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ABSTRACT

This monograph provides information about behavior change techniques of relevance to the treatment and handling of offenders. Since behavior modification techniques focus on behavior and since most offenses involve observable behavior, these techniques are remarkably well-suited for integration into the criminal justice system. The author describes the major behavior modification techniques of classical and operant conditioning, aversive suppression, and electronic monitoring and intervention and discusses significant research related to these techniques. In examining the legal regulation of offenders, he notes the inconsistent and vague statutory standards among the States, the poorly defined administrative standards, and the need for judicial intervention to protect the offender's rights covered in provisions on cruel and unusual punishment, due process, equal protection, and privacy. (Author/LAA)

NATIONAL INSTITUTE OF MENTAL HEALTH

Development and Legal Regulation of Coercive Behavior Modification Techniques With Offenders

National Clearinghouse for Mental Health Information

CRIME AND DELINQUENCY ISSUES:

A Monograph Series

Development and Legal Regulation of Coercive Behavior Modification Techniques With Offenders

by
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This monograph is one of a series on current issues and directions in the area of crime and delinquency. The series is being sponsored by the Center for Studies of Crime and Delinquency, National Institute of Mental Health, to encourage the exchange of views on issues and to promote in-depth analyses and development of insights and recommendations pertaining to them.

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Foreword

While experimental psychologists have for several decades been concerned with laboratory research pertaining to theories and principles of learning, it has been primarily in the past two decades that a sophisticated technology of learning and behavior change has begun to be applied to a wide range of clinical, educational, and many other situations. Since such studies typically are reported in specialized scientific and professional journals, the information is not readily and widely available to the broader audience which might be interested in such developments and their possible applications.

In this monograph, Dr. Ralph Schwitzgebel provides information about behavior change technologies of relevance to the treatment and handling of offenders. Not only does the author provide a description of the major behavior modification techniques which have been developed or are in process of being tested and refined, but he also discusses some of the legislative, administrative, and judicial approaches concerning the regulation of the above technologies.

The aforementioned developments and some related electronic innovations raise a number of legal, constitutional, and broad social policy questions concerning their use. It is interesting to note that many of these social policy questions have been present in reference to several of our traditional and longstanding methods for the handling of delinquents and offenders, viz., involuntary programs of treatment, correction, and rehabilitation. However, the basic issues appear to have been sharpened and made more visible because of increasing concerns about the rights of individuals subjected to coercive treatment, and also because the power and effectiveness of behavior change techniques have been markedly increased. There is a common assumption, indeed often a complaint, that technological innovations typically bring about and even force a variety of changes in the social order of a culture. It has also been said that technology is the scientific tail which often wags the social dog. Quite typically, however, the larger effects and consequences of technological developments are not often adequately anticipated nor are they carefully studied

prior to their utilization. Thus, social policy guidelines to regulate and control the uses of such innovations are not usually developed in advance of their applications.

Widely available information about the nature and potential uses of technological innovations, and open discussion of their value, limitations, and potential problems and consequences, appears to be one of the most effective ways to prevent misunderstanding about and misuse of such developments.

Dr. Schwitzgebel, whose academic training includes the fields of psychology and law, and who is also a part-time inventor, is very knowledgeable regarding potential applications of electronic and related innovations to various social situations. He has written extensively on this topic, and is also alert to the possible misuses of such knowledge. He notes, for example, that while much crime could be technologically prevented, procedures would have to be developed for the effective regulation of the use of such equipment to avoid political coercion by governments.

If this monograph helps to provide a better understanding of the possible uses, and limitations, of behavior change technologies, and if it helps to stimulate open discussion about the social policy issues pertaining to the regulation of such developments, then the major purpose underlying this work will indeed have been accomplished.

In order to provide the author full freedom to develop the issues pertaining to this area, no detailed specifications were set in advance and no substantive or editorial changes have been made in the manuscript submitted. The views expressed herein are those of the author and do not necessarily reflect the policies or position of the National Institute of Mental Health; the Center for Studies of Crime and Delinquency is pleased to make this monograph widely available to facilitate discussion of its topic.

Saleem A. Shah, Ph.D., Chief
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I. Introduction

Within the past few years there has been a rapid growth in the experimental study and application of behavior modification techniques derived from the principles of learning and technology. These techniques, which have been used primarily in clinical and experimental settings thus far, create the potential for major changes in the area of corrections. It may be helpful to compare briefly these techniques with other techniques that have been used historically to modify the behavior of offenders.

The use of coercive techniques to deter or change the behavior of offenders has a long history of social and legal approval in Western civilization, including the United States. The care and treatment of offenders in the early American colonies had certain medieval overtones. Punishment was often viewed as a form of "enforced penance." For example, although branding on the forehead or hand was a frequent form of punishment, the most common penalty for "immorality" was to stand the offender on the gallows for an hour or two on lecture day with the hangman's rope around his neck and then whip him.[1] Profane tongues were treated more directly by squeezing them in a cleft stick for as long as an hour while the offender was standing with his neck and arms held in a pillory.

Quakers were particularly troublesome to the political leaders in Massachusetts. A statute of 1657 prohibited their entry into the colony, and provided that for the first offense a male Quaker could have one ear cut off.[2] If he entered the colony a second time, the other ear could be cut off. If he then entered a third time, the statute required that his tongue be burned through with a hot iron. In several early American colonies, the death penalty was used not only for murder but also for offenses such as rape, witchcraft, and blasphemy.

Perhaps these penalties were not much more punitive than those used in the rest of Western civilization at that time. They were, however, as far as can be ascertained, rather mechanically applied to the offenders with little concern for the suffering they produced. Erickson[3] has suggested a reason for this: "It was God, not the magistrates, who had sentenced the offender

to everlasting suffering, and if the magistrates lashed a few stripes on his back or printed his skin with a hot iron, they were only doing what God, in His infinite wisdom, had already decreed. In a sense, then, the punishment of culprits was not only a handy method for protecting the public peace; it was an act of fealty to God."

In 1764, Beccaria published his now famous political treatise, *An Essay on Crimes and Punishments.* It opposed the use of the death penalty not so much out of compassion as out of a realization that the penalty was not the most effective method of deterring others from crime. "The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others than the continued example of a man deprived of his liberty, condemned, as a beast of burden, to repair, by his labour, the injury he has done to society." [4] This essay had a major impact upon public thinking and was generally viewed as "humanitarian" in its outlook.

When the States began to build large prisons in the early 1800's, many of those offenders who would ordinarily have been executed or mutilated were often placed in isolation or assigned to hard labor.[5] Corporal punishment was frequently used because, as the well-known sociologist de Tocqueville noted, "It effects the immediate submission of the delinquent; his labor is not interrupted a single instant; the chastisement is painful, but not injurious to health; finally, it is believed that no other punishment would produce the same effects." [6]

One of the most commonly accepted forms of treatment at this time, in addition to hard labor, was enforced silence or what was more commonly called "solitude." Several beneficial effects were assumed to result by not permitting prisoners to talk to each other in addition to facilitating the maintenance of order in the prison. It was believed that whenever prisoners associated with one another, it was those prisoners who were the most troublesome who would influence those who were less troublesome. By not allowing communication, this "mutual pollution" could be avoided. Furthermore, solitude would promote meditation and repentance. According to opinion in the early nineteenth century: "Thrown into solitude, he reflects. Placed alone, in view of his crime, he learns to hate it; and if his soul be not yet surfeited with crime, and thus have lost all taste for anything better, it is in solitude, where remorse will come to assail him." [7]

Solitude was sometimes accompanied by confinement away from other prisoners. Writing in 1822, the Society for Preventing Pauperism in New York suggested that, "Six months solitary

confinement, in a cell, would leave a deeper remembrance of horror on the mind of the culprit, and inspire more dread, and prove a greater safeguard against crime, than 10 years imprisonment in our penitentiaries, as they are now managed . . . To felons, whose minds should be broken on the rack and wheel, instead of their bodies, and who can only have their obstinate and guilty principles crushed and destroyed by severe treatment, no kind of labor should be given . . . [S]olitude, complete and entire solitude, should be left to do its effectual work." [8]

One of the early "experiments" in silence and isolation was conducted under direction of the New York State Legislature in 1821. Eighty prisoners were placed in continual solitary confinement on Christmas Day, 1821. During the following year five of the prisoners died, one attempted to escape, only accidentally avoiding death from a fall of four galleries, and at least one became insane. So many others became extremely depressed that the Governor of the State pardoned and released 26 of them and the others were allowed to leave their cells during the day to work in the common workshop of the prison. Even among those prisoners who survived the confinement and were released, the results were disappointing. At least 12 of them were returned in a short time for new offenses. One committed burglary the first night of his release, and the warden reported "not one instance of reformation." [9]

Following these results, the use of solitude gradually diminished in use and silence is now seldom required except in large dining halls. Today the emphasis is much more likely to be placed on encouraging the prisoner to communicate with relatives and to discuss his problems with a counselor or in group therapy with other offenders, if these facilities are available. This remarkable change from silence to discussion seems to have resulted at least in part from the recognition that the earlier method did not effectively change the behavior of prisoners after they were released. This enlarged perspective, which looks beyond imprisonment to the offender's subsequent behavior in the community, has occasioned the re-examination of many correctional practices to determine if they are in fact "correctional" or only temporarily beneficial or expedient.

Just as silence was discovered not always to be an effective treatment procedure, so also some doubt is now being raised about verbally oriented treatment as it is customarily practiced with offenders. Some studies have shown no greater reduction in the behavior problems of offenders receiving verbally oriented treatment than that found for offenders not receiving treatment. Failures have been noted for group counseling in prison,[10] group

counseling outside of prison,[11] and individual counseling.[12] In some studies, the group receiving the treatment has shown even more maladaptive behavior,[13] psychoneurotic symptoms,[14] or recidivism [15] than the control group not receiving the treatment.

The general picture is not promising. In a review of 100 outcome reports on correctional programs, Baily [16] reported that those studies based upon rigorous research designs usually showed statistically nonsignificant improvement, no change, or a worsening in regard to the outcome criteria used by the study. It is these often disappointing results that have led at least in part, to an increased emphasis on treatment procedures derived from certain principles of learning theory. These procedures are usually developed in psychology laboratories on a small scale and then applied to institutionalized or outpatient populations.

II. Behavior Modification Programs and Research

A. General Characteristics of Behavior Modification Programs

A major characteristic of behavior modification programs is their emphasis upon overt behaviors and the systematic manipulation of the environment to change these behaviors.[17] Some of the techniques that can be included within the category of behavior modification are operant and classical conditioning, aversive suppression, and electronic monitoring and intervention. These techniques are only a few of many behavior modification techniques that may also include imitation, progressive relaxation, and sensitivity training. The techniques discussed in the following sections are those that are now playing an increasingly important role in the clinical and experimental treatment of offenders.

Behavior modification, as a separate area of study, began to emerge clearly in the early 1950's. Its direction as a new discipline is still not clear. The emphasis upon the treatment of overt behaviors and the measurement of observable events in the patient's environment gives the discipline a great heuristic value over some of the more traditional, psychoanalytically oriented treatment procedures.[18] Its theoretical bases are, however, still in the process of being formulated.

Although behavior modification procedures are often oriented toward operant or classical conditioning theories, they are not necessarily so oriented and there is much diversity. Regardless of orientation, the basic underlying theory usually involves carefully specified changes in the environment of the person whose behavior is to be changed. A procedure for changing behavior that relies upon unique, nontransferrable characteristics of a therapist or change agent lies outside of the domain of scientific behavior modification.

B. Specific Programs and Research

The following programs and related research are briefly described to give a general purview of behavior modification studies that have been completed or those that are now being conducted.

The studies that have been selected are those that are generally related to present or potential treatment programs for offenders.

1. Operant Conditioning

In operant conditioning studies, a reinforcer (popularly called a "reward") is given to a subject after he produces the required behavior once or several times. In terms of operant conditioning, it is said that the reinforcer is made contingent upon the emission of the correct response. This response is known as an operant. If the response is not emitted by the individual, no reinforcer is given. In a sense, the person must voluntarily "operate" upon his environment to receive reinforcement. A reinforcer such as food, money, or time out from a task is known to be a reinforcer when it increases the rate, or changes the form of the behavior it follows. One of the most familiar examples of operant conditioning at the infrahuman level is the early work of B. F. Skinner in which he trained pigeons to peck at lights for many hours at a time to receive small pellets of food.[19]

Although a detailed discussion of operant conditioning theory is beyond the scope of this paper, it might be noted that except for some specialized procedures for shaping behavior, reinforcers are seldom given for each correct response.[20] Rather, intermittent reinforcement is given. A fixed ratio schedule provides a reinforcer after the operant response has occurred a specified number of times. A fixed interval schedule provides a reinforcer for the first response occurring after a specified period of time following the preceding reinforcement. There may also be variable-ratio, variable-interval, and mixed ratio-interval schedules of considerable complexity.[21]

Different types of schedules produce varying patterns of behavior. As Skinner notes:

> The efficacy of such schedules [variable ratio] in generating high rates has long been known to proprietors of gambling establishments. Slot machines, roulette wheels, dice cages, horse races, and so on pay off on a schedule of variable-ratio reinforcement . . . The pathological gambler exemplifies the result. Like the pigeon with its five responses per second for many hours, he is the victim of an unpredictable contingency of reinforcement. The long-term net gain or loss is almost irrelevant in accounting for the effectiveness of this schedule.[22]

The scheduling of reinforcers to increase the probability of socially desirable behaviors of offenders is generally accomplished in one of two ways. One method involves reinforcing a desired

behavior, such as cooperation, in such a way that it competes with an undesirable behavior, such as fighting. The second method involves reducing the reinforcement usually obtained by the person as a consequence of his deviant behavior. This is based upon the assumption that deviant as well as normal behaviors are produced and maintained by their reinforcing consequences. Both of these operant conditioning approaches to deviant behavior require structuring the environment so that the reinforcers received by the person are carefully specified and controlled. Programs that control reinforcers in this manner are sometimes known as contingency management programs.[23]

In the project CASE II (Contingencies Applicable for Special Education), conducted at the National Training School for Boys, delinquent boys could obtain points for successfully completing specified amounts of educational material.[24] These boys lived in a specially constructed environment on the schoolgrounds which for the first 3 to 5 days included a small but attractive private room and exceptionally good meals. Following this, points had to be earned by the boy in order to pay for his private room and good meals. In addition, he could use these points, sometimes converted into tokens or small amounts of money, to pay for such things as snacks, office study space, private tutoring, magazines, telephone calls, or articles from a mail-order catalog. Conversely, if a student did not successfully complete his educational tasks, he was known as a "relief" student and would lose his private room and would have to have his meals served on a metal tray after the other students had eaten. Also, he would not be able to wear street clothing, attend movies, or take trips outside.

Under these conditions of contingency management, most of the students showed very great increases in the level of their academic performance and there were marked decreases in the number of behavioral problems as compared with the regular training school population. These were the primary goals of the project. The effect of this type of program on the recidivism of these students when they return to the community is not yet known.

It may be noted that the CASE II project used secondary reinforcers such as points or tokens which could later be turned in by the boys to purchase primary reinforcers such as food or a trip out of the institution. This permits the immediate reinforcement of behavior in situations when the use of primary reinforcers would be difficult or impossible. Although the use of these secondary reinforcers can be helpful in modifying the behavior of institutionalized youths,[25] even greater potential may

lie in their use in community settings. The Behavioral Research Project in Tucson, Ariz.[26] utilized community-trained teachers, parents, or other adults in the child's natural environment to use reinforcers to modify delinquent or predelinquent behavior, such as stealing, property destruction, and truancy, following the principles of contingency management. An intervention plan for each child was designed and the child was given notes, points, or a mark on a chart which could be exchanged later for primary reinforcers. Behaviors such as prompt arrival at school or obedience to instructions were reinforced, as well as periods in which a particular undesirable behavior did not occur, e.g., a recess completed without a fist fight. Marked improvements in behavior were recorded. Similar token economies have been used to improve the academic and job performance of male and female high school dropouts.[27] It is also likely that the reinforcement procedures that have been used to modify a wide range of neurotic and schizophrenic symptoms might also be used to modify some types delinquent behavior.[28] Community oriented programs are still, however, at a very rudimentary level.

One rapidly emerging area of research in operant conditioning should perhaps be mentioned before discussing classical conditioning programs. It is the operant conditioning of responses which have been traditionally associated with the autonomic nervous system. Some studies, though not all, have been able to operantly change human skin potential,[29] heart rate,[30] and salivation.[31] Animal studies have an advantage over human studies in that the animals can be temporarily paralyzed by curare to remove artifacts caused by movement. Under these conditions, animals have been taught to increase or decrease heart rate, intestinal contractions, stomach contractions, urine formation, and electrical brain waves.[32] Either direct electrical stimulation of the brain or escape from mild electrical shock has been used as a primary reinforcer. In some instances, clear and extreme physiological changes can be produced using this process. Some success has also been obtained in training epileptic patients to suppress abnormal paroxysmal spikes in their electroencephalograms.[33] As Miller notes, "While it is far too early to promise any cures, it certainly will be worthwhile to investigate thoroughly the therapeutic possibilities of improved instrumental training techniques."[34]

2. Classical Conditioning

Another type of conditioning frequently used to change behavior is classical conditioning as demonstrated by the work of Ivan Pavlov.[35] If a stimulus such as food or an electric shock is pre-

sented to a person, it can generally elicit an involuntary response (or "reflex") such as salivation or muscle contraction. This eliciting stimulus is called the unconditioned stimulus. In a typical classical conditioning experiment, a neutral stimulus such as a bell is presented to the person and this stimulus is followed shortly (from a few tenths of a second to 3 or 4 seconds) by the presentation of the unconditioned stimulus and the response. Sometimes the neutral stimulus and the unconditioned stimulus overlap each other briefly. When these stimuli are repeatedly paired with each other in this manner, the neutral stimulus eventually becomes able to elicit the response even when the unconditioned stimulus is no longer present. The neutral stimulus is then labeled a conditioned stimulus and the response is known as a conditioned response.

In Pavlov's early experiments, dogs were presented with the sound of a metronome followed by meat powder until the presentation of the sound alone elicited salivation.[36] Similar conditioning procedures have been used with humans to produce salivation as a conditioned response.

Two central concepts in classical conditioning are excitation and inhibition. Excitation, in most general terms, was used by Pavlov to refer to the gradual irradiation or spread of impulses over the cerebral cortex. Thus, if a conditioned response is elicited by a tone of 500 cycles per second, a tone of 400 cycles might also elicit the same or similar conditioned response. Opposed to this process were various types of inhibition that produce a diminution of response strength to all stimuli. For example, a conditioned response which is initially elicited by both 500 and 490 cycle tones will become restricted to one of them—the 500 cycle tone—if the 490 cycle tone is repeatedly presented without being followed by the unconditioned stimulus, while the 500 cycle tone remains paired with the unconditioned stimulus.[37] This process is known as differential inhibition.

These concepts of excitation and inhibition have been recently integrated into a theory suggesting that each stimulus produces a generalization gradient. The gradients thus produced interact with each other in a mathematically predictable manner to produce the observed conditioned response.[38] Classical conditioning procedures have been used to modify salivation, heart rate, blood pressure, urination, respiration, excretion of bile, infantile sucking, eyelid movement, and many other responses usually, but not always, associated with the autonomic nervous system.

Classical conditioning procedures have been used primarily with two major categories of offenders—alcoholics and homosexuals. The central objective is to produce an unpleasant reaction in the

patient to alcohol or to homosexual activity. In the case of alcoholism, the patient is given an emetic such as emetine hydrochloride (the unconditioned stimulus) and just before the onset of nausea he is required to look at, smell, or taste the alcohol (the conditioned stimulus).[39] The results of this procedure appear to be as effective as the usual psychotherapeutic approaches. Vallance,[40] for example, found that approximately 5 percent or fewer alcoholics treated by standard psychotherapeutic methods in the psychiatric unit of a general hospital could be considered abstinent over a 2-year follow-up period. In contrast, one of the highest rates of abstinence was reported in a study by Lemere and Voegtlin [41] in which 51 percent of 4,09€ patients treated by conditioning procedures were found abstinent for 2 to 5 years following treatment. These studies represent extremes and more typical studies show a range of abstinence between 10 and 35 percent over a period of 1 year or longer. Because of a wide diversity in the criteria used to determine abstinence or improvement, it is difficult to compare the results of different treatment methods reliably.

Other unconditioned stimuli have been used with alcoholics in addition to emetics. One of the most extreme is succinylcholine chloride, or its derivatives, a curare-like drug that rapidly produces complete paralysis of the skeletal muscles, including those which control respiration. Just as the patient is about to drink the alcohol, paralysis occurs, producing great fright about being unable to breathe and a fear of suffocation. Without danger, resuscitation is provided for the patient within 30 seconds or less. The results, however, are not clearly better than with emetics.[42]

Although electric shock was reported to have been used as an unconditioned stimulus in the treatment of alcoholism as long ago as 1930,[43] it is only in recent years that it has gained some preference in use over emetics. One major advantage is that its onset and duration can be precisely controlled. The procedure generally used is the same as that described earlier with emetics. Because of the high degree of control of administration of electric shock, it is possible to pair the termination or avoidance of the shock with the sight or smell of a nonalcoholic substance, thus perhaps associating the nonalcoholic substance with reduced anxiety or relaxation. Tentatively, however, this relaxation-

[39] It should be noted that if nausea follows the drinking of the alcohol rather than the sight or smell of it which precedes the drinking of it, the procedure is more nearly punishment or aversive suppression than classical conditioning. Aversive suppression will be discussed in the following section of this paper. In many studies, classical conditioning and aversive suppression procedures are confused or not clearly specified. *See* Franks, C. M. Conditioning and Conditioned Aversion Therapies in the Treatment of the Alcoholic, *International Journal of the Addictions*, 1:61-98, 1966.

aversion procedure does not appear to be significantly better than the more standard aversion techniques.[44]

The procedures used in the treatment of alcoholism have also been used in substantially the same form in the treatment of sexual disorders, particularly homosexuality. The underlying assumption is that, except for very basic physiological responses, sexual behavior is learned. As Kinsey and his associates have noted, "The variations which exist in adult sexual behavior probably depend more upon conditioning than upon variations in the gross anatomy or physiology of the sexual mechanisms." [45] Traditionally, behavior modification techniques have attempted to pair the stimulus that elicits the homosexual behavior, e.g., a picture of a nude male, with an aversive stimulus such as an electric shock or nausea.[46]

Although electric shock was experimentally studied as early as 1935 in the treatment of homosexuality, it is only in more recent years that electric shock has been used clinically. In its simplest form, the treatment requires the presentation of pictures of attractive males or other homosexually-oriented stimuli which are immediately followed by an electric shock.[47] More complex procedures sometimes utilize pictures of attractive females or other nonhomosexual stimuli at the termination of the homosexual stimuli.[48]

Similar conditioning procedures employing aversive stimuli have also been used to treat transvestism,[49] fetishism,[50] and sadism.[51] Within the past few years, behavioral treatment strategies have begun to emphasize not only the negative conditioning of the stimuli giving rise to the sexually deviant behavior, but also the positive conditioning of sexual responses to heterosexual stimuli. In one study, homosexual stimuli were paired with nausea and then later the patient was given an injection of testosterone propionate to produce sexual arousal and was encouraged to masturbate while looking at pictures of females.[52] A similar procedure has been used to reduce voyeurism [53] and sadistic fantasies.[54]

To the extent that male homosexual behavior is produced not so much by an attraction toward males as by a fear of females, as suggested by Freudian psychodynamic theory, homosexual behavior might be reduced by eliminating the patient's fear or anxiety of heterosexual behavior. This is sometimes accomplished by systematic desensitization, a procedure that uses relaxation to reduce the anxiety associated with heterosexual stimuli.[55] The patient is relaxed and then heterosexual images of gradually increasing anxiety are presented to be "counter-conditioned." Systematic desensitization may also be combined with the aversive conditioning procedures as described above.[56]

Some very preliminary research has been done using classical conditioning procedures in the treatment of other behaviors such as drug addiction,[57] gasoline sniffing,[58] check writing,[59] and shoplifting.[60] It is likely that the tentative success of these conditioning procedures will lead to the further application of this general methodology to other types of offenses.

