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ABSTRACT

This report responds to a directive issued to the Senate Subcommittee on Constitutional Rights to conduct an investigation into behavior modification programs, with particular emphasis on the federal government's involvement in the technology of behavior control and the implications of this involvement for individual rights. Two basic considerations motivated the investigation: first, the concern that the rights of human subjects of behavioral research are sufficiently protected by adequate guidelines and review structures; and second, the question of whether the federal government has any business participating in programs that may alter the substance of individual freedom. Although the material included in this report is by no means comprehensive, some initial findings are apparent: (1) there is widespread and growing interest in the development of methods designed to predict, identify, control, and modify individual behavior; (2) few measures are being taken to resolve questions of freedom, privacy, and self-determination; (3) the Federal government is heavily involved in a variety of behavior modification programs ranging from simple reinforcement techniques to psychosurgery; and (4) a number of departments and agencies fund, participate in, or sanction research involving various aspects of behavior modification. (Author/PC)

INDIVIDUAL RIGHTS AND THE FEDERAL ROLE IN BEHAVIOR MODIFICATION

A STUDY PREPARED BY

THE STAFF OF THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-THIRD CONGRESS

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PREFACE

When the founding fathers established our constitutional system of government, they based it on their fundamental belief in the sanctity of the individual. They declared:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

The founding fathers took care to see that these inalienable rights were carefully protected. They understood that self-determination is the source of individuality, and individuality is the mainstay of freedom. As threats to individual freedom have arisen from time to time during our history, laws have been developed to insure that basic constitutional guarantees are assured.

Few of these threats have been direct in nature, attempting to limit in various ways individual freedom of expression or movement. Recently, however, technology has begun to develop new methods of behavior control capable of altering not just an individual's actions but his very personality and manner of thinking as well. Because it affects the ability of the individual to think for himself, the behavioral technology being developed in the United States today touches upon the most basic sources of individuality, and the very core of personal freedom.

To my mind, the most serious threat posed by the technology of behavior modification is the power this technology gives one man to impose his views and values on another. In our democratic society, values such as political and religious preferences are expressly left to individual choice. If our society is to remain free, one man must not be empowered to change another man's personality and dictate the values, thoughts and feelings of another.

This is not to say that all behavior therapy is inherently evil. Many types of therapy which result in the modification of behavior have proved beneficial to our society. But whenever such therapies are applied to alter men's minds, extreme care must be taken to prevent the infringement of individual rights. Concepts of freedom, privacy and self-determination inherently conflict with programs designed to control not just physical freedom, but the source of free thought as well. Moreover, because the power of federal government is limited to the implementation of the Constitution and the protection of constitutional rights, there is a real question whether the government should be involved at all in programs that potentially pose substantial threats to our basic freedoms. The question becomes even more acute when these programs are conducted, as they are today, in the absence of strict controls.

As disturbing as behavior modification may be on a theoretical level, the unchecked growth of the practical technology of behavior

control is cause for even greater concern. In fulfilling its mandate to "examine, investigate, and make a complete study of any and all matters pertaining to constitutional rights," the Constitutional Rights Subcommittee has over the years devoted an increasing portion of its energies to the study of the special questions posed by science and technology with respect to our basic freedoms. As technology has expanded our capacity for meeting society's needs, it has also increased, to a startling degree, our ability to enter and affect the lives of individual citizens. In its continuing study of individual rights, the subcommittee has considered many questions raised with respect to personal freedoms by such technological innovations as computers, polygraphs and wiretapping devices. Similarly, we have watched with growing concern as behavioral research unearths vast new capabilities far more rapidly than we are able to reconcile the many important questions of individual liberties raised by those capabilities. With the rapid proliferation of behavior modification techniques, it is all the more disturbing that few real efforts have been made to consider the basic issues of individual freedom involved, and to minimize fundamental conflicts between individual rights and behavior technology.

In addition, the subcommittee has long been concerned with constitutional issues arising out of the treatment of the mentally ill. This work has found expression in a series of hearings on the constitutional rights of the mentally ill beginning in the early 1960's. In 1965 the Congress enacted The District of Columbia Hospitalization of the Mentally Ill Act, a law developed by the subcommittee to secure procedural and substantive rights to the mentally ill. At the same time, the subcommittee has worked in the area of criminal procedures and rights and has consistently been involved in issues involving the constitutional rights of prisoners. Through these interests the subcommittee became aware of the increasing employment of new scientific techniques of behavior modification directed at these two "captive" populations.

In response to this situation, the staff of the Senate Subcommittee on Constitutional Rights was directed to conduct an investigation of behavior modification programs, with particular emphasis on the federal government's involvement in the technology of behavior control and the implications of this involvement for individual rights. Two basic considerations have motivated our investigation: first, the concern that the rights of human subjects of behavioral research are sufficiently protected by adequate guidelines and review structures; and second, the larger question of whether the federal government has any business participating in programs that may alter the substance of individual freedom.

As these materials were being prepared for publication, I was pleased to see the Congress enact as part of the National Research Act (Public Law 93–348), important legislation designed to initiate serious consideration of the many difficult questions raised by biomedical and behavioral research on human subjects. As a result of the very fine work of Senator Edward M. Kennedy, Congressmen Paul G. Rogers and Richardson Preyer and many other colleagues, title II of the National Research Act establishes a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Experimentation. The Commission will conduct an intensive two-year study

of the implications of advances in biomedical and behavioral research with respect to medical ethics and individual rights. One of the reasons for publishing this report at this time is to make available to the Commission, as well as the Congress and the general public, the information the subcommittee has collected in the course of its study of behavior modification. I hope that the Commission will make good use of this information in developing mechanisms to resolve the many questions raised by behavior control technology and to minimize the threats posed by this technology to individual liberties.

The subcommittee staff has assembled in this report a mass of information concerning government-sanctioned programs designed to predict, control, and modify human behavior. Even though the material included in this report is by no means comprehensive or complete, some initial findings are already apparent:

There is a widespread and growing interest in the development of methods designed to predict, identify, control, and modify individual human behavior.

Few substantive measures have as yet been taken to resolve the important questions of freedom, privacy, and self-determination raised by behavior control technology.

The Federal government is heavily involved in a variety of behavior modification programs ranging from simple reinforcement techniques to psychosurgery.

A number of departments and agencies, including the Department of Justice, the Department of Labor, the Veterans Administration, the Department of Defense, and the National Science Foundation, fund, participate in, or otherwise sanction research involving various aspects of behavior modification in the absence of effective review structures, guidelines or standards for participation.

The Department of Health, Education and Welfare, whose responsibility to provide leadership in the field is perhaps greater than any other department or agency, operates under an inadequate system of regulations, and has only recently begun to take steps to resolve the fundamental constitutional questions raised by federal government involvement in behavior modification and behavior control technology.

Although a great deal of work has gone into the preparation of this report, much remains to be done. I hope that the information we are presenting here will encourage others to ask further questions and to begin to find some answers to the difficult problems federally funded behavior modification programs pose for individual liberties.

A number of individuals have made important contributions to this study during the course of the subcommittee's investigation; they deserve a special note of thanks from the subcommittee. Alfred Pollard, a research assistant on the staff of the subcommittee, began work in the area and made many of the initial inquiries. Joseph Kluttz, also a research assistant, continued and analyzed much of the work begun by Mr. Pollard. Anita Jo Kinlaw, a legal intern with the subcommittee, provided valuable assistance with the legal analysis. Dorothy Glancy, Subcommittee Counsel, was responsible for editorial oversight and coordination of the investigation.

SAM J. ERVIN, JR.,
Chairman, Subcommittee on Constitutional Rights.

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INTRODUCTION

Since 1971, the Senate Subcommittee on Constitutional Rights has conducted a continuing investigation into a variety of programs designed to predict, control and modify human behavior. Although the investigation has been primarily concerned with various specific federally funded behavior modification programs, the subcommittee has also been interested in the broader constitutional issues involved.

The field of behavioral technology is comparatively new and, as with any new field, there are problems with the precise definition of key phrases and distinctive elements. Among the various terms associated with the field, the phrase "behavior modification" is the most familiar and generally descriptive. However, "behavior modification" is itself the source of substantial controversy. Some define behavior modification as a specialized type of behavior therapy utilizing physical punishment, shock treatments, drug therapy, and other forms of aversive conditioning. Others argue that any learned response to any stimulus, such as the avoidance of bees after having been stung, is a form of behavior modification. The Department of Health, Education, and Welfare uses "the following operational definition of behavorial modification: the systematic application of psychological and social principles to bring about desired changes in or to prevent development of certain 'problematic' behaviors and responses." [1]

The common element of all of the programs investigated by the subcommittee is that each employs methods that depend upon the direct and systematic manipulation by one individual of the personality of another through the use of consciously applied psychological, medical, and other technological methods. Because it is not based upon the reasoned exchange of information, behavior modification is not a traditional learning process. Analogous to a surgeon operating to remove a tumor, the behavior therapist attempts to remove an undesirable aspect of an individual's behavior through direct intervention into the latter individual's basic thought processes. The aim of behavior modification is to restructure personality and the methods range from gold-star-type rewards to psychosurgery. The objective of behavior modification, whatever its form, is that the individual will no longer act in a manner previously determined to be unacceptable.

