produce satisfactory results. This is due in part to the imprecision with which the goals have been defined and in part to the inconsistency with which the negative consequences have been dispensed. The systematic application of reinforcement is necessary to achieve effective behavior modification.³⁹ Rewards and punishments should ideally be dispensed on an established schedule as soon as the desired or undesired behavior appears.⁴⁰ Absent this immediate reinforcement, shaping takes place slowly or not at all. An additional requirement is that the subject understand which of his specific behaviors will lead to punishment or reward.⁴¹

This is not to say that negative reinforcement strategies are ineffective.

28 *E.g.*, J. MANN, CHANGING HUMAN BEHAVIOR 81-94, 97-106 (1965) [hereinafter cited as MANN].

29 *Id.* at 113-17.

30 *Id.*; Ferster, *Transition from Animal Laboratory to Clinic*, in SELECTED READINGS IN BEHAVIOR MODIFICATION 15-20 (R. Ruskin ed. 1972).

31 *See* notes 65-72 *infra* and accompanying text.

32 Skinner, *Some Relations Between Behavior Modification and Basic Research*, in BEHAVIOR MODIFICATION: ISSUES AND EXTENSIONS 2 (S. Bijou & E. Ribes-Inesta eds. 1972).

33 *Id.*

34 *See* notes 47-48, 66 *infra* and accompanying text.

35 *See* notes 42-43, 49-57 *infra* and accompanying text.

36 *See* notes 58-72 *infra* and accompanying text.

37 *E.g.*, Schwitzgebel, *Behavior Modification: Past, Present, and Future*, in BEHAVIOR MODIFICATION: THE HUMAN EFFORT 3-6 (R. Bradfield ed. 1970).

38 *Id.* at 3-5; MANN, *supra* note 28, at 56-61.

39 MANN, *supra* note 28, at 56-60; M. ARKAVA, BEHAVIOR MODIFICATION: A PROCEDURAL GUIDE FOR SOCIAL WORKERS 22-24 (1973) [hereinafter cited as ARKAVA].

40 *Id.*

41 ARKAVA, *supra* note 39, at 32; BANDURA, *supra* note 15, at 564-67 (1969).

Aversive techniques have successfully attained a wide variety of therapeutic ends.⁴² Sexual behaviors, self-mutilation, cigarette smoking, alcohol abuse, compulsive stealing, and other relatively resistant behaviors can often be eradicated or reduced through the use of aversive conditioning such as mild electric shocks.⁴³ The notion of one human being consciously administering painful sensations to another, however, is a highly dramatic one, and it is this form of behavior modification that has been most responsible for alerting the public and the courts to the potential hazards of irresponsible behavioral engineering.⁴⁴

In recent years, however, a noticeable shift has occurred in the strategy of behavior manipulation as practiced by professional behavioral psychologists. Relying heavily on the use of positive reinforcement and the principles of contingency management, behavioral psychologists have demonstrated remarkable success in altering a wide variety of behaviors in both individuals and groups.⁴⁵ As with negative reinforcement, this is no new discovery. The process whereby individuals receive rewards (social approval, food, money) for doing "the right thing" has been used by numerous cultures as a device for altering behavior.⁴⁶ Behavioral scientists are now attempting to systematically unravel the nuances of reinforcement theory so as to obtain maximum effect. Target behaviors now cover a wide range of man's experience. In children and adolescents, behavior technology has altered speech dysfunction, school phobia, enuresis and encopresis, seizures, self-injurious behavior, and oppositional character traits.⁴⁷ Autistic behavior, certain forms of learning disorder, and even nervous tics have been successfully treated by application of behavior therapy.⁴⁸ In the adult population, the use of behavior technology has cured depression,⁴⁹ phobias,⁵⁰ and anxiety reactions⁵¹ and has altered such diverse behaviors as compulsive gambling,⁵² compulsive hand-washing,⁵³ hysterical retention of urine,⁵⁴ stage fright,⁵⁵ sleep-

42 E.g., Feldman, *Aversion Therapy for Sexual Deviations: A Critical Review*, 65 PSYCHOLOGICAL BULL. 65 (1966); Rachman & Teasdale, *Aversion Therapy: An Appraisal*, in BEHAVIOR THERAPY 279 (G. Franks ed. 1969) [hereinafter cited as Rachman & Turner].

43 Rachman & Turner, *supra* note 42, at 280-314.

44 See notes 85-99, 185-88 *infra* and accompanying text.

45 See notes 47-72 *infra* and accompanying text.

46 See A. SHERMAN, BEHAVIOR MODIFICATION: THEORY AND PRACTICE 33-34 (1973); L. KRASNER & L. ULLMAN, BEHAVIOR INFLUENCE AND PERSONALITY 140-45, 327-463 (1973).

47 Johnson & Katz, *Using Parents as Change Agents for Their Children*, 14 J. CHILD PSYCHOLOGY & PSYCHIATRY 181 (1973).

48 Gelfand & Hartmann, *Behavior Therapy with Children*, 69 PSYCHOLOGICAL BULL. 204 (1968).

49 Lewinsohn, Weinstein & Alper, *A Behavioral Approach to the Group Treatment of Depressed Persons*, 26 J. CLINICAL PSYCHOLOGY 525 (1970).

50 Andrews, *Psychotherapy of Phobias*, 66 PSYCHOLOGICAL BULL. 455 (1966); Benson, *Systematic Desensitization in the Treatment of Phobic Reactions*, 20 J. GENERAL EDUCATION 119 (1968) [hereinafter cited as Benson].

51 Benson, *supra* note 50.

52 Barker & Miller, *Aversion Therapy for Compulsive Gambling*, 146 J. MENTAL DISEASE 285 (1968).

53 Bailey & Atchinson, *The Treatment of Compulsive Handwashing Using Reinforcement Principles*, 7 BEHAVIOR RESEARCH & THERAPY 327 (1969).

54 Cooper, *Conditioning Therapy in Hysterical Retention of Urine*, 111 BRIT. J. PSYCHIATRY 575 (1965).

55 Kondas, *Reduction of Examination Anxiety and "Stage Fright" by Group Desensitization and Relaxation*, 5 BEHAVIOR RESEARCH & THERAPY 255 (1967).

walking,⁵⁶ and even the visual performance of functionally blind persons.⁵⁷

Although these classic applications of behavior therapy have normally been conducted in one-to-one, behaviorist-patient contexts, attempts have been made recently to apply behavior modification techniques to groups or entire populations. In 1961 Theodore Ayllon and Nathan Azrin began a pioneering project that demonstrated the effectiveness of a "token economy" system in modifying individual behavior on an institution-wide basis.⁵⁸ They carried out the project in an Illinois state hospital ward of chronically psychotic female patients whose prolonged hospitalization had resulted in behavior patterns of extreme apathy and dependence.⁵⁹ Tokens, which the patients could exchange for reinforcers such as special foods, privacy, television time, and grounds privileges, were dispensed contingently in response to certain target behaviors.⁶⁰ The behavioral objectives were to reverse the apathy and dependence of the patients and eventually develop self-care and work skills.⁶¹ Brushing their own teeth, making their own beds, and the performance of certain kitchen chores were reinforced by awarding a designated number of tokens.⁶²

By determining the items or activities highly reinforcing to an individual patient and then limiting access to those reinforcers, the managers of token economy systems can systematically manipulate the environment to effect substantial and highly predictable changes in the behaviors of an institutionalized patient.⁶³ As the patient progresses, increasingly complex behaviors and additional skills can be required in order to earn tokens. The goal is to teach "behaviors which lead to social reinforcers from others," so that the new behavior patterns will be reinforced and therefore maintained outside the institution.⁶⁴

Use of these techniques is not limited, however, to institutional settings. Although the community is less susceptible to control and manipulation, it offers the advantages of greater freedom to the individual and less expense to the state, while simultaneously avoiding the difficult transition from the institution to the outside world. Recent developments in the use of behavior therapy within family

56 Meyer, *A Behavioral Treatment Approach to Sleepwalking Associated with Test Anxiety*, in PROCEEDINGS OF THE 77TH ANNUAL CONVENTION OF THE AM. PSYCHOLOGICAL ASS'N 485 (1969).