3. Aversive Suppression

The aversive suppression of behavior corresponds in common usage with the concept of punishment. But the term "punishment" as it is ordinarily used has several conflicting meanings when examined from the viewpoint of learning theory. Most customarily, punishment refers to the presentation of an aversive stimulus after the person has emitted the behavior which is to be reduced in frequency or eliminated. Thus, the child is slapped on the hand (aversive stimulation) after he has reached into the cookie jar or even after he has started to eat the cookie.

Another type of punishment which is often used consists of the removal of positively reinforcing stimuli following the behavior to be eliminated. For example, after the child has reached into the cookie jar, his mother may take the cookie away and may also prevent him from playing with his toys. These two possible types of punishment, while recognized,[61] have not been given any generally accepted labels. Burgess and Akers have suggested that "Those stimuli whose presentation will weaken an operant's [behavior's] future occurrence are called punishers; the process, positive punishment . . . Those stimuli whose removal will weaken an operant's future occurrence are called positive reinforcers; the process, negative punishment."[62] The terms "positive punishment" and "negative punishment" are not widely used, but they do point out the distinction between the presentation of aversive stimuli and the withdrawal of positive stimuli following the prohibited behavior. It is the scientific application of aversive stimuli that is of primary concern here as it raises more acutely certain legal and ethical problems than does the withdrawal of positive stimuli which has had much broader public use and acceptance.[63]

The application of aversive stimuli following the prohibited behavior is surely not new. Whippings, mutilations, and ducklings in cold water have had a long history of use. A rather novel form of treatment was once reported by the famous 18th century

[61] "In solving the problem of punishment we simply ask: What is the effect of *withdrawing* a *positive* reinforcer or *presenting* a negative? . . . [I]nsofar as we are able to give a scientific definition of a lay term, these two possibilities appear to constitute the field of punishment." Skinner, B. F. *Science and Human Behavior*. New York: Macmillan, 1956, p. 185.

physician and patriot, Benjamin Rush, in which a drug addict was successfully cured by having an artificial snake pop out of her opium box. Although such a treatment now seems quite out of style, it does have the virtue of pairing the aversive stimulus closely in time with the behavior to be suppressed. In fact, if there is a series of behaviors leading to the final, prohibited behavior, punishment may be most effectively used if the aversive stimulus is applied following one of the behaviors in the series prior to the final behavior.[64] This is rarely the situation in the administration of criminal justice. Punishment is rarely administered prior to the offense and more generally occurs several hours to several years following the prohibited behavior. The typical delinquent may steal several cars before being apprehended and the application of aversive stimuli or the withdrawal of positive stimuli begins.[65]

If it were not for the rather humiliating and painful aspects of public whipping, the failure of this treatment to produce long-lasting changes in offenders' behavior would be a rather amusing illustration of correctional ineffectiveness. In a study of the whipping penalty in Delaware, Caldwell found that 1,302 offenders were whipped between the years of 1900 and 1942 inclusive.[66] In a special study of the criminal careers of 320 prisoners who were whipped, 61.9 percent were again convicted of some crime after their first whipping. Of course, it might be argued that not enough whipping was administered to be effective. The data collected by Caldwell do not bear this out. Of those offenders who were whipped twice, 65.1 percent were again convicted of a subsequent offense. Also, in a comparison study of whipped and unwhipped offenders, 68.5 percent of those whipped were later convicted of crimes, 61.1 percent of those offenders who were imprisoned instead of whipped were later convicted, and only 37.5 percent of those offenders placed on probation instead of whipped were later convicted. From a learning theory viewpoint,

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[64] The application of the aversive stimulus to one of the behaviors in a series of behaviors may be effective because the punished behavior, or a stimulus closely associated with it, comes to serve as a signal of potential, aversive stimulation, thus producing avoidance responses rather than the prohibited behavior. *See* Dinsmoor, J. A., Punishment: I. The Avoidance Hypothesis. *Psychological Review*, 61:34–46, 1954. Dinsmoor, J. A., Punishment: An Interpretation of Empirical Findings. *Psychological Review*, 62:95–105, 1955. *See also* Bandura, A., and Walters, R. H. *Social Learning and Personality Development*. New York: Holt, Rinehart and Winston, 1963, pp. 182–186.

[65] "In addition to the fact that delayed punishment may affect the wrong behavior, delay is also ineffective because it increases the possibility for the undesirable response to be reinforced in some way. We can see this fact, too, in the criminal's case. If capture is not immediate, then there is indeed a good chance that the act of breaking a law will be immediately reinforced. No matter what the long-range consequences turn out to be, from the criminal's point of view the fact may still remain that sticking a gun in someone's face *was* followed by the acquisition of money; ergo, armed robbery 'obviously' works, the problem being not to get caught later." Lawson, R., *Learning and Behavior*. New York: Macmillan, 1960, pp. 281–282.

whipping could be expected to be ineffective for a number of reasons, one of them being the delay between the prohibited act and the subsequent punishment, as previously mentioned.[67]

Behavioral modification techniques closely pair the prohibited behavior, or precursors of it, with the subsequent aversive stimuli. Considerable experimentation of this nature has been conducted in the past few years with sexually deviant persons. In one well known early study of the treatment of transvestism, the patient received painful electric shocks on his feet from a grid on which he was standing while dressing in women's clothes.[68] Over a period of 8 days, the patient received a total of 200 shocks during the frequent treatment sessions. A follow-up study 14 months later indicated only one subsequent relapse of crossdressing by this patient.[69]

The use of aversive stimuli in the suppression of homosexual behavior or other deviant sexual behavior has been reported in over 26 studies.[70] These studies, generally using electric shock or an emetic to induce vomiting, often do not clearly distinguish between classical conditioning procedures and aversive suppression procedures. The studies tend to show an effectiveness in changing behavior which is at least equal to or better than the traditional, psychoanalytic treatment of these disorders. Greater attention, however, needs to be given to the design of these treatment methods to incorporate learning theory paradigms to assess more accurately their therapeutic potential.[71]

Temporary paralysis and apnea have been used in the treatment of chronic alcoholics. Clancy, Vanderhoof, and Campbell [72] reported using the following treatment procedure after the patients were informed that they would have "some difficulty in breathing." A hypodermic needle was inserted in the patient's arm vein and a saline drip attached. When the drip was running and an injection of succinylcholine chloride prepared, a small amount of the patient's favorite alcoholic beverage was poured into a glass in front of him. A few seconds after the patient tasted the alcohol, apnea occurred and the patient, fearful of suffocating, was ventilated with a breathing bag. A 1-year follow-up study by these researchers, as well as a study by other researchers using a similar procedure closer to classical conditioning,[73] showed somewhat positive results in producing abstinence. These researchers, however, are cautious in advising the use of apneic paralysis except for a carefully selected population, and even then the subsequent anxiety or other side effects may make the procedure inadvisable.

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[67] Although whipping is now seldom used, it is still permissible under Delaware statutes. *Del. Code Ann.* tit. 11 secs. 3907, 3908 (Supp. 1968).

Some preliminary research has been done in the use of apomorphine, an emetic, in the treatment of drug addiction. In a study by Liberman, two hospitalized narcotic addicts were made nauseous following a "fix" with morphine by the administration of apomorphine during 38 treatment sessions conducted over a period of 5 weeks.[74] "Booster" sessions were also used at varying intervals when the patients began to notice a recurrence of craving for morphine. Tentatively, the procedure appears to be useful in reducing the craving for narcotics although considerable social assistance and perhaps outpatient therapy may be needed in addition to this treatment to avoid subsequent dependence.

The above study by Liberman also provided occasional, free-choice situations in which the patient could choose between morphine and a pleasant social situation with the therapist and nurse. This illustrates the application of some experimental studies suggesting that the development of appropriate, alternative responses during the period of suppression induced by punishment is helpful in preventing high rates of recurrence of the punished behavior.[75]

There are additional findings from laboratory studies that generally have not yet been included in the design of treatment programs utilizing the aversive suppression of behavior. For example, the suppression of behaviors that are based upon an inner drive or upon the avoidance of other aversive stimuli may yield different patterns of suppression.[76] Also, unless the stimuli are very intense, aversive suppression generally does not completely eliminate the occurrence of the punished behavior but rather lowers its rate, which may gradually, without additional suppression, return to its approximate prepunishment rate. There are also occasional "paradoxical" effects of punishment in which the use of aversive stimuli may increase the rate of the punished behavior when the aversive stimuli are removed.[77] Finally, punishment may produce side effects such as anxiety or deception which ultimately make the behavior increase. Nevertheless, there is considerable agreement that the appropriate application of aversive stimuli can at best, for short periods of time, markedly alter the rate or pattern of expression of the punished behavior.

4. Electronic Monitoring and Intervention

Within the past few years there has been an increasing recognition that some changes in behavior can be produced better by treatment which is conducted in the offender's natural environment than by treatment conducted within an institution. One manifestation of this is the rapid increase in the use of work-release programs, preparole community service programs,

and halfway houses. Therapy techniques are also being modified with the understanding that some reinforcers that maintain appropriate behavior in an institution may not be the same reinforcers that maintain appropriate behavior in the community.

Ultimately, most offenders will have to live in an environment similar to the one that produced, or at least did not successfully inhibit, their illegal behaviors. Two approaches are possible. The therapist may be able to help the offender deal with these environmental stimuli by introducing them into treatment sessions while the offender is still institutionalized or by extending treatment procedures into a community setting in which the offender lives during a temporary or conditional release from the institution.

Although some environmental stimuli that are the precursors of illegal behavior, such as new cars or potential victims, obviously cannot be brought easily into treatment sessions, photographs or films of them can be used. For example, a film of women pushing perambulators was presented to a patient with this fetish just prior to the onset of chemically induced nausea.[78] Similarly, a picture of the roommate of a homosexual patient, or a film of shoplifting in one of the shoplifter's favorite stores can be used in treatment.[79] Of course, some stimuli such as alcohol or bank checks can be brought easily into treatment sessions.[80]

However, even though some stimuli can be brought into the treatment session, a problem still remains. The stimulus removed from its customary context may appear much different from usual to the patient and therefore may not elicit his typical response. For this reason, increasing emphasis has been placed on the *in vivo* treatment of behavioral disorders, particularly the phobias. For example, a patient who is fearful of flying may be relaxed either chemically or by verbal instructions and then gradually introduced to flying by being accompanied by the therapist to the airport.[81] Subsequently, the therapist may accompany the patient on short, trial flights. Similarly, a patient with homosexual tendencies can be treated by an emetic in an office setting and then he can self-administer the emetic in the community when his impulses may lead to homosexual behavior.[82] This type of *in vivo* treatment has an additional advantage over typical institutional or office treatment. The successes achieved by the patient, though perhaps initially small, are likely to seem more "real" to him than changes that occur within an institution. These changes may encourage more effort by him for further change. Also, the environmental changes produced by the patient's effort may reinforce new patterns of behavior.

The treatment of the institutionalized offender in the community, however, presents the problems of a potential escape and increased risk to the community. One approach to this problem has been the development, in prototype form, of small personally worn transmitters that permit the continual monitoring of the geographical location of parolees.[83] This system, which also involves the use of intensive treatment and the help of volunteers in the community, is known as an electronic rehabilitation system.

> As presently designed the electronic rehabilitation system is capable of monitoring the geographical location of a subject in an urban setting up to 24 hours. The subject wears two small units approximately 6 inches by 3 inches by 1 inch in size, weighing about 2 pounds. As the wearer walks through a prescribed monitored area, his transmitter activates various repeater stations which retransmit his signal, with a special location code, to the base station. The repeater stations are so located that at least one is always activated by the wearer's transmitter.
>
> This prototype system as now used extends only a few blocks during street use and covers the inside of one large building. The primary purpose of this system is to demonstrate the feasibility of larger, more complete systems and gather some preliminary data. Through the use of carefully placed repeater stations in each block, the system is theoretically duplicable such that large geographical areas may be covered with a large number of subjects each transmitting a unique signal. The range of the system and the specificity with which a person can be located depend largely upon the number of repeater stations used.[84]

The impetus for the use of electronic intervention in the treatment of offenders emerges from several sources. There has been a rapid increase in the use of telemetry for medical purposes [85] and a shift in the budget allocations of the electronic industry from defense research and development projects to feasibility studies in the public sector.[86] In addition, there has been a marked increase in the research and development of law enforcement technology. Some of this research has been aimed at facilitating surveillance through the use of specially equipped helicopters,[87] computerized information retrieval systems,[88] and infrared sensors.[89]

Considerable effort is also being devoted to the development of

systems for the rapid, electronic location of objects in an urban setting. Many of these systems are being developed primarily for monitoring the location of motor vehicles such as buses or police cars. One presently operative system provides the location of a vehicle every 5 seconds within a limited urban area with an accuracy of approximately one block.[90] The Institute of Public Administration has indicated the feasibility of developing a broad-scale vehicle locator service within 2 years. In a report prepared for the Office of Urban Transportation of the U.S. Department of Housing and Urban Development, the organization notes, "Another, secretive, law enforcement use of AVM [Automatic Vehicle Monitor] systems would be in 'bugging' suspect vehicles, valuable shipments, etc.; movement could be traced through the city without a conspicuous 'tail'. Future refinement of the craft may make it possible to implant a transponder on a subject's person—in his shoe, for instance." [91]

Special security equipment has been designed and is being further developed to prevent the removal or compromise of personally worn equipment by parolees.[92] If this equipment were used to guarantee the wearing of personal transmitters and integrated into an electronic locator system, a very powerful, involuntary surveillance system would be possible. All of the major components of such a system have been developed in a design or prototype stage in various laboratories. The complete, involuntary system has not yet been used; but as described earlier, a voluntary, prototype system covering a few city blocks has been studied.[93]

Another potential source for the introduction of location monitoring systems into the public domain may be citizen protection. Citizens might be equipped with transmitters to alert the police in the event of attack. Crewe suggests:

> It is at least conceivable that citizens could be licensed to carry miniaturized police call systems in the form of a small radio transmitter. This could relay a cry for help to transmitters on the corners of each block. This signal could be automatically and instantaneously transmitted to the local police who could immediately dispatch assistance. It would be relatively simple to design into such a communications system the necessary safeguards against tampering and abuse. For example, the pocket transmitter should be capable of being turned on but not of being turned off. This would prevent the criminal from interrupting the signal. With modern electronic systems such a transmitter could be very small,

making it difficult to detect and in any case the signal would be inaudible. As regards abuse, it would be possible to license the use of such transmitters thereby restricting their use to those who do not abuse the privilege of carrying it. It should perhaps be pointed out that it would be entirely unnecessary for the whole population to carry such transmitters. In fact, this problem is something like the problem of vaccination against smallpox, that is, it only requires a certain percentage of the population to be innoculated to eradicate the disease.[94]

In addition to monitoring the location of a person, other characteristics might also be monitored. Equipment has been developed for monitoring voice,[95] blood pressure,[96] physiological activity,[97] and electroencephalograms.[98] Sophistication of design in instrumentation is making the implantation of sensors less necessary,[99] but unless transmission is by hard wire, telemetry is still generally limited to a short range of a few hundred feet or within one or two buildings. Capabilities are, however, rapidly expanding.

As previously noted, many components of potentially effective monitoring and intervention systems usable with offenders have been developed in various laboratories but have not yet been often integrated into operable systems. For example, devices have been developed for measuring penile erection during the therapeutic treatment of sexual deviates or for the objective measurement of sexual preferences. These devices have generally recorded changes either by using a plethysmograph [100] or a strain gauge.[101] Transducers have been designed that provide an electrical output suitable for the continuous monitoring and recording of penile changes.[102] The linkage of these transducers to a portable transmitter rather than to a recorder would not be difficult and could, when included within an electronic locator system, provide the capability of precisely monitoring sex offenders within the community.

Thus far in the present discussion, the emphasis has been upon the acquisition of data about the offender. A complete communication system could also permit the transmission of signals to the offender within the community. These signals could transmit information to the offender or activate equipment worn by him or near to him. To date, there has been no extensive use of portable equipment in behavior modification. There are, however, a few notable exceptions. A small, portable shock apparatus with electrodes attached to the wrist has been used to help inhibit a patient's addiction to Demerol (Pethidine).[103] The patient in this

study applied electric shocks to himself when he felt strong impulses to take the drug. The researcher, Joseph Wolpe, known for several innovations in psychotherapy, observed, "A strong and frequent endogenous impulse for Demerol was markedly diminished, apparently as a consequence of its being reciprocally inhibited by strong faradic stimulation of the forearm of the patient. Though only nine shocks were given in relation to the endogenous craving—all in the course of 1 week (the shocks in the following 2 weeks having been in relation to exogenous stimuli)—the decrease in its strength and frequency was such that the patient was easily able to abstain from the drug for a 3-month period during which no further shocks were administered." [104]

Powell and Azrin have developed a cigarette case that consists of a shock device and counter that are activated each time the case is opened.[105] Portable devices that produce a regular, rhythmic beat have been developed to be worn behind the ear [106] or on the wrist to reduce stuttering.[107] A portable device has also been developed that emits a tone signal when a patient assumes a faulty posture known as "round shoulders" for a period of at least 3 seconds.[108] Similarly, a personally worn device has been developed for delivering small amounts of direct current to the forehead of patients to reduce depresson.[109] Gradually, a new field of study may be emerging, variously known as behavioral engineering or behavioral instrumentation, that focuses upon the use of electromechanical devices for the modification of behavior.[110]

One of the most controversial areas of behavioral instrumentation is that of intracranial stimulation. Some of the early studies of the intracranial stimulation of the human brain began approximately 15 years ago.[111] Techniques that originally allowed the implantation of electrodes for only a few days or a few weeks have now been developed to permit the positioning of the electrodes for periods up to 3 years.[112] This research has generally been conducted for medical purposes to gain a better understanding of brain function or to alleviate severe behavioral impairments,[113] or modify human emotions.[114]

Relatively little research has been done in the area of remote communication with patients, but there are some exceptions. For example, to help control the restlessness of a 10-year-old boy in a classroom, a therapist transmitted a tone signal to him through an earphone whenever the boy sat quietly long enough to earn a piece of candy.[115] Similarly, devices have been used for transmitting comments or instructions to parents [116] or psychology trainees [117] during therapy sessions. In the treatment of alcoholics, a distant observer has used a walkie-talkie type transmitter to deliver electric shocks to patients at appropriate moments in the

treatment procedure.[118] Tone signals have also been transmitted to persons over a location monitoring system, previously described, to reduce crime-related behaviors.[119] Using this system, a person with a problem of aggression following heavy drinking was conditioned in a laboratory to experience nausea when he was served alcohol following the presentation of a particular tone signal. Later, this tone signal was transmitted to him in barrooms in a high crime rate area to reduce his drinking behavior.

The standard bellboy paging system has been used to help patients reduce their rate of smoking.[120] Tone signals were transmitted to the patients in their homes or offices that permitted them to smoke. Smoking at other times was forbidden. The number of transmitted tone signals was gradually reduced over a period of several weeks. An experimentor has also transmitted a signal to a delinquent which was received and displayed to the delinquent as a small light or as a "tap" from a vibratactile unit within the belt. This system was used to operantly condition appropriate behavior in the classroom.[121]

Another example is a recently developed two-way communication system used to transmit the electrocardiographic signals of cardiac patients from a moving ambulance to a hospital where a physician makes an interpretation of the signals.[122] Directions are then transmitted back to the ambulance personnel to initiate, in emergency situations, resuscitative procedures such as electrical defibrillation. A more behaviorally oriented feedback system is that of intracerebral telemetry which involves both the remote electroencephalographic recording of brain wave patterns and the remote brain stimulation of human subjects.[123] Although this has been accomplished only over a short distance within a building, Delgado et al. have suggested:

> The combination of both stimulation and EEG recording by radio telemetry offers a new tool for two-way clinical exploration of the brain and it may be predicted that in the near future microminiaturization and more refined methodology will permit the construction of instruments without batteries and small enough to be permanently implanted underneath the patient's skin for transdermal reception and transmission of signals through several channels.[124]

As can be seen, new developments in monitoring and intervention systems are occurring rapidly and are greatly increasing communication capabilities within the offender's natural environment. Within the near future, electronic technology is likely to become a very important factor in the design of programs for the modification of the behavior of offenders.

III. Legal Regulation

A. Statutory Standards

To help determine the standards of practice for the treatment of offenders within the criminal justice system, major statutes related to sex offenders, habitual criminals, and drug addicts were examined in all 50 States and the District of Columbia. These three categories of offenders were chosen because they present a wide range of significant policy issues that must be resolved in the daily operation of the criminal justice system. The statutes were examined in the latest official codes and supplements available as of September 1, 1969, ranging in date of enforcement for the various States from 1967 to 1969 inclusive. The following discussion presents briefly some of the data obtained from these statutes and the statistical analysis of this data.

In the present study, 31 States and the District of Columbia had statutes specifically related to sex offenders as a category of persons.[125] These statutes include those that require compulsory registration by persons convicted of sex offenses as well as the more typical sex offender statutes permitting special penalties or treatments for this category of offenders. The distinction between civil and criminal statutes was not always clear and was sometimes a matter of arbitrary decision. The present study used the location of the statute in the State code and the type of commitment procedures as the primary criteria determinative of the civil or criminal nature of the statutes. Under these criteria, 18 States (56.3 percent) had criminally oriented sex offender statutes. Fourteen States (43.7 percent) had civilly oriented sex offender statutes.[126]

The statutory definitions of a sex offender varied widely among the States. Seven States (21.9 percent) used a definition of a sex offender that required at least a sexual act as an element of the definition *and* dangerousness or harmfulness to others.[127] Seven States (21.9 percent) required a propensity or impulse toward

[125] See Appendix A for a listing of these statutes.

[126] Hereinafter the District of Columbia is included within the terms "State" and "States" unless otherwise specified.

[127] Includes statutes using phrases such as "course ...misconduct in sexual matters" (*Neb. Rev. Stat.* sec. 29-2901 [1964]) or othe- t indicating the requirement of evidence of a prior, legally prohibited sexual act.

sexual acts *and* mental abnormality, illness, or instability. The remaining States (56.2 percent) tended to combine in various patterns the elements of sexual behavior or impulses, mental abnormality, and dangerousness.

Nine States (28.1 percent) mentioned a disparity between the age of the victim (usually 16 years of age or younger) and the age of the offender (usually an adult or over 16 years of age) as an element in the definition of the offender.

Six States (18.8 percent) provide sentences of incarceration or treatment for sex offenders that are limited to a fixed period of time. The remaining 26 States (81.2 percent) provide indeterminate sentences for sex offenders.[128] The criteria underlying the standards for release from incarceration or treatment are typically quite broad or vague. For example in Pennsylvania the sex offender may be released ". . . at such time and under such conditions as the interest of justice may dictate." [129] Seven States set standards of release that emphasize recovery and/or maximum benefit from the sentence. An Alabama statute provides that the offender shall remain under treatment "until such person shall have fully and permanently recovered from such psychopathy" [130] and a Colorado statute stipulates that the offender may be released "when maximum benefits have been obtained from supervision." [131] In contrast to these treatment-oriented criteria, there are nine statutes that focus more directly upon the probability of future offenses as a standard of release. In Nevada the offender must be certified not to be dangerous.[132] Some statutes combine treatment and probability orientations such as the Washington statute that requires the incarceration of the offender until in the superintendent's opinion he is "safe to be at large, or until he has received the maximum benefit of treatment." [133]

A comparison of the statutory definitions of sex offenders with the criteria for release of sex offenders shows a statistically significant relationship between the definition of offenders in terms of acts, dangerousness, or mental illness and the criteria of release in terms of specified time periods, dangerousness, or recovery.[134] Thus, statutes that tended to define sex offenders in terms of mental illness also tended to permit release when the offender was recovered or had received the maximum benefit from his sentence.

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[128] "Indeterminate" includes here any sentence that may be imposed for the natural life of the offender.

[134] Chi square=15.958, 8 df, p<.05; Cramer's V=.499; Lambda (symmetric)=.810. For statistical analyses, the Data-Text Program, Preliminary Draft, 1969, Department of Social Relations, Harvard University was used. Intercoder reliability was .93.