Two major factors appear to have stimulated the growing popularity of research into behavior control technology: a growing interest in the study of violent behavior, and the increase in government funding of research aimed at violence-reduction and crime prevention at a time when funding for general medical and scientific research had been reduced. The widespread civil disobedience of the

[1] Letter from Frank Carlucci, Acting Secretary of Health, Education, and Welfare, to Chairman Sam J. Ervin, Jr., July 25, 1974, printed as Item I.A.26.

nineteen sixties caused many to despair of more indirect methods of "behavior modification" such as rehabilitation and understanding. Subsequent calls for law and order stimulated the search for immediate and efficient means to control violence and other forms of antisocial behavior. The control of violence replaced more time-consuming attempts to understand its sources. Crime and delinquency have become the motivation for studying the most basic components of human nature. Research directed toward an intrinsic understanding of human behavior has been applied to produce a broad range of sophisticated methods of controlling behavior.

This emphasis placed on violence-control by the federal government has been encouraged by several new agencies whose essential function is the funding of programs dealing with various aspects of violence. Notable among these agencies are the Law Enforcement Assistance Administration of the Justice Department, and the Center for the Study of Crime and Delinquency in the Department of Health, Education and Welfare. Each of these agencies, in addition to others in the federal government, provide funds for a variety of programs dealing with various aspects of human behavior. It is the purpose of this report to outline the nature and extent of the federal involvement in these behavior modification programs and the issues this involvement raises for the rights of citizens.

BEHAVIOR MODIFICATION AND THE COURTS: THE LEGAL BACKGROUND[1]

Behavior modification therapies present a complex, and relatively uncharted area of the law. Even now there are but few cases which primarily deal with limitations on behavior modification in institutional settings. The recent appearance of litigation in this field is due largely to two factors: (1) an increase in the number of behavior modification programs in prisons and mental institutions; and (2) an increased willingness on the part of the courts to drop their former "hands-off" doctrine and begin scrutinizing treatment and living conditions in prisons and mental institutions.

Projects designed to predict, control, and modify individual human behavior present the courts with difficult problems of conflicting values. To begin with there is the quest to advance scientific knowledge through experimentation which must be reconciled with our society's belief in the inviolability of a person's mind and body. Moreover, this personal autonomy must be reconciled with the need in certain circumstances, for the state to restrict the individual's choice concerning experimental medical procedures in order to enhance or protect his autonomy and welfare.

The increased activity in the area of behavior modification therapies presents serious constitutional issues, particularly where involuntarily confined populations are involved. To the extent that the first amendment protects the dissemination of ideas and the expression of thoughts, many commentators have argued that it must equally protect the individual's right to generate ideas. Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 So. Cal. L.R. 616, 661 (1972); Shapiro, *The Uses of Behavior Control Technologies: A Response*, 7 Issues in Criminology 55, 68–78 (1972). The principle that a person's mental processes come within the ambit of first amendment guarantees is also found in *Stanley* v. *Georgia*, 394 U.S. 557 at 565–66 (1969):

> Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds . . . We are not certain that this argument [protecting the individual's mind from the effects of obscenity] amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts . . . 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 thoughts.

Opponents of behavior modification therapies argue that the right of privacy found in the first, third, fourth, fifth, and ninth amendments prohibits their use with involuntarily confined populations.

[1] Mr. Richard Ehlke of the American Law Division of the Congressional Research Service, Library of Congress, assisted with research for this section.

They argue that the courts have found a right to privacy of the marital bed, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); a right to view obscenity in the privacy of one's own home. *Stanley* v. *Georgia*, 394 U.S. 557 (1969); and the right of a woman to control her own body by determining whether or not she wishes to terminate a pregnancy, *Roe* v. *Wade*, 410 U.S. 113 (1973) An analogous right to privacy should be found to protect the freedom of an individual's mind when he is a prisoner or mental patient threatened with the application of therapies that drastically intrude into his person and engender gross changes in his behavior and thought patterns. Such a right "would seem to be at the core of any notion of privacy * * * because if one is not guarded in his thoughts, behavior, personality and ultimately, in his identity, then these concepts will become meaningless." Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, *supra*, at 663.

The eighth amendment's mandate against cruel and unusual punishment is advanced by many to prohibit the use of various behavior modification therapies. They argue that the procedures used in much of the so-called therapy imposed on involuntarily confined individuals is really a form of torture. *Id.* at 665. See also, Jessica Mitford, *The Torture Cure*. (1973), an excerpt from which is printed in the Appendix as Item VI.D.5.

The due process clauses of the fifth and fourteenth amendments present another constitutional issue where behavior modification experiments using involuntarily confined populations are concerned. The liberty protected by these clauses covers more than those freedoms explicitly named in the Bill of Rights. *Roe* v. *Wade*, 410 U.S. 113 (1973). As Justice Harlan stated:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property: the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what reasonable and sensible judgment must, that certain interests require *particularly careful scrutiny*, of the state needs asserted to justify their abridgement. *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961). [Emphasis added.]

So, the broad question becomes whether institutionally confined individuals have rights to or against various methods of treatment or rehabilitation. The right to treatment or rehabilitation has been discussed in cases such as *Rouse* v. *Cameron*, 373 F. 2d 451 (D.C. Cir. 1966) and *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970) and will not be examined in detail here. See hearings on *Constitutional Rights of the Mentally Ill*, *Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong., 1st and 2d Sess. (1970) at 41 *et. seq.* The focus of this discussion will be the judicially recognized rights which an institutionally confined individual has to refuse various methods of treatment or rehabilitation and how, if at all, these rights may be waived.

Experiments on Mental Patients

There are few legal standards in the area of experimentation on mental patients. One of the first issues raised in the courts involved involuntary sterilization laws. When this issue was before the United States Supreme Court, state laws providing for the involuntary sterilization of mental patients were upheld, *Buck* v. *Bell*, 274 U.S. 200 (1927). However, strict judicial scrutiny has been applied to such laws:

> The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . Any experiment which the state conducts is to his irreparable injury. . . . We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

While sterilization is not considered "experimental" in the same sense as psychosurgery or lobotomy, Justice Jackson, in concurring in *Skinner*, hinted at what the Court's view might be of more exotic medical experimentation:

> I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained such an experiment with respect to an imbecile, a person with definite and observable characteristics, where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come. *Buck* v. *Bell*, 274 U.S. 200
>
> There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of a minority—even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment. *Id.*, at 546.

In 1973 a state trial court in Michigan issued a decision in what has been termed a landmark case in the area of medical experimentation and informed consent. *Kaimowitz* v. *Michigan Department of Mental Health*, Civil No. 73-19434-AW (Cir. Ct., Wayne County, Mich., July 10, 1973).[2] The issue in *Kaimowitz* was whether legally adequate consent could be obtained from adults involuntarily confined in the state mental health system for experimental or innovative surgery on the brain aimed at the amelioration of violent behavior. This case involved an experiment using criminal sexual psychopaths as subjects. It would compare the effects of surgery on a portion of the brain with the effect of a certain drug on levels of a male hormone to determine which, if either, would be effective in controlling aggression of males in an institutional setting. The court in *Kaimowitz* held that truly voluntary and informed consent was impossible given the status of the patient ("involuntarily committed") and the nature of the experiment ("dangerous, intrusive, irre-

[2] The opinion is printed in the Appendix as Item VI.B.1.

versible, and of uncertain benefit to the patient and society") and that such experimentation, even if "consent" had been procured, was unconstitutional. The court stated:

> The keystone to any intrusion upon the body of a person must be full, adequate and informed consent. The integrity of the individual must be protected from invasion into his body and personality not voluntarily agreed to. Consent is not an idle or symbolic act; it is a fundamental requirement for the protection of the individual's integrity.
>
> We therefore conclude that involuntarily detained mental patients cannot give informed and adequate consent to experimental psychosurgical procedures on the brain.
>
> The three basic elements of informed consent—competency, knowledge, and voluntariness—cannot be ascertained with a degree of reliability warranting resort to use of such an invasive procedure. *Id* at 31-32.

The court further based its decision on constitutional principles. It stated:

> Freedom of speech and expression, and the right of all men to disseminate ideas, popular or unpopular, are fundamental to ordered liberty. Government has no power or right to control men's minds, thoughts, and expressions. This is the command of the First Amendment. And we adhere to it in holding an involuntarily detained mental patient may not consent to experimental psychosurgery. *Id.* at 35.