57 Zimmerman & Grosz, "Visual" Performance of a Functionally Blind Person, 4 BEHAVIOR RESEARCH & THERAPY 119 (1966). For accounts of the use of behavior therapy to alter other forms of behavior see, e.g., Lazarus, *The Treatment of a Sexually Inadequate Man*, in CASE STUDIES IN BEHAVIOR MODIFICATION 243 (L. Ullman & L. Krasner eds. 1965); Burchard & Tylor, *The Modification of Delinquent Behavior through Operant Conditioning*, 2 BEHAVIOR RESEARCH & THERAPY 245 (1965); Keutzer, Lichtenstein & Mees, *Modification of Smoking Behavior: A Review*, 70 PSYCHOLOGICAL BULL. 520 (1968); Liberman, *Aversive Conditioning of Drug Addicts*, 6 BEHAVIOR RESEARCH & THERAPY 229 (1968).

58 Ayllon & Azrin, *The Measurement and Reinforcement of Behavior of Psychotics*, 8 J. EXPERIMENTAL ANALYSIS OF BEHAVIOR 357 (1965) [hereinafter cited as Ayllon & Azrin]; see also T. AYLLON & N. AZRIN, *THE TOKEN ECONOMY: A MOTIVATIONAL SYSTEM FOR THERAPY AND REHABILITATION* (1968).

59 Ayllon & Azrin, *supra* note 58, at 358-59.

60 *Id.* at 357-58.

61 *Id.* at 382.

62 *Id.* at 368.

63 See generally Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CAL. L. REV. 81 (1973) [hereinafter cited as Wexler] for an excellent discussion of the techniques employed by managers of token economies and the legal problems that arise from their use.

64 Paper presented by L. Krasner at Ciba Symposium on Learning and Psychology, London, England (1968) (on file at law library, University of Utah, Salt Lake City, Utah).

units indicate that a wide range of individual behavior can be controlled by the systematic manipulation of the social environment.⁶⁵ By training the significant persons in an individual's life to respond to that individual in specific ways, a continuous influence can be exerted on his behavior. Those most influential with the individual, such as parents, teachers, or spouse, can be trained to become behavioral engineers for shaping his behavior.⁶⁶

Using similar principles of social reinforcement, a team of Salt Lake City psychologists designed and put into effect a program offered to delinquent juveniles and their families as an alternative to the existing juvenile justice system.⁶⁷ The psychologists used a "matching to sample" procedure which focused on certain family parameters of behavior.⁶⁸ First, they attempted to define, for certain behavioral areas, the interaction patterns of "normal" families. The investigators concluded that six family-related factors which contribute to the development of deviant children are especially significant: (1) a lack of structure within the home, (2) the unsystematic use of punishment, (3) frequent periods of crisis—times when the child receives little positive reinforcement, (4) reliance on coercion instead or reciprocity within the family, (5) deviant parents, and (6) selective responsiveness on the part of the child, in which he attends to either parent but not both, or responds more actively to influences outside the home ("peer pollution").

It also appeared that marked differences existed between the speech patterns of normal and delinquent families. Normal families, it was found, display positive variability in their speech, which provides the opportunity for change, for the introduction of new information, and for conflict resolution. Abnormal families tended to demonstrate ritualistic, nondisrupted patterns of communication providing neither new information nor the possibility of change.⁶⁹ These families also displayed conflict patterns such as "derailing comments" (topic

65 *E.g.*, Stuart, *Operant-Interpersonal Treatment for Marital Discord*, 33 J. CONSULTING & CLINICAL PSYCHOLOGY 675 (1969).

66 *See* Parsons & Alexander, *Short-Term Family Intervention: A Therapy Outcome Study*, 41 J. CONSULTING & CLINICAL PSYCHOLOGY 195 (1973); G. R. Patterson & Y. Redit, *Two Facets of Social Systems*, paper presented at Ninth Institute for Research in Clinical Psychology, at the University of Kansas, April, 1967 (on file at law library, University of Utah, Salt Lake City, Utah). By training parents in behavior modification techniques, researchers have brought about marked changes in the behavior of children seen on an out-patient basis. O'Leary, O'Leary & Becker, *Modification of the Deviant Sibling Interaction Pattern in the Home*, 5 BEHAVIOR RESEARCH & THERAPY 113 (1967); Patterson & Brodsky, *A Behavior Modification Program for a Child with Multiple Problem Behaviors*, 7 J. CHILD PSYCHOLOGY & PSYCHIATRY 277 (1966). This method has been used successfully in the treatment of schizophrenic and autistic children, *e.g.*, Wolf, Risley & Mees, *Application of Operant Conditioning Procedures to the Behavior Problems of an Autistic Child*, 1 BEHAVIOR RESEARCH & THERAPY 305 (1964), as well as delinquent adolescents, Thorne, Tharp & Wetzel, *Behavior Research Report* (Office of Juvenile Delinquency & Youth Development, H.E.W. Grants 65023, 66020) (1968).

67 *See generally* Alexander & Parsons, *Short-Term Behavioral Intervention with Delinquent Families*, 81 J. ABNORMAL PSYCHOLOGY 219 (1973) [hereinafter cited as Alexander & Parsons].

68 *Id.* at 219-20.

69 *See also* E. MISHLER & N. WAXLER, *INTERACTION IN FAMILIES* (1968); Mishler & Waxler, *Family Interaction Processes and Schizophrenia: A Review of Current Theories*, 11 MERRILL-PALMER Q. 269 (1965).

change) designed to avoid problem solution and ritualized aggressive comments designed to injure others.⁷⁰

The hypotheses examined in this study reflected an assumption that the variables responsible for creating delinquent families could be conceptualized and systematically manipulated so as to reduce family disequilibrium and decrease the likelihood of further crisis situations. The matching-to-normality procedure, after identifying the parameters of normal family functioning, systematically shaped dysfunctional families in the direction of those parameters. As the balance of mutual reinforcement among the family members was made more equitable by therapeutic intervention, the families moved from "bedlam" to relatively low rates of disruptive behavior. At the same time, these families increased the frequency and duration of speech, distributing talk time more equitably and decreasing periods of silence.⁷¹

Success was measured by the degree of similarity between the "ideal normal family parameters" and the delinquent family. At the end of the experiment, all families had become more like the "normal" standard than before. Follow-up data indicate that these families also had significantly reduced rates of recidivism in the juvenile courts, suggesting that they retained their "normal" patterns.⁷²

The implications of this and similar programs are far reaching. On the positive side, this method can alter broad patterns of dysfunctional behavior without the expense and risk that attend institutionalization. Moreover, clear enunciation of the target behaviors in the Salt Lake City program made possible continual monitoring of progress toward those targets. Both the ends and the means were susceptible to fairly accurate evaluation. The inclusion of the families subjected to treatment in the planning stages of the project further aided this evaluation.