Forty-seven States have statutes related to habitual offenders.[135] Twelve of these States (25.5 percent) require only one offense for the application of the statute to the offender. Thirty-five States (74.5 percent) require two or more offenses. Nineteen of these States (40.4 percent) provide sentences for habitual offenders that are limited to a fixed period of time. Twenty-eight States (59.6 percent) provide indeterminate sentences. Those States that require two or more offenses for the application of the statute tend also to use more indeterminate sentences than those States requiring only one offense.[136] Thirty of the 47 States with habitual offender statutes (63.8 percent) expressly permit the offender to be released on parole during the term of his sentence. Release to the community is by action of the parole board in 42 of the States (89.4 percent) but in five States (10.6 percent) release may be by action of the court or other organization.

Forty-two States have statutes specifically related to drug addicts or users.[137] Twelve of these States (28.6 percent) have statutes that are criminally oriented and 30 (71.4 percent) have satutes that are civilly oriented. The definitions of drug addicts varied widely among the States. Twenty-seven States (64.3 percent) appear to focus primarily upon the use, often repeated or habitual, of a drug. A Missouri statute defines a drug addict as a person who habitually uses narcotic drugs to such an extent as to create a tolerance of such drugs and who does not have a medical need of such drugs.[138] Nine States (21.4 percent) have statutes that more clearly focus upon the harmfulness or dangerousness of the use of drugs to the user or others. An Illinois statute applies to any person who has lost the power of self-control with reference to narcotic drugs and abuses the use of drugs to such an extent that the person or society is harmed.[139] Six States (14.3 percent) have statutes that variously combine these elements of use and dangerousness or that contain other elements. In North Dakota, a drug addict is a person who because of his illness is likely to injure himself or others if allowed to remain at liberty or needs care and lacks sufficient capacity to make responsible decisions about hospitalization.[140] Six States (14.3 percent) have statutes that refer to the self-harm of the drug addict as an element of definition, 36 States (85.7 percent) do not refer to self-harm as a definitional element.

Nineteen States (45.2 percent) provide sentences for drug addicts that are limited to a fixed period of time. Twenty-three States (54.8 percent) provide indeterminate sentences. Of these

[135] See Appendix B for a listing of these statutes.
[136] Chi square=7.99. 1 df, p<.05; Phi=.413; Lambda (symmetric)=.194.
[137] See Appendix C for a listing of these statutes.

States, 12 (52.2 percent) allow release of the addict when he is cured or no longer addicted. The remaining States allow release when the addict has benefited,[141] becomes of sound mind and memory,[142] or meets other conditions of an unclear nature. For example, the drug addict may be released in North Dakota when the "conditions justifying hospitalization no longer exist," [143] and the drug addict in Mississippi may be given treatment as long as necessary.[144] There is a slight tendency for drug addict statutes that are time-limited to define drug offenders in terms of the use of the drug whereas statutes that are indeterminate tend to define drug offenders as dangerous to themselves or others.[145]

It is clear that the statutes related to sex offenders, habitual offenders, and drug addicts vary widely both within and among the States. Uniformities in the statutory standards for the treatment of these offenders are difficult to find. A statistical analysis was made to determine whether there were consistences within individual States in the manner in which the States deal with these three categories of offenders. The results suggest that those States that utilize either criminally or civilly oriented statutes in the treatment of sex offenders do not similarly utilize criminally or civilly oriented statutes in the treatment of habitual offenders or drug addicts. Nor do those States that define sex offenders in terms of harmfulness or mental abnormality similarly tend to define habitual offenders or drug addicts in these terms. Nor is use of time limited or indeterminate sentences with sex offenders closely associated with the use of time-limited or indeterminate sentences with habitual offenders or drug addicts.

There is, however, one exception to this general pattern of no relationship between the types of definition and treatment given these three categories of offenders. Among those 24 States that have both sex offender and drug addict statutes, there appears to be some rough similarity between the criteria used to determine the release of these offenders from treatment.[146] Those States that emphasize a time limit or lack of dangerousness for the release of sex offenders also tend to use the same criteria for the release of drug addicts when compared to States that emphasize recovery, benefit from treatment, or other criteria of release. Nevertheless, in general, there appears to be little similarity in the manner in which the States as separate legal units deal with these categories of offenders.

Another potential source of statutory variation in the treatment standards applicable to offenders lies in the conditions or terms of probation and parole. A survey of parole rules by Arluke

[145] Chi square =5.81, 2 df, p<.05; Cramer's V=.381; Lambda (symmetric)=.091.
[146] Chi square=27.09, 12 df, p<.05; Cramer's V=.613; Lambda (symmetric)=.40.

indicates a wide variation among the States.[147] A few broad consistencies can be found. Most States require some notification of the parole officer before changes can be made in employment or living quarters. Most States also require gainful employment, filing of written reports, compliance with the law, support of dependents, and permission to use a motor vehicle. Most States also prohibit undesirable associations and the use of alcohol or narcotics.

No single parole rule is common to all of the States.[148] Furthermore, the similarity of standards is sometimes more apparent than real, even when a large percentage of States specify by statute a particular condition of parole. In a discussion of liquor usage, Arluke notes:

> Oddly, three States (Florida, Idaho, Michigan) have moved from "allowed but not to excess" to "prohibited." To counterbalance this, three States that had prohibited the use of liquor (Kansas, Louisiana, Mississippi) have discarded this regulation. Missouri, Virginia, and West Virginia previously were the only States with no liquor regulation; West Virginia now prohibits usage. Hawaii and Alaska have both included liquor usage as "prohibited." [149]

Some conditions such as requiring permission to travel out of the county or a curfew clearly vary among the States. A few States have conditions relating to criminal registration, search of parolees, gambling, and church attendance. There appears to be a slight increase in number of parole conditions specified by statute.[150] To the extent that these conditions represent standards for administrative action that are likely to be broadly followed within the State, they may provide some basis for the judicial review of administrative action.

In summary, the statutory standards for the treatment of offenders (sex offenders, habitual offenders, and drug addicts), and even the statutory definitions of these offenders, do not appear to be generally similar among the States. Only the most broad conditions of parole appear to be common among the States and consistent over time. There may be a trend toward increasing the number of statutory specifications of standards within State jurisdiction.

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[147] A table of parole rules as prepared by Nat R. Arluke is reproduced in Appendix D. A. luke. N. R. A Summary of Parole Rules—Thirteen Years Later. *Crime and Delinquency.* 15: 267-274. 1969.

B. Administrative Standards

Within the criminal justice system, considerably more emphasis has been placed upon securing the rights of the accused than guaranteeing the rights of offenders following the determination of guilt or need for treatment. This emphasis, in view of the limited resources of the criminal justice system, is perhaps not misplaced, for the use of criminal or civil sanctions against an innocent person is a grave injustice. Nevertheless, even those who have transgressed the laws or customs of our society still remain citizens. Most of them will remain in the community on probation or, if imprisoned, will eventually be returned to the community as participants in the common life of the community. No longer is the offender considered, as in the eighteenth century, "a beast of burden, to repair, by his labour, the injury he has done to society." [151] Rather, the emphasis is now placed on the rehabilitation of the offender through treatment to prevent future violations of the law.

The rehabilitation of offenders must take place, however, within a system which must also be capable of managing and if necessary subduing and restraining for the public good the most violent and dangerous persons in our society. The correctional systems of the various States have developed a very wide range of procedures for achieving these objectives and unless abuse is very clear or likely, judicial review and restraint are seldom used. In summarizing a study of correctional practices, Wechsler concluded, "Nowhere, indeed, in the entire legal system is so much discretion vested in the organs of administration as in the treatment aspects of the penal law and nowhere have we given less attention to the formulation of authoritative standards for the exercise of the discretion thus reposed." [152]

As previously indicated, the broad scope of administrative discretion may derive not only from the traditional lack of judicial review but also from a failure of legislatures to specify clear standards for administrative action. For example, the statutory standards for the release of sex offenders from treatment are not closely related to the civil or criminal nature of the statute under which the offenders are committed.[153] Furthermore, the standards of release are often quite vague.

Some additional indication of the wide range of discretion exercised by parole officers is found in a study conducted by Robison and Takagi of 7,301 parolees released in California during 1965.[154] The attitudes of the parole officers in general toward the types of offenders who should remain in the com-

[153] Chi square=4.52, 4 df, p=.34.

munity were greater determinants of whether parole would be revoked by a parole officer than was the parolee's behavior. Revocation rates therefore varied widely from one parole district to another.[155] Furthermore, when parole officers were presented with 10 hypothetical cases and asked to make recommendations regarding whether the parolees should remain on parole or be returned to prison, agreement among the parole officers was clear in only two of the cases; the remaining recommendations showed a consistency no greater than that achievable by chance.[156]

The reluctance of courts to review decisions of an administrative nature made by correctional agencies is sometimes referred to as the "hands-off" doctrine as it found expression in *Banning* v. *Looney*.[157] "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." [158] Although the courts have sometimes considered prison administration as a matter beyond their jurisdiction,[159] it seems more likely that the reluctance of the courts to intervene has been based upon policy reasons, particularly the fear that judicial review would subvert the authority of prison officials necessary for the maintenance of prison discipline.[160] Whether judicial review would in fact lead to the disruption of order in prisons or whether it would reduce abuse and prisoner dissatisfaction, thus facilitating order in prisons, is an empirical question. Also, the current trend toward more frequent judicial review of parole administration may suggest that the underlying reason for the prior lack of judicial review of prison administration was one of policy rather than jurisdiction.

The courts have shown a gradually increasing willingness to review prisoners' petitions regarding their treatment and care. As Vogelman has observed:

> During the past 25 years, a number of courts have recognized that the "hands-off" doctrine is not a satisfactory principle in prisoner litigation, and a trend has been noted away from it. Perhaps the leading statement indicative of this trend was made in dictum by the Court of Appeals for the Sixth Circuit in *Coffin* v. *Reichard*. The court stated: "A prisoner retains all the

[155] The authors suggest, "The results of this study underscore the importance of the parole agent and the parole unit supervisor as decision-makers or decision-influencers who contribute to variations in rates of return to prison or favorable outcome on parole. This variation was found to be more or less independent of variations in the characteristics of parolees. Accordingly, these results add to the existing accumulation of data which make inappropriate the interpretation that these variations in rates are a primary function of changes in the characteristics of parolees." Robison, J., and Takagi, P. Case Decisions in a State Parole System. Administrative Abstract No. 31, Research Division Department of Corrections, State of California, 1968, iv. *See also* Takagi, P. and Robison, J. The Parole Violater: An Organizational Reject. *Journal of Research in Crime and Delinquency*, 6:78–86, 1969.

> rights of an ordinary citizen except those expressly, or by necessary implication, taken away from him by law." [161]

However, even when the courts are available, the prisoners can redress wrongs only through specific remedies that carry with them certain limitations developed by case law. For example, the writ of habeas corpus was traditionally restricted to the challenge of the legality of the imprisonment. A marked change occurred, however, in *Coffin* v. *Reichard* [162] in 1944. The Sixth Circuit court indicated that it would permit the use of habeas corpus to inquire into any unlawful interference with the personal liberty of the inmate who had suffered "injuries and indignities" at the U.S. Public Health Service at Lexington, Ky.[163] Prisoners may also seek injunctions, not limited by the exhaustion doctrine, to prevent the infringement of their rights under the various Federal civil rights acts.[165] Civil and criminal penalties are sometimes available under these acts. Prisoners may also attempt to bring tort actions under the Federal Tort Claims Act [166] or similar State statutes that waive sovereign immunity and they may attempt to utilize a writ of mandamus.[167]

The State or Federal correctional agencies have authority delegated to them by the legislatures (or by constitutional mandate) to make certain kinds of determinations with broad discretion. A wide range of decision-making functions to achieve certain objectives is, in the terms of the Administrative Procedure Act, "committed to agency discretion by law." [168] Nevertheless, certain determinations by the agencies may be open to judicial review when the administrator of the agency has acted beyond the limits of his discretion, has acted arbitrarily without discretion, or has violated his statutory duty. Partial judicial reviews of certain aspects of agency action not committed to discretion are also permitted.[169] There remains, however, a judicial reluctance to review which has been particularly marked in regard to State and Federal correctional agencies.

Underlying the doctrine of agency discretion as a limitation on judicial review there are several policy issues that the courts may consider in determining the legislative intent. Saferstein has suggested three:

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[162] The use of habeas corpus in still limited by the doctrine of exhaustion of State remedies for State prisoners attempting to bring cases in Federal courts as expressed in 28 U.S.C. sec. 2254 (1964). As some writers have pointed out, "[A] prisoner seeking redress from the Federal courts faces a dilemma. Because the State courts have followed a 'hands-off' policy in the area of prison administration, State intervention is unlikely. If a prisoner chooses not to seek review by certiorari, this fact is likely to influence the Federal court not to hear the case. If he does seek certiorari, and his petition is denied, Federal review is equally unlikely."[164]

> First is the interest in fostering the most creative and efficient use of limited agency resources. For example, an agency may need a certain freedom of action and informality of procedure that may be jeopardized by reviewing courts' tendency to facilitate review by the judicialization of agency procedure. Second is the interest in the most efficient allocation of the resources of the Federal courts, potentially threatened by an onslaught of requests for review of administrative actions. Although these two interests are in effect parts of more general interests of the public in the most effective, cheapest, and speediest enforcement of congressional programs, they are considered separately because they often conflict with one another in this area. The third interest is that of the individuals seriously enough affected by the agency's action to have standing to challenge its validity.[170]

Quite understandably, courts are reluctant to review administrative actions if there are alternative methods of regulating agency discretion such as review by legislative committees, if much expertise is required to understand agency operation, or if the agency's actions are highly integrated into an overall plan. Finally, if the legislative delegation of authority to the agency is very broad and general, as it often is in regard to correctional agencies,[171] the court is left without clear guidelines by which to weigh competing factors or develop appropriate remedies. The delegation of authority in Federal agencies is seldom invalidated even if the standards are vague. Even standards as vague as "to eradicate the evils of Communist activity" have been allowed by the Supreme Court in considering the refusal of bail to aliens by the U.S. Attorney General.[172] State courts have been somewhat less reluctant to find an invalid delegation when standards are not clear.[173]

Although the standards set by the legislature for agency action may be vague, some of the problems of this vagueness might be cured if clear standards of practice have developed prior to, or perhaps even following, the delegation of authority. Viewed nationally, treatment procedures vary widely from State to State. The conditions of parole, for example, differ greatly among the States.[174]

The most common parole conditions are prohibitions against liquor usage, change of employment or living quarters without permission, and undesirable associations or correspondence.[175]

[174] See Appendix D.

Other conditions involve prohibitions against out-of-county or community travel, possession of weapons, or marriage without approval. Some States require support of dependents, treatment for VD, participation in antinarcotics programs, return to living quarters at a specified or reasonable hour, and church attendance. A similarly wide range of conditions may attach to the status of the probationer.[176]

Nor do the conditions enumerated by statute exhaust the potential range of conditions, for many statutes allow the court to impose additional conditions. Probationers, for example, have been required to refrain from making remarks against the sheriff,[177] compensate an individual,[178] join the Navy,[179] or write an essay,[180] and not have a telephone on the premises.[181] Standards of practice, both explicit and implicit, are widely discrepant and the doctrine that suggests that consistently applied standards can be curative of vagueness in the delegation of authority to an administrative agency thus requires special caution in its application to correctional agencies.

Unlike some carefully integrated Federal agencies with well-defined and publicly visible policies, State correctional agencies are not likely to be as well integrated or consistent. Personnel frequently change and there is generally low public visibility except during a crisis, which is not a very appropriate time to formulate broadly applicable standards. The court is thus left without clear policy guidelines from either the legislature, as derived from statutes and records of hearings, or the public, as derived from customary and generally accepted practice. Without expressions of basic policy, procedural safeguards are not likely to be adequate as to constitutional rights or the permissible scope of the judicial review.

Finally, it should be asked whether permitting the judicial review of administrative action in correctional agencies might open the "floodgates" and overwhelm the courts with the complaints of prisoners. To this possibility, the court in *Edwards* v. *Duncan*[182] noted that ". . . Where there is no administrative provision for an impartial resolution of factual issues underlying such claims, there is no alternative to judicial inquiry, even though many, or even most of such claims may be asserted irresponsibly."[183] Expanded judicial review appears to be in ascendancy and the "hands-off" doctrine in decline. This may be reflected in the 1968 Supreme Court decision in *Lee* v. *Washington*[184] which found racial discrimination in prisons in violation of the fourteenth amendment. To avoid overburdening the courts, Justice Friendly suggested in *Cappadora* v. *Celebrezze*,[185] a case involving the appeal of claims under the Social

Security Administration, that the number of appealable claims might be regulated by limiting the extent or scope of judicial review.[186] Courts could improve their understanding of the institutional effects of permitting certain types of partial review and then adjust their policy accordingly to achieve a suitable balance between clear institutional requirements and the interests of offenders.

C. Constitutional Provisions

As previously noted, the gradual abandonment of the "hands-off" doctrine by the courts in regard to the review of administrative action has been limited to that necessary to safeguard the constitutional rights of offenders. The present section will consider some of the constitutional provisions that may set limits on the treatment of offenders. Of particular concern will be the provisions related to cruel and unusual punishments, due process of law, equal protection, and the "penumbral" right of privacy. Finally, several less frequently used provisions found in the first, fourth, thirteenth, and fourteenth amendments will be briefly considered.

1. Cruel and Unusual Punishments

In addition to a limitation on excessive bail and fines, the eighth amendment of the United States Constitution prohibits cruel and unusual punishments.[187] Although the term "cruel" in its historical context clearly bars the use of vindictive punishments such as torture, disfigurement, and burning, the meaning of the term "unusual" is much less certain. The term is often considered to be a modifier of "cruel" and thus unusually cruel punishments may be prohibited. But a linguistic analysis of the term does not seem to provide a very reliable guide to judicial interpretation. Bodily injuries and indignities from guards and inmates have been prohibited by this constitutional provision.[188] Rather, the phrase "cruel and unusual" appears to reflect an underlying policy forbidding punishment that is contrary to the contemporary standards of human decency.[189] This policy finds expression functionally in prohibiting certain categories of punishment.

Various *kinds* of punishment, such as chaining a prisoner to his cell by his neck,[190] may be prohibited. The court may also consider the cruelty of various *methods* of punishment. Thus, the Supreme Court found that electrocution as a means of execution was not prohibited by the eighth amendment,[191] but be-

[187] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." United State Constitution, eighth amendment.

heading was prohibited. Also, punishments may be prohibited that are *disproportionate* to the offense. Perhaps the most noteworthy case in this regard is *Weems* v. *United States* [192] in which, for a minor falsification of a public record, the offender was sentenced to 15 years of hard and painful labor, the wearing of a chain fastened from his wrist to his ankle, and, following release, surveillance for life.

Although the distinctions between method and proportionality are not always clear, Sherman [193] has provided a helpful illustration:

> A death sentence for rape and murder would not be held disproportionate to the offense; however, if the sentence were to be carried out by starvation, it would no doubt be held an unnecessarily severe infliction of a proper penalty and would thus be prohibited. On the other hand, a sentence of 20 years at hard labor for a Peeping Tom offense is likely to be deemed cruel and forbidden because it is disproportionate to the offense.

Finally, the infliction of any punishment or penalty whatever may under some circumstances be viewed as prohibited by the eighth amendment. In *Robinson* v. *California*,[194] the Supreme Court found that a California statute which defined an offense as "being addicted to the use of narcotic drugs" violated the eighth amendment's cruel and unusual clause. Although interpretations vary, this decision in light of the later *Powell* v. *Texas* [195] case appears to prohibit criminal convictions based upon mere status without an act.[196] In a sense, *Robinson* moves toward a definition of criminal responsibility and does not go to the conditions of care or treatment of persons following conviction.[197]

Even though *Robinson* does not directly relate the cruel and unusual clause to the treatment of offenders, it has had two important, indirect consequences. First, it makes quite clear that this clause of the eighth amendment is applicable to the States through the fourteenth amendment, an assumption that was theretofore primarily implicit in the decisions of the Supreme Court. Second, *Robinson* renewed interest in the possible appli-

[196] Mr. Justice Marshall observed in *Powell*: "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*." *Powell* v. *Texas*, *supra*, note 195, p. 533. If, however, *Robinson* prevents only "pure status" offenses, then perhaps a similar result could have been reached in *Robinson*, on due process grounds, thus obviating a confusion: that to permit the punishment of acts associated with a status is the same as punishing the status itself. Such an interpretation may go too far, because although the ingestion of narcotics may be essential to addiction, appearance in public while intoxicated may not be an invariable concomitant of alcoholism. There may be degrees of association between a status and a proscribed act.

cations of the cruel and unusual clause to the care and treatment of offenders.

Prior to *Robinson,* the cruel and unusual clause was generally considered not a very effective constitutional provision. It appeared particularly ineffective following *Louisiana ex rel. Francis* v. *Resweber,*[198] a case brought before the Su preme Court in 1947. The State of Louisiana attempted to electrocute the petitioner but the equipment failed. The petitioner claimed that to be subjected again to the process of electrocution would be a cruel and unusual punishment. Although the Court noted that death by installment would not be permitted, the equipment failure was an unforeseeable accident and the mental anguish and physical pain not worse than that suffered during a fire in a cell block. Following *Robinson* in 1962, however, the cruel and unusual clause appeared more viable. Although the clause is frequently used (over 200 cases involving the cruel and unusual clause are reported in the Seventh Decennial Digest), it is seldom successful in challenging the care or treatment of offenders.[199]

The cruel and unusual clause applies to "punishments" and this term is generally taken to mean criminal punishments. The constitutional context of the term in the eighth amendment is plainly criminal. Therefore, one often finds more difficulty in applying this clause to procedures that are labeled "civil" rather than "criminal." [200] For example, although the trend appears to be away from the use of sterilization procedures with socially troublesome persons, sterilization statutes are more likely to be upheld when they appear to be civil rather than criminal in nature.[201] But because the distinctions between civil penalties and criminal punishments may often not be clear, it would seem more useful to look to the general purpose of the statute in question rather than its label.

As to purpose, statutes may permit procedures directed toward punishment (or discipline), treatment, or research. Punishment may have either retributive or utilitarian purposes. From a utilitarian viewpoint, it may facilitate the general deterrence of others from crime. Although there may be some question about the deterrence effects of certain punishments, this is a policy matter that has long been left to the legislatures.

Treatment, in contrast, is directed toward producing an enduring change in the behavior of an individual as he lives under natural conditions within the community. Included within the concept of treatment is an idea of restoration or improvement rather than restriction or disablement. Also intrinsic to treatment, especially behavior modification, is the requirement of measurable results. "Treatment" techniques that do not produce

measurable results may be either an aspect of research or merely ineffective, and therefore probably inappropriate, procedures.

Punishment, treatment, and research may be subject to different constitutional limits. Some of the major limitations upon punishment as found in the cruel and unusual clause have been briefly indicated above. In contrast, there appears to be a tendency to place fewer or less severe constitutional restrictions on treatment than on the punishment or discipline of offenders. Perhaps this is because treatment, particularly if it is of an aversive nature, may not only serve retribution and deterrence functions but may also be viewed as benefiting the offender. This latter attribute of "benefit" to the offender, whether he desires such benefit or not, seems to broaden considerably administrative discretion and at the same time allows the introduction of medical metaphors and analogies into the evaluation of the appropriateness of the treatment techniques. Whether this is desirable in terms of policy will be considered below.