Citing *Stanley* v. *Georgia*, 395 U.S. 557 (1969), and *Griswold* v. *Connecticut*, 381 U.S. 479 (1962), the Court also dealt with the privacy issues involved:

> In the hierarchy of values, it is more important to protect one's mental processes than to protect even the privacy of the marital bed. To authorize an involuntarily detained mental patient to consent to experimental psychosurgery would be to fail to recognize and follow the mandates of the Supreme Court of the United States, which has constitutionally protected the privacy of body and mind. *Id.* at 39.

Both the status of an involuntarily detained mental patient and the nature of the experiment involved influenced the court's decision. The court, noting the state of dependence bred by prolonged institutional confinement, recognized that an "involuntarily confined mental patient clearly has diminished capacity for making a decision about irreversible experimental psychosurgery." *Id.* at 26. Furthermore, the voluntariness implicit in informed consent is undermined by the fact "the most important thing to a large number of involuntarily detained mental patients incarcerated for an unknown length of time, is freedom." *Id.* at 27. In conclusion, the court emphasized two points regarding the nature of the experiment and the effect that that factor has on its decision:

> First, the conclusion is based upon the state of the knowledge as of the time of the writing of this Opinion. When the state of medical knowledge develops to the extent that the type of psychosurgical intervention proposed here becomes an accepted neurosurgical procedure and is no longer experimental, it is possible, with appropriate review mechanisms, that involuntarily detained mental patients could consent to such an operation.
>
> Second, we specifically hold that an involuntarily detained mental patient today can give adequate consent to accepted neurosurgical procedures. *Id.*, at 40.

In *Winters* v. *Miller*, 446 F. 2d 65 (2d Cir. 1971), the court also spoke to the issue of forced medical treatment of an involuntarily detained mental patient although medical experimentation was not

involved and the case was complicated by issues of religious freedom (the patient was a Christian Scientist.) The *Winters* court, consistent with the later holding in *Kaimowitz*, *supra*, rejected the theory of the lower court that "any patient alleged to be suffering from a mental illness of any kind * * * loses the right to make a decision on whether or not to accept treatment." *Winters*, *supra*, at 68. In terms which indicate that the court saw this right as fundamental and requiring a compelling state interest to overcome it, the court continued:

> In the present case, the state purports to find an "overriding secular interest of public health and welfare" in the "care and treatment of persons suffering from a mental disorder or defect and [in] the protection of the mental health of the state." Yet there is no evidence that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party. *Id.* at 70.

In the related case of *Wyatt* v. *Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972),[3] the court enumerated in great detail basic rights constitutionally guaranteed to hospitalized mental patients. Among these were a right to a "comfortable bed" (*Id.* at 381), a right to "nutritionally adequate meals" (*Id.* at 383), and a right "to wear one's own clothes" (*Id.* at 380). In discussing these constitutional rights, the *Wyatt* court recognized that "patients have a right to the least restrictive conditions necessary to achieve the purposes of commitment." *Id.* at 379. While this principle might be applied to behavior modification programs, the court did not go as far as expressly doing so. See Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 Cal. Law Rev. 81–109 (1973).

Experiments on Prisoners

In a non-experimental context, the courts have upheld the administration of *needed* medical treatment and diagnostic procedures without a prisoner's consent. As stated in *Haynes* v. *Harris*, 344 F. 2d 463 (8th Cir. 1965):

> Petitioner argues in effect that he, and he alone, should determine whether he should receive certain medical treatment, and that "forced medical treatment is corporal punishment and cannot be legally inflicted upon anyone confined under a sentence that calls for less than capital punishment." This contention is obviously without merit. One of the paramount purposes for which a defendant is committed to the Medical Center is that he have the benefit of receiving from trained and qualified personnel proper examination, diagnosis, and all necessary and available treatment. *Id.* at 465.

This holding does not prevent a prisoner, however, from bringing an action based on forced treatment which is unnecessary in terms of a valid state or institutional purpose nor does it prevent him from alleging malpractice in the administration of needed medical aid. See *United States* v. *Muniz*, 374 U.S. 150 (1963) (Negligence of employees of prison to properly tend to medical needs of prisoners); *Irwin* v. *Arrendale*, 159 S.E. 2d 719 (Ga. 1967) (Suit against the medical director of the prison for assault and battery allegedly occurring when the prisoner was X-rayed without consent.)

[3] Both opinions are printed in the Appendix as Item VI.B.1.

In prisoner cases, as in the mental patient cases, the courts have distinguished between accepted medical techniques and more experimental, less widely-approved procedures and treatment. In *Veals* v. *Ciccone*, 281 F. Supp. 1017 (W.D. Mo. 1968), a federal prisoner brought suit because he was administered an injection without his consent. The court noted:

> It is not alleged that the administration of this medication is not sanctioned by approved medical practice. If it is alleged that the nature of the medication or the method of its administration is not sanctioned by any substantial recognized medical authority, a claim for relief would be stated. *Id.* at 1018.

This distinction was reiterated in *Ramsey* v. *Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970), where the court stated:

> It is negligence (malpractice) to subject a patient to such treatment [treatment causing unusual pain, mental suffering, which was not considered appropriate by any recognized branch of the healing arts] without his consent. Even though the treatment is unusually painful, or causes unusual mental suffering, it may be administered to a prisoner without his consent if it is recognized as appropriate by recognized medical authority or authorities. See, *Anderson* v. *Kennedy* (W.D. Mo.) Civil Action No. 14099-4.

See also *Lopez Tijerina* v. *Ciccone*, 324 F. Supp. 1265 (W.D. Mo. 1971); *Ayers* v. *Ciccone*, 300 F. Supp. 572 (W.D. Mo. 1968).

Many of the constitutional principles discussed in *Kaimowitz* v. *Department of Mental Health*, *supra*, with reference to mental patients, would arguably be applicable to the involuntarily-detained prison inmate.

In *Knecht* v. *Gillman*, 488 F. 2d 1136 (8th Cir. 1973),[4] two residents of the Iowa Security Medical Facility (ISMF) sought to enjoin the use of apomorphine on non-consenting residents. Apomorphine is a morphine base drug which induces vomiting for an extended period when injected. At ISMF apomorphine was used as part of an "aversive conditioning program" for inmates with behavioral problems. Under the program at ISMF, "the drug could be injected for such behavior as not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying." *Id.* at 1137. The patients at the facility who might be "treated" under this program included residents from any institution under the jurisdiction of the Department of Social Services, persons found to be mentally incompetent to stand trial, referrals by the Court for psychological diagnosis and recommendations as part of the pretrial or presentence procedures, and mentally ill prisoners. *Id.* at 1138.

In its reversal of the lower court's dismissal of the case, the Eighth Circuit held that to subject a patient to this type of aversive therapy either without his informed consent or after his consent had been withdrawn violated the Eighth Amendment prohibition against cruel and unusual punishment.

> Whether it is called "aversive stimuli" or punishment, the act of forcing someone to vomit for a fifteen minute period for committing some minor breach of the rules can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently has consented to it. *Id.* at 1139.

The Court then ordered that all treatment of inmates using apomorphine at ISMF be prohibited unless such treatment conformed

[4] The opinion is printed in the Appendix as Item VI.B.3.

with the following provisions: (1) a written consent was obtained from the inmate which specified the nature, purpose and risks of the treatment and advised the inmate of his right to terminate his consent at any time; (2) a physician certified that the inmate had read and understood the terms of the consent and that the inmate was mentally competent to understand the consent; (3) the consent may be revoked at any time; and (4) each injection is individually authorized by a doctor. *Id.* at 1140.

In *Mackey* v. *Procunier*, 477 F. 2d 877 (9th Cir. 1973), a state prisoner at Folsom State Prison in California alleged that his constitutional right to be free from cruel and unusual punishment had been violated when he was given succinylcholine (a drug which causes temporary paralysis and inability to breathe) at the California Medical Facility at Vacaville without his consent. On appeal, the Ninth Circuit reversed the dismissal below and remanded for a hearing on the merits. In doing so, the court stated:

> It is asserted in memoranda that the staff at Vacaville is engaged in medical and psychiatric experimentation with "aversive treatment" of criminal offenders, including the use of succinylcholine on fully conscious patients. It is emphasized that plaintiff was subject to experimentation without consent.
>
> Proof of such matters could, in our judgment, raise serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with mental processes. [The court here cited in a footnote, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Stanley* v. *Georgia*, 394 U.S. 557; and *Roe* v. *Wade*, 410 U.S. 113 (1973).] In our judgment it was error to dismiss the case without ascertaining, at the least, the extent to which such charges can be substantiated. *Mackey* v. *Procunier*, *supra*, at 878.

A third case, *Adams* v. *Carlson*, 368 F. Supp. 1050 (E.D. Ill. 1973), involved the confinement of thirty-six prisoners in segregation for a period of sixteen months at the maximum security federal prison in Marion, Illinois, because of their participation in prison work stoppage. The court held here that confinement as restrictive as that imposed in this situation violated the constitutional prohibition against cruel and unusual punishment. The prisoners were denied general prison population privileges and were required to spend over twenty-three hours a day in an individual cell eight feet by six feet. Although *Adams* did not technically involve behavior modification therapy the court's decision regarding cruel and unusual punishment may have some bearing on situations involving behavior modification therapies.