Despite these advantages, the program is not without its troubling aspects. One difficulty—common to all behavior modification programs—concerns its use of goal-concepts such as "normal." With reference to individual or family behavior, the problem is that terms such as "normal" or "deviant" have an irreducible value component that cannot be defined in a culture-free way.⁷³ To decide on "normal" juvenile behavior for purposes of a behavior-shaping program, it is necessary to ask what standard shapes the definition of "normal." Is it to be the "normal" Black or Chicano family, or the "normal" white middle-class family? Is it the "normal" California family, Massachusetts family, Georgia family, or some composite "normal" American family?

Although science offers various definitions of "normality," it cannot tell us which to pursue or even whether normality is desirable in itself, without reference to some external, subjectively chosen value.⁷⁴ The problem is somewhat simplified by the existence of a juvenile code, since "normal" can be operationally

70 See also Farina, *Patterns of Role Dominance and Conflict in Parents of Schizophrenic Patients*, 61 *J. ABNORMAL AND SOCIAL PSYCH.* 31 (1960).

71 Alexander & Parsons, *supra* note 67, at 220-21.

72 J. Alexander & B. Parsons, *Short-Term Therapy and Recidivism Rates: A Two-Year Follow-Up*, paper presented to the Western Psychological Association, San Francisco, California (1974) (on file at law library, University of Utah, Salt Lake City, Utah).

73 E.g., T. SZASZ, *THE MYTH OF MENTAL ILLNESS* 52-72 (1961).

74 See notes 22-27 *supra* and accompanying text.

defined as that which does not violate the juvenile code. This does not resolve the deeper dilemma, because compliance with the juvenile code is only one of society's goals, and this goal must be balanced against others including the preservation of personal liberty and individual differences.

The Salt Lake City experiment raises an even more fundamental danger with regard to ethnic minorities and the poor. Once an individual has been adjudged delinquent—thereby giving the state the power to intervene—the onus is entirely on the individual to become “normal.”⁷⁵ But it is a truism of behavioral science that aberrant behavior is often simply a normal response to abnormal conditions.⁷⁶ Once the state has a ready device for shaping individuals, it becomes easy to overlook the fact that the environment may be the root cause of the individual's problem. By focusing attention on the abnormal individual to the exclusion of his social environment, it is easy to “adjust away” sources of complaint that left alone might have resulted in pressure for societal reform. That a small minority of unmonitored technicians currently carry out just such “adjustments,” often against the will of the person whose behavior is being modified, suggests a need for greater legislative and judicial attention in this area.

III. Judicial and Administrative Regulation of Behavior Modification

A. *Assessment of Methods*

Self-modification of behavior and consensual modification of another's behavior pose few problems for the law, provided the target behaviors are not forbidden conduct and consent is knowingly and freely given. Adults “consent” to having their behavior modified every time they enroll in a school or training program, engage a psychiatrist or marriage counselor, or attend religious services.

For persons highly motivated to change a behavior pattern, methods that involve little or no intrusiveness are available. The work of Joseph Cautela has demonstrated that positive and negative reinforcers can be administered to a willing patient simply by asking him to imagine a pleasant or unpleasant event, object, or circumstance.⁷⁷ Cautela has effectively treated patients anxious to eliminate behaviors such as alcoholism, homosexuality, overeating, and excessive smoking by suggesting that they imagine themselves becoming nauseated and vomiting as they are about to encounter the object of their habit.⁷⁸ Alternatively, the patient can imagine himself refusing the stimulus and then receiving a “reward.” The reward can be “winning \$25,000 in a contest,” “skiing down a mountain feeling exhilarated,” or any of the patient's high preference items.⁷⁹ Patients can practice on their own as a self-control procedure, and frequently do daily “homework assignments.”⁸⁰ Purely voluntary procedures such as Cautela's,

75 Cf. L. KRASNER & L. ULLMAN, *BEHAVIOR INFLUENCE AND PERSONALITY* 487 (1973).

76 *Id.*

77 Cautela, *Covert Reinforcement*, 1 *BEHAVIOR THERAPY* 1, 36-38 (1970).

78 *Id.* at 35.

79 *Id.* at 36-39.

80 *Id.* at 43.

involving neither intrusiveness nor coercion, are legally unassailable. But these procedures are obviously unavailable when the patient will not or cannot use his imaginative powers as suggested by the therapist.

Constitutional questions arise only when the state has a right to modify an individual's behavior by coercion and the individual cannot or will not give knowing consent.⁸¹ Ordinarily, the severity and intrusiveness of the methods necessary for a given behavioral change are a function of the amount of resistance the subject offers to the change.⁸² If resistance is strong, mild measures will generally fail. On the other hand, for a patient strongly motivated to change his pattern of behavior, drastic therapies are rarely necessary. A patient's resistance may be either deliberate or nondeliberate (such as deeply ingrained behavior or habits). Moreover, objections to treatment may relate to either the methods or the target behaviors. Most law students consent to the target behavior of acquiring skills of legal analysis. A student may not in fact consent to writing a given paper or taking a given final examination; but so long as these methods are reasonably related to the development of the target behavior, the student is deemed to have consented to the methods as well.

It is with respect to techniques performed on unwilling subjects that the law has begun to impose limits on the scientific manipulation of behavior. Although case law is sparse, legal limits already exist not only on the use of aversive techniques⁸³ but also on the use of positive reinforcement.⁸⁴

In *Knecht v. Gillman*,⁸⁵ the Court of Appeals for the Eighth Circuit declared an aversive drug therapy program to be cruel and unusual punishment. The drug apomorphine had been used at the Iowa Security Medical Facility as an aversive conditioner in a behavior modification program. When injected into the bloodstream, apomorphine induces vomiting, high blood pressure, and palpitations of the heart.⁸⁶ Inmates received the drug—without a doctor's specific order—following every act of wilful disobedience.⁸⁷ The court held that such use of the drug violated the eighth amendment. Characterizing the drug's use as "treatment" did not remove it from constitutional scrutiny, since the use of the drug amounted to a form of punishment. In order for the institution to continue to use the drug, it was required to obtain the consent of each inmate for each use and to advise each patient of his right to discontinue the program at any time.⁸⁸ Each administration of the drug would require authorization by

81 In earlier years, courts were reluctant to intrude upon the realm of "medical judgment," and review of treatment programs adopted by mental institutions was rarely given, see Wexler, *supra* note 63, at 91 and sources cited therein. Judicial deference seems to be coming to an end, however, as courts are beginning to scrutinize living conditions and treatment modalities that prevail in these institutions. See, e.g., *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972); *Kaimowitz v. Department of Mental Health*, No. 73-19434 (Mich. Cir. Ct. Wayne County, July 10, 1973) [1972-74 Transfer Binder], CCH Pov. L. REP. ¶ 17,493; Wexler, *supra* note 63, at 91; see also Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972).