A New York case, *In re Spadafora*,[202] in 1967 upheld a compulsory treatment program for narcotics addicts against constitutional attack. The court cited *Robinson* [203] and *In re De La O* [204] and quoted section 200 of the New York Mental Hygiene Law stating that "Narcotic addicts alone are estimated to be responsible for one-half the crimes committed in the city of New York . . . " [205] The court also noted with unusually vivid language that:

> They [narcotics addicts] require the mandatory *life-saving* aid now offered for the first time by the wise enactment of the New York State Legislature under the enlightened and dynamic sponsorship of Governor Nelson A. Rockefeller, who inspire the favorable response of the community to the compulsory rehabilitation of those who are so unfortunately addicted. The enforced separation of narcotic addicts from the general population is the only humane and benevolent means to succor and rescue these victims from the mire of their own mental and physical deterioration, while at the same time protecting the bulk of our citizenry from the perils of the depredations of those with uncontrolled and insatiable need for drugs.[206]

Nearly 2 years later, in 1969, the Supreme Court of New York, Washington County, could still facilely attempt to combine the dual objectives of community safety and benefit to the drug addict in *People ex rel. Stutz* v. *Conboy*.[207] The offenders contended that their confinement in a correctional institution for the treatment of addiction constituted cruel and unusual punishment. In addition to

detention in the correctional facility, the offenders participated in group therapy meetings of approximately 1½ hours in length scheduled at least three times a week. The court denied the cruel and unusual punishment claim and observed that, "It matters not that Great Meadows is a correctional institution. Indeed, there is testimony that at least 40 inmates, most of them young people, are narcotic addicts who, although not certified under Article 9 [Mental Hygiene Law], partake in the program, voluntarily attending the classes regularly. In order for relators to obtain the benefits of the program, their liberty must be sacrificed." [208]

But the objectives of community safety and the beneficial treatment of offenders are not always compatible and this becomes disturbingly apparent when the offender refuses treatment or is no longer considered treatable. This issue was confronted more directly by the 4th Circuit Court of Appeals in *Sas* v. *State of Maryland* [209] than by the courts in *Spadafora* or *Stutz*, though the case left the issue perhaps unsatisfactorily resolved. In considering the Maryland Defective Delinquent Act that would allow the indeterminate confinement of delinquents for treatment, the court observed, "It is obvious, however, from the statistics to date, that the justification for the Act may not rest solely or even primarily, on the theory that all defective delinquents will receive treatment or that the majority of the inmates who do will be greatly benefited or cured by treatment . . . Many of the inmates will, therefore, in all likelihood, be confined for life on the premise that they are untreatable or incurable but, nevertheless, too dangerous either to life or to property to be released in a free society." [210] Treatment is thus confused with preventive detention.

The techniques of treatment as found in behavior modification programs emphasize measurable results and can be clearly differentiated from mere confinement or preventive detention. This does not, of course, prevent legislatures from passing statutes that specify both treatment and public safety objectives. Most States with special sex offender statutes provide indeterminate sentences.[211] The criteria for the release of offenders incarcerated under these statutes allow very much room for differing judgments. This greatly increases the probability of confusion in the handling of offenders or even abuse because long-term detention may be carried out under guise of treatment.[212] Although

[212] An example of linguistic and logical confusion may be found in *In re Marks*, 458 P.2d 441, 458 (Cal. Sup. Ct. 1969): "Unless the rehabilitation authorities are empowered to act with equal swiftness [as parole officers] to remove him [the addict] from the contaminating environment and provide him with the necessary physiological and psychological support, the timetable of his recovery may be severely set back." But the relevant statute (Welfare and Institution Code, sec. 3000) as cited by the court (p. 455) suggests that treatment shall be carried out not only for the protection of the addict against himself, " . . . but also for the prevention of contamination of others and the protection of the public."

behavior modification may at times necessitate confinement, there is a clear trend toward providing treatment within the community where ultimately new behavior patterns must be established and observed if the treatment is to be considered successful.

It appears that treatment, as separate from mere confinement, may, if it is within the customary limits of decency, be imposed upon the offender. In *Haynes* v. *Harris* [213] the petitioner who was serving an indeterminate sentence at the Medical Center for Federal Prisoners, Springfield, Mo., contended that medical treatment which was forced upon him against his will was corporal punishment and that it violated the eighth amendment. The court found that the facts did not imply "cruel and inhuman" punishment and regarded the contention as "obviously without merit."

In *Peek* v. *Ciccone,*[214] the court permitted the forceful, intramuscular administration of a tranquilizer to an inmate who was diagnosed as a schizophrenic. The extent to which this administration of the drug was for the purpose of long-term rehabilitation rather than for the temporary management (discipline) of the prisoner is not clear. Treatment, when available, is customarily offered to or required of the prisoner without clear procedures for obtaining his consent. Rather, there seems to be a presumption that the offender will participate in treatment. In *Buchanan* v. *State,*[215] the Supreme Court of Wisconsin examined the due process claims of a sex offender who was incarcerated beyond the maximum term that could have been imposed for his crime as a person "dangerous to the public." The court commented, as dictum, that "The defendant cannot be heard to complain when he did not accept the treatment offered." [216]

If an offender may be compelled either directly or indirectly by future administrative or legal consequences to participate in treatment (and there might be some question about this), it would be very important to know the permissible limits of such treatment. Surely, the treatment should not offend contemporary standards of decency, but the standards of decency as customarily applied to offenders are far less humanitarian than those generally found in voluntary admission institutions. Prisoners may be deprived of personal items, placed in solitary confinement, and fed a restricted diet.[217] Physical force and sometimes even tear gas may be used to control prisoners.[218] A prisoner, however, may not be deprived of the fundamental physical needs of personal hygiene, warmth, and light.[219] A behavior modification procedure that attempted such severe deprivations would not be permitted.

The torture of prisoners is not permitted [220] and the beating of prisoners is rapidly becoming unlawful,[221] although public

whipping as "treatment" might be reluctantly allowed.[222] By analogy, treatment techniques that required the administration of painful electric shock over a period of time, as used in some aversive suppression treatments of transvestism or homosexuality,[223] would probably require express, voluntary consent from the prisoner as well as other procedural safeguards such as publicly available records of the treatment. Similarly, as involuntary sterilization becomes increasingly less acceptable as a medical technique for offenders, behavior modification methods involving the implantation of electrodes or sensors will probably require higher standards of express, voluntary consent even though these physiological alterations, unlike sterilization in most instances, may be reversible. Even with consent, and the offender's eager participation, there can still be some question as to the extent to which offenders may permissibly waive their rights. This will be discussed in the following section as an aspect of the due process of law.

Although the conditions of parole and probation vary widely, they have seldom been invalidated on eighth amendment grounds. In 1936, a California Appellate Court permitted the sterilization of a sex offender as a condition of probation.[224] In 1965, the Supreme Court declined to review a California decision that imposed sterilization as a condition of probation on an offender in lieu of his confinement.[225] The offender had failed to support his children. With changing standards under the eighth amendment, these decisions may be of questionable authority, but they define the outer limits of permissible conditions.

The imposition of antinarcotic testing as a condition of parole, probation, or "outpatient status" [226] for drug addicts is becoming quite common, particularly in California and New York. This testing is generally compulsory and conducted on a periodic and surprise basis. It usually involves the injection of a small amount of Nalline (nalorphine hydrochloride) under the skin, or a urinalysis.[227] The Nalline testing involves the measurement of pupil size before and after the administration of the Nalline. The procedure requires about 30 minutes, is reliable, and the side effects range from slight euphoria to nausea.

These tests can detect the use of narcotics in the absence

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[222] *Baker* v. *State*, 195 A2d 757 (Del. Sup. Ct. 1963); *Cannon* v. *State*, 196 A.2d 379 (Del. Sup. Ct. 1963). The court has consistently permitted whipping, relying largely on the doctrine of judicial restraint. Whipping could not, however, qualify as treatment as herein defined because the behavioral results appear to be negative. *Supra* notes 65, 66.

[223] "[A]lthough the California Rehabilitation Center outpatient is not officially called a parolee, the manner and methods of release and the continuing control and supervision of a parolee from prison and an outpatient from California Rehabilitation Center are strikingly similar . . ." 49 Ops. Cal. Atty. Gen. 11 (1967) cited in *In re Marks*, 453 P.2d 441, 451 (Cal. Sup. Ct. 1969).

of any other evidence. The argument that the revocation of probation on this evidence alone would be cruel and unusual punishment for a status, based upon an extention of the *Robinson* case, has not been accepted by the courts. In *Hacker* v. *Superior Court of Tulare County* [228] a positive urine test could be used to provide "reasonable or probable cause" for a search of a known addict and could be used to help infer his knowledgeable possession of narcotics serving as a basis for revocation.

The use of antinarcotic testing to determine the frequency of illegal behavior and reduce it, hints at the possible acceptability of other methods of recording and preventing behaviors in the community. Electronic monitoring and tracking devices would not seem to be directly prohibited by the cruel and unusual clause within a broad view of the issue,[229] and have been used to monitor the location of parolees.[230] If, however, the equipment was particularly cumbersome, obvious to a casual observer, and clearly labelled the wearer in the community as an offender, it might be considered a form of "branding" or excessive social censure and therefore impermissible. Also, the severe status degradation resulting from the wearing of such equipment would be likely to impair its therapeutic effects and thus the use of the equipment could not be considered an aspect of treatment but rather of retribution or deterrence.[231]

The Court in *Weems* v. *United States* [232] appeared to focus not only upon the physical cruelty to be endured by the prisoner while incarcerated but also his lifelong social isolation and mental suffering while in the community. This suffering was, in the Court's view, clearly disproportionate to the offense. The purpose and use to which the electronically obtained information would be put, as well as its general availability, might help to determine the extent to which surveillance was repugnant to the eighth amendment. This is closely related to the issue of privacy to be discussed subsequently.

Several of the functions that could be performed by electronic monitoring and intervention systems are now being carried out by parole or probation agents as permissible conditions. Probationers may be required to submit to searches of person and property. Some States permit the search by statute or administrative practice. This will be discussed later in more detail as a fourth amendment problem.

Restrictions on the movement of offenders are common. Probationers in most States must request permission to change their places of employment or residence and the majority of States also require permission for out-of-State travel and the use of an automobile.[233] A few courts typically require a brief period of con-

finement as a condition of probation at the outset of the probationary term.[234] Although this may be criticized on policy grounds,[235] it has customarily been permitted. Youths may be required to report to a "Training Academy" for manual labor during the working hours of a weekend,[236] and if the youth is a ward of the court, confinement may be permissible during the weekends.[237] The Model Penal Code, section 301.1(2)(c), promulgated by the American Law Institute,[238] states that the court may require the probationer to undergo available medical or psychiatric treatment and to enter and remain in a specified institution, when required for that purpose." Requiring noncustodial and perhaps even temporary custodial attendance at behavior modification programs that are not unreasonably distant from the offender's residence would seem allowable.

There is presently considerable emphasis upon providing treatment to offenders. A nationwide sample of adult probation agencies indicates that approximately 18 percent provide special treatment such as group counseling, halfway houses, or special programs for alcoholics or drug addicts.[239] Although not all treatment programs are pleasant,[240] they can usually be distinguished from mere discipline or humanitarian kindness. The use of chain gangs in South Carolina is an example of confusion between the concept of treatment and the concept of discipline or retribution. Working on a chain gang is sometimes justified by the prison administrators as helping prisoners to "work off" hostilities and frustrations and develop good "work habits."[241] The difficulty is not so much with the treatment theory, though this is certainly questionable, but with the failure to provide clear measures of therapeutic effectiveness. The little evidence that is available does not support the assumption that working on a chain gang will reduce subsequent offenses more effectively than standard incarceration.[242]

In discussing the application of the cruel and unusual clause of the eighth amendment to the juvenile courts, a certain anomaly exists. The juvenile court has been traditionally characterized as noncriminal and treatment-oriented. Therefore, because it does not punish the juvenile, the cruel and unusual clause does not apply. In *Ex parte Walters*,[243] a Criminal Court of Appeals of Oklahoma forbade a child of 9 years of age who begged on the street with her father from seeing her parents until she became at least 18 years of age. The petitioners argued that this violated the cruel and unusual clause. The court replied that, "[T]here is no intention on the part of the State to punish a minor who is determined by the juvenile court to not understand the consequences of its acts . . . [B]y reason of the nature of the hearing, and

judgment complained of which does not attempt to inflict punishment, the constitutional provision cited is not involved." [244] Sherman [245] has usefully discussed these limitations traditionally placed upon the application of the eighth amendment.

In the context of increasing concern about the basic fairness of many juvenile court dispositions, the standards implicit in the cruel and unusual clause might be applied by "analogy" to the juvenile court situation.[246] Some judicial recognition of this possibility appears to be occurring. The court in *In re Green* [247] commented, "Although criminal probation statutes are not pertinent to juveniles, they are relevant to the basic question of specificity of formulation of the conditions of probation." [248] Also noteworthy is the case *Workman* v. *Commonwealth*,[249] in which the Kentucky Court of Appeals held that life imprisonment without parole of two 14-year-old boys for rape violated the eighth amendment because it shocks the general conscience of society. Certainly such a sentence could hardly qualify as lying within the treatment objectives of the juvenile court.

As noted above, the concept of treatment is often confused with discipline or retribution. Intrinsic to the treatment of offenders by behavior modification techniques is the measurement of the effectiveness of the techniques in changing observable illegal behavior. The effectiveness of a technique in preventing subsequent offenses for long periods of time in the future might from a utilitarian, public safety viewpoint justify somewhat more aversiveness than those procedures only concomitant with the customary institutional or postinstitutional care of offenders. However, therapists should not be permitted to do under the label of treatment or behavior modification that which cannot also be done under the label of discipline. Ultimately the justification of discipline or behavior modification is the safety of the community and not a supposed benefit to the offender who, if he were persuaded of such benefit, would generally consent to the treatment technique.

Furthermore, judicially sanctioned incursions by either treatment or discipline techniques upon the fundamental concepts of decency as expressed in the eighth amendment reflect an evolving standard of judgment derived from the ethical milieu of the culture. In this context of changing or conflicting values, the court, or the legislature, would seem to be a more equitable forum for the open presentation and weighing of values than a treatment clinic or laboratory where the offender is typically at a decided social disadvantage.[250] It may be that behavior modifica-

[250] While the American Bar Association has been advocating shorter sentences and calling for more investigation of prison conditions, the Gallup Poll shows that from 1965 to 1968

tion techniques will eventually have a distinct advantage over the more traditional forms of therapy by presenting data clearly demonstrating the effective promotion of public safety. Thus, behavior therapists may ultimately persuade the public of a reluctant necessity for the limited use of very aversive but effective techniques. However, in the absence of unequivocal evidence of long-term therapeutic effectiveness of a particular behavior modification technique as routinely carried out by trained personnel, a similarity of standards for both behavior modification and discipline techniques would seem to provide at present the maximum legally enforceable protection for offenders.

2. Due Process

There is general agreement that the concept of "due process of law" as found in the fifth and fourteenth amendments has been increasingly applied in the area of corrections. For example, the courts have become increasingly explicit about the procedures necessary for legally valid confessions, findings of delinquency in the juvenile court, and the revocation of probation. Even though the changes in the application of the due process concept are clear, the definition of the concept itself remains elusive.

In simplest terms, the concept refers to a sense of fundamental fairness. The fairness of legal proceedings, including investigation and arrest, is to be considered as well as the fairness of the outcome of the trial. Although this sense of fairness helps to guide judicial decision-making, it cannot be readily reduced to a verbal formula because most cases involve the weighing of conflicting social claims. Also, what is considered "fair" procedurally or substantively tends to vary over the years.

In *Rochin* v. *California*,[251] Mr. Justice Frankfurter suggested, "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' . . . or are 'implicit in the concept of ordered liberty.' " The Court found that forcefully "pumping" the stomach of the petitioner by giving him an emetic to obtain evidence of the use of a narcotic drug "shocks the conscience" and would "offend hardened sensibilities." [252]

Without clear guidelines, due process has come to be categorized under several rubrics of policy. Judicial decisions reflecting due process policy for persons under a disability are of particular

there was an increase of 15 percent (from 48 to 63 percent) of respondents who indicated that the courts were not dealing "harshly enough" with criminals. Roth, L. H. Treating the Incarcerated Offender. *Corrective Psychiatry and Journal of Social Therapy*, 15:4-14, 1969.

relevance to the treatment of offenders. A statute, sentence, order, or administrative standard may violate the due process clause if it fails to give adequate guidance to its addressees.[253] If reasonable certainty is provided by the directive and a general class of behavior is plainly ordered or proscribed by its terms, the directive will not be invalid on due process grounds even though doubts might arise in regard to marginal cases.[254]

There has been a general reluctance of appellate courts to review the sentences imposed by trial judges or the conditions of parole or probation. When there is a review, particularly of probation conditions, the courts often look to a standard of fairness and reasonableness rather than to constitutional doctrines.[255] This may be in part because probation, as well as parole, is viewed as a matter of "grace" and rehabilitation. Customarily, somewhat more discretionary leeway is permitted parole and prison authorities than probation authorities. For this reason, the following discussion will focus primarily upon the limits imposed by the due process clause on behavior modification techniques in the context of probation.

The statutory conditions of probation are often very general. For example, they may exhort the probationer to obey the laws of the State,[256] or avoid disreputable places or persons.[257] In addition, the court is often authorized to impose conditions of probation. These statutes usually allow very much discretion to the trial court. California's Penal Code, section 1203.1, provides that the court may impose certain previously specified conditions and "other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach, and generally and specifically for the reformation and rehabilitation of the probationer . . ." Finally some authority may be given to the probation officer to impose conditions.[258]

In the context of parole, authority to impose conditions is generally given to the parole commission or its equivalent and then delegated to the parole officers. There is implied in this situation an agreement that the probationer or parolee will not be imprisoned unless he violates one of the conditions of probation or parole.

The conditions imposed by the court or by parole officers may, however, be rather vague without contravening the due process clause, perhaps because probationers and parolees are considered to be under legal disabilities. A noteworthy example is provided by *Kaplan* v. *United States*,[259] in which the trial court imposed upon the appellant, who had pleaded guilty to selling heroin,

several "usual" conditions of probation. Among these conditions were, "Live a clean, honest, and temperate life," and "Keep good company and good hours." The appellant later refused under court order to disclose to a grand jury the source of some heroin purchases. His probation was revoked and a sentence of 15 year's imprisonment was imposed. The court did not agree with the appellant's contention that he had violated none of the conditions of probation that were imposed upon him and noted, "One on probation is not at liberty; he is in law and in fact in the custody and under the control of the court granting probation. We also think there can be no doubt but what, aside from the written conditions of probation, there is an implied condition that the probationer will follow the reasonable directions and orders of both the probation officer and the District Judge." [260] Even conditions as vague as "stay out of all trouble" have been allowed.[261]

It would appear therefore that there is considerable leeway in specifying the nature of the treatment in which the probationer is to participate. Treatment as in typical contingency management programs would be allowable. For example, a probationer might receive reinforcements, such as money or driving lessons, contingent upon his attendance at school or upon his social conduct. Contingencies might also be changed during his term of probation, for as the courts often note, "No doubt it is difficult to know in advance precisely what will be needed, and hence the cited statute [New Jersey Statutes Annotated, 2A:168–2] expressly provides that the court 'may, at any time, modify the conditions of probation.' " [262] The contingencies, if changed, however, must be clear to the probationer so that he knows with reasonable certainty what is expected of him and what consequences will flow from a violation of conditions. Further, because a probationer may generally not be imprisoned without violating a condition of his probation, it is customarily not permissible to revoke his probation solely on the basis that imprisonment might be a more effective treatment procedure.

There are other limitations also set upon treatment by the due process clause. Although a probationer may be required to undergo some form of treatment as a condition of probation,[263] the treatment must be "reasonably related to the rehabilitation of the defendant" as well as "not unduly restrictive of his liberty or incompatible with his freedom of conscience." [264] Of particular concern here is the relationship of the behavior the probationer is required to produce or inhibit to the conditions of his probation. The behavior dealt with by the conditions must be reasonably directed toward achieving the objective of probation, namely, re-

habilitation and the reduction of subsequent offenses. For example, it is possible to forbid a drug addict to associate with other users,[265] or a person who has been convicted of sending obscene matter through the mail to receive mail.[266] Likewise it is possible to prohibit an offender from seeing a woman whose son-in-law was a victim of an assault because she was "clearly a factor in his criminal conduct." [267]

People v. *Dominguez* [268] provides a clear example of a condition of probation not reasonably related to the objectives of probation. The appellant was found guilty of second degree robbery. In setting the conditions of probation, the judge stated to the appellant, who had two illegitimate children, "The third condition is that you are not to live with any man to whom you are not married and you are not to become pregnant until after you become married. Now this will develop by just becoming pregnant. You are going to prison unless you are married first." [269] The woman became pregnant while on probation and the trial judge revoked probation commenting that, "It appears to me this woman is irresponsible; she is foisting obligations upon others, and one of the objectives of probation is to teach and encourage responsibility in all phases, including the economics of life and being able to support the dependents who will naturally flow from this sort of conduct." [270]

In reversing the revocation of probation, the California Court of Appeal. Second District, used the following test: "A condition of probation which (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality does not serve the statutory ends of probation and is invalid." [271] The court then made the observation, "Appellant's future pregnancy was unrelated to robbery. Becoming pregnant while unmarried is a misfortune not a crime." [272]

Several points here are worthy of consideration as they may suggest due process limitations upon treatment. Treatment in broad perspective is directed toward the reduction of future offenses and may therefore, as noted above, be imposed as a condition of probation. But this assumes that the treatment so ordered as a condition is in fact related to a reduction of future offenses. The assumption of this relationship is often implicit and unexamined. Surely the imposition of alternating warm and cool baths as a form of treatment for robbery would no longer be acceptable as being "reasonably related" to a reduction of future offenses. But evidence is not always convincing that other forms of more customary treatment are related to the reduction

of criminality. As discussed in the introduction, treatment in the form of counseling or psychotherapy is often ineffective [273] and occasionally it is even related to increased subsequent criminal behavior.[274] Behavior modification techniques, as well as counseling and psychoanalytically oriented treatment methods, should be examined carefully in regard to their therapeutic effectiveness or hazard.

It is highly questionable, as *Dominguez* indicates, whether ineffective treatment should be permitted as a condition of probation or parole.[275] Conversely, one would expect that effective forms of treatment likely to reduce subsequent offenses would be particularly consonant with the objectives of probation or parole and would therefore be looked upon favorably by the courts. There are some hints in this direction. In *Faucette* v. *Dunbar* [276] the petitioner, a drug addict who was residing at Synanon House for the purpose of receiving a newly developed type of group therapy, was summarily ordered by the Adult Authority to move or suffer the revocation of his parole. The petitioner had also refused to take Nalline tests, a customary condition of parole, because they were discouraged by Synanon House.

The California Court of Appeal, Second District, affirmed the trial court's order requiring the Adult Authority to consider the petitioner's request to remain at Synanon House. The appellate court noted that the petitioner appeared to be doing well and placed emphasis on the possible therapeutic effectiveness of the treatment the petitioner was receiving. The trial court was quoted with approval: "The respondent, Adult Authority, has not favored the Court with any evidence indicating that it has considered the use of Synanon facilities in its overall program for rehabilitation of addicts on parole. The Court is, frankly, unable to understand the lack of interest in such a proven technique for rehabilitation of addicts." [277] The court also suggested that the Adult Authority could waive its requirement of Nalline tests. The court appeared to be persuaded that the treatment had at least some probability of rehabilitating drug addicts and deserved consideration even to the temporary exclusion of a customary parole condition.[278]

Even though a treatment technique might be effective, such as the inhibition of homosexual behavior by classical conditioning, it should also be related at least in a general manner to the offense of which the offender was found guilty. The court in *Dominguez* pointedly asserted, "If the condition of probation is not directly

[278] The trial court appended to its decision a report by the California Assembly Interim Committee on Criminal Procedure highly favorable to the therapeutic potential of Synanon. This report noted that Synanon provided an "unparalleled opportunity for research" and urged the State of California to take a "friendly but nondirective interest in Synanon and any other private attempts to rehabilitate narcotic addicts."

related to the crime, the condition may be invalidated." [279] In *State* v. *Baynard* [280] the trial court imposed several conditions of probation upon the appellant, who was convicted of operating a motor vehicle while under the influence of intoxicating liquor. Two of the five conditions imposed were that the appellant not go into or near any premises where intoxicating liquors were sold and that he not ride in any motor vehicle except for his business. The appellant contended that the conditions were unreasonable because they did not grow out of the offense for which he was convicted. The court appropriately rejected this argument.