A large number of cases were filed in 1973 to challenge the transfer and retention of prisoners to the START program at the Medical Center for Federal Prisoners at Springfield, Missouri. This program was developed by the United States Bureau of Prisons to deal with offenders who have not, in the Bureau's view, adjusted satisfactorily to life in correctional institutions. START inmates were placed in a ward separated from the regular prison population. It was an involuntary program, which started an inmate out at a base level with only the most basic of necessities. As an inmate's behavior began to conform to what prison officials considered appropriate, he would be advanced to a higher level with more freedoms and privileges.

In the recent decision of *Clonce* v. *Richardson*, No. 73 CV 373-S (W.D. Mo. July 31, 1974),[6] a Federal District Court held that when a

[6] The opinion is printed in the Appendix as Item VI.B.4.

prisoner is transferred into a behavior modification program like START, which involves a major change for the worse in the conditions of confinement, he is entitled to at least minimal due process. The court stated:

> * * *, we find and conclude that the transfer of the petitioner to S.T.A.R.T. did involve a major change in the conditions of confinement of each petitioner, even though he may have been in segregation in the institution from whence he was transferred and that each transfer, made without any sort of hearing, violated the minimum requirements of due process to which he was entitled under the Constitution. *Id.* at 22.

The court also spoke in specific terms about prisoners' rights where behavior modification projects are involved:

> Forced participation in S.T.A.R.T. was obviously designed to accomplish a modification of the participant's behavior and his general motivation. He was forced to submit to procedures designed to change his mental attitudes, reactions and processes. A prisoner may not have a constitutional right to prevent such experimentation but procedures specifically designed and implemented to change a man's mind and therefore his behavior in a manner substantially different from the conditions to which a prisoner is subjected in segregation reflects a major change in the conditions of confinement. *Id.* at 24.

The court in *Clonce* declined to discuss the constitutional issues raised by a program such as START which requires prisoner participation; instead the court held that the question was mooted by the voluntary termination of the START program. However, the court did voice its concern that the Bureau develop guidelines to cover any future projects:

> Because of the obvious and highly commendable concern of the Federal Bureau of Prisons to develop innovative, humane, and effective correctional programs for offenders committed to its custody, we are confident that appropriate consideration will be given to whether procedures under which transfers to programs which will correct the mistakes of S.T.A.R.T. and which will reflect the benefit of the experience gained before the Bureau's voluntary termination of that program, should include much more than the minimal due process requirements mandated by *Wolff* v. *McDonnell*. [—— U.S. —— (1974), 42 L.W. 4190] We are confident that the Bureau will give appropriate consideration to whether it will not only comply with *Wolff* v. *McDonnell's* requirement that written records of the proceedings be maintained (p. 23 of the slip opinion) but that it will also give appropriate consideration to designing new procedures and appropriate Policy Statement guidelines which will insure that those written records will include accurate factual information concerning the nature of the program and the reasons why and the manner in which participants are selected which will tend to establish at the outset that there is no legitimate reasonable basis for the emotional reaction prompted by S.T.A.R.T. *Clonce* v. *Richardson*, *supra*, at 26–27.

It seems that the rights of institutionally-confined individuals vis-a-vis behavior modification programs are slowly beginning to be defined by the courts. The question that remains is whether other courts will follow and develop the line of thought voiced in such cases as *Kaimowitz*, *Wyatt*, *Knecht*, and *Clonce*.

In summary, some courts have recently held first, that constitutionally guaranteed rights to due process and personal privacy, as well as first and eighth amendment rights, do apply to institutionalized populations; and, second, at a minimum, that informed consent is required before certain experimental techniques are used on these populations. Some courts have gone even further in holding that because truly voluntary consent is required before a person is subjected to radical experimentation, as a matter of law an involuntarily detained person cannot give the required consent.

BEHAVIOR MODIFICATION TECHNOLOGY

In its broadest definition, the technology of behavior modification ranges from the most benign and indirect of persuasion to psychosurgery. Of all the methods of behavior control and modification, psychosurgery is the most direct, most permanent, and most controversial. Defined in a recent HEW report as the "surgical removal or destruction of brain tissue or the cutting of brain tissue to disconnect one part of the brain from another with the intent of altering behavior," psychosurgery is experiencing a resurgence of popularity following years of discredit.[6]

From 1930 to 1950, psychosurgical techniques known as prefrontal lobotomies were commonly performed in the United States. Estimates have indicated that over fifty thousand individuals were lobotomized during that period for a variety of behavioral disorders ranging from mere cantankerousness to epilepsy.[7] While lobotomy makes formerly uncontrollable subjects more docile and manageable, it also makes them much more ambivalent, less responsive and less rational. The popularity of the operation was widespread. One practitioner is reported to have used a sterilized ice-pick to perform over four thousand lobotomies under local anesthesia in a special chair in his office.[8] Disenchantment with the effectiveness of the technique, constitutional and ethical questions concerning its use, and the advent of pharmacological treatments for psychological disorders caused the technique to fall into disuse in the mid-nineteen fifties.

Stimulated by a growing interest in the control of violence, new surgical techniques, and new theories that suggest that violence is controlled and caused by abnormalities deep within the unconscious brain, the popularity of psychosurgery is again returning. Although the technique is not so widespread as it was in the earlier decades of this century, estimates indicate that as many as one thousand psychosurgical operations are being performed in the United States each year.[9] Although the methods used are far more sophisticated than those of the earlier lobotomies, the operation nevertheless results in the surgical deadening or removal of brain tissue in order to modify behavior.

Present methods may be more sophisticated but the wisdom of such treatment is still in doubt. In one of the more controversial cases of psychosurgery, a subject known as "Thomas R." was given what is referred to as an amygdalotomy, an operation which surgically deadened an area deep inside his brain. In the words of the surgeons, Thomas R. was "a brilliant, 34-year-old engineer" with a long history of violent outburst. In a conversation with his wife, the doctors re-

[6] Psychosurgery Report of the National Institute of Mental Health, January 21, 1974, printed in the Appendix as Item I.B.6.
[7] Richard Restak, "The Promise and Peril of Psychosurgery," *Saturday Review/World*, June 25, 1973, pp. 65–66.
[8] *Id.*, p. 56.
[9] *Psychosurgery Report of the National Institute of Mental Health, supra.*

ported, Thomas R. "would seize upon some innocuous remark and interpret it as an insult. At first, he would try to ignore what she had said, but could not help brooding, and the more he thought about it, the surer he felt that his wife no longer loved him, and was 'carrying on with a neighbor.' Eventually he would reproach his wife for these faults, and she would hotly deny them. Her denials were enough to set him off into a frenzy of violence." [10] According to the report, Thomas did not respond to other treatments, and ultimately was persuaded to undergo the operation. The surgeons later reported that "four years have passed since the operation, during which time Thomas has not had a single episode of rage. He continues, however, to have an occasional epileptic seizure with periods of confusion and disordered thinking." [11] In 1973, a law suit was filed in behalf of Thomas charging that "the plaintiff was permanently injured and incapacitated, [and] has suffered * * * great pain of body and mind." [12]

In addition to the very nature of the operation itself, the rationale accompanying the resurgence of the popularity of psychosurgery is a source of further concern about the rights of subjects. Dr. Orlando J. Andy, a controversial neurosurgeon, recently expressed his views in an address before a conference on psychosurgery sponsored by the National Institute of Mental Health:

> It is unfortunate that our institutions are constantly filled with patients having behavioral disorders which do not respond to psychiatric and medical therapy and which would respond to surgery but are denied appropriate treatment for a variety of rational and irrational reasons. My own clinical interest has been in the realm of controlling aggressive, uncontrollable, violent and hyperactive behavior which does not respond to medical or psychiatric therapy. . . . These are the patients who need surgical treatment. In addition, there are others; patients who are a detriment to themselves and to society; custodial patients who require constant attention, supervision and an inordinant amount of institutional care. It should be used in children and adolescents in order to allow their developing brain to mature with as normal a reaction to its environment as possible.[13]

With respect to the ethics of behavior control, Dr. Andy continued:

> The ethics involved in the treatment of behavioral disorders is no different from the ethics involved in the treatment of all medical disorders. The medical problems involving behavior have a more direct impact on society than other medical problems such as coronary or kidney disease. Still, if treatment is desired it is neither the moral nor the legal responsibility of society what type of treatment should be administered. The ethics for the diagnosis and treatment of behavioral illness should remain in the hands of the treating physician.[14]

Such a view would leave in the hands of the psychosurgeon exclusive discretion to determine what thoughts, attitudes, emotions, behavior and personality an individual is to be allowed.