82 A. GOLDSTEIN, K. HELLER & L. SEGREEST, *PSYCHOTHERAPY AND THE PSYCHOLOGY OF BEHAVIOR CHANGE* 146 (1966).

83 See notes 85-99 *infra* and accompanying text.

84 See notes 100-03 *infra* and accompanying text.

85 488 F.2d 1136 (8th Cir. 1973).

86 *Id.* at 1137.

87 *Id.*

88 *Id.* at 1140.

a physician and administration by either a physician or a nurse. The court also limited use of the drug to offending conduct personally observed by a staff member.⁸⁹

The Ninth Circuit recently reviewed a similar program of aversive therapy in *Mackey v. Procunier*.⁹⁰ In *Mackey*, a prisoner challenged his forced participation in a program that used the drug anectine, which produces sensations of suffocation and drowning.⁹¹ The Court of Appeals reversed the trial court's dismissal for failure to state a claim, holding that use of the drug might be found to be "experimental."⁹² If experimental and administered without the prisoner's consent, issues of cruel and unusual punishment or "impermissible tinkering with the mental process" might arise.⁹³

Although both *Knecht* and *Mackey* arose in prison settings, other holdings suggest that the eighth amendment's guarantee also applies to those civilly committed for mental illness.⁹⁴ In *Wyatt v. Stickney*,⁹⁵ a landmark case in the development of the law relating to the mentally ill, a federal district court placed several limitations on the use of behavior modification techniques. Use of these techniques was held to require the consent of the patient, guardian, or next of kin, after opportunities for consultation with independent specialists and legal counsel, and then only with the approval of a human rights committee.⁹⁶ Electric shock was permissible only "in extraordinary circumstances to prevent self-mutilation leading to repeated and possibly permanent physical damage to the resident and only after alternative techniques have failed."⁹⁷ Neither medication, seclusion, nor physical restraint could be used as punishment devices.⁹⁸ Legitimate "time out" or segregation procedures were permissible as punishment, but only under "close and direct professional supervision as a technique in behavior-shaping programs."⁹⁹

With respect to positive reinforcement techniques, *Wyatt's* impact should be equally broad. Positive reinforcement—the selective rewarding of target behaviors—is generally recognized as the most powerful technique in the arsenal of the behavior modifier.¹⁰⁰ Application of this technique to particular patients, however, is often limited by the cost of continuing to supply the desired reinforcement.¹⁰¹ Token economy systems are therefore substituted, in which access

89 *Id.*

90 477 F.2d 877 (9th Cir. 1973).

91 *Id.* at 878; see Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 So. CAL. L. REV. 616, 636-38 (1972) for a description of the effects of the drug anectine.

92 477 F.2d at 878.

93 *Id.*

94 *E.g.*, *Martarella v. Kelley*, 349 F. Supp. 575, 584 (S.D.N.Y. 1972); *Inmates of Boys Training Schools v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Lollis v. Department of Social Services*, 322 F. Supp. 473, 475 (S.D.N.Y. 1970); *United States ex rel. Wolfersdorff v. Johnston*, 317 F. Supp. 66, 68 (S.D.N.Y. 1970).

95 344 F. Supp. 387 (M.D. Ala. 1972).

96 *Id.* at 400.

97 *Id.* at 401.

98 *Id.* at 400-01.

99 *Id.* at 400.

100 See notes 45-72 *supra* and accompanying text.

101 Some behavior modifiers have solved this problem with private patients by negotiating contracts with them requiring the patients to place money or items of value in trust. *E.g.*, R. STUART & B. DAVIS, *SLIM CHANCE IN A FAT WORLD: BEHAVIORAL CONTROL OF OBESITY*

to privileges and items of comfort is made contingently available.¹⁰² By specifying the minimum requirements of a constitutionally adequate environment, *Wyatt* limits the use of many potentially powerful reinforcers. When such items as screens for privacy, bedside tables, and physical exercise are a matter of right,¹⁰³ these items are beyond the reach of behavioral psychologists as contingent rewards.

This result has caused concern that *Wyatt* may impede the work of therapists with patients whose condition renders them unresponsive to any but the most basic of reinforcers.¹⁰⁴ The opinion does, however, permit "unusual or hazardous treatment procedures" upon a showing that due process requirements have been met and that the procedures are therapeutically necessary.¹⁰⁵ Although these requirements may make application of behavior modification methods more cumbersome, this is a small price for ensuring that drastic methods will only be used as a last resort. As Professor David Wexler has suggested, *Wyatt* will probably have the beneficial effect of stimulating behaviorists to search for new reinforcers that can be used without encroaching on patients' rights.¹⁰⁶

A number of cases, grouped under the rubric of the "right to refuse treatment," suggest that such a search may well be constitutionally required.¹⁰⁷ Once a person has been involuntarily institutionalized or designated for compulsory treatment, the right to refuse treatment becomes the right to the least restrictive treatment alternative.¹⁰⁸ Such cases often present agonizing choices between the individual's right to refuse unwanted treatment, society's right to be free from disruptive or dangerous behavior, and the financial burden of prolonged custodial care. *Sanchez v. Ciccone*,¹⁰⁹ for example, was a suit filed by the National Prison Project of the American Civil Liberties Union on behalf of certain prisoners who had been involuntarily placed in a behavior modification program called START (Special Treatment and Rehabilitation Training).¹¹⁰ A project of the Federal Bureau of Prisons, START was located at the Medical Center for Federal Prisoners in Springfield, Missouri. The inmates selected for START came from other federal penal institutions at which their disruptive behavior had resulted in prolonged periods of solitary confinement.¹¹¹ The

(1972). These items are then returned contingent on the patient's displaying the target behaviors. If the behaviors are not produced, the agreement usually provides that the objects are forfeited to charity.

102 See notes 58-64 *supra* and accompanying text.

103 344 F. Supp. at 402, 404.

104 *E.g.*, Wexler, *supra* note 63, at 101.

105 344 F. Supp. at 402.

106 Wexler, *supra* note 63 at 103.

107 *E.g.*, *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971); *Stowers v. Ardmore Acres Hospital*, 19 Mich. App. 115, 172 N.W.2d 497 (1969); *In re Brooks*, 32 Ill.2d 361, 205 N.E. 2d 435 (1965). *But see* *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952).

108 See text accompanying notes 151-55 *infra*; see also text accompanying notes 8-21 *supra*.

109 Nos. 20182-4, 3061-4 (W.D. Mo. 1973), decided *sub nom.* *Clonce v. Richardson*, 15 CRIM. L. REP. 2504 (1974).

110 For a general description of the workings of Project START, see Steinman, *The Case of the Frightened Convict*, 217 THE NATION (Dec. 3, 1973) [hereinafter cited as *Frightened Convict*].