Sometimes the relationship between certain conditions of probation and the offense might not be clear unless the pattern of conduct of the offender is known. For example, a defendant convicted of larceny in *State* v. *Smith* [281] was not permitted to operate a motor vehicle for 1 year. In the act of larceny the defendant had used a vehicle to haul away 900 pounds of seed cotton. An offender may be required to make resititution to a victim of his offense,[282] or to the local government,[283] but not to a person who is not a victim.[284] A notable exception to this general principle has been developed in regard to sex offenders in some jurisdictions. Sexually dangerous persons may be incarcerated for long periods of treatment when their original offense is unrelated to any sexual act.[285] This may result from an overriding consideration of public safety (or morals) applicable ideally to a narrow range of cases.[286]

Finally, although a condition of probation such as treatment may be reasonably related to the objectives of probation and likely to achieve these objectives, it must also meet a standard of fairness that does not offend a common view of justice. Though the concept of "substantive" due process has assuredly not been clarified by its "distinguished descent," [288] some sense of "ordered liberty" still remains.[289] In *Springer* v. *United States* [290] the appellant refused induction into military service on religious grounds. One of the three conditions of probation that were imposed was that the appellant donate a pint of blood to the Red Cross blood bank within 30 days. The appellant at the time did not clearly accept or reject the conditions. Later, the appellate court tersely noted, "We regard the requirement that 'a

[286] Dictum in *Sas* v. *State of Maryland* is worth consideration in this regard. After approving the indeterminate psychiatric treatment of offenders, the court observes, "But a statute though 'fair on its face and impartial in appearance' may be fraught with the possibility of abuse in that if not administered in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society. Many of the inmates of Patuxent are there by reason of offenses against property rights. Many jurists and laymen would seriously question the wisdom of the practice of indefinitely confining young men under these circumstances." [287]

pint of blood' be given as invading the physical person in an unwarranted manner and void on its face. It may be entirely disregarded."[291] The compulsory implantation or attachment of devices as a condition of probation or parole should certainly be subject to careful scrutiny.

The comments of Mr. Justice Field in 1876 are still appropriate today, if not more so, because of the increased possibilities of technological incursions upon the person.

> No State "shall deprive any person of life, liberty, or property without due process of law," says the fourteenth amendment to the Constitution. By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.[292]

Nevertheless, such sentiments still find limitations, as they always have, in the tangible and complex situations of contemporary apellate review. *In re Peeler*[293] is a noteworthy example. The petitioner, a 20-year-old girl, pleaded guilty to the possession of marijuana and the matter was referred to the probation officer for investigation. Following arrest and prior to sentencing, she married a college student near her age against whom charges of furnishing marijuana and a dangerous drug were pending. The petitioner claimed no knowledge of the student's drug involvement and failed to inform the court of her marriage. Among several conditions imposed by the court were two: she was to live with her parents and she was not to associate with any known or reputed user of marijuana. She later petitioned for the elimination of these conditions and the court, thereupon finding that she was married, imposed a 60-day jail sentence and reaffirmed the prohibition against her association with reputed marijuana users. Thus, the trial court essentially required her to live apart from her husband.

After noting "the brink of the precipice upon which this petitioner precariously is perched," the appellate court reviewing this case concluded, "We have no doubt whatever that the facts

before the court justified the imposition of the new conditions of probation." [294] The appellate court added, "The trial court here has not severed the marital union of petitioner and Peeler [her husband]. Had it denied or revoked probation it would have more permanently affected the probability of the durability of the marriage." [295]

This goes very far toward reaching, or even surpassing, customary due process limits.[296] It does point out clearly the fact that probation is an alternative to incarceration which is a very severe penalty. It could be argued that the petitioner in *Peeler* could have chosen incarceration instead of separation from her husband or that she voluntarily waived her rights. A valid waiver requires that the person be physically and emotionally able to consent in a knowledgeable manner. The petitioner in *Peeler* would have been capable of this. As pointed out by *In re Walker*,[297] the courts should examine carefully those waivers of rights by which an offender, a drug addict in the instant case, seeks to obtain treatment rather than a criminal sentence.[298]

Two theories have been used to invalidate a procedurally suitable waiver by a parolee or probationer by which conditions, such as inappropriate treatment, are imposed. The court, as in *Dominguez*, may consider the condition void, e.g., sterilization, as a matter of public policy and, as the State interest in this matter cannot be contravened by private agreement, the waiver is invalid. Essentially, there can be no waiver of a void condition. Another, perhaps more fruitful approach is that found in the doctrine of "unconstitutional conditions."

Though this doctrine has been variously formulated, it would in broad outline suggest that the right of the government to withhold a benefit does not imply the right of the government to grant it only if the recipient surrenders a constitutional right.[299] Thus, a State may not be permitted to refuse the benefit of tax subsidies to veterans refusing to sign loyalty oaths because this would curtail a constitutionally guaranteed right of speech.[300] But, of course, some rights may be validly waived by individuals. The doctrine would seem to apply particularly to those situations in which the government seeks a waiver of rights in an area not related to the purpose for which the benefit was given.

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[294] Putting aside summarily the presumptive innocence of the husband, the appeiate court suggested, "Our ruling does not extend to a blanket endorsement by this court of the separation of husbands and wives as a condition of probation under all circumstances. Decision must be on a case-by-case basis." *Id.* at 261.

[296] The court found that the petitioner's story of a lack of understanding of the consequences of her waiver was lent credibility "by her headlong rush from illness to doctor's examining room to county hospital to district attorney's office to courtroom to commitment, all in the span of a single working day." *Id.* at 19. The court also criticized the casual use of printed waiver forms.

Thus, a major consideration in determining the validity of a condition attached to probation would be its relevancy to obtaining the legitimate, governmental objective of rehabilitation.

The policy underlying the use of the unconstitutional conditions doctrine is that the government is in a position to offer many benefits to petitioners and through bargaining techniques produce a potential erosion of fundamental liberties.[301] Further, it is not quite accurate to say that probation with the imposed conditions is an alternative to incarceration because the judge determines both the likelihood of incarceration and the terms under which that likelihood can be reduced by obedience to certain conditions of probation. It is in fact a single decision in alternate forms. By this decision-making procedure, due process is undermined because what is "due" is determined by the same authority.

To prevent the concept of due process from becoming a mere tautology for the enforcement of subjective standards of fairness, administratively independent alternatives might be offered to the offender. Thus, for example, after the parole authority had decided that the inmate was not eligible for parole, an independent correctional agency could recommend reconsideration of parole with the added condition of participation in a behavior modification program. Thus, inmates eligible for parole without treatment would not have the condition of treatment imposed upon them. Of course, many other arrangements are possible and suitable, but the goal remains of providing liberty in the community through an ordered process of decision.

3. Equal Protection

Although the fourteenth amendment rather clearly prohibits the States from denying to any person within their jurisdictions the equal protection of the law,[302] the equal protection clause was called by Mr. Justice Holmes "the usual last resort of constitutional arguments." [303] Mr. Justice Jackson, however, urged the more frequent use of the equal protection clause: "I regard it as a salutary doctrine that cities, States, and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation." [304]

The "last resort" of the equal protection clause was used in 1942 in the famous case of *Skinner* v. *Oklahoma*,[305] 7 years prior to Mr. Justice Jackson's comment cited above. The relevant statute

[302] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, fourteenth amendment, sec. 1.

permitted the sterilization of persons committing two or three felonies as habitual criminals. In delivering the opinion of the Supreme Court, Mr. Justice Douglas noted that "A person who enters a chicken coop and steals chickens commits a felony; and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. Hence, no matter how habitual his proclivities for embezzelment are and no matter how often his conviction, he may not be sterilized." [306] Because the statute was seen as drawing a conspicuously artificial line between intrinsically similar offenses, it was rendered invalid on equal protection grounds.[307]

It is noteworthy that the equal protection clause in *Skinner* was applied to the proposed treatment of the offender rather than to a determination of his guilt. However, in practice, appellants often invoke the equal protection clause in the treatment context, but not successfully. This can be understood perhaps in part if one considers the general correctional context in which the disparate treatment of similarly situated offenders takes place.

As Rubin et al.[308] have pointed out, the granting of probation may vary as much as from 5 to 80 percent of the cases coming before various judges. The percentage receiving probation under these circumstances does not seem to be closely related to subsequent recidivism. To insist upon the clear drawing of distinctions in regard to appropriate types of treatment following probation or release on parole would seem, as the old adage puts it, to be straining at the gnat while swallowing the elephant. The differentiation of treatment recognized by the courts is very broad.

In *Buchanan* v. *State*,[309] the defendant challenged the Wisconsin Sex Crimes Act under which he was being treated beyond the maximum term that could have been imposed for his offense. His primary challenge was on due process grounds. But he also argued from an equal protection viewpoint that because mentally ill persons have the right to a jury trial prior to involuntary commitment sex offenders should have that right. The court disposed of the equal protection argument by noting a valid distinction between the purposes of the commitment of the mentally ill person and the sex offender. "There are several germane distinctions to the classification . . . the most important is that a sexual deviate is con-

[307] Mr. Chief Justice Stone in a concurring opinion suggested reaching the same result using the due process clause. It is a point worth considering because surely the Court would not have been pleased if subsequently the State of Oklahoma proposed to sterilise all offenders, thus making no invidious discriminations among them. There has been some tendency to bring "substantive" due process considerations within the purview of the equal protection clause.

fined because he is dangerous to the public, and the mentally ill, infirm, or deficient person is confined primarily for his own benefit and treatment." [310] Here, putting aside the therapeutic treatment implications of the operative statute, the court makes very broad distinctions that are not likely to be helpful to the offender in challenging alternative types of therapeutic treatment following a determination of his suitability for some type of treatment. Nor would the decision in the earlier case of *Baxtrom* v. *Herold*,[311] which applied the equal protection clause through the fourteenth amendment to insanity proceedings whether they were labeled as civil or criminal, seem to reach this far.

Thus far, though there has been some extension of the application of the equal protection clause, the decisions of the courts seem to be in line with the traditional reluctance of courts to intervene on equal protection grounds in matters of types of appropriate treatment for offenders. This is generally the outcome even when the statute under which the treatment is being conducted is very vague. The mental health or correctional agency is assumed to have a level of expertise that favors the development of appropriate categories of treatment and the assignment of persons to them. This appears to be particularly the situation when the problem addressed by the court involves public safety and its solution is uncertain. The Fourth Circuit Court of Appeals in *Sas* v. *State of Maryland* [312] directly declared:

> We must also reject the petitioners' contention that the Act upon its face violates the equal protection clause of the fourteenth amendment. The preoccupation of society with the problems of recidivism and rehabilitation, which show no signs of solution by conventional penological methods, strongly support the efforts of Maryland to seek a new approach. The problem furnishes a rational basis for the legislature's efforts to set apart a group of convicted felons who were "demonstrably dangerous to society unless cured of their criminal propensities." [313]

Similarly, the New York Supreme Court, Bronx County, has commented, "When a subject is within the proper scope of the State's police power, any exercise of that power is constitutional if there is a rational basis for the legislative act, even where the state of knowledge is uncertain and conflicting theories exist as to the problem's solution." [314]

The reluctance of the courts to intervene on equal protection grounds when a treatment program is in its early, developmental stages is seen even more clearly in a later, significant decision

by this same court in *People ex rel. Blunt* v. *Narcotic Addiction Control Commission.*[315] The relator in this case, a drug addict, contended that he was not receiving treatment substantially different from prison inmates and that the treatment offered was not effective. The treatment consisted almost exclusively of voluntary group meetings held several times a week at which the inmates were encouraged to talk about their problems. The group meetings were conducted primarily by other incarcerated addicts who had progressed to a later stage in the program. No routine, professional treatment was offered to the addicts. The court considered the program not "totally without merit. However, the evidence adduced does show serious flaws in the present approach to the problem. Though millions have been spent setting up this program, the results have not been too encouraging. To date only 20–25 criminal addicts have been provisionally designated as rehabilitated." [316] The court dismissed the relator's petition for habeas corpus, however, and concluded:

> The State Narcotics Program, as administered by the ASA [Addiction Service Agency], cannot be permitted to stagnate, nor can these addicts be ignored once placed in custody. It is apparent that what is needed is some objective administrative board not wedded to any particular form of treatment which can evaluate what progress, if any, is being made, and mandate change if required.
>
> Still, whatever its present shortcomings, New York State's new and revolutionary approach to drug addiction and crime should be given every chance to succeed. Some addicts are participating in the City program and some progress has been shown. The experimental nature of this program is obvious, and trial and error must be permitted if an effective and efficient program is to be evolved.[317]

This same view was later reaffirmed in *Stutz* v. *Conboy* [318] in which the relators contended on equal protection grounds that the classification that placed them in a newly initiated and not clearly organized treatment program in a correctional institution rather than another facility was inappropriate.[319] The court took a position of self-restraint on the matter: "The courts must let the administrative agency with expertise work out the specifics of the program on the basis of its experience and should not interfere to scuttle the program on so tenuous a basis." [320]

[320] Within the institution, the inmates were classified into three groups according to their respective levels of achievement in the program and likelihood of release. This, if further developed, is analogous to contingency management programs. *See supra* Chapter II, B.

It appears that the courts may allow administrative agencies considerable leeway in content and time in developing new programs for the treatment of offenders if challenged on equal protection grounds. If, however, the sensibilities of the court are offended by the nature of the treatment as in *Skinner*, the court might apply the equal protection clause, rather than relying on a "substantive" concept of due process or the less often used cruel and unusual punishment clause.

4. Privacy

In 1965 the case of *Griswold* v. *Connecticut* [321] opened up a potentially wide area for the application of the concept of privacy. Although the facts of the case appeared to call for some positive action in response to the Connecticut statute that aimed at reducing illicit sexual conduct by prohibiting the use of contraceptives, the Supreme Court might have reached the result on grounds narrower than a concept of privacy.[322] Building upon an earlier dissenting opinion in *Poe* v. *Ullman*,[323] which dealt with largely the same issue in Connecticut, Mr. Justice Douglas delivered the opinion of the Court. As he saw it, "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy." [324] In regard to marital privacy, Mr. Justice Douglas suggested that "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." [325] Mr. Justice Goldberg also found that "the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights . . ." [326]

Close attention to the context of the *Griswold* decision would suggest that the right being protected by the holding was one of marital privacy, though surely by now the implications have become broader. A rather generalized concept of privacy has long been suggested. Over 75 years ago, Samuel Warren and Louis Brandeis, disturbed about some newspaper publicity in regard to the social activities of Mrs. Warren, wrote an often quoted article, "The Right to Privacy."[327] In it they asserted that there was a right simply "to be left alone." [328]

Approximately 50 years ago, Roscoe Pound recommended the development of a claim to private personality so that "private personal affairs shall not be laid bare to the world and be discussed by strangers." [329]

Although the concept of privacy was not always recognized

[323] Mr. Justice Harlan in his dissent considered the Connecticut statute a violation of the due process clause.

explicitly, it was developing at least implicitly prior to *Griswold.* Courts have prevented physical entry into another's home,[330] giving credit information without authorization,[331] peering into windows,[332] and seizing certain material within a home without a warrant.[333] The concept of privacy since *Griswold* has had an uncertain but basically promising history. Most clearly, the courts have continued to uphold a privilege against unreasonable search and seizure including electronic eavesdropping.[334] On the other hand, the concept of privacy has not been successfully used to protect homosexual relationships between prisoners [335] or smoking marijuana.[336] In *Nader* v. *General Motors Corporation* the court agreed with the plaintiff that unauthorized wiretapping, trailing, and other forms of investigation violated a constitutional right of privacy.[337]

In view of the still unclarified limits of the concept of privacy as it is being judicially developed, it may be helpful to examine briefly some broader perspectives on privacy as they may relate to treatment. A well known definition of privacy is that provided by Ruebhausen and Brim: "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior, and opinions are to be shared with or withheld from others." [338] This definition emphasizes the informational aspects of privacy, though perhaps "attitudes" or "beliefs" could be expanded to include emotions and feelings. It is this latter aspect of privacy, the communication and sharing of emotions, that is emphasized by Fried:

> It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship, and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others, and to regard ourselves as the objects of love, trust, and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.[339]

Taking a somewhat similar view of privacy, a Government report entitled *Privacy and Behavioral Research*, prepared by a panel of recognized scholars, including Ruebhausen, suggested, "Every person lives in several different worlds, and in each his mode of response may—indeed, must—be different. The roles of father, husband, clerk, good neighbor, union leader, school board chairman, candidate for office, solicitor of funds for the local church, call for different responses. The right to privacy includes the freedom to live in each of these different roles without having his performance and aspirations in one context placed in another without permission." [340] This perspective on privacy would fit well with the "zones of privacy" discussed in *Griswold* [341] that would protect in particular the confidentiality of membership in an organization, the right of parents to educate their children in a school of their choice, the right to study any particular subject, and the right to have the marital bedroom free from search by the police.

Stanley v. *Georgia* [342] developed the concept of privacy considerably further than *Griswold*. The Supreme Court held that the first and fourteenth amendments prohibited making mere possession of obscene material a crime. In speaking for the Court, Mr. Justice Marshall relied heavily upon a concept of privacy:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[343]

This was not dissimilar to a brief suggestion made by a New York court earlier in *Pare* v. *Donovan* [344] that privacy includes the right to be free of intrusion that would cause mental suffering, shame, or humiliation.

Turning more specifically to the context of treatment, if an offender incarcerated under an indeterminate sentence will not be heard to complain about his incarceration and lack of treatment if he refuses treatment as in *Buchanan* v. *State*,[345] then the groundwork for extensive invasions of privacy through treatment techniques is laid. Although an offender may waive his right of privacy in order to participate in the "benefits" of treatment, great caution would be needed to determine that such a waiver was voluntary. It is unlikely that such a waiver could be given without at least some duress to taint it when treatment

is the alternative to lengthy incarceration. Also, the doctrine of unconstitutional conditions might be applicable.[346]

But a doctrine that prevents offenders from obtaining treatment on the grounds of a potential or likely invasion of privacy by treatment techniques, when a criterion of release is improvement, would be illogical and harsh. It could, in some circumstances, have the effect of preventing the offender's release on the theory that he was being "protected" from a harm (invasion of privacy) which is almost certain to be less severe than incarceration.

If improvement is a criterion of release, then effective treatment must be made available to the offender even though there is some diminution of privacy. Limits, of course, must be set in regard to the permissible, therapeutic incursions upon privacy. To help set limits, one might use an analogy to the doctrine of implied consent, whereby the criminal act itself gives a specified group of persons a privilege to inquire into certain matters. For example, reckless driving and a resulting accident (or even the consent to examine a driver's license in some States) may give implied consent for the police to make blood-alcohol tests.[347] So also, when an offender invades the zone of privacy of another, he may give implied consent for limited incursions upon a related zone of his own privacy. Some indication of this view, though implicit, is found in the general reluctance of courts to deal favorably with offenders who refuse to cooperate in psychiatric examinations.

If some incursion upon the offender's privacy is permitted for purposes of treatment, it probably should be limited to those zones of privacy related to the offender's illegal act as just suggested. Thus, in the treatment of an aggressive offender, inquiry and treatment in regard to aggressive acts and fantasies would seem quite appropriate. Inquiry into, and the regulation of, the offender's financial matters might place some burden of explanation upon the therapist, which, of course, the therapist might meet by showing that the offender's aggression usually resulted from disputes over financial obligations.

Finally, it might be noted that behavior modification techniques generally entail considerably less incursion into a range of private matters than do psychoanalytically oriented techniques. Treatment by behavior modification techniques customarily focuses on the specific behavior to be changed and the environmental contingencies or mental images directly related to that behavior. Thus, shoplifting, for example, can be treated directly [348] without inquiring into the patient's early childhood fantasies or toilet training as would be customary if the patient's

behavior was viewed psychoanalytieally as a problem of kleptomania.

5. Miscellaneous Provisions

Since the "experiments" in silence conducted in the early 19th century in American prisons,[349] the freedom of speech accorded to prisoners has greatly increased. Although prison authorities may still censor mail [350] or prevent prisoners from taking correspondence courses,[351] the court is becoming increasingly concerned about prisoners' first amendment rights.[352] Censorship should not be arbitrary because, as one court noted,[353] it would breed contempt and interfere with the eventual social adjustment of the prisoners. Of course, this does not prevent the curtailment of speech and assembly to maintain prison discipline and order.

In regard to religion, the distinction between the freedom to believe and the freedom to exercise that belief has been particularly significant.[354] This distinction permits the authorities to encourage belief but also to regulate its practice when it threatens prison discipline. As with freedom of speech, a denial of the opportunity to worship or to practice one's religion must have a reasonable basis.[355]

When the freedoms of speech and religion coalesce, the court may be particuarly sensitive to infringements not clearly related to discipline or order. *Peek* v. *Ciccone* [356] provides an example. The petitioner in this case, a prisoner convicted of robbery, underwent a religious experience in which he came to believe that in his body, "the body of a thief," Christ, a Jew, had reappeared on earth. The petitioner was given a tranquilizer, forcibly on one occasion,[357] and the Rabbi conducting services refused to allow him to attend because he was not a Jew by birth or choice. The court found this policy governing religious practices not unreasonable because it "does not restrict the freedom of those confined there to belief in the religion of their choice, but it does limit those who may attend the services of certain religious faiths."[358] The prison authorities had also prevented the petitioner from mailing a letter to the Pope explaining his ideas. The court ordered the authorities "to mail a respectful letter from petitioner to the Pope setting forth his claims and beliefs in connection with the alleged fulfillment of

[355] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." United States Constitution, first amendment.

[357] This led to a claim by the petitioner of cruel and unusual punishment which the court dismissed. See *supra* Chapter III, C, 1.

the unrevealed prophecies of Fatima." [359] In view of the absence of harm caused by such a letter, the order of the court, though unusual, seems appropriate and sensitive to the particular needs of this troubled prisoner.

One State, Nebraska, requires church attendance on parole and three other States recommend it.[360] Apparently the purpose of this condition of parole is to strengthen or otherwise modify the parolee's religious beliefs so that his recidivism will be reduced—a practice of questionable effectiveness. In contrast, a Utah statute prohibits treatment directed toward changing the religious beliefs of persons receiving mental health services. It reads: "It shall be a felony to give psychiatric treatment, non-vocational mental health counseling, case-finding testing, psychoanalysis, drugs, shock treatment, lobotomy, or surgery to any individual for the purpose of changing his concept of, belief about, or faith in God." [361]

Requiring attendance at church services or participation in religious services as a condition of probation may be prohibited on first amendment grounds though court decisions are few. In *Jones* v. *Commonwealth*,[362] first amendment provisions were applied within the juvenile court context. Two youths were placed on probation with eight conditions. Among these, they were required to be home every evening at 9:30 and to remain there unless escorted by an adult.[363] They were not permitted to drive an automobile, and they were to "attend Sunday School and Church each Sunday hereafter for a period of one year, and present satisfactory evidence of such attendance at the conclusion of each month to the Probation Officer." [364] In reversing a prior judgment, the court observed that "There is preserved, and assured to each individual the right to determine for himself all questions which relate to his relation with the Creator of the Universe. No civil authority has the right to require any one to accept or reject any religious belief or to contribute any support thereto." [365]

The limitations placed upon the treatment of offenders in regard to fourth amendment rights have not been well developed.[366] This is most clearly seen in the very wide latitude given to probation and parole officers to inquire into the personal life of

[360] See Appendix D.

[362] This appears analogous to the use of electronic tracking and monitoring as a condition of parole or probation. The youths were found delinquent on very slight evidence that they had thrown some rocks, a misdemeanor. The court found that the offense did not require the supervision of a probation officer and therefore seemed to use a test that weighed the seriousness of the offense against the extent of the restrictions imposed by the conditions of probation.

[366] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." United States Constitution, fourth amendment.

the offender and at times to search and seize without a warrant. In three States, statutes provide that the parolee grant approval for searches as a condition of his parole.[367] A privilege to search may also be validly made a condition of parole if the parolee appropriately consents.[368] A more difficult issue arises when there has been no express condition.