Although psychosurgery is the most controversial of behavior modification techniques, it by no means is the only technique that raises important constitutional and ethnical questions concerning

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[10] Stephan L. Chorover, "The Pacification of the Brain," *Psychology Today*, May, 1974. p. 64. This article is printed in the Appendix as Item VI.D.6.
[11] *Id.*
[12] *Id.*, pp. 66–67.
[13] Statement of Orlando J. Andy, M.D., before panel discussion of National Institutes of Health-National Institute of Mental Health Ad Hoc Committee on Psychosurgery, Washington, D.C., January 18, 1973, as quoted in Richard Restak, "The Promise and Peril of Psychosurgery," *supra* at 64–65.
[14] *Id.* at 65.

its use and application. A major component of the emerging methods of behavior control is a specialized technology of electrophysiology that employs the use of mechanical devices to control various aspects of human behavior. A particularly popular concept in the new behavior technology is biofeedback, through which bodily functions can be monitored and controlled through electronic devices worn by the subject himself. Biofeedback has been used with great success in the treatment of epilepsy and heart disease. Now there is a growing interest in the use of biofeedback for behavior modification. A device worn by the subject can monitor various bodily functions that are considered indicators of behavior, such as muscular tension, heart beat, and alpha and beta brain waves. The device can also be used to prevent a suspected behavior from occurring.

Present uses of biofeedback appear to depend upon the voluntary cooperation of the subjects. For example, a sexual offender can use the device to monitor his own behavior, and to administer a shock to himself as soon as deviant behavior is detected. But more direct, involuntary, and automatic electrophysiological controls are being considered and tested. For example, one recent proposal stated that it is possible, through a radio transmitter-receiver implanted in the brain of a known offender, constantly to monitor and control his behavior through a computer:

> Certain other physiological data, however, such as respiration, muscle tension, the presence of adrenalin in the blood stream, combined with a knowledge of the subject's location, may be particularly revealing—e.g., a parolee with a past record of burglaries is tracked to a downtown shopping district (in fact, is exactly placed in a store known to be locked up for the night) and the physiological data reveals an increased respiration rate, a tension in the musculature and an increased flow of adrenalin. It would be a safe guess, certainly, that he was up to no good. The computer in this case, weighing the probabilities, would come to a decision and alert the police or parole officer so that they would hasten to the scene; or, if the subject were equipped with a radiotelemeter, it could transmit an electrical signal which could block further action by the subject by causing him to forget or abandon his project.[15]

The Center for the Study and Reduction of Violence at the University of California at Los Angeles, a project that has requested funding from the federal government, will be concerned at least indirectly with electrophysiology as it relates to the control and modification of behavior. In an early draft of the proposal for the Center, it was suggested that surgically implanted remote monitoring devices could be tested in an effort to determine the feasibility of "large scale screening that might permit detection of violence-predisposing brain disorders prior to the occurence of a violent episode."[16]

Although psychosurgery and certain forms of electrophysiology are perhaps the most highly sophisticated methods of behavior control, there are now being tested a number of other techniques based on more traditional psychological principles. These techniques pose similar questions with respect to individual liberties. A major seg-

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[15] Barton L. Ingraham and Gerald W. Smith, "The Use of Electronics in the Observation and Control of Human Behavior and Its Possible Use in Rehabilitation and Parole," *Issues in Criminology*, Vol. 7, No. 2 (1972) p. 42. This article is printed in the Appendix as Item VI.D.3.

[16] Center for the Study and Reduction of Violence, Project Description, September 1, 1972, printed in the Appendix as Item III.B.2.a.

ment of the emerging behavior control technology is concerned with conditioning, through which various forms of persuasion are used to stimulate certain types of behaviors while suppressing others. The two major categories of conditioning, in general terms, are positive reinforcement and negative reinforcement. Positive reinforcement involves giving the subject rewards for correct behavior; negative reinforcement involves punishing him for incorrect or improper attitudes or behavior. Positive reinforcement uses incentives provided through token economies and other programs; negative reinforcement is based on the aversion of the subject to painful or other adverse consequences of improper behavior.

Negative reinforcement, or aversive conditioning, is generally considered the more tromblesome of the conditioning techniques. In its milder forms, negative reinforcement deprives an individual of privileges because of inappropriate behavior. In its more coercive forms, negative reinforcement, through what is referred to as "aversion therapy" or "aversive conditioning," uses drugs, beatings, and electric shocks as painful punishment for violation of rules or accepted norms. For example, a program in Iowa that stimulated court action against its continuation employed the use of the drug apomorphine which can cause uncontrolled vomiting for up to an hour. Whenever a prisoner broke a rule by using abusive language or smoking illegally, he would be injected with the nausea-inducing drug. Another drug frequently used in aversive conditioning is anectine, which causes a prolonged seizure of the respiratory system that some have described as "worse than dying." An aversion therapy program at the Vacaville, California, state mental facility was described by the chief researchers in the program as follows:

> [The program was] an attempt to evaluate the effectiveness of an aversive treatment program using Succinylcholine (anectine) as a means of suppressing such hazardous behavior [e.g., repeated assaults, attempted suicide]. The drug was selected for use as a means of providing an extremely negative experience for association with the behavior in question. Succinylcholine, when injected intramuscularly, results in complete muscular paralysis including temporary respiratory arrest. Onset of the effects are rapid and the reaction can be controlled by the amount injected. It avoids many of the strenuous features which characterize other chemical aversion procedures [i.e., uncontrolled vomiting caused by the drug, apomorphine] * * *, allows for more precise control temporally, and is almost free of side effects. It was hypothesized that the association of such a frightening consequence (respiratory arrest, muscular paralysis) with certain behavioral acts would be effective in suppressing these acts * * *.
>
> How severe is the anectine experience from the point of view of the patient? Sixteen likened it to dying. Three of these compared it to actual experiences in the past in which they had almost drowned. The majority described it as a terrible, scary, experience.[17]

In this program at Vacaville some of the patients were subjected to the program involuntarily:

> A few subjects were given the anectine treatment following the occurrence of an episode of aggressive acting out without prior warning that they would receive such a treatment. . . . Of five patients, consent was not received from

[17] Mattocks & Jew, Assessment of an Aversive Treatment Program with Extreme Acting-Out Patients in a Psychiatric Facility for Criminal Offenders (Unpublished Manuscript prepared for the California Department of Corrections, on file with the University of Southern California Law Library, undated), as quoted in Michael H. Shapiro, "Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies," 47 So. Calif. L. Rev. 237, 245 (1974).

the patient himself, but was granted by the institution's special treatment Board. Thus, five patients were included in the program against their will.[18]

Apomorphine and anectine are but the more familiar of a variety of similar drugs causing varying degrees of discomfort which are used in aversive conditioning programs.

Other forms of aversive conditioning using artificial choice situations attempt to suppress specific attitudes, while stimulating others. The systematic application of electric shocks is, for example, widely used in the treatment of alcoholism, homosexuality and other forms of so-called deviant behavior. For instance, an alcoholic, wired to a shock-generating device will be presented with two choices: a mixed alcoholic drink or a soft drink such as ginger ale. If the subject reaches for the alcoholic drink, he will automatically be shocked. If he reaches instead for the soft drink, no shock will be administered. In the catalogue of a firm specializing in shock treatment apparatuses, the therapy is described as follows:

> Aversive conditioning has proven an effective aid in the treatment of child molesters, transvestites, exhibitionists, alcoholics, shop lifters and other people with similar problems. Stimulus slides are shown to the patient intermixed with neutral slides. Shock is delivered with stimulus scenes but not with neutral scenes. In reinforcing heterosexual preference in latent male homosexuals, male slides give a shock while the stimulus relief slides of females do not give shock. The patient is given a "Slide Change" handbutton which enables him to escape or avoid a shock by rejecting a shock cue scene.[19]

Other forms of behavior modification techniques employ intensive "encounter sessions" in which individuals are required to participate in group therapy discussions where intensive pressure is often placed on the individuals to accept the attitudes of the group. More intensive forms of encounter groups begin first by subjecting the individual to isolation and humiliation in a conscious effort to break down his psychological defenses. Once the individual is submissive, his personality can begin to be reformed around attitudes determined by the program director to be acceptable. Similar to the highly refined "brainwashing" techniques employed by the North Koreans in the early nineteen fifties, the method is used in the treatment of drug abusers. In an article supporting this type of brainwashing as a behavior modification technique published in 1962, Professor Edgar Schein suggested that:

> In order to produce marked change of behavior and/or attitude, it is necessary to weaken, undermine or remove the supports of the old pattern of behavior and the old attitudes. Because most of these supports are the face-to-face confirmation of present behavior and attitudes which are provided by those with whom close emotional ties exist, it is often necessary to break those emotional ties. 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.[20]

"The Seed", a drug abuse treatment program in Florida that, until recently, received funding from the Department of Health,

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[18] *Id.* at 246.
[19] Catalogue No. F-72, Farrall Instruments Company, Grand Island, Nebraska, Company Catalogue, 1973, printed in the Appendix as Item VI.C.
[20] Edgar H. Schein, "Man Against Man: Brainwashing," Corrective Psychiatry and Journal of Social Therapy, Vol. 8, No. 2, (1962), pp. 91–92.