111 Coordinator of Mental Health Services, U.S. Bureau of Prisons, OPERATIONS MEMO. 7300.128, PROCEDURE FOR PROCESSING PARTICIPANTS INTO PROJECT START (SPECIAL TREATMENT AND REHABILITATIVE TRAINING) 1 (1972) [hereinafter cited as START MEMO].

Bureau of Prisons had amassed compelling evidence that continued confinement in solitary tends to produce psychological disintegration due to sensory deprivation and lack of human interaction.¹¹² It was claimed that since the prisoners had demonstrated unwillingness to participate in less intrusive forms of therapy and since their behavior was disruptive to the prison regime, there were only two alternatives: continued psychological deterioration in solitary confinement or involuntary placement in a program designed to eliminate the disruptive behavior.¹¹³

START was designed for "that element of the prison population which has chronically demonstrated inability to effectuate adherence to established regulations."¹¹⁴ The program sought to develop "behavioral and attitudinal changes in offenders who have not adjusted satisfactorily to institutional settings."¹¹⁵ Prison periodicals¹¹⁶ and the popular press,¹¹⁷ however, noted the high proportion of Blacks and Chicanos selected for participation and criticized the program as a means of "dehumanizing" those who protested against unjust and barbaric prison conditions.

START was based on a theory of "status systems."¹¹⁸ The program involved a number of levels, each characterized by a stated set of privileges and responsibilities.¹¹⁹ As the inmate demonstrated improved adaptation, he was rewarded by advancement to a higher, more privileged, level.¹²⁰ Even the highest levels had fewer privileges than life in the regular institution; the prisoner was thus led to perceive a return to his former prison as a positive good.¹²¹

START had three levels.¹²² Upon transfer to the program, an inmate was placed in Level I. There the prisoner was allowed only a few basic personal articles, was permitted very little time outside his cell, and was given little exercise.¹²³ In order to progress to Level II, the prisoner had to do such things as keep his room neat, achieve a high cooperation rating, and achieve a certain level of self-care and cleanliness.¹²⁴

Some prisoners refused to cooperate even at Level I. At least three of the original group of transferees staged a 65-day "fast for rights."¹²⁵ Even after they discontinued their fast, they were uncooperative with program officials who responded by creating a status level even more restrictive than Level I.¹²⁶ A

112 Working sheets for START MEMO, *supra* note 115 (enclosed in letter to Sanford Rosen, Mexican American Legal Defense and Educational Fund Litigation Director, from Arpiar Saunders, Jr., staff attorney, National Prison Project, Feb. 27, 1973) [hereinafter cited as Working Sheets].

113 *Id.*; *Frightened Convict*, *supra* note 110.

114 Working sheets, *supra* note 112.

115 START MEMO, *supra* note 111, at 1.

116 Prisoner's Digest International, Sept.-Oct., 1972, at 4, col. 1.

117 *Frightened Convict*, *supra* note 110.

118 START MEMO, *supra* note 111, at 6-7; Working Sheets, *supra* note 112.

119 START MEMO, *supra* note 111.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 Letter to Mexican American Legal Defense and Educational Fund from inmate, Segregation Unit, United States Penitentiary, Marion, Ill., Jan. 24, 1973.

126 *Id.*

staff attorney from the National Prison Project of the American Civil Liberties Union described conditions in the new sublevel as "shocking."¹²⁷ During a visit to Project START, the attorney observed participants shackled by their arms and legs and chained to their steel beds.¹²⁸ He learned that prisoners had been forced to eat with both hands shackled and had had difficulty obtaining assistance from the staff in removing the chains to perform necessary bodily functions.¹²⁹ The prisoners had been placed in sublevel I because of their "non-cooperative attitude,"¹³⁰ without ever being charged or allowed to appear before a disciplinary committee.¹³¹

Shortly thereafter the National Prison Project filed *Sanchez v. Ciccone*,¹³² which is still in litigation. The allegations include cruel and unusual punishment, excessively rigorous conditions of confinement, failure to inform inmates of expected behaviors, and the deprivation of absolute rights by treating them as contingent. Project START may well be declared unconstitutional, fraught as it is with legal difficulties.¹³³ Even so, it illustrates some of the dilemmas that "least restrictive alternative" analysis introduces when behavior modification technology is sought to be applied to hardened offenders. Solitary confinement has a demonstrated tendency to cause severe psychological deterioration,¹³⁴ yet Project START, according to prison officials the only practicable alternative,¹³⁵ violates basic human rights of prisoners, if only for a limited period of time.

It is here that scientific expertise reaches its limit and basic societal judgments must be made.¹³⁶ These judgments involve balancing the individual, institutional, and societal values involved. Courts and legislatures are capable of rendering these judgments; the weighing of conflicting interests has been one of their historic functions.¹³⁷ In fact, it is important to note that those who advocate, market, and operate the programs are not necessarily qualified to make these judgments. As judicial opinions have stated, those who administer the programs tend to have their own biases and values—such as ease of operation and custodial efficiency¹³⁸—and these values may well conflict with the values of individual rehabilitation. Given the critical nature of the rights at stake and the demonstrated propensity of "total" institutions to give short shrift to

127 Letter to Dr. P. J. Ciccone, Director, Medical Center for Federal Prisoners, Springfield, Mo., from Arpiar Saunder, Jr., staff attorney, National Prison Project, Feb. 26, 1973.

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 Nos. 20182-4, 3061-4 (W.D. Mo. 1973), decided *sub nom.* Clonce v. Richardson, 15 CRIM. L. REP. 2504 (1974).

133 As of this writing, the Bureau of Prisons has discontinued the START program, allegedly because of its high cost. In Clonce v. Richardson, 15 CRIM. L. REP. 2504 (1974), the court held that this rendered moot all constitutional issues except procedural due process. The court further held that the transfer of prisoners to START without any sort of a hearing violated due process. *Id.* at 2505.

134 See note 112 *supra* and accompanying text.

135 See notes 111-15 *supra* and accompanying text.

136 The existence of such a limitation is not peculiar to behavior modification; rather, it is a characteristic of every scientific endeavor. See notes 22-27 *supra* and accompanying text.

137 *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (regulation of abortion); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (search and seizure); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (economic regulation); see Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424 (1962).

138 *E.g.*, *Wyatt v. Stickney*, 344 F. Supp. 387, 396, 402, 407 (1972).

the rights of those committed to their care,¹³⁹ continued deference to scientific authority seems ill-advised. If courts and legislatures are to perform their historic functions, they must assume the role of ultimate arbiters of the legitimacy of the means used by those who seek to apply the new behavior technologies directly to the human spirit.

B. Assessment of Goals

As with similar programs of compulsory behavior modification, Project START is undoubtedly assailable on its methods. But it is arguably even more assailable on its goals and the procedures by which those goals are established.

When a subject knowingly and freely consents to a behavior modification program, he has a voice in deciding the goals he wants to pursue.¹⁴⁰ This is the best guarantee that the goal-setting process will preserve individual and cultural differences. There is a growing trend to seek consent from those civilly incarcerated before beginning a behavior modification program¹⁴¹ and at least the beginnings of such a trend for the criminally incarcerated.¹⁴² In the case of children and the mentally ill, it is now recognized that even greater precautions are necessary and that obtaining a standard consent form may not be sufficient.