Although case law is not clear, there appears to be a trend toward allowing a search of the person and the premises under the control of the parolee. In *People* v. *Denne*,[369] the Court of Appeal of California permitted the search of a parolee's apartment when he was not in it. The parole officers entered the locked apartment and found marijuana. The parolee had agreed as a condition of his parole to refrain from the use of marijuana. The possession was admitted in evidence. The court noted, "[H]e continues at all times to remain in penal custody, the same as the prisoner allowed the privilege of working on the prison's 'honor farm'. Parole has simply pushed back the prison walls for him, allowing him wider mobility and greater personal opportunity while serving his sentence." [370] In *People* v. *Kern*, [371] a probationer agreed to "submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant." [372] In upholding this condition as reasonable, the court observed:

> The condition of probation that defendant consent to a search of his person by a law enforcement officer without a search warrant is a supervisorial procedure related to his reformation and rehabilitation in light of the offense of which he was convicted. With knowledge he may be subject to a search by law enforcement officers at any time, he will be less inclined to have narcotics or dangerous drugs in his possession. The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with his terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law.[373]

Perhaps going further than these cases above, is *Hacker* v. *Superior Court of Tulare County*,[374] also involving drugs. The petitioner was committed under a civil statute for treatment as a narcotics addict and then released on an "outpatient status" under supervision of a field agent. The petitioner's urine test indicated the use of narcotics and the petitioner was subsequently arrested and his premises searched in which a narcotic drug was found. The court noted that there was no need to use a

[367] See Appendix D.

"constructive custody" doctrine because there was enough evidence that the petitioner was involved in a felony and therefore the search was incident to a lawful arrest with probable cause. The court also commented, with distressing accuracy, "[P]etitioner asserts that his civil rights were not impaired by his status as an outpatient, but his distinction between a parolee and an outpatient is not completely accurate." [375]

Based upon the above, there would seem to be no great restriction on the privilege of a therapist to obtain behavioral information from an offender on probation or parole for the conduct of the usual behavioral modification program.[376] There should be, however, no undue interference with the offender's daily life that might constitute harrassment. The constitutionally permissible acquisition of information about behavior that could be used to revoke the offender's probation or parole status presents the serious problem of the scope of therapeutic confidentiality and privileged communication. This problem is, however, beyond the range of the present discussion.[377]

As previously noted,[378] a brief period of confinement is sometimes required as a condition of probation. This confinement and related restrictions on freedom are sometimes claimed to be a violation of the involuntary servitude clause of the thirteenth amendment.[379] However, this amendment is generally considered to be aimed at the abolition of slavery and was enacted in 1865 as a part of the Reconstruction plans following the Civil War. In 1964, several student protestors at the Berkeley Campus of the University of California unlawfully gathered inside the administration building and upon arrest "went limp" and had to be carried from the building. As one of the conditions of their probation,[380] they were required to spend four weekends at a "training academy" at which they would probably also be required to help clean up "old and historic cemetery lots." One of their contentions upon appeal was that this condition imposed involuntary servitude. The court dismissed this claim, noting that it was not certain that the appellants would be required to perform manual labor, thus leaving the issue essentially unsettled. The appellants' claim on the grounds of involuntary servitude, though imaginative, would probably not have been successful even with a clearer fact situation.

[379] "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." United States Constitution, thirteenth amendment, sec. 1.

IV. Conclusion

A. Criminal Justice System

The discussion above has briefly described the development of behavior modification techniques and has indicated in broad outline some of the legislative, administrative, and judicial approaches related to its regulation. Although behavior modification techniques appear to be remarkably effective in some individual cases when treated within a clinic or laboratory, there has been no broad scale application of these techniques to offenders. If such a broad scale application does occur, it will have to take place within the general context of the criminal justice system. Criticisms of this system are not difficult to find.

It has been suggested by Teeters that "It is not just the philosophy of imprisonment that is 'sick' but rather, the entire classical theory of criminal law. We are operating, by and large, under eighteenth century concepts, all of which, from police to court trial and sentencing, are pathetically outmoded and clamor for outright change." [381] Similarly, Barnes in an article entitled "Scientific Treatment" comments, "[W]e cannot achieve anything like complete success until the old punitive philosophy and the conventional prisons are abolished, root and branch. It is as futile to try to graft a rational treatment of criminals on the traditional prison system as it would be to attach a motor car to an ancient stagecoach." [382]

But criminologists are not alone in their criticism of the criminal justice system. Thus, Karl Menninger inveighs, "The concept [of justice] is so vague, so distorted in its application, and usually so irrelevant that it offers no help in the solution of the crime problem which it exists to combat but results in the exact opposite—injustice, injustice to everybody." [383] This criticism is not entirely inappropriate. As a reflection of one of the most "ferocious" penal policies of any civilized country,[384] we presently have approximately 1.3 million persons subject to correctional authority [385] serving some of the longest sentences in the world.[386]

More specifically, the present study shows tentatively that the criteria in the statutes that are used to define sex offenders, habitual offenders, and drug addicts are often vague and clearly incon-

sistent among the States.[387] Further, the criteria used for the release of offenders from confinement under these statutes are not closely related to the criteria used to incarcerate them.[388] Finally, administrative standards are poorly defined and court intervention has become necessary to safeguard some of the fundamental rights of offenders.

Situations such as this are fertile ground for the development of proposals for reform. (Getting these proposals translated into actual programs is another, more unlikely, event.) For example, it is clear that prison administrators have very great discretion and that there is much potential for abuse. Silverberg suggests that, "[I]n this country, where trained and reliable staff is scarce, environment control might best be accomplished by automating much of prison life, since it is easier to see to it that a machine does not abuse prisoners than to insure that a thoughtless guard will not."[389] Perhaps more promising, and likely of adoption, are proposals for the treatment of offenders based upon concepts derived from learning theory. As well pointed out by Schwartz in "A Learning Theory of Law,"[390] derivatives of learning theory may be usefully applied to the understanding of the effects of criminal sanctions and the classification of deviant behavior.

B. Behavior Modification Techniques

Some of the difficulties in the criminal justice system, such as the inconsistent definition of offenders, cannot be corrected merely by an increased use of behavior modification techniques. On the other hand, behavior modification techniques are remarkably well suited for integration into the criminal justice system because they, and their underlying theories, focus upon behavior, and most offenses involve observable behavior. Unlike treatment orientations that focus upon goals such as mental health, which are diffuse and difficult to define, behavior modification goals are readily measurable. Thus, questions about the effectiveness of the approach and its influence on the criminal justice system can be answered by empirical study rather than by speculation unsupported by data.[391]

The promise of behavior modification techniques lies not so much in accomplishments to date as in the success of clinical and laboratory experiments and in the general methodology. In

[391] An example of theoretical speculation beyond data, perhaps even beyond reason, using mental health concepts is provided in an article by McGavran in which the physician, with other members of the public health team, may become "the doctor of the body politic." In this article the entire community is viewed as a patient to be healed by the physician. Presumably this includes the police and courts as well as correctional authorities. McGavran, E. G., Scientific Diagnosis and Treatment of the Community as a Patient. *Journal of the American Medical Association*, 162: 723–727, 1956.

the area of operant conditioning, reinforcers such as food, release from an institution, or money have been successfully used to modify delinquent behavior. Further study needs to be done on the duration of these changes in community settings. In the area of classical conditioning, aversive stimuli such as emetics or electric shock have been used with alcoholics and homosexuals. The aversive stimulus in this procedure precedes by a very brief interval the behavior to be modified. This results in a reduced frequency of the behavior subsequently. In another technique, aversive suppression, the aversive stimulus follows the behavior to be modified. This is similar to the traditional procedures of punishment.

Classical conditioning with aversive stimuli and aversive suppression are unpleasant for the offender and legal coercion may be required to obtain participation in the treatment procedures. Also, some ethical issues may be raised in regard to the extent to which the community may employ aversive procedures against an offender's will to prevent predicted, subsequent offenses. In classical conditioning, however, there is a newly emerging trend that emphasizes the pairing of pleasant stimuli with behavior that competes with the illegal behavior. For example, heterosexual behavior is increased by conditioning in order to reduce homosexual behavior. The positive results of this research are encouraging but more long-term followup studies are required.

Electronic monitoring and intervention systems have been designed and used with offenders in prototype form. Large scale systems have not yet been used. Complex systems are in laboratory development that can provide two-way communication with offenders in the community as well as the continual monitoring of their geographical location. It would appear that much crime can be technologically prevented; however, procedures need to be developed for the effective regulation of the use of this equipment to avoid undue coercion by the government.

Therapeutically, electronic systems can allow the offender to remain in the community where he must ultimately learn to live. Also, behavior modification techniques such as operant and classical conditioning procedures can be remotely applied. The long-term therapeutic potential of these systems, independent of their immediate crime prevention capabilities, is the subject of present research.

Behavior modification techniques are not tied exclusively to psychological theory. They can be theoretically integrated with sociological concepts of crime causation and prevention. Shah [392] has developed one of these theoretical integrations. He notes:

> It could be demonstrated that a great deal of the behavior of organisms exists because of its effects on the

environment. Most human behavior is social because it has certain effects on other people, which in turn helps to establish certain schedules of reinforcement. The same reinforcement paradigm may be extended to larger groups of people such as social agencies and institutions, less well-defined groups of people involved in social practices, codes of conduct, etc., and also smaller groups or the neighborhood "gang" of children. These social practices ultimately refer to the various sets of reinforcements and punishments which the people who constitute the agency, institution, or group, apply to the behaviors of other people. The powerful controlling and regulating influence of social norms are mediated in large measure by the reinforcing effects of group approval and disapproval.

Although the legal and ethical aspects of research in behavior modification have not been discussed herein, this is an area that needs further study. It is likely that the courts will allow somewhat more leeway in the development of new techniques under careful supervision and appropriate procedural safeguards than in the application of techniques already developed to large populations with general supervision.[393]

C. Legal Regulation

The development of appropriate standards for the application of behavior modification techniques requires some flexibility and tentativeness. Although judicial and legislative opinion is now helpful in setting the outer limits of permissible treatment, restrictive case law and statutes based upon inadequate information are likely to prevent an advantageous development of new knowledge and more effective techniques. There needs to be an opportunity for conceptual changes in the treatment of offenders, at least until a higher degree of therapeutic success is achieved. Thomas Szasz has often quoted Seymour Krim to the effect that the vocabulary and definitions of psychiatry have become a "noose around the neck of the brain." [394] Similarly, the vocabulary and definitions of law should not unduly restrict the logical development of the field of behavior modification as they would if they were the predominant terms determining its growth.

Rather than relying upon case law or statutes, more flexibility and conceptual integrity could be obtained by having professional organizations and practitioners establish internal standards and guidelines. Courts and legislatures could then look to these standards in resolving difficult problems. The development of these

standards will, of course, require openly confronting some very difficult policy issues. For example, the present practice of the civil commitment of offenders for "treatment" often results in the long-term preventive detention of some property offenders or persons of undetermined dangerousness.[395] This practice now probably could not be directly mandated by legislatures. As behavior therapists move out of the laboratory and private clinic into the criminal justice system, they will certainly be involved in this issue because criminal behaviors will have to be assigned expected frequencies prior to treatment.

The application of behavior modification techniques to the behavior of offenders necessarily involves some view of the relationship of the State's coercive power to the individual. Silverberg has suggested that because foreseeable future prisons are likely to be closed societies, "[W]e should begin to think about operating them so as to derive maximum benefit from their totalitarian nature, rather than sweeping this characteristic under the rug." [396] Further, "The community need not protect a man's right to be a criminal by refusing to change his criminal mind (and through it, his criminal behavior) without his consent." [397]

In contrast, one might take more nearly the view of the "community" as de Toqueville saw it. In this view, the legal order in a democracy is based upon reciprocal relationships which include both complimentary and conflicting viewpoints. A democratic order, or "ordered liberty," does not rely primarily upon political or therapeutic power. Of course, coercive power must sometimes be used when the behavior of offenders restricts unduly the freedom of others, for example, attacks on persons using public streets. The harm is not only measured by the actual frequency of attacks but also their assumed recurrence that would make people fearful of leaving their homes, thus restricting their freedom of movement. On the other hand, some private, consensual acts between persons, now considered crimes, would be permitted. The physical restraint of offenders, who are also citizens, would be limited to that which was necessary to maximize the freedom of action and thought in the community. In this view, the long and ineffective sentences of imprisonment now often used would need to be changed. Such changes, however, are more nearly matters of public policy than therapeutic technique.

Whether legal institutions can regulate the coercive potential of behavior modification techniques toward the implicit jurisprudential values of "fairness" and "justice" is an open question. The necessary constitutional provisions appear to be available but too infrequently applied to specific cases to be clear in outline. This appears to be not so much the result of judicial reluctance as the

absence of firm information about the effects of behavior modification techniques on sizeable populations of offenders. When such information becomes reliable, it may help to shape judicial opinion so that the legal limits and leeway of application become more clear.

Very much more needs to be learned about the potential effects of behavior modification techniques. Although considerable gains have been made over the past 15 years of research, one is reminded of Phaedrus' mountain:

> A mountain was in labour, sending forth dreadful groans, and there was in the region the highest expectation. After all, it brought forth a mouse.[81]

But perhaps, we will not be too criticized if, with occasional glimpses of success, we continue to hope for genuinely effective and humane procedures for changing those behaviors that have so long troubled men and caused them to be troubled.

Appendix A

Statutes Related to Sex Offenders*

Ala. Code title 15, secs. 434–451 (Supp. 1967).
Ariz. Rev. Stat. Ann. secs. 13–1271 thr. 1274 (1956).
Cal. Welf. & Inst'ns. secs. 6300 thr. 6330, 6450 thr. 6457 (West Supp. 1969).
Colo. Rev. Stat. Ann. secs. 39–19–1 thr. 10 (1963).
Conn. Gen. Stat. Ann. sec. 17–244 (1958).
D.C. Code Encycl. Ann. secs. 22–3503 thr. 3510 (1958).
Fla. Stat. Ann. sec. 917.12 (Supp. 1969).
Ga. Code Ann. sec. 77–539 (1957).
Ill. Ann. Stat. ch. 38, secs. 105–1.01 thr. 12 (Smith-Hurd 1969).
Ind. Ann. Stat. secs. 9–3401 thr. 3404; 3406 thr. 3412 (Burns Supp. 1969).
Iowa Code secs. 225A.1 thr. 15 (1946).
Kan. Stat. Ann. secs. 62–1534 thr. 1537 (Supp. 1968).
Mass. Gen. Laws Ann. ch. 123A, secs. 1 thr. 10 (1969).
Mich. Comp. Laws sec. 330.54 (1967).
Minn. Stat. Ann. secs. 526.09 thr. 11 (1959).
Mo. Ann. Stat. secs. 202.700 thr. 770 (Vernon 1959).
Neb. Rev. Stat. secs. 29–2901 thr. 2907 (1964).
Nev. Rev. Stat. secs. 207.151 thr. 157 (1967).
N.H. Rev. Stat. Ann. secs. 173.2 thr. 16 (1968).
N.J. Rev. Stat. secs. 2A:164–3 thr. 13 (1968).
N.D. Cent. Code sec. 12–30–12 (1960).
Ohio Rev. Code Ann. secs. 2950.01 thr. 99 (Page 1969).
Ore. Rev. Stat. secs. 426.510 thr. 670 (1953).
Pa. Stat. Ann. title 19, secs. 1166 thr. 1174 (1958).
Tenn. Code Ann. secs. 33–1301 thr. 1305 (1956).
Utah Code Ann. secs. 77–49–1 thr. 8 (1953).
Vt. Stat. Ann. title 18, secs. 8501 thr. 8506 (1957).
Va. Code Ann. secs. 53–278.2 thr. 3 (1950).
Wash. Rev. Code Ann. secs. 71.06.010 thr. 260; 72.25.010 thr. 040 (1950).
W.Va. Code Ann. secs. 27.6A–1 thr. 20 (1966).
Wis. Stat. Ann. sec. 959.15 (West 1969).
Wyo. Stat. Ann. secs. 7–348 thr. 362 (1957).

*Statutes cited were used in statistical analyses, Chapter III.

Appendix B

Statutes Related to Habitual Offenders*

Ala. Code title 15, sec. 331 (1959).
Alaska Stat. Ann. secs. 12.55.040 thr. 070 (Supp. 1969).
Ariz. Rev. Stat. Ann. secs. 13–1649 thr. 50 (Supp. 1969).
Ark. Stat. Ann. secs. 43.2328 thr. 2330 (Supp. 1967).
Cal. Penal secs. 3047 thr. 3050 (West Supp. 1968).
Colo. Rev. Stat. Ann. secs. 39–13–1 thr. 3 (1963).
Conn. Gen. Stat. Ann. secs. 54–118a,b (Supp. 1969).
Del. Code Ann. title 11, secs. 3911 thr. 3912 (Supp. 1969).
D.C. Code Encycl. Ann. sec. 22–104 (Supp. 1967).
Fla. Stat. Ann. secs. 775.09 thr. 11 (Supp. 1965).
Hawaii Rev. Laws sec. 43–2328 (Supp. 1965).
Idaho Code Ann. sec. 19–2514 (Supp. 1969).
Ind. Ann. Stat. secs. 9.2207 thr. 2208 (Burns Supp. 1956).
Iowa Code secs. 747.1 thr. 7 (Supp. 1969).
Kan. Stat. Ann. sec. 21–107a (Supp. 1964).
Ky. Rev. Stat. Ann. sec. 431.190 (1962).
La. Rev. Stat. Ann. sec. 15.529.1 (West 1967).
Me. Rev. Stat. Ann. title 15, sec. 1742 (1964).
Mass. Gen. Laws Ann. ch. 279, sec. 25 (Supp. 1969).
Mich. Comp. Laws secs. 769.10 thr. 13 (Supp. 1968).
Minn. Stat. Ann. secs. 609.155 thr. 16 (Supp. 1964).
Miss. Code Ann. sec. 4004–03 (Supp. 1969).
Mo. Ann. Stat. secs. 556.280, 556.290, 560.161 (Vernon Supp. 1968).
Neb. Rev. Stat. secs. 29.2221 thr. 2222 (1943).
Nev. Rev. Stat. sec. 207.010 (Supp. 1968).
N.H. Rev. Stat. Ann. sec. 591.1 (Supp. 1955).
N.J. Rev. Stat. secs. 2A:85–12 thr. 13 (Supp. 1969).
N.M. Stat. Ann. secs. 40A–29–5 thr. 8 (1953).
N.Y. Penal sec. 70.10 (McKinney 1967).
N.C. Gen. Stat. secs. 14–7.1 thr 6 (Supp. 1967).
N.D. Cent. Code sec. 12.06–21 (1960).
Ohio Rev. Code Ann. secs. 2961.11 thr. 13 (Page Supp. 1969).
Okla. Stat. Ann. tit. 21, secs. 51 thr. 54 (Supp. 1969).
Ore. Rev. Stat. secs. 168.015 thr. .090 (1953).
Pa. Stat. Ann. title 18, sec. 5108 (Purdon Supp. 1963).
R.I. Gen. Laws Ann. sec. 12–19–21 (1956).
S.C. Code Ann. sec. 17–553.1 (1962).
S.D. Code secs. 22–7–1 thr. 5 (Supp. 1967).

*Statutes cited were used in statistical analyses, Chapter III.

Tenn. Code Ann. secs. 40–2801 thr. 2807 (Supp. 1955).
Tex. Penal Code Ann. art. 61 thr. 64 (1952).
Utah Code Ann. secs. 76–1–18 thr. 19 (1953).
Vt. Stat. Ann. title 13, sec. 11 (1958).
Va. Code Ann. secs. 20–46, 53–296 (Supp. 1966).
Wash. Rev. Code Ann. sec. 9.92.090 (1961).
W. Va. Code Ann. secs. 61–11–18 thr. 21 (1966).
Wis. Stat. Ann. sec. 939.62 (West 1958).
Wyo. Stat. Ann. secs. 6–9 thr. 11 (1959).

Appendix C

Statutes Related to Drug Addicts*

Ala. Code title 22, secs. 249 thr. 255 (1959).
Ariz. Ann. Stat. secs. 36.1062 thr. .03 (1969).
Ark. Stat. Ann. secs. 82.1051 thr. 1061 (Supp. 1969).
Cal. Welf. and Inst'ns. secs. 6350 thr. 6362, 6400 thr. 6408 (West Supp. 1969).
Conn. Gen. Stat. Ann. secs. 19.486 thr. 502 (1969).
Del. Code Ann. title 16, sec. 4714 (1953).
D.C. Code Encycl. Ann. secs. 21–1301 thr. 1304, 24–601 thr. 615, (1968).
Fla. Stat. Ann. secs. 398.18 thr. 22 (1941).
Ga. Code Ann. sec. 79A–818 (Supp. 1968).
Hawaii Rev. Laws secs. 82–1052 thr. 1053 (1965).
Idaho Code Ann. secs. 66.316, 37–2722 thr. 2723, 37–3101 thr. 3110 (Supp. 1969).
Ill. Ann. Stat. ch. 23, secs. 3501 thr. 3508 (Smith-Hurd 1968).
Ind. Ann. Stat. secs. 10–3538, 10–3538a (Burns Supp. 1969).
Iowa Code secs. 224.1 thr. 5 (1946).
Kans. Stat. Ann. 62–1538 thr. 1540 (1964).
La. Rev. Stat. Ann. secs. 40–961 thr. 962 (1965).
Me. Rev. Stat. Ann. secs. 22.1351 thr. 1355 (1964).
Md. Ann. Code art. 16, sec. 49 (1966).
Mass. Gen. Laws Ann. ch. 123, secs. 62 thr. 65 (1969).
Mich. Comp. Laws Ann. secs. 330.18, 330.18a (1967).
Minn. Stat. Ann. secs. 254.01 thr. 11 (1959).
Miss. Code Ann. secs. 436.01 thr. 09 (Supp. 1967).
Mo. Ann. Stat. sec. 195.010 (1962).
Mont. Rev. Code Ann. sec. 66.1517 (1947).
Neb. Rev. Stat. secs. 83.701 thr. 707 (1943).
Nev. Rev. Stat. secs. 433.248 thr. 290 (1967).
N.J. Rev. Stat. Ann. secs. 30:6C–1 thr. 10 (Supp. 1969).
N.M. Stat. Ann. secs. 54.7.35 thr. 43 (1952).
N.Y. Mental Hygiene secs. 200 thr. 213 (McKinney Supp. 1969).
N.C. Gen. Stat. secs. 35–1 thr. 35–5 (1966).
N.D. Cent. Code secs. 25–03–07 thr. 11 (1969).
Okla. Stat. Ann. title 63, secs. 470.11 thr. 12, title 43A, sec. 451 (Supp. 1969).
Ore. Rev. Stat. secs. 475.010 thr. 990 (1953).
Pa. Stat. Ann. title 50, secs. 2061 thr. 2069 (1969).
R.I. Gen. Laws Ann. secs. 21–28–56 thr. 67 (1956).

*Statutes cited were used in statistical analyses, Chapter III.

Tenn. Code Ann. sec. 33–919 (1968).
Tex. Penal Code art. 725c (Supp. 1969).
Utah Code Ann. sec. 76–42–9 (Supp. 1969).
Vt. Stat. Ann. title 18, secs. 8401 thr. 8405 (1957).
Wash. Rev. Code Ann. secs. 69.32.010 thr. 960 (1950).
W. Va. Code Ann. secs. 27.6.1 thr. 8 (1966).
Wis. Stat. Ann. secs. 51.09, 161.28 (West Supp. 1969).