Education, and Welfare, is based on a similar philosophy. The grant request from the program to HEW describes the process as follows:

> * * * new clients entering the program are placed in a temporary foster home environment during the first phase * * * of the program. It has been evidenced that it is necessary to remove the client from his home environment as there might be existing problems that would prohibit normal progression during this phase of the program, and this procedure also eliminates any outside interference that might hamper the client's progress.[21]

The "client" is committed to the program either by the courts or his parents, and in both cases becomes the temporary ward of "The Seed." Once in the program, the client is placed in a graduated social structure where he is subjected to intensive peer pressure and where acceptable attitudes win progression to more agreeable levels of the program. As stated in the grant request,

> For the first three days, the client is placed in the first row. During this period he is not permitted to relate his feelings and his experiences. He is watched closely by the group and Staff with detailed notes recorded regarding his behavior.
>
> On the fourth day, the client moves back a few rows. He is permitted to participate in group discussions. His attitude begins to change with a softening of facial features, attention focused on discussions, and loss of hostility.[22]

Of all the methods of behavior modification presently being employed in the United States, positive reinforcement is perhaps the most benign. But as with all other forms of behavior modification, positive reinforcement seeks to restructure personality through artificially applied techniques. In its simplest form, positive reinforcement amounts to the use of "gold-star" incentives for appropriate behavior. More elaborate systems are based on what are referred to as "token economies". In such a program, so-called tokens are given as rewards for good behavior, e.g., showing respect for authority, greater productivity, or greater responsiveness. The tokens may, in turn, be exchanged for items not normally available in that particular environment such as candy, extra time off, an hour of television, etc. In a token economy program funded by LEAA, for example, subjects are initially placed in a base group with limited privileges. As the subject expresses a willingness to cooperate with authority and to adopt behavior determined to be more acceptable, he is progressively moved to higher levels, with each level bringing with it a new range of privileges. But if a subject is uncooperative or engages in undesired behavior a number of times, he may be placed in what is called "Monad," a more coercive program. Base privileges in one such "Monad" were described as follows:

1. Mattress on floors in room (that's all).
2. Pajamas or nightgown only.
3. Nutritious meals, but not appetizing (e.g., mush, pureed meals, granola, other cereal, soup, vitamin pills).
4. Doing menial, monotonous work or calisthenics several times a day in order to earn concrete reinforcement.
5. Emergency phone calls only.
6. Communication with staff only.[23]

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[21] See "Excerpts from Grant Request by 'the Seed' to the Department of Health, Education and Welfare, June 20, 1972" printed in the Appendix as Item I.C.2.a.

[22] *Id.*

[23] See "Closed Adolescent Treatment Center, Program Description," printed in the Appendix as Item III.B.3.

Good behavior in the program earns:

1. Cigarettes (no more than 5 a day).
2. Regular meals (in room).
3. Bed.
4. State clothes.
5. One or two hours of recreation a day.
6. The privilege to participate in the program.[24]

In addition to the range of behavior modification techniques described above, there is another aspect of behavior technology designed to develop "scientific" methods of predicting violent behavior before it occurs. A number of theories have stimulated interest in this relatively new science. For example, some suggest that individuals with a particular chromosome configuration, certain fingerprint patterns, or certain brain malfunctions are more likely to commit acts of violence than others. Although many of the research programs involved with violence prediction are not initially concerned with the modification of behavior, they often provide bases for future applications of behavior modification techniques. For example, a program description in the list of LEAA-funded projects relating to behavior modification printed in the Appendix states:

> The study is confined to three specific dimensions: Phase I: the testing of a research instrument to prove effectiveness in identifying and diagnosing the behavior patterns of violence-prone offenders: Phase II: the administration of the instrument which is composed of a series of statements designed to elicit inmate responses concerning self-perception of covert and overt aggressive tendencies, the capacity to control aggressivity and to subjectively evaluate the meaning of past or present assaultive tendencies; Phase III: will involve the collection and evaluation of data to be used in the construction of a base violence expectancy scale. Such a predictive scale can be used in selecting the type of custody the inmate can best use as well as some of the behavioral or characterological problems with which custody and treatment staff must deal.[25]

At the Boston City Hospital project, also funded by LEAA, efforts were made to identify correlations between chromosome configurations and violent or aggressive behavior. Tests were made to determine whether fingerprint classifications could be used as indicators of chromosome patterns prevalent among violent individuals. Tests of "Dermatoglyphic Analysis" were described in the final report as follows:

> This is a physical (anthropometric) measure of patterns formed by sweat gland ridges on the hands and feet. They represent the embryological development of the skin surface in these regions. They are known to differ between sexes and races, but are unrelated to age. They exhibit specific variations in known genetic diseases including chromosomal abnormalities of the kind found in habitually aggressive offenders. They are also valuable as a screen for cases on whom (more expensive) chromosomal tests are likely to be valuable.[26]

Although violence-prediction does not always result in the actual application of behavior modification techniques, it is a significant component of the emerging behavior control technology. Many of the research projects dealing with behavior prediction are designed to provide a framework through which individuals are to be screened for behavior modification.

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[24] *Id.*
[25] Excerpts from LEAA Computer Printout Listing Behavior-Related Projects, April 10, 1974, printed in the Appendix as Item III.B.5.
[26] Excerpts from the Final Report of a study of "The Medical Epidemiology of Criminals," Neuro-Research Foundation, Boston, Massachusetts, printed in the Appendix as Item III.B.1.

THE CONSTITUTIONAL RIGHTS SUBCOMMITTEE INVESTIGATION

Late in 1971, several seemingly unrelated programs under investigation by the staff began to point collectively to the emergence of a new technology of behavior control which posed serious questions with regard to the protection of the constitutional rights of individuals. At that time, the psychosurgery controversy was reappearing, and a number of questions were being raised regarding the propriety of federal funding for psychosurgical operations. Of particular concern was a controversial study of the relationship between brain disease and violent behavior at Boston City Hospital funded jointly by the Law Enforcement Assistance Administration and the Department of Health, Education, and Welfare.

During the same period, the subcommittee became aware of the Bureau of Prisons' proposed Center for Behavioral Research to be constructed at Butner, North Carolina. Plans for the Center had been closely guarded and there were concerns that psychosurgery and other forms of radical behavior modification were being contemplated. Presidential veto of the appropriations bill that provided additional funds for the Boston City Hospital project added to speculation that similar programs might be reinstated at Butner. The Boston and Butner projects, both to have been financed in part by LEAA, led the subcommittee to inquire into other LEAA projects, which may involve some aspect of behavior modification.

Apart from LEAA, which funded projects at the state and local level, the inquiry also involved other federal agencies which were involved in funding or operating their own behavioral programs. Of primary interest were the activities of the Department of Health, Education, and Welfare, the federal agency most directly involved with biomedical and behavioral research. The inquiry spread to other agencies, however, such as the Veterans Administration, when it became apparent that they, too, administered programs involving some aspect of behavioral modification.

The inquiry sought to establish what programs and studies dealing with behavior modification were being carried out under the auspices of the federal government. Beyond this, it was the intent of the subcommittee to determine what rights were being accorded those individuals subject to such programs, and under what regulations and controls the programs were being administered.

At the time of this report's publication, many of the responses to subcommittee inquiries appear to be incomplete, and further inquiry and investigation is needed. A great deal of information has, however, been assembled concerning both the nature of the federal government's involvement in behavior modification and the specific programs themselves. This report, however, records the results of the subcommittee's inquiry thus far and can form the basis for further investigation and study in the next Congress.

FEDERAL INVOLVEMENT

In the course of its investigation, the subcommittee found that a wide variety of behavior modification techniques ranging from simple positive reinforcement to psychosurgery are presently being employed in the United States under the auspices of the federal government. The nature and rapid growth of some of the projects continue to be the cause of concern. The Department of Health, Education, and Welfare funds the most substantial amount of research into human behavior, but other departments sponsor and conduct extensive behavioral research programs as well. Notably, it was found that the Department of Justice, through the Bureau of Prisons and the Law Enforcement Assistance Administration, the Veterans' Administration, the Defense Department, the Labor Department and the National Science Foundation all support various behavior modification programs.

Department of Health, Education, and Welfare

A substantial portion of the investigation into behavior control technology has been concerned with the Department of Health, Education, and Welfare. The Department participates in a very large number of projects dealing with the control and alteration of human behavior. The Department does provide some degree of monitoring for the projects that it conducts, and has made some attempts to resolve some of the questions posed by behavior control techniques with regard to individual liberties.