139 See notes 8-14, 85-99, 109-35 *supra* and accompanying text.

140 See *Kaimowitz v. Department of Mental Health*, No. 73-19434 (Mich. Cir. Ct. Wayne County, July 10, 1973) [1972-74 Transfer Binder], CCH *POV. L. REP.* ¶ 17,493 for an excellent discussion of legal consent to treatment.

141 See notes 95-106 *supra* and accompanying text.

142 See notes 85-94 *supra* and accompanying text. Perhaps the most eloquent argument for affording prisoners the greatest possible opportunity for making choices concerning their own rehabilitation was recently made in an open letter to Governor Daniel P. Walker of Illinois. Written by "the men and women confined in the correctional institutions in Illinois," the letter urged:

We in all sincerity are convinced that the proper posture for correctional institution officials regarding the rehabilitation of confined persons should be to encourage inmates to make decisions at every possible turn. It is an indisputable fact that we need guidance. We need to learn how to make responsible decisions in our everyday lives. Proper guidance and the opportunity to test the effectiveness of this guidance in our rehabilitation is lacking in the present policy. . . . Improvement in our decision-making abilities represents the crux of rehabilitation. It is . . . by emphasizing decision-making in the rehabilitative process and guiding the individual to make proper decisions that the administration can claim that when he returns to the community he will be able to make responsible decisions. If, however, as is now the case, the individual is denied any role in decision-making during his incarceration, he will inevitably become a moral cripple, incapable of making responsible decisions. . . . Furthermore, a very significant number, in fact the overwhelming majority of us were not incarcerated as hardened criminals and very few if any as absolutely non-redeemable. By and large we are men and women who have accepted imprisonment as punitive remuneration for deeds resulting from our making poor decisions, and who have opted for redemption, a redemption that while paying debts will allow us to grow and that will allow us to develop a proper understanding respecting the lives, rights, and property of others. Most of us enter prison with prayers, hope, and determination to become . . . better human beings than we were when we entered. It is this . . . hope that even now moves us to seek to address the problems of rehabilitation, the problems involved in redirecting the values of men and women so as to make them productive members of society. . . . We believe as Dostoevski that the quality of a society can be determined by the state of its prisons inasmuch as prisons reflect the primary values of a society and are accorded the responsibility of reorienting and transforming those individuals who have transgressed its mores and laws into responsible members of society once again.

"An Open Letter to Daniel P. Walker," 3 Chicago Connections Newsletter, No. 1, at 6 (1974). See also note 88 *supra* and accompanying text.

The Department of Health, Education, and Welfare's recently promulgated "Policies and Procedures for the Protection of Human Subjects"¹⁴³ suggests that in the case of children, prisoners, and others subject to coercive control, even consent of the subject and his next of kin may be inadequate. The establishment of a human rights commission along the lines suggested by the *Wyatt* court¹⁴⁴ may therefore be advisable in institutions whose functions result in the modification of human behavior. Because such commissions set behavioral objectives, they must comprise a true cross section of the community.¹⁴⁵ In particular, such commissions should include substantial representation from the minority communities, especially Blacks and Chicanos, since these groups are disproportionately represented among the institutionalized.¹⁴⁶ Unless this is done, behavior modification programs may appear to be vehicles whereby members of cultural and racial minorities are "reprogrammed" and indoctrinated into the value system of the dominant social group.¹⁴⁷ It is difficult to believe that the involuntary participants in Project START actually preferred solitary confinement to the relative freedom of Level II, unless their resistance is understood as a function of the goal-setting aspect of the program. Significantly, of the inmates who refused to cooperate at the lowest level of START, more than half were either Blacks or Chicanos.¹⁴⁸ Although no empirical proof exists, it seems reasonable to suspect that the fear of being programmed in a way that would blur their class or racial identities played a part in their refusal to cooperate.¹⁴⁹

There are essentially two types of judicial restrictions emerging from recent cases relating to the permissible range of goals set by behavior modification programs. The first restriction is substantive due process requiring that involuntary treatment bear some reasonable relation to the purpose for which the state's coercive power is applied.¹⁵⁰ In the case of mentally ill patients who have been civilly committed, this requirement has been interpreted to mean a right to rehabilitative treatment.¹⁵¹ Recent opinions have held that this includes a right to the least restrictive treatment method available, considering the circumstances and the reason for incarceration.¹⁵² In *Kaimowitz v. Department of Mental*

143 38 Fed. Reg. 31738, 31745 (1973).

144 See note 96 *supra* and accompanying text.

145 See notes 74-76, 117 *supra* and accompanying text.

146 For example, in federal prisons nearly half of the inmates are non-white. *Frightened Convict*, *supra* note 110.

147 Cf. Heldman, *Social Psychology Versus the First Amendment Freedoms, Due Process Liberty, and Limited Government*, 4 CUMB.-SAM. L. REV. 1, 18-40 (1973).

148 Of a total of 15 involuntary participants three were brown, seven were black and five were white. Working sheets, *supra* note 112.

149 The aberrant behavior that each START participant exhibited in the prison from which he came may also have been at least in part a normal reaction to abnormal conditions. See notes 75-76 *supra* and accompanying text. The refusal of several prisoners to cooperate with START may have been attributable to START's obvious potential for destroying the ability or desire to protest against conditions seen as inhumane and in need of reform. See notes 75-76 *supra* and accompanying text.

150 *E.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

151 *E.g.*, *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972); *Wyatt v. Stickney*, 344 F. Supp. 373, 387, 391, 394 (M.D. Ala. 1972).

152 *E.g.*, *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Wyatt v. Stickney*, *supra* note 151, at 373, 379, 396; see also *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Wexler, Scoville, et al., The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 140-46 (1971).

Health,¹⁵³ for example, a three-judge Wayne County court held that an involuntarily confined mental patient could not give legally valid consent to experimental psychosurgery because of the nature of the operation and the coercion inherent in confinement.¹⁵⁴ Moreover, the state's interest could justify only the alteration of those aspects of the patient's personality that pertained to aggression and only to the extent necessary for the protection of the patient and the public.¹⁵⁵ The proposed psychosurgical operation satisfied none of these limitations.

A second variety of judicial restrictions on goals derives from the personal guarantees in the Bill of Rights, particularly freedom of speech, religion, and association; the right to privacy; and the prohibition against cruel and unusual punishment. It is unlikely that the state (whether acting as *parens patriae* or exercising the police power) could ever justify an attempt to alter or eradicate religious or political beliefs. Although certain limited restrictions on first amendment freedoms have been tolerated where the state has proved a compelling interest,¹⁵⁶ these situations are few in number and have been increasingly narrowed by the courts.