Appendix D

COMPARISON OF PAROLE REGULATIONS [1]

	Federal parole	Alabama	Alaska	Arizona	Arkansas	California	Colorado	Connecticut	Delaware	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming
1. Liquor usage	4	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	-	2	-	2	2	2	2	2	-	-	2	2	2	2	2	2	2	2	2	2	2	2	-	2	2	2	2	2	-	2	2	2	2
2. Change of employment or living quarters	1	1	1	-	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	-	1	1	1	1	1	1	1	1	1	1	-	1	1	-	1	1	1	1	-	1	1	-	1	-
3. Undesirable associations or correspondence	1	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	1	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	-	2	2	2	2	-	2	2	-	2
4. Filing written reports	3	3	3	3	3	3	3	3	-	3	3	3	3	3	-	3	3	3	3	3	3	3	3	3	-	3	3	3	3	3	-	3	-	-	3	3	3	3	3	-	-	3	-	3	3	3	3	3	-	-	3
5. Approval of marriage (or of divorce*)	-	1	1	-	1	1	1	1	1*	1	-	1	1	1	1	1	1	1	-	1	1	1	1	1	-	1	1	1	1	1*	1*	1*	1	1	1	1	1	1	1	-	-	1	1	1	1	-	1	1	1	1
6. Out-of-State travel	-	1	-	-	1	-	1	1	1	-	1	1	1	1	1	1	1	1	-	1	1	1	1	1	-	1	1	1	1	1	1	1	1	-	1	1	1	1	1	1	-	1	1	1	1	-	-	1	1	1
7. First arrival report	3	3	3	-	3	3	3	3	-	3	3	-	3	3	3	3	3	3	3	3	3	-	3	3	-	-	3	3	3	3	3	-	3	-	3	3	3	3	3	3	-	-	3	-	-	-	3	-	-	3
8. Motor vehicle registration and license	-	-	1	-	1	1	-	1	1	1	-	-	1	1	1	1	1	1	-	1	1	1	1	1	-	1	1	1	1	1	1	1	1	1	1	-	1	1	1	-	1	1	1	1	-	1	1	1	1	1
9. Narcotics usage	2	2	-	-	2	2	2	2	2	2	2	2	2	2	2	2	-	2	-	2	2	2	2	-	-	-	2	-	2	2	2	2	-	2	-	2	2	2	2	2	2			2	2	2			2		
10. Participation in anti-narcotics program	-	-	-	-	-	3	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-
11. Support dependents	3	3	3	-	-	-	-	3	3	3	3	3	3	-	3	-	3	3	3	3	3	3	3	-	3	3	3	3	-	3	3	3	3	3	-	3	3	3	3	3	-	3	-	-	3	3	3	3	3	-	-	-
12. Weapons; hunting license	1	-	1	-	2	2	2	2	1	1	2	2	2	2	2	1	1	1	-	1	1	1	1	-	-	-	1	2	-	1	1	2	2	1	-	2	2	2	1	1	1	1	2	1	1	2	1	2	2	1	1
13. Out-of-county or community travel (limited to specific area*)	1	-	-	-	-	1	1	-	-	1	-	-	-	1	1	-	3	1	1	1	-	-	1	1	2*	1	-	1	1	-	-	1	1	1	1	1	1	-	1	1	-	1	1	1	1	-	1	1	-	-	-
14. Waiver of extradition	-	3	3	-	3	3	3	3	3	3	3	1	3	3	-	3	-	-	-	3	3	-	3	3	-	-	3	3	3	3	-	3	3	3	-	3	3	-	3	3	3	-	-	3	3		3	3	3		3

COMPARISON OF PAROLE REGULATIONS [1]—Continued

	Federal parole	Alabama	Alaska	Arizona	Arkansas	California	Colorado	Connecticut	Delaware	Florida	Georgia	Hawaii	Idaho	Illinois	Indiana	Iowa	Kansas	Kentucky	Louisiana	Maine	Maryland	Massachusetts	Michigan	Minnesota	Mississippi	Missouri	Montana	Nebraska	Nevada	New Hampshire	New Jersey	New Mexico	New York	North Carolina	North Dakota	Ohio	Oklahoma	Oregon	Pennsylvania	Rhode Island	South Carolina	South Dakota	Tennessee	Texas	Utah	Vermont	Virginia	Washington	West Virginia	Wisconsin	Wyoming
15. Indebtedness	-	1	-	-	-	1	1	-	1	-	-	1	1	-	-	-	1	-	-	1	1		1	1	-	-	1	2	1	1	1	-	-	1	1	-	-	1	-	-		1		-	1			1		1	
16. Curfew	-	-	-	-	-	-	-	-	-	-	-	b	-	c	-		-	-	-	6	-	-	6	6	-	-	-	-	-	6	-	-	-	-	-	-	-	-	-	-	6	c		6	-	-	-	-	-
17. Civil rights, suffrage	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-			-	-	-	-	2	-	-	-	2	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-
18. Gambling	-	-	-	2	-	-	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-		2	-	-	-	-	-	-	-
19. Airplane (or power boat*) license	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1*	-	-	-	-	-	-			-	-	-	-	-	-	-	-	-	-	1*	-	-	1	-	-								
20. Report if arrested	3	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	3	3	3	3			-	-	-	-	-	-	-	-	-	-	-	-	-
21. Treatment for V.D.	-	3	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-
22. Credit on return as P.V.	-	-	-	-	-	-	-	-	-	-	-	5	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	5	5	-	5		-	-	-	5	5	-	-	-	-	-	-	-	-	-
23. Criminal registration	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	-	-	3	-	-	-	-	-	-	-	-	-	-
24. Church attendance	-	7	-	-	-	-	-	-	-	7	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	-	-	-	-	7	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
25. Permit home or job visits (search*)	-	3	-	-	-	-	3*	3	-	3	3	-	-	3	-	-	-	3	-	3	-	-	-	-	3	-	-	-	3	-	3	-	3	3*	3*	-	-	3	-	3	3	3	-	-	-	3	-	3	-	-	-
26. Comply with law	3	3	3	-	3	3	3	3	3	3	3	-	3	-	-	3	3	3	3	3	3	3	3	3	3	3	3	3	3	-	3	3		3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3
27. Maintain gainful employment (inform employer of parole*)	3	3	3	-	-	3	3	-	3	3	3	3	3	3	-	-	3	3	3	-	3	3	3	-	3	-	3	-	-	3	3	3	3	3	-		-	3	3*	-	3	-		3	3	3	3	3	-	-	-
28. Return to county (or State*) of commitment	-	-	-	-	-	-	1	-	-	-	-	-	1*	-	-	-	-	-	-	-	-	-	-	-	-	-	1*		-	-	-	-	-	-	-	-	1*	-	-	-	-		-	-	-	-	-	-
29. Act as informer	2	-	-	-	-	-	-	-	-	-	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-		-	-	-	-	-	-	-	-

Key: 1. Must have permission. 2. Prohibited. 3. Compulsory. 4. Allowed but not to excess. 5. May receive. 6. Reasonable hour. 7. Advised or recommended.
a. 50 miles. b. 11:00 p.m. c. 10:30 p.m.

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References

1. Merrill, L.T. The Puritan Policeman. *American Sociological Review*, 10:766–776, 1945.
2. Shurtleff, N., ed. *Records of the Governor and the Company of the Massachusetts Bay in New England, 1650–1660.* 1854, pp. 308–309.
3. Erickson, K.T. *Wayward Puritans: A Study in the Sociology of Deviance.* New York: Wiley, 1966, p. 190.
4. Beccaria, C. *An Essay on Crimes and Punishments.* Philadelphia: P.H. Nicklin, 1819, p. 99. Cited by Johnson, E.H. *Crime, Correction and Society.* Homewood, Ill.: Dorsey Press, 1964, pp. 429–430.
5. De Beaumont, G. and De Tocqueville, A. *On the Penitentiary System in the United States and Its Application in France.* H. Lantz, ed., 1833, Carbondale, Ill.: Southern Illinois University Press, 1964.
6. *Id.* at 73.
7. *Id.* at 55.
8. Society for Preventing Pauperism in New York, *Report*, 1822. Cited by F. Gray, *Prison Discipline in America*, Boston: Little and Brown, 1847, p. 37.
9. Gray, *supra* note 8, at 39–40; De Beaumont and De Tocqueville, *supra* note 5, at 41, 191–192.
10. Ward, D. Evaluations of Correctional Treatment: Some Implications of Negative Findings. In: Yefsky, S., ed. *Law Enforcement Science and Technology*, Berkeley, Calif.: Academic Press, 1967, pp. 201–208. This exceptionally well designed study involved approximately 1,000 prisoners and a 2-year followup.
11. Miller, W.B. The Impact of a "Total Community" Delinquency Control Project. *Social Problems*, 10:168–191, 1962; Caplan, N. Treatment Intervention and Reciprocal Interaction Effects. *Journal of Social Issues*, 24:63–88, 1968.
12. McCord, W., McCord, J., and Zola, I. *Origins of Crime: A New Evaluation of the Cambridge-Somerville Youth Study.* New York: Columbia University Press, 1959; Teuber, N.L., and Powers, E. Evaluating Therapy in a Delinquency Prevention Program. *Proceedings of the Association for Research in Nervous and Mental Disease*, 31: 138–147, 1953; Lenz, W.P., Delinquency as a Stable Role. *Social Work*, 11: 66–70, 1966.
13. Cohen, A.R., A Dissonance Analysis of the Boomerang Effect. *Journal of Personality*, 30: 75–88, 1962.
14. Schorer, C.E., Lowinger, P., Sullivan, T., and Hartlaub, G.H., Improvement Without Treatment. *Diseases of the Nervous System*, 29: 100–104, 1968.
15. Bureau of Social Research, *Final Report IV: Experimental and Demonstration Manpower Program for Training and Placement of Youthful Inmates of the Youth Center, Lorton, Virginia*, Washington, D.C.: The Catholic University of America, 1966.
16. Bailey, W. *Correctional Outcome: An Evaluation of 100 Reports.* Los Angeles: School of Social Welfare, University of California at Los Angeles, 1961.
17. Ullmann, L.P., and Krasner, L. The Roots of Behavior Modification. *A Psychological Approach to Abnormal Behavior*, Englewood Cliffs, N.J.: Prentice-Hall, 1969, pp. 171–185.

18. Greenspoon, J. Learning Theory Contribution to Psychotherapy. *Psychotherapy: Theory, Research and Practice*, 2:145–146, 1965.
19. Skinner, B.F. *Science and Human Behavior*, New York: Macmillan, 1956.
20. For a general basic discussion of learning theories, see Hilgard, E.R. and Bower, G.H. *Theories of Learning*. New York: Appleton-Century-Crofts, 1966.
21. *See* Ferster, C.B., and Skinner, B.F. *Schedules of Reinforcement*. New York: Appleton-Century-Crofts, 1957.
22. Skinner, *supra* note 19, at 104.
23. Homme, L.E. and Tosti, D.T. Contingency Management and Motivation. *National Society of Programmed Instruction Journal*, 4:14–16, 1965.
24. Cohen, H.L., Filipczak, J.A., and Bis, J.S. *Contingencies Applicable to Special Education of Delinquents: Establishing 24-Hour Control in an Experimental Cottage*. Silver Spring, Md: Institute for Behavioral Research, 1966; Cohen, H.L., Filipczak, J.A., Bis, J.S., Cohen, J.E., and Larkin, P. *Case II-Model: Contingencies Applicable to Special Education—Motivationally Oriented Design for an Ecology of Learning*. Final Report to the Office of Juvenile Delinquency and Youth Development, U.S. DHEW, Washington, D.C., 1968. *See also* Meichenbaum, D.H., Bowers, K.S., and Ross, R.R. Modification of Classroom Behavior of Female Adolescent Offenders. *Behaviour Research and Therapy*, 6:343–353, 1968.
25. *E.g.*, Tyler, V.O., Jr. Exploring the Use of Operant Techniques in the Rehabilitation of Delinquent Boys. Paper presented at the meeting of the American Psychological Association, Chicago, September 1965; Burchard, J.D. and Tyler, V.O., Jr. The Modification of Delinquent Behavior Through Operant Conditioning. *Behaviour Research and Therapy*, 2:245–250, 1965.
26. Tharp, R.S., Wetzel, R.J., and Thorne, G.L. *Behavioral Research Project*, Final Report to the Office of Juvenile Delinquency and Youth Development, U.S. DHEW, Washington, D.C., 1968.
27. Clark, M., Lachowitz, J., and Wolf, M. A Pilot Basic Education Program for School Dropouts Incorporating a Token Reinforcement System. *Behaviour Research and Therapy*, 6:183–188, 1968; Liberman, R. A View of Behavior Modification Projects in California. *Behaviour Research and Therapy*, 6:331–341, 1968.
28. Several case studies of the operant conditioning of offenders in the community are provided in Thorne, G.L., Tharp, R.S., and Wetzel, R.J. Behavior Modification Techniques: New Tools for Probation Officers. *Federal Probation*, 31:21–28, 1967. For a general discussion of the use of secondary reinforcers with mentally ill patients see Ayllon, T., and Azrin, N. *The Token Economy: A Motivational System for Therapy and Rehabilitation*. New York: Appleton-Century-Crofts, 1968.
29. Shapiro, D., Crider, A.B., and Tursky, B. Differentiation of an Autonomic Response through Operant Reinforcement. *Psychonomic Science*, 1:147–148, 1964.
30. Shearn, D. Operant Conditioning of Heart Rate. *Science*, 137:530–531, 1962.
31. Brown, C.C. and Katz, R.A. Operant Salivary Conditioning in Man. *Psychophysiology*, 4:156–160, 1967.
32. Miller, N.E. Learning of Visceral and Glandular Responses. *Science*, 163:434–445, 1969.

33. *Id.* at 444. A brief, general review may be found in DiCara, L.V. Instrumental Learning of Visceral and Glandular Responses and Implications for Psychosomatic Medicine. *Proceedings, 76th Annual Convention, American Psychological Association,* 1968, pp. 259–260.
34. Miller, *supra* note 32, at 445.
35. Pavlov, I.P. *Essential Works of Pavlov,* Kaplan, M. ed., New York: Grosset and Dunlap, 1966.
36. Pavlov, I.P. Lecture II. In: *Conditioned Reflexes: An Investigation of the Physiological Activity of the Cerebral Cortex.* Anrep, G.V., trans. New York: Dover, 1960, pp. 16–32.
37. Pavlov, I.P. The conditioned reflex. In: *Conditioned Reflexes and Psychiatry.* Vol. II. Gantt, W.H., trans. New York: International Publishers, 1963, pp. 166–185.
38. Hearst, E. Discrimination Learning as the Summation of Excitation and Inhibition. *Science,* 162: 1303–1306, 1968. For the development and application of theory, see generally Prokasy, W.F., ed., *Classical Conditioning: A Symposium,* New York: Appleton-Century-Crofts, 1965.
40. Vallance, M. Alcoholism: A 2 Year Follow-up Study. *British Journal of Psychiatry,* 111: 348–356, 1965.
41. Lemere, F. and Voegtlin, W. An Evaluation of Aversion Treatment of Alcoholism. *Quarterly Journal of Studies on Alcohol,* 11:199–204, 1950.
42. Madill, M.F., Campbell, D., Laverty, S.G., Sanderson, K.E., and Vanderwater, S.L. Aversion Treatment of Alcoholics by Succinylcholine-Induced Apneic Paralysis. *Quarterly Journal of Studies on Alcohol,* 27: 483–509, 1966; Farrar, C.H., Powell, B.J., and Martin, L.K. Punishment of Alcohol Consumption by Apneic Paralysis. *Behaviour Research and Therapy,* 6:13–16, 1968.
43. Kantorovich, N. An Attempt at Associative-Reflex Therapy in Alcoholism. *Psychological Abstracts,* 4(4282):493, 1930.
44. Blake, G.B. A Follow-up of Alcoholics Treated by Behaviour Therapy. *Behaviour Research and Therapy,* 5:89–94, 1967.
45. Kinsey, A.C., Pomeroy, W.B., Martin, C.E., and Gebhard, P.H. *Sexual Behavior of the Human Female,* New York: Saunders, 1953, p. 644.
46. Rachman, S. Sexual Disorders and Behavior Therapy. *American Journal of Psychiatry,* 118:235–240, 1961.
47. *E.g.,* McGuire, R.J. and Vallance, M. Aversion Therapy by Electric Shock: A Simple Technique. *British Medical Journal,* 1:151–152, 1964.
48. Thorpe, J.G., Schmidt, E., Brown, P.T., and Castell, D. Aversion-Relief Therapy: A New Method for General Application. *Behaviour Research and Therapy,* 2:71–82, 1964; Feldman, M.P. and MacCulloch, M.J. The Application of Anticipatory Avoidance Learning to the Treatment of Homosexuality, I: Theory, Technique and Preliminary Results. *Behaviour Research and Therapy,* 2:165–183, 1965.
49. Lavin, N.I., Thorpe, J.G., Barker, J.C., Blakemore, C.B., and Conway, C.G. Behavior Therapy in a Case of Transvestism. *Journal of Nervous and Mental Disease,* 133:346–353, 1961.
50. Raymond, M.J. Case of Fetishism Treated by Aversion Therapy. *British Medical Journal,* 2:854–857, 1956; Marks, I.M. and Gelder, M.G. Transvestism and Fetishism: Clinical and Psychological Changes during Faradic Aversion. *British Journal of Psychiatry,* 113:711–729, 1967.
51. Mees, H.L. Sadistic Fantasies Modified by Aversive Conditioning and

Substitution: A Case Study. *Behaviour Research and Therapy*, 4: 317–320, 1966.

52. James, B. Case of Homosexuality Treated by Aversion Therapy. *British Medical Journal*, 1:768–770, 1962. *See also* Freund, K. Some Problems of the Treatment of Homosexuality. In: Eysenck, H. J., ed. *Behaviour Therapy in the Neuroses*. New York: Pergamon Press, 1960, pp. 312–326; and Feldman and MacCulloch, *supra* note 48.
53. Jackson, B.T. A Case of Voyeurism Treated by Counter Conditioning. *Behaviour Research and Therapy*, 7:133–134, 1969.
54. *E.g.*, Davison, G.C. The Elimination of a Sadistic Fantasy by a Client-Controlled Conditioning Technique. *Journal of Abnormal Psychology*, 73: 84–90, 1968.
55. Wolpe, J. *Psychotherapy by Reciprocal Inhibition*, Stanford, Calif.: Stanford University Press, 1958; Kraft, T. Treatment for Sexual Perversions. *Behaviour Research and Therapy*, 7:215, 1969.
56. Levin, S.M. , Hirsch, I.S., Shugar, G., and Kapche, R. Treatment of Homosexuality and Heterosexual Anxiety with Avoidance Conditioning and Systematic Desensitization: Data and Case Report. *Psychotherapy: Theory, Research and Practice*, 5:160–168, 1968.
57. Wolpe, J. Conditioned Inhibition of Craving in Drug Addiction: A Pilot Experiment. *Behaviour Research and Therapy*, 2: 285–288, 1965; Raymond, M.J. The Treatment of Addiction in Aversion Conditioning with Apomorphine. *Behaviour Research and Therapy*, 1: 287–291, 1964.
58. Kolvin, I. "Aversive Imagery" Treatment in Adolescents. *Behaviour Research and Therapy*, 5: 245–248, 1967.
59. Schwitzgebel, R.K. *Streetcorner Research: An Experimental Approach to the Delinquent*, Cambridge, Mass.: Harvard University Press, 1965, pp. 125–127.
60. Kellam, A.M. Shoplifting Treated by Aversion to a Film. *Behaviour Research and Therapy*, 7:125–127, 1969.
62. Burgess, R.L. and Akers, R.L. Are Operant Principles Tautological? *The Psychological Record*, 16:305–312, 1966, p. 311. (The authors suggest that operant principles, such as those that underlie the definitions of punishment, are not tautological because there is a difference between a definition, which is of necessity tautological, and a proposition. Operant principles, as propositions, are subject to observation and empirical exceptions to them can be found.)
63. An excellent survey of theories of punishment may be found in Campbell, B.A. and Church, R.M., eds. *Punishment and Aversive Behavior*. New York: Appleton-Century-Crofts, 1969.
66. Caldwell, R.G. Forty-three Years of Whippings in Delaware. In: *Red Hannah, Delaware's Whipping Post*, Philadelphia: University of Pennsylvania Press, 1947, pp. 69–82.
68. Blakemore, C.B., Thorpe, J.G., Barker, J.C., Conway, C.G., and Lavin, N.I. The Application of Faradic Aversion Conditioning in a Case of Transvestism. *Behaviour Research and Therapy*, 1:29–34, 1963.
69. Blakemore, C.B., Thorpe, J.G., Barker, J.C., Conway, C.G. and Lavin, N.I. Followup Note to: The Application of Faradic Aversion Conditioning in a Case of Transvestism. *Behaviour Research and Therapy*, 1:191, 1963.
70. *See generally* Feldman, M.P. Aversion Therapy for Sexual Deviations: A Critical Review. *Psychological Bulletin*, 65:65–79, 1966; Marks I.M., and Gelder, M.G. Transvestism and Fetishism: Clinical and Psy-

chological Changes during Faradic Aversion. *British Journal of Psychiatry*, 113:711–729, 1967.
71. Kushner, M., and Sandler, J. Aversion Therapy and the Concept of Punishment. *Behaviour Research and Therapy*, 4: 179–186, 1966.
72. Clancy, J., Vanderhoof, E., and Campbell, P. Evaluation of an Aversive Technique as a Treatment for Alcoholism. *Quarterly Journal of Studies on Alcohol*, 28: 476–485, 1967.
73. Farrar et al., *supra* note 42.
74. Liberman, R. Aversive Conditioning of Drug Addicts: A Pilot Study. *Behaviour Research and Therapy*, 6:229–231, 1968.
75. Holz, W.C., Azrin, N.H., and Ayllon, T. Elimination of Behavior of Mental Patients by Response Produced Extinction. *Journal of the Experimental Analysis of Behavior*, 6:407–412, 1963.
76. For a general discussion of animal experiments related to the effects of aversive stimuli on performance, see Morgan, M.J. Negative Reinforcement. In: Weiskrantz, L., ed. *Analysis of Behavioral Change*. New York: Harper and Row, 1968, pp. 19–49.
77. Deese, J. and Hulse, S.H. *The Psychology of Learning*. New York: McGraw-Hill, 1967, pp. 234–249.
78. Raymond, M.J. Case of Fetishism Treated by Aversion Therapy. *British Medical Journal*, 2:854–857, 1965.
79. Lavin et al., *supra* note 56 (homosexual patient); Kellam, *supra* note 60 (shoplifter).
80. The use of alcohol is discussed above in the sections on classical conditioning and aversive suppression. For the use of bank checks, see Schwitzgebel, *supra* note 59.
81. Meldman, M., and Hatch, B. *In vivo* Desensitization of an Airplane Phobia with Penthranization. *Behaviour Research and Therapy*, 7: 213–214, 1969.
82. Schwitzgebel, *supra* note 59, pp. 127–128.
83. Schwitzgebel, R.K., Schwitzgebel, R.L., Pahnke, W.N., and Hurd, W.S. A Program of Research in Behavioral Electronics. *Behavioral Science*, 9:233–238, 1964; Schwitzgebel, R.K. Development of an Electronic Rehabilitation System for Parolees. *Law and Computer Technology*, 2: 9–12, 1969.
84. Schwitzgebel, R.K. Electronic Alternatives to Imprisonment. *Lex et Scientia*, 5: 99–104, 1968, p. 99.
85. *E.g.*, Cromwell, L., and Laks, M. Some Advances in Techniques for Remote Monitoring of Blood Pressure. *Institute of Electrical and Electronic Engineers Conference Record, Fifth Annual Rocky Mountain Bioengineering Symposium*, May 6-7, 1968.
86. Field, R.K. Electronics Starts Solving the Problems of the Cities. *Electronic Design*, 16:66–84, 1968.
87. Office of the Sheriff, County of Los Angeles, *Sky Knight II*, Los Angeles, California, 1967.
88. Hovey, S.W. Computer-Based Information Systems for Police Departments. In: Yefsky, S.A., ed. *Law Enforcement Science and Technology*. London: Academic Press, 1967, pp. 517–522.
89. Woodward, A.E., and Williams, A.D. Present and Future Applications of Infrared Technology to Law Enforcement. In: Yefsky, S.A., ed. *Law Enforcement Science and Technology*. London: Academic Press, 1967, pp. 835–841.
90. Urban Scientific Corporation, *Computerized Locator System*, Greenwale, New York, 1969.