However, despite extensive departmental guidelines concerning the rights of human subjects and other ethical questions raised by biomedical and behavorial research, abuses have occurred. For example, in a study of syphilis funded by the Department of Health, Education, and Welfare in Tuskeegee, Alabama, researchers did not obtain the informed consent of participants prior to their participation in the program.[1] The Tuskeegee study serves as an example of the kinds of abuses that can occur in the absence of strict constitutional and ethical guidelines. In the case of behavioral research, where the researcher may have virtually complete control over the well-being of the individual subject, the most definite of guidelines are essential. Although the Department of Health, Education, and Welfare has made several gestures to strengthen its guidelines, it is unclear whether these guidelines are sufficient to prevent further abuses of individual rights and well-being.

[1] In the experiment, individuals who were led to believe that they were being treated for syphilis were actually allowed to go untreated for as long as twenty years so that the researchers involved could study the effects of the disease in its most advanced stages. See Excerpts from the Report of the Tuskeegee Syphilis Study Ad Hoc Advisory Panel, 1973, printed in the Appendix as Item I.B.3.

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Department of Health, Education, and Welfare Policies Concerning Behavioral Research

The Department of Health, Education and Welfare has devoted forty pages of its Grants Administration Manual[2] to a detailed description of the ethics approval process necessary for an institution or individual to become eligible for HEW research grants. In addition departmental regulations[3] are applicable to all HEW grants and contracts supporting activities in which human subjects may be at risk. Generally, the responsibility for the protection of human subjects lies with individual institutions. The Department's control over individual projects relies on a certification process through which institutional review committees for each institution are established and approved. Before an institution can become eligible for a HEW grant, that institution must submit an "assurance" which, in turn, must be approved by the Department. Among other things, an assurance must include a statement of intent to comply with departmental guidelines concerning the rights of human subjects. In addition, an assurance must provide for the establishment of a local review committee, whose "maturity, experience, and expertise must be such as to justify respect for its advice and counsel." The assurance must also outline the means by which informed consent is to be obtained from individual participants. Although HEW requirements for the assurances are described in some detail, HEW approval of the assurances provides the sole mechanism for HEW to supervise the research conducted at individual institutions. Once an assurance for an institution is approved, HEW has no direct supervisional authority over that institution, nor over the ways in which the projects are carried out. The Department conducts no oversight to ensure that the commitments in the "assurance" are adhered to.

Critics of HEW policy have pointed out that there are some distinct weaknesses which render this review process relatively ineffectual. Although an institutional assurance appears to be an understanding of some substance, it does not provide for the kind of binding contract and continuing supervision necessary to protect the rights of human subjects. Overall, the process depends for enforcement almost entirely upon the good faith of researchers. Because of the overriding interest of a researcher in the program he is conducting, there is some question as to whether his good faith alone can be depended upon for adequate protection of the interests of his subjects.

Responding, at least in part, to pressure from the Congress, HEW has made several attempts to improve its guidelines concerning biomedical and behavioral research. In an effort to add force to existing policy, HEW promulgated the guidelines in the form of departmental regulations.[4] The action gave the guidelines added force but the same weaknesses remained.

Prior to issuance, Secretary Weinberger solicited comments on the regulations. In a letter to the Secretary, Chairman Ervin expressed his

[2] "The Institutional Guide to DHEW Policy on Protection of Human Subjects," December 1, 1971, printed in the Appendix as Item I.B.1.

[3] HEW Regulations Concerning the Protection of Human Subjects, *Fed. Reg.*, Vol. 30, No. 105 (May 30, 1974), printed in the Appendix as Item I.B.2.

[4] HEW Regulations Concerning the Protection of Human Subjects, *supra*.

serious reservations about the guidelines and the potential damage that the new regulations could inflict on pending legislation:

> When medical research is conducted with human subjects there is a real danger that purely scientific interests may lead some researchers to give insufficient attention to the rights of persons who are experimental subjects * * *. Minimum standards concerning informed consent and other ethical considerations must be defined and enforced, not just for the Department of Health, Education and Welfare, but for all experimentation involving human beings that is conducted under grant or sponsorship from the Federal government. Regrettably, the proposed guidelines do not clearly define many of the ethical problems that are faced in medical research, they do not provide for adequate continuing review by HEW, and of course they can be applied only to experiments that relate to the Department of Health, Edu[illegible]on, and Welfare * * *. HEW has a responsibility to establish the strongest [illegible]ible guidelines in the field of the protection of the rights of human subj[illegible] to serve as a model for other federal, state, or private research * * *.[5]

Opposition to HEW's merely codifying in regulations the guidelines already proved to be inadequate came from throughout the academic and medical communities. Dr. Jay Katz, Adjunct Professor of Law and Psychiatry at Yale Law School, is a member of the Department's own Tuskeegee Syphilis Study Advisory Panel which submitted detailed recommendations for revision of existing HEW policies regarding protection of human subjects. They summarized the major objections to the codification of existing HEW guidelines in a letter to the Department. Dr. Katz criticized the regulations because they "do not reflect any new thought by DHEW and, instead, merely enact the current, often criticized and inadequate departmental regulations into law."[6] Referring Secretary Weinberger to Charge III of the report of the Tuskeegee Syphilis Study Ad Hoc Advisory Panel (printed in the Appendix as Item I.B.3.), Dr. Katz outlined three important lines of criticism:

> 1. The proposed regulations do not provide mechanisms for the review and publication of the important decisions made by Institutional Review Committees. As I have argued repeatedly, procedures must be established for publication and review in order to radically change the currently uninformed and secretive climate which pervades research decisionmaking. At present decisionmaking in human research remains divorced from pertinent prior decisions of other committees or from scholarly and public evaluation and criticism. I regard such an omission as a serious and fatal defect which will defeat the objective of providing workable standards for the regulation of the human experimentation process.
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> 2. The proposed rules do not make provisions for the participation of "outsiders" in the formulation of research policies. (By "outsiders" I mean members of professions not directly engaged in human research as well as representatives of the general public.) It is left unclear in the proposed rules whether "outsiders" must be represented on the institutional review committees or whether this is optional; however, even if their inclusion were to become a requirement, it would not place them in the most strategic position to have a significant impact. At the level of the institutional review committees, where decisions have to be made expeditiously and on a case-by-case basis, outsiders cannot make an effective contribution to the formulation of basic policies. Thus in essence the proposed regulations continue to leave decisionmaking to members of the research community and do not provide for participation in overall decisionmaking by representatives of society. I believe that outsiders who represent and protect individual and societal values must participate in

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[5] Letter from Chairman Sam J. Ervin, Jr., to Caspar Weinberger, Secretary of Health, Education and Welfare, January 11, 1974, printed in the Appendix as Item I.A.17.

[6] Letter from Jay Katz, M.D., to Chief, Institutional Relations Branch, Division of Research Grants, National Institutes of Health, October 30, 1973 (copy on file in Senate Constitutional Rights Subcommittee Offices).

the formulation of research policy as well as in the review of decisions. The recent Senate debate on psychosurgery and fetal research make the need for participation of outsiders in formulation of research policies abundantly clear.

3. Most important, the proposed rules delegate the responsibility of formulating the specific policies required to give meaning and substance to the proposed regulations to the institutional review committees. The Secretary of Health, Education, and Welfare must know that these committees have neither the capacity nor the time nor the resources nor the interest to confront this complex assignment. For that reason alone the proposed rules are dangerous to the welfare of research subjects and to the objectives of science. The committees cannot fulfill the obligations which the proposed rules seek to impose on them. Moreover, even if the committees could rise to this task, it would be a repetitive and burdensome assignment for each committee to formulate its own policies.[7]

Dr. Katz urged HEW "to withdraw the proposed rules from consideration at this time and instead to revise them carefully before proposing their enactment into law. In their present form they will only invite disregard of the law. Neither law nor medicine is well served by such an approach to the complex problems raised by the regulation of human research."[8]

Despite this and other similar criticism, the regulations were promulgated as proposed. The Department has, however, also initiated several special studies of specific ethical problems raised by biomedical and behavioral research. One such study investigated limitations on informed consent in certain inherently coercive situations, and proposed that special guidelines be established and applied where experimental techniques are used in the treatment of children, prisoners, or the mentally infirm.[9] A second report investigated special aspects of sterilization programs involving mentally incompetent individuals. This second report was initiated, in part, in response to the disclosure of unethical testing procedures of certain birth control drugs conducted under grant from the Department.[10]

Two additional studies were of particular interest to the subcommittee because of their direct bearing on behavior research: a report on the biomedical research into the brain and aggressive violent behavior,[11] and a detailed study of the merits and implications of psychosurgery.[12]

The Report on Biomedical Research Aspects of Aggressive Violent Behavior, released on October 23, 1973, was divided into two parts: a review of the present state of such research, and recommendations for future action in the area. The report recognized the sensitivity of many of the issues involved in research aimed at controlling violent behavior through biomedical means. The report's recommendations include the following: that the Department's position on the biomedical therapy of violent and rage behavior be that the scientific and medical literature available at this time is incon-

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[7] *Id.*

[8] *Id.* See also "Excerpts from the Report of the Tuskegee Syphilis Study Ad Hoc Advisory Panel, printed in the Appendix as Item I.B.3.