With few exceptions, persons not incarcerated are free to believe in and practice unorthodox religions.¹⁵⁷ A decade ago, the Supreme Court ruled that this right also applies behind bars when it reversed a lower court's dismissal of a Black Muslim's claim for relief from denial of access to religious publications.¹⁵⁸ In a similar case, the Court found a valid claim for relief on the part of a Buddhist who alleged that he had been placed in solitary confinement for sharing his religious views with others.¹⁵⁹

Lower courts have extended these decisions to validate other claims for religious freedom within prisons. In *Brown v. Peyton*,¹⁶⁰ for example, the Fourth Circuit held that a prisoner who had been denied access to the publications *Muhammed Speaks* and *Message to the Blackman* and who had been denied permission to conduct prayer meetings with other members of his sect stated a valid claim for deprivation of his civil rights. A prisoner, the court held, "does not shed his first amendment rights at the prison portals."¹⁶¹ Even though prison authorities have a legitimate interest in rehabilitating prisoners and may limit their freedom to promote their rehabilitation, the state must still prove a compelling interest in order to suppress religious practices and communications.¹⁶² Without a showing that the practices presented a threat of danger to other prisoners, there was insufficient state interest to prohibit those practices.¹⁶³

153 No. 73-19434 (Mich. Cir. Ct. Wayne County July 10, 1973) [1972-74 Transfer Binder], CCH Pov. L. REP. ¶ 17,493.

154 *Id.* at 29-37 [1972-74 Transfer Binder], CCH Pov. L. REP. at 17,297.

155 *Id.* at 36-38 [1972-74 Transfer Binder], CCH Pov. L. REP. at 17,298.

156 *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of violence); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (freedom of association); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (freedom of speech); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (freedom of religion).

157 *E.g.*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

158 *Cooper v. Pate*, 378 U.S. 546 (1964).

159 *Cruz v. Beto*, 405 U.S. 319 (1972).

160 437 F.2d 1228 (4th Cir. 1971).

161 *Id.* at 1230.

162 *Id.* at 1231.

163 *Id.*

The first amendment also provides the basis for decisions sustaining a right to protest incarceration. In *Sostre v. McGinniss*,¹⁶⁴ the Second Circuit allowed the curtailment of certain mailing privileges for the purpose of controlling contraband and preventing conspiratorial communications between prisoners and persons on the outside. It held, however, that prison officials may not edit letters addressed to courts, public officials, attorneys, or newspapers when the subject is the illegality of the prisoner's conviction or the conditions of incarceration.¹⁶⁵

Even within prison walls, freedom of expression has obtained judicial solicitude. *Fortune Society v. McGinnis*¹⁶⁶ arose out of an attempt by prison officials to ban a prison reform newsletter. The court declared that "only a compelling state interest centering about prison security, or a clear and present danger of a breach of discipline, . . . can justify curtailment of a prisoner's constitutional rights."¹⁶⁷

In *Carothers v. Follette*,¹⁶⁸ a prisoner alleged that he had been punished and locked in solitary confinement due to a letter he had written to the commissioner of corrections complaining about the prison administration. The court held that punishment or even the threat of punishment would have a chilling effect on a prisoner's first amendment right to voice dissatisfaction.¹⁶⁹ The court concluded that any prison regulation or practice restricting a prisoner's freedom of expression beyond that enjoyed by other citizens must be necessarily related to some justifiable purpose of imprisonment.¹⁷⁰

*In re Mannino*¹⁷¹ concerned both free speech and free association. Here a California appellate court held invalid a parole provision forbidding an anti-war activist from speaking to any kind of gathering or printing any essay in any publication. Mannino had been found guilty of assault on a police officer during an anti-war demonstration. The court found that the petitioner's writing had neither a direct relationship to his crime nor any relation to his future potential for criminality. Freedom of speech, the court declared, is constitutionally protected and cannot be criminal "aside from some vice in its content."¹⁷² The court also struck down parole conditions forbidding Mannino from joining any organization which advocated social change. As with the ban on speech, there was no showing that the parolee's membership or participation in an organization—as opposed to his lack of self-control—caused his transgression.¹⁷³

Although drawn primarily from the heavily litigated area of prisoners' rights, these first amendment cases impose significant limitations on the target behaviors or goals that any state sponsored behavior modification program may set.¹⁷⁴ Unorthodox or unpopular religious, political, or social beliefs may not be

164 442 F.2d 178 (2d Cir. 1971).

165 *Id.* at 200.

166 319 F. Supp. 901 (S.D.N.Y. 1970).

167 *Id.* at 904.

168 314 F. Supp. 1014 (S.D.N.Y. 1970).

169 *Id.* at 1022.

170 *Id.* at 1024.

171 14 Cal. App. 3d 953, 92 Cal. Rptr. 880 (1971).

172 *Id.* at 964, 92 Cal. Rptr. at 886.

173 *Id.* at 964, 92 Cal. Rptr. at 886.

174 Courts appear to be unanimous that the status of the civilly incarcerated can never justifiably be lower than that of the prisoner, since in the case of the former no act of moral culpability has been committed. *See, e.g., Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972);

suppressed; conditioning may not stifle dissatisfaction with institutional conditions.

Closely associated with first amendment rights are the various rights subsumed under the "right to privacy."¹⁷⁵ Although this right originated in the Brandeis dissent in *Olmstead v. United States*,¹⁷⁶ it has recently been applied in cases involving bodily or psychological integrity. In *Roe v. Wade*¹⁷⁷ and *Doe v. Bolton*,¹⁷⁸ the Supreme Court held that a woman's right to privacy extends far enough to include her right to an abortion. In *Mackey v. Procunier*,¹⁷⁹ a federal court—presumably with privacy in mind—spoke of an "impermissible tinkering with the mental processes"¹⁸⁰ in a case dealing with aversive drug conditioning. *Kaimowitz* also speaks of the right to privacy as incorporating the protection of private thought: "Intrusion into one's intellect . . . is an intrusion into one's constitutionally protected right of privacy. If one is not protected in his thoughts . . . then the right of privacy becomes meaningless."¹⁸¹

Finally, the eighth amendment limits what can be done in the name of punishment or treatment. Traditionally used to protect against physical punishment intentionally inflicted,¹⁸² the amendment has been extended to a number of noncriminal areas in which punishment is effected by other than physical means.¹⁸³ The Supreme Court has declared that the interest served by the eighth amendment is nothing less than the dignity of man.¹⁸⁴

The prohibition against cruel and unusual punishment has recently been applied to persons forcibly administered behavior-altering drugs in mental hospitals.¹⁸⁵ In *Holt v. Sarver*,¹⁸⁶ a federal court found the eighth amendment applicable to inhumane prison conditions described as "shocking to the conscience."¹⁸⁷ In declaring these conditions unconstitutional, the court described the amendment as a flexible guarantee that "tends to broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane."¹⁸⁸

As courts begin to focus on the goals of treatment and rehabilitation programs, the right to privacy and the protection against cruel and unusual punishment will find increased application. One area in which they may find use

Anderson v. Nossner, 456 F.2d 835 (5th Cir. 1972); Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (E.D.N.Y. 1973).

175 For a recent effort to catalogue these rights, see *Doe v. Bolton*, 410 U.S. 179, 211-15 (1973) (Douglas, J., concurring).

176 277 U.S. 438, 471 (1928).

177 410 U.S. 113 (1973).

178 410 U.S. 179 (1973).

179 477 F.2d 877 (9th Cir. 1973).

180 *Id.* at 878.

181 *Kaimowitz v. Department of Health, Education & Welfare*, No. 73-19434, at 38 (Mich. Cir. Ct. Wayne County July 10, 1973) [1972-74 Transfer Binder], CCH Pov. L. REP. ¶ 17,493.

182 See *Graham v. Willingham*, 384 F.2d 367 (10th Cir. 1967); *Cannon v. Willingham*, 358 F.2d 719 (10th Cir. 1966); *Owens v. Aldridge*, 311 F. Supp. 667 (W. D. Okla. 1970).

183 *E.g.*, *Trop v. Dulles*, 356 U.S. 86 (1958) (deprivation of citizenship for desertion in wartime held cruel and unusual punishment).

184 *Id.* at 100.

185 See notes 85-99 *supra* and accompanying text.

186 309 F. Supp. 362 (E.D. Ark. 1970).

187 *Id.* at 373.

188 *Id.* at 380.

concerns the demand—increasingly heard from minority groups—that rehabilitative, therapeutic, and educational programs respect cultural differences. That the deprivation of one's cultural identity may be as great a punishment as deprivation of citizenship is incontrovertible.¹⁸⁹ The prohibition against cruel and unusual punishment and the right to privacy are two constitutional grounds available to protect against such deprivation.

IV. Conclusion

Man's knowledge of the principles of human behavior has expanded so rapidly that it is now safe to call this body of knowledge a science. As Goethe's *Faust* attests, however, increased knowledge is often a mixed blessing.¹⁹⁰ Because we now have the technology, we will use it to study our present—largely non-scientific — systems of individual and social control. When these systems are approached from the viewpoint of behavioral science, it is obvious that they could be "better."¹⁹¹ The drastic effects of solitary confinement, for example,

189 Accordingly, preservation of diversity requires the inclusion of hitherto excluded groups, not only with respect to scientific uses of behavior modification, but nonscientific ones as well. Their inclusion must take place at all levels at which behavior modification policy is formulated, from Congress to the local institution and its human rights commission. At the same time, there needs to be discussion of the appropriate size and level of the governmental units to be entrusted with goal setting for institutions. It may well appear that many goals, such as law enforcement, are primarily local in their impact; if so, goals might profitably be set by communities of interest smaller than those presently charged with that responsibility. Entrusting goal-setting to representative groups from the community to be served by the institution not only helps ensure that minority values are preserved, but minimizes the likelihood that institutional values will be permitted to override individual and societal concerns. If it should appear, in a certain community, that crime or mental illness are necessary by-products of a defective environment, then it is useless—or worse—to pretend that reconditioning damaged individuals serves any long-term purpose. Local residents are best equipped to make judgments about the relative contributions various environmental factors make to the human problems being treated, and are best able to check the technician's tendency to see dysfunction purely in individual terms. Whether more or less effort should go toward providing individual therapy or improving social conditions is a choice-of-goals problem that is best addressed by responsive groups who comprise a representative cross section of the community.

190 Indeed, perhaps the greatest potential difficulty with behavior science, from a philosophical and humanistic viewpoint, lies in its view of man. The way man views himself tends to dictate what he becomes. If man sees himself as controlled by external, environmental factors—and it is hard not to come to this conclusion when the environment is harsh or difficult to change—he acts as though he is so determined. If man thinks he is free, he acts as though he is. If man comes to view himself as a stimulus-response creature, he will also become that. The challenge, then, will be to use behavior modification to free man from the shackles of habit and unwanted behavior patterns, without permitting behavior modification to become a way of life.

191 Another aspect of the dilemma described above, *see* note 190 *supra*, is the tendency of behaviorism to promote a reductionist attitude toward human nature. One can approach any object, a painting for example, from a number of perspectives. One can study the chemical composition of the paint, analyze the colors with respect to the spectrum, or explore the painting's relationship to a historical epoch. But if one approaches the painting solely as a scientist and studies it only scientifically, it may cease to be a work of art. Similarly, the potent techniques of behavior modification can easily encourage us to assume that only one aspect of man's nature—that which is accessible to behavioral manipulation—is worth taking into account. Perhaps this explains, in part, the train of "abuses" that has accompanied the early development of behaviorist technology, *see, e.g.*, notes 67-76, 85-139, 153-55, 179-81, 185-88 *supra* and accompanying text. Although this explanation has never been tested, and indeed may be incapable of empirical verification or refutation, it may well account for many of the otherwise inexplicable difficulties surrounding the introduction of behaviorist methods into state institutions. To the extent the hypothesis is true, the formation of human rights commissions composed of nontechnical persons of widely varying backgrounds becomes an even more essential counterweight to technocratic narrowness and lack of vision.

are well known and documented. As a society we will soon feel we can do better than that. Not to attempt an improvement will be viewed as tacit acceptance of the present systems that modify behavior nonscientifically, but modify it nonetheless. The following comments are offered with the expectation that the use and power of behavioral science will increase and with the hope that man will use that power wisely.

We can no longer continue to ignore behavioral science by regarding it as a personal aberration of B. F. Skinner. On the contrary, we must include present nonscientific behavioral control systems in our scrutiny. Legal controls should not center around an unrealistic absolute right to refuse treatment, but around a requirement of full disclosure with the attendant right of the individual to select the least restrictive alternative. If the knowing and willing consent of the subject cannot be obtained to what the state considers the least restrictive alternative, a decision to proceed should be made only following a proceeding governed by due process requirements and approval by a human rights committee. At the hearing, the individual should have the right to counsel and access to an independent specialist. Judicial review should be available in all cases. Once target behaviors and the proposed methods for their attainment have been agreed upon, the progress of the individual toward these targets must be closely monitored, not only to ensure progress but also to prevent undesirable side effects.

Minimum standards for certification of behaviorists should be established. That we are all behavior modifiers to some extent will make the definition of "behaviorist" more difficult but not impossible. Mechanisms for peer rating and review should be set up so that a behaviorist who violated accepted norms of practice would be subject to censure by his profession.¹⁹² A code of ethics for behavior modifiers is also badly needed.

The procedures by which goals are set must be revised. This task can no longer be left to "science," nor to any other single group. Goal-setting is a function to be performed by representative bodies reflecting the diversity of our society.

Finally, the judiciary must expand its scrutiny over programs of behavioral control¹⁹³ to ensure the preservation of a constitutionally protected right to dissent as well as to protect the right to retain one's own identity even while undergoing rehabilitative treatment.

192 One professional has suggested that these mechanisms will be necessary to ensure that "the behavior modifier who is unable to demonstrate that his techniques [are] of therapeutic benefit to the patient, and [are] of greater benefit than alternative and less extreme measure, will . . . find himself subject to . . . aversive consequences." S. Braun, Ethical Issues in Behavior Modification, paper presented to Annual Convention of the Association for Advancement of Behavior Therapy, Miami Beach, Florida, Dec. 1973 (on file with Stephen H. Braun, Director, Social Learning Division, Arizona State Hospital, 2500 E. Van Buren St., Phoenix, Arizona).

193 See note 81 *supra* and accompanying text.