[9] Protection of Human Subjects—Policies and Procedures, DHEW–NIH, *Fed. Reg.*, Vol. 38, No. 221 (November 16, 1973).

[10] Sterilization Restrictions-Federally Funded Programs and Projects, DHEW–PHS–SRS, *Fed. Reg.*, Vol. 39, No. 36 (February 6, 1974).

[11] Report on the Biomedical Research Aspects of Brain and Aggressive Violent Behavior, by the National Institute of Neurological Diseases and Stroke, October 23, 1973. Excerpts are printed in the Appendix as Item I.B.5.

[12] Psychosurgery Report of the National Institute of Mental Health, *supra*.

clusive in regard to the efficacy of these procedures;" [13] and that funding under existing procedures of violent behavior research as "necessary concerns of biomedical investigation" be continued.[14] The report also recommended the establishment of a case-by-case review of the rights of subjects involved in the research:

> To ensure that the interests of the individual are adequately protected in investigative situations in which issues of either the adequacy of being informed or the appropriateness of giving consent can be questioned, a Human Subject Advocacy Committee (HUSAC) should be involved. The HUSAC should comprise members of society (e.g. theologians, jurists, community representatives) drawn from the local geographic area who are selected for their dedication to the protection of the individual rights of the human subject * * *. On a case-by-case basis, the HUSAC should rule on the participation of every human subject in an investigative procedure that cannot benefit the subject or in which a question is posed about the ability of the subject to give informed consent.[15]

The report made several general recommendations concerning the protection of the rights of human subjects of violence. However, it did not specifically deal with the questions raised by research designed to develop methods of predicting human behavior on a large scale in an effort to control that behavior before it is manifested.

Because of the sharp controversy surrounding psychosurgery, a special study of psychosurgery was conducted by the National Institute of Mental Health in conjunction with the National Institute for Neurological Diseases and Stroke.[16] Among its conclusions, the Psychosurgery Report recommended that "[p]sychosurgery should be regarded as an experimental therapy at the present time. As such, it should not be considered to be a form of therapy which can be made generally available to the public because of the peculiar nature of the procedure and of the problems with which it deals." [17] The report further recommended that a moratorium be placed on psychosurgery until detailed guidelines concerning its use can be implemented.

This report was particularly interesting because in a series of correspondence with the Department of Health, Education, and Welfare, Chairman Ervin had been assured that no psychosurgery or violent behavior research would be conducted under grant from the Department until the report was completed. In a letter from Dr. Robert S. Stone, director of the National Institute of Health, the chairman was told on January 30, 1974, that the report had not been completed.[18] In an article that appeared in *The Washington Post* six months later, it was disclosed that the report had in fact been completed on January 21, 1974, but had not been released because it was critical of psychosurgery and recommended that the practice be discontinued until ethical questions surrounding its use had been fully considered. "HEW spokesmen said the report is being considered but that no action has been taken and that none is likely soon," the article stated.[19] In a letter to Secre-

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[13] Report on the Biomedical Research Aspects of Brain and Aggressive Violent Behavior, *supra* at 167.
[14] *Id.* at 167.
[15] *Id.* at 166.
[16] Psychosurgery Report, *supra*.
[17] *Id.*
[18] Letter from Robert S. Stone to Chairman Sam J. Ervin, Jr., January 30, 1974, printed in Appendix as Item I.A.20.
[19] Craig A. Palmer, "Surgery Report Bottled Up," *Washington Post*, June 5, 1974, p. A-9.

tary Weinberger protesting the failure of the Department to act on the report. Chairman Ervin stated his view that:

> Psychosurgery is a practice that poses a profound threat to individual privacy and freedom. I am disturbed that the Department of Health, Education, and Welfare has not taken the steps recommended in the report of its study to minimize this threat, and thereby provide the leadership it should as the premiere health organization in the world. While the merits of psychosurgery may be debatable, the rights and well-being of individual citizens cannot be compromised. I suggest that action on the recommendations be taken at once, and that a formal moratorium be placed on the practice until the vital questions concerning its use can be thoroughly considered and resolved.[20]

Secretary Weinberger replied that the NINDS Report on the Biomedical Research Aspects of Brain and Aggressive Violent Behavior and the NIMH Pychosurgery Report, discussed above, were available to the public, but were not the final word with respect to HEW policy on the subject:

> Let me stress again that these reports were prepared at the request of, and to provide advice to, the Assistant Secretary. They do not, at this time, have my endorsement of all their details. As you clearly point out, they raise a number of medical, legal, ethical, and administrative issues and provide recommendations concerning those issues. However, the Department does not now nor will we in the foreseeable future support research efforts involving surgery on the human brain solely for the treatment of psychiatric or behavioral problems.[21]

At present the Department of Health, Education, and Welfare appears to be awaiting the findings of the newly-created National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research before definitive departmental policies are promulgated.

Behavioral Research Projects Funded By the Department of Health, Education and Welfare

While a substantial portion of the subcommittee's interest in the Department of Health, Education, and Welfare was concerned with agency guidelines concerning human experimentation, a major portion of the investigation focused on various projects involving human behavior participated in by the department. Because of the larger number of such projects, the subcommittee has thus far looked into only part of the behavioral research being conducted.

Of primary interest is the National Center for the Study of Crime and Delinquency (NCSCD), an agency under the auspices of the Alcohol, Drug Abuse and Mental Health Administration. The Center is primarily a funding organization which supports and conducts an extensive number of projects involved with various aspects of delinquent behavior. In a detailed response to an inquiry from the chairman, Bertram Brown, then Director of the National Institute of Mental Health, stated that the "Center places primary emphasis on efforts to understand and cope with problems of mental health as these are or may be reflected in various types of deviant, maladaptive, aggressive and violent behaviors that frequently involve violations of criminal or juvenile law." [22] Dr. Brown further

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[20] Letter from Chairman Sam J. Ervin, Jr., to Secretary Caspar Weinberger, July 12, 1974, printed in the Appendix as Item I.A.24.
[21] Letter from Secretary Caspar Weinberger to Chairman Sam J. Ervin, Jr., July 29, 1974, printed in the Appendix as Item I.A.25.
[22] Letter from Bertram Brown to Chairman Sam J. Ervin, Jr., December 10, 1973, printed in the Appendix as Item I.A.16.

described the Center as the "focal point in NIMH for research, training, and related activities in the areas of crime and delinquency, individual violent behavior, and law and mental health interactions." [23]

The Center conducts a wide spectrum of behavioral research with a particular emphasis on the development of methods of controlling abnormal or asocial attitudes. In response to the subcommittee's inquiry, the director listed a total of nineteen projects conducted in three environments—schools, mental institutions and prisons—where special questions would be raised concerning informed consent. Among these projects are programs involving the use of experimental drugs, encephalographic research involving the external activation of brain waves, and various behavior modification projects designed to "improve academic and social skills of children with problem behaviors." [24] NCSCD also conducts a number of projects dealing with the prediction of violent behavior, including studies of chromosome abnormalities, and the repetition of criminal behavior in families. The Center for the Study of Crime and Delinquency therefore presents many of the basic questions to be considered in what many consider the inherent conflict between behavior control technology and constitutional rights.

Based on information assembled during the subcommittee's investigation, there is some question as to whether the rights of the human subjects of such research and treatment are adequately protected. A cardinal principle of the HEW guidelines is that a subject must be determined to be "at risk" before he is to be accorded the minimal protection of the regulations. A number of projects investigated by the subcommittee, although posing no direct physical danger to the individuals involved, presented questions with respect to the constitutional rights of the subjects. For example, a study funded by the Center attempting to link chromosome configurations to the prediction of violent behavior involved the arbitrary separation of individuals into physical typologies. As described in the project description received from HEW:

> The proposed research would hope to answer the following questions: 1) are previously noted anomalies in 47,XYY [chromosome] males (e.g., neurological abnormalities, body asymmetries, homosexuality) more frequent in such males than in controls matched for several factors including height? 2) Are there significant differences between 47,XYY males and matched controls in regard to type of crime, age at first arrest, family background, and other social and psychological variables? 3) within a particular state (Wisconsin), are there differences in the frequency of XYY males in the population of institutionalized juvenile offenders, adult offenders hospitalized for mental illness and/or mental retardation, and other prisoners? 4) Do tallness or any other traits develop sufficiently early to be of value in the early recognition of XYY males? And 5) how does the frequency of the 47,XYY condition in adult and juvenile offenders vary with height? [25]

Such identification and separation is the first step toward unequal treatment of otherwise innocent individuals.

Moreover, several of the programs conducted by the Center for the Study of Crime and Delinquency are so unproven as to raise the question whether the federal government should be involved at all. Al-

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[23] *Id.*
[24] *Id.*
[25] Center for the Study of Crime and Delinquency—Abstracts of CSCD-Funded Projects, December 10, 1973, printed in the Appendix as Item I.C.3.