91. The Institute of Public Administration, *Public Urban Locator Service (PULSE)—Background and Conference Proceedings*, Springfield, Va.: Clearinghouse for Federal Scientific and Technical Information, 1968, PB 180116, p. 28.
92. Schwitzgebel, R.K. and Hurd, W.S. Patent No. 3,478,344 (1969). (Use of a nonremovable wrist transmitter.)
93. Schwitzgebel *et al.*, *supra* note 83.
94. Crewe, A.V., The Enrico Fermi Institute for Nuclear Studies, University of Chicago, Chicago, Ill. Crime as a scientific problem. Unpublished paper, 1967.
95. Purcell, K., and Brady, K. Adaptation to the Invasion of Privacy: Monitoring Behavior with a Miniature Radio Transmitter. *Merrill-Palmer Quarterly of Behavior and Development*, 12: 242–254, 1966.
96. Cromwell and Laks, *supra* note 85.
97. Tursky, B. Problems Encountered in Telemetering of Physiological Activity of Schizophrenics on an Experimental Psychiatric Ward. Paper presented at the 15th Annual Conference on Engineering in Medicine and Biology, New York, 1962. Copies available from author, Massachusetts Mental Health Center, Boston.
98. Jacobson, A., Kales, A., Lehmann, D., and Zweizig, J.R. Somnambulism: All-Night Electroencephalographic Studies. *Science*, 148: 975–977, 1965.
99. *Cf.* Petrovick, M.L., and Lindberg, G.W. On the Nature of Biomedical Engineering in Criminology. In: Yefsky, S.A., ed. *Law Enforcement Science and Technology*. London: Academic Press, 1967, pp. 393–401.
100. Freund, K. A Laboratory Method for Diagnosing Predominance of Homo- or Hetero-Erotic Interest in the Male. *Behaviour Research and Therapy*, 1:85–93, 1963; Freund, K. Erotic Preference in Pedophilia. *Behaviour Research and Therapy*, 5:339–348, 1967; McConaghy, N. Penile Volume Change to Moving Pictures of Male and Female Nudes in Heterosexual and Homosexual Males. *Behaviour Research and Therapy*, 5:43–48, 1967.
101. Bancroft, J.H.J., Jones, H.G., and Pullan, B.R. A Simple Transducer for Measuring Penile Erection, with Comments on its Use in the Treatment of Sexual Disorders. *Behaviour Research and Therapy*, 4: 239–241, 1966; Fisher, C., Gross, J., and Zuch, J. Cycle of Penile Erection Synchronous with Dreaming (REM) Sleep. *Archives of General Psychiatry*, 12: 29–45, 1965.
102. Bancroft et al., *supra* note 101; Laws, D.R. and Rubin, H.B. Instructional Control of an Autonomic Sexual Response. *Journal of Applied Behavior Analysis*, 2: 93–99, 1969.
103. Wolpe, J. Conditioned Inhibition of Craving in Drug Addiction: A Pilot Experiment. *Behaviour Research and Therapy*, 2: 285–288, 1965. *See also* Kushner, M. Behaviour Therapy Program at VA Hospital. *Association for the Advancement of Behavior Therapy Newsletter*, 2:7, 1967.
104. Wolpe, *supra* note 103, at 287–288.
105. Powell, J. and Azrin, N. The Effects of Shock as a Punisher for Cigrette Smoking. *Journal of Applied Behavior Analysis*, 1: 63–72. 1968.
106. Meyer, V. and Mair, J.M.M. A New Technique to Control Stammering: A Preliminary Report. *Behaviour Research and Therapy*, 1:251–254, 1963.
107. Azrin, N., Jones, R.J., and Flye, B. A Synchronization Effect and Its

Application to Stuttering by a Portable Apparatus. *Journal of Applied Behavior Analysis*, 1: 283–295, 1968.

108. Azrin, N., Rubin, H., O'Brian, F., Ayllon, T., and Roll, D. Behavioral Engineering: Postural Control by a Portable Operant Apparatus. *Journal of Applied Behavior Analysis*, 1: 99–108, 1968.
109. Lippold, O.C. and Redfearn, J.W.T. Mental Changes Resulting from The Passage of Small Direct Currents through the Human Brain. *British Journal of Psychiatry*, 110: 768–772, 1964.
110. *See generally* Schwitzgebel, R.L. Survey of Electromechanical Devices for Behavior Modification. *Psychological Bulletin*, 70: 444–459, 1968.
111. *E.g.*, Becker, H.C., Founds, W.L., Peacock, S.M., Heath, R.G., and Llewellyn, R.C. Improvements in the Technique for Implanting Subcortical Electrodes in Man by a Stereotaxic Method. In: Heath, R.G., ed. *Studies in Schizophrenia*, Cambridge, Mass.: Harvard University Press, 1954, pp. 565–570.
112. Heath, R.G. Pleasure Response of Human Subjects to Direct Stimulation of the Brain: Physiologic and Psychodynamic Considerations. In: Heath, R.G., ed. *The Role of Pleasure in Behavior*. New York: Hoeber, 1964, pp. 219–243.
113. Vaughan, H.G. Some Reflections on Stimulation of the Human Brain. In: Zubin, J., and Shagass, C., eds. *Neurobiological Aspects of Psychopathology*. New York: Grune and Stratton, 1969.
114. Ervin, F.R. Affective Responses to Brain Stimulation in Man. Paper presented at the American Psychological Association meeting, Washington, D.C., 1969. Copies available from author, Massachusetts General Hospital, Boston, Mass.; Stevens, J.R., Mark, V.H., Ervin, F., Pecheco, P., and Suematsu, K. Deep Temporal Stimulation in Man. *The Archives of Neurology*, 21:157–169, 1969.
115. Patterson, G., Jones, R., Whittier, J., and Wright, M. A. Behavior Modification Technique for the Hyperactive Child. *Behaviour Research and Therapy*, 2:217–226, 1965.
116. Welsh, R.S. A Highly Efficient Method of Parental Counseling: A Mechanical Third Ear. Paper presented at the meeting of the Rocky Mountain Psychological Association, Denver, June 1966.
117. Sanders, R.A. The "Bug-in-the-Ear": A Device for Training of Clinical Psychologists. Paper presented at the meeting of the Midwestern Psychological Association, Chicago, May 1966.
118. Kushner, M. Behavior Theory Program at VA Hospital. *Association for the Advancement of Behavior Therapy Newsletter*, 2:7, 1967.
119. Schwitzgebel *et. al.*, *supra* note 83.
120. Shapiro, David, Department of Psychiatry, Harvard Medical School. Personal communication, October 1969.
121. Schwitzgebel, *supra* note 110, at 452; Schwitzgebel, R.L. An Electronic Communication System for Classroom Use with the Poorly Motivated Student, Final Report, Project No. 5-8352. U.S. Office of Education, 1967; Schwitzgebel, R.L. A Belt from Big Brother. *Psychology Today*, 2:45–65, 1969.
122. Huszar, R.J. and Hoburdo, J. EKG Transmission from Emergency Vehicles. Paper presented at the Institute of Electrical and Electronic Engineers National Telemetering Conference, Washington, D.C., 1969; copies available from author, St. Francis Hospital, Hartford, Conn.
123. Delgado, J.M.R., Mark V., Sweet, W., Ervin, F., Weiss, G., Bach-Y-

Rita, G., and Hagiwara, R. Intracerebral Radio Stimulation and Recording in Completely Free Patients. *Journal of Nervous and Mental Disease*, 147:329–340, 1968.

124. *Id.* at 338.
129. *Pa. Stat. Ann.* title 19, sec. 1173 (1958).
130. *Ala. Code.* title 15, sec. 438 (1959; same, Supp. 1967).
131. *Colo. Rev. Stat. Ann.* sec. 39–19–5 (1963) (applicable to first sex offense).
132. *Nev. Rev. Stat.* sec. 207.157 (1967).
133. *Wash. Rev. Code Ann.* sec. 71.06.091 (Supp. 1969).
138. *Mo. Ann. Stat.* sec. 195.010 (1962).
139. *Ill. Ann. Stat.* ch. 23, sec. 3501 (Smith-Hurd 1968).
140. *N.D. Cent. Code* sec. 25-03-11 (1960).
141. *W. Va. Code Ann.* sec. 27–6–8 (1966).
142. *N.C. Gen. Stat.* sec. 35–4 (1966).
143. *N.D. Cent. Code* sec. 25–03–15 (1969).
144. *Miss. Code Ann.* sec. 436–03 (1957, same, Supp. 1967).
148. Arluke, *supra* note 147, at 268.
149. *Id.* at 269.
150. *Id.* at 268.
151. Beccaria, *supra* note 4.
152. Wechsler, H. Correctional Practices and the Law. *Federal Probation*, 17:16–20, 1953, p. 19.
154. Takagi, P. and Robison, J. The Parole Violator: An Organizational Reject. *Journal of Research in Crime and Delinquency*, 6: 78–86, 1969.
156. Takagi and Robison, *supra* note 154.
157. 213 F. 2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).
158. *Id.* at 771. The Ninth Circuit earlier noted, "We think it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." *Stroud* v. *Swope*, 187 F.2d 850, 851 (9th Cir. 1951). *See also Cooke* v. *Tramburg*, 43 N.J. 514, 205 A.2d 889 (1964).
159. Comment, Constitutional Rights of Prisoners: The Developing Law. *University of Pennsylvania Law Review*, 110:985–1008, 1962, pp. 985–986; *Powell* v. *Hunter*, 172 F.2d 330, 331 (10th Cir. 1949).
160. Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts. *The Yale Law Journal*, 72: 506–558, 1963; *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968) (dictum). There is also some tendency for courts to review less often than usual those agencies, criminal or civil, that regulate activities inimical to the public welfare. *See* Lorch, R.S., *Democratic Process and Administrative Law*, Detroit, Mich.: Wayne State University Press, 1969, p. 86.
161. Vogelman, R.P. Prison Restrictions—Prisoner Rights. *The Journal of Criminal Law, Criminology and Police Science*, 59: 386–396, 1968, p. 387. *See also* Rubin, S., Weihofen, H., Edwards, G., and Rosenzweig, S. *The Law of Criminal Correction*, St. Paul, Minn.: West, 1963, pp. 294–295.
162. 143 F.2d 443, 155, A.L.R. 143 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945). *See also Jones* v. *Cunningham*, 371 U.S. 236 (1962); Jackson v. *Godwin*, 400 F.2d 529 (5th Cir. 1968).
164. Note, The Problems of Modern Penology: Prison Life and Prisoners' Rights. *Iowa Law Review*, 53:671–709, 1967, p. 701.
165. Civil Rights Act of 1871, 42 U.S.C. secs. 1981, 1983, 1985 (1964);

Civil Rights Act of 1948, 18 U.S.C. sec. 242 (1964); *See Pierce* v. *LaVallee*, 293 F.2d 233 (2d Cir. 1961), *Elsberry* v. *Haynes*, 256 F. Supp. 737 (W.D. Okla. 1966) and *Wright* v. *McMann*, 387 F.2d 519 (2d Cir. 1967).

166. Federal Tort Claims Act, 28 U.S.C. sec. 2680 (1964).
167. *Fulwood* v. *Clemmer*, 295 F.2d 171 (D.C. App. 1961).
168. Administrative Procedure Act, 5 U.S.C. sec. 701 (a) (1967).
169. Davis, K.C. *Administrative Law Treatise.* St. Paul, Minn.: West, 1958, vol. 4, secs. 28.08–28.16.
170. Saferstein, H. Nonreviewability: A Functional Analysis of "Committed to Agency Discretion." *Harvard Law Review*, 82: 367–398, 1968, p. 371.
171. See analysis of statutes, *supra* notes 141–144.
172. *Carlson* v. *Landon*, 342 U.S. 524 (1952).
173. *See* Jaffe, L. L. and Nathanson, N.L. *Administrative Law: Cases and Materials*, 3d ed. Boston: Little, Brown, 1968, pp. 38–122.
175. The President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Corrections.* Washington, D.C.: U.S. Government Printing Office, 1967, pp. 67–79.
176. Doyle, R.F. Conditions of Probation. In: Newman, C.L., and Rector, M., eds. *Sourcebook on Probation, Parole, and Pardons.* Springfield, Ill: Thomas, 1964, pp. 112–120.
177. *Morris* v. *State*, 44 Ga. App. 765, 162 S.E. 879 1932).
178. *Bohannon* v. *State*, 271 P.2d 739 (Okla. Crim. 1954).
179. *People* v. *Patrick*, 118 Cal. 332, 50 Pac. 425 (1897).
180. *People* v. *Sly*, 180 Misc. 96, 39 N.Y.S. 2d 474 (County Ct. 1942).
181. *People* v. *Stanley*, 162 Cal. App. 2d 416, 327 P.2d 973 (1958).
182. 355 F.2d 993 (4th Cir. 1966).
183. *Id.* at 994–995.
184. 390 U.S. 333 (1968).
185. 356 F.2d 1,6 (2d Cir. 1966). It has also been suggested that fuller administrative review or more legal assistance in prisons might help to reduce frivolous claims. The President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Corrections.* Washington, D.C.: U.S. Government Printing Office, 1967, p. 84.
186. *See also* Saferstein, *supra* note 170, at 397–398.
188. *E.g., Gordon* v. *Garrson*, 77 F. Supp. 477 (E.D. Ill. 1948); *United States* v. *Jones*, 207 F.2d 785 (5th Cir. 1953). Mr. Chief Justice Warren commented, "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear." *Trop* v. *Dulles*, 356 U.S. 86, 100, n 32 1958). *But see Anthony* v. *United States*, 331 F.2d 687 (9th Cir. 1964). ("Customary" practice indicates that the punishment is not "unusual.")
189. *See* Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law. *Harvard Law Review*, 79: 635–655, 1966, p. 635.
190. *In re Birdsong*, 39 Fed. 599 (S.D. Ga. 1889).
191. *In re Kemmler*, 136 U.S. 436 (1890).
192. 217 U.S. 349 (1910). Proportionality, however, can be found emerging as a principle before this case, *e.g., State* v. *Driver*, 78 N.C. 423 (1878).
193. Sherman, P.R. ". . . Nor Cruel and Unusual Punishments Inflicted:" The Eighth Amendment. *Crime and Delinquency*, 14: 73–84, 1968, pp. 76–77.
194. 370 U.S. 660 (1962).

195. 392 U.S. 514 (1968).
197. *See generally* Lieb, F.L. Cruel and Unusual Punishments and the Durham Rule. *The Journal of Criminal Law, Criminology and Police Science* 59:227–234, 1968.
198. 329 U.S. 459 (1947).
199. Some exceptions have been noted above and cases can be found in *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966) and *Wright* v. *McMann*, 387 F.2d 519 (2d Cir. 1967).
200. *See* Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment. *New York University Law Review*, 36: 846–876, 1961.
201. *Mickle* v. *Henrichs*, 262 Fed. 687 (D. Nev. 1918) (criminal); *State* v. *Troutman*, 50 Idaho 673, 299 Pac. 668 (1931) (civil); *Buck* v. *Bell*, 143 Va. 310, 130 S.E. 516 (1925), aff'd on different grounds, 274 U.S. 200 (1927) (civil), *In re Cavitt*, 157 N.W. 2d 171 (Neb. 1968) (civil); Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment. *New York University Law Review*, *supra* note 200, at 855–856; Lindman, F.T. and McIntyre, D.M. *The Mentally Disabled and the Law*, Chicago: University of Chicago Press, 1961, pp. 183–190.
202. 54 Misc. 2d 123, 281 N.Y.S. 2d 923 (Sup. Ct. 1967).
203. *Robinson* v. *California*, 370 U.S. 660 (1962).
204. 28 Cal. Rptr. 489, 378 P. 2d 793 (1963), *cert. denied*, 83 Sup. Ct. 1927 (1963).
205. 281 N.Y.S. 2d 923, 929 (Sup. Ct. 1967); Mental Hygiene Law, Article 9, Drug Addiction; sec. 200, Declaration of Purpose (Supp. 1968 McKinney).
206. *In re Spadafora*, 281 N.Y.S. 2d 923, 927 (Sup. Ct. 1967).
207. 300 N.Y.S. 2d 453 (Sup. Ct. 1969).
208. *Id.* at 456.
209. 334 F.2d 506 (4th Cir. 1964).
210. *Id.* at 513.
211. *Supra* notes 128–133.
213. 344 F.2d 463 (8th Cir. 1965).
214. 288 F. Supp. 329 (W. D. Mo. 1968).
215. 164 N.W. 2d 253 (Wisc. 1969) (dictum).
216. *Id.* at 259.
217. *Snow* v. *Roche*, 143 F.2d 718 (9th Cir), *cert. denied*, 323 U.S. 788 (1949); *State* v. *Doolittle*, 122 Coun. Supp. 32, 158 A.2d 858 (Super. Ct. 1960); *Ford* v. *Board of Managers of New Jersey State Prison*, 407 F. 2d 937 (3d Cir. 1969).
218. *Landman* v. *Peyton*, 370 F.2d 135 (4th Cir. 1966).
219. *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Calif. 1966); *Wright* v. *McMann*, 387 F.2d 519 (2d Cir. 1967).
220. *See generally Weems* v. *United States*, 217 U.S. 349 (1910) (examples cited).
221. *See, e.g., Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1968).
223. *E.g., supra* note 67.
224. *People* v. *Blankenship*, 16 Cal. App. 2d 606, 61 P.2d 352 (Dist. Ct. App. 1936).
225. *In re Andrada*, 380 U.S. 953 (1965). *See also* Young, D.J., Alverson, P.Y., and Young, D.J. Court-Ordered Contraception. *American Bar Association Journal*, 55:223–226, 1969.

227. *See generally* Goldfarb, S.H. Antinarcotic Testing in California: Of Substantive Due Process. *California Law Review*, 56:37–53, 1968.
228. 73 Cal. Rptr. 907 (App. 1968).
229. Note, Anthropotelemetry: Dr. Schwitzgebel's Machine. *Harvard Law Review*, 80:403–421, 1966, p. 415.
230. Schwitzgebel *et al.*, *supra* note 83. *The New York Times*, September 7, 1969, p. 85 (tracking of location of parolees within a four to five block area; authorization by the Division of Youth Service, Commonwealth of Massachusetts).
231. *See generally* Schwitzgebel, R.K. Issues in the Use of an Electronic Rehabilitation System with Chronic Recidivists. *Law and Society Review*, 3:597–611, 1969; Beck, B., Commentary, and Schwitzgebel, R.K., Reply, *Id.* at 611–615.
232. 217 U.S. 349 (1910).
233. *See* Appendix D. *E.g.*, *State* v. *Sandoval*, 452 P.2d 350 (Idaho 1969) (limits placed on driving).
234. *People* v. *Cleveland*, 24- N.E. 2d (Ill. App. Ct. 1969). *See also* Best, J. and Birzon, P.I. Conditions of Probation: An Analysis. *The Georgetown Law Journal*, 51:809–836, 1963, pp. 829–831.
235. The President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Corrections*, Washington, D.C.: U.S. Government Printing Office, 1967, pp. 34–35; Special Task Force on Correctional Standards. Correctional Standards. *Crime and Delinquency*, 13:264–280, 1967.
236. *In re Bacon*, 49 Cal. Rptr. 322 (App. Ct. 1966).
237. *In re Preston*, 78 Cal. Rptr. 436 (App. Ct. 1969).
238. American Law Institute, Model Penal Code, section 301.1(2)(c), Proposed Official Draft, 1962.
239. National Council on Crime and Delinquency. Correction in the United States. *Crime and Delinquency*, 13:1–281, 1967, p. 177.
240. Levinson, R.B., Ingram, G.L., and Azarate, E. "Aversive" Group Therapy: Sometimes Good Medicine Tastes Bad. *Crime and Delinquency*, 14: 336–339, 1968 (group confrontation techniques used with inmates frequently placed in segregation).
241. Note, The Historical Background and Present Status of the County Chain Gang in South Carolina. *South Carolina Law Review*, 21:53–69, 1968, p. 61.
242. *Id.* at 61–67.
243. 221 P.2d 659 (Crim. Ct. App. 1950).
244. *Id.* at 665.
245. Sherman, *supra* note 193, at 79–81.
246. *See* Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment, *supra* note 200, at 855.
247. 203 So. 2d 470 (Miss. 1967) (dictum).
248. *Id.* at 472. *See also In re Robertson*, 54 A2d 848 (Del. Gen. Sess. 1947) (dictum).
249. 429 S.W. 2d 374 (Ken. Ct. App. 1968).
251. 342 U.S. 169 (1952).
252. *Id.* at 172. *But see* concurring opinion of Mr. Justice Black in *Rochin* v. *California*, *Id.* at 174; Note, Dissimilarites in Content Between the Two Due Process Clauses of the Federal Constitution. *Columbia Law Review*, 29:624–630, 1929.
253. *Cf.. Musser* v. *Utah*, 333 U.S. 95 (1948).

254. *United States* v. *Harriss*, 347 U.S. 612 (1954).
255. *See* Hink, H.R. The Application of Constitutional Standards of Protection to Probation. *The University of Chicago Law Review*, 29:483–497, 1962, p. 488.
256. Miss. Code 4004–23(a). *See also State* v. *Baynard*, 167 S.E. 2d 514 (N.C. App. 1969).
257. Ga. Code Ann. 27:2711(2) (Supp. 1968).
258. Hink, *supra* note 255, at 816.
259. 234 F.2d 345 (8th Cir. 1956).
260. *Id.* at 348–349.
261. *In re Green*, 203 So. 2d 470 (Miss. 1967).
262. *In re Buehrer*, 236 A. 2d 592, 597 (N.J. 1967). (The court also notes that probation is not meant to be painless.)
263. *See supra* note 238 and related discussion.
264. American Law Institute, Model Penal Code, section 301.1(2)(l), Proposed Official Draft, 1962.
265. *In re Peeler*, 72 Cal. Rptr. 254 (App. 1968).
266. *Klaw* v. *Shaffer*, 151 F. Supp. 534 (D.C.N.Y. 1957).
267. *Willis* v. *United States*, 250 A. 2d 569 (D.C. App. 1969).
268. 64 Cal. Rptr. 290 (App. 1967).
269. *Id.* at 292.
270. *Id.* at 292.
271. *Id.* at 293.
272. *Id.* at 293.
273. *Supra* notes 10, 11, 12, 16.
274. *Supra* note 15.
275. 64 Cal. Rptr. 290 (App. 1967).
276. 61 Cal. Rptr. 97 (App. 1967).
277. *Id.* at 100–101.
279. *People* v. *Dominguez*, 64 Cal. Rptr. 290, 294 (App. 1967).
280. 167 S.E. 2d 514 (N.C. App. Ct. 1969).
281. 233 N.C. 68, 62 S.E. 2d 495 (1950).
282. *Bohannon* v. *State*, 271 P. 2d 739 (Okla. Crim. 1954).
283. *Commonwealth* v. *Keenan*, 178 Pa. Super. 461, 116 A. 2d 314 (1955).
284. *People* v. *Williams*, 55 Cal. Rptr. 550 (App. 1960).
285. *See supra* Chapter III, A.
287. *Sas* v. *State of Maryland*, 334 F. 2d 506, 516 (4th Cir. 1964).
288. Freund, P.A., Sutherland, A.E., Howe, M.DeW., and Brown, E.J. *Constitutional Law: Cases and Other Problems.* Boston: Little, Brown and Co., 1967, p. 1322.
289. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (Mr. Justice Harlan concurring opinion).
290. 148 F.2d 411 (9th Cir. 1945).
291. *Id.* at 416.
292. *Munn* v. *Illinois*, 94 U.S. 113, 142 (1876) (Mr. Justice Field dissenting opinion).
293. 72 Cal. Rptr. 254 (App. 1968).
294. *Id.* at 260.
295. *Id.* at 261.
297. 77 Cal. Rptr. 16 (1969).
299. Note, Unconstitutional Conditions. *Harvard Law Review*, 73:1595–1609, 1960.
300. *See Speiser* v. *Randall*, 357 U.S. 513, 518–519 (1958).
301. Note, Unconstitutional Conditions, *supra* note 299, at 1596.

303. *Buck* v. *Bell*, 274 U.S. 200, 208 (1927).
304. *Railway Express Agency* v. *New York*, 336 U.S. 106, 112 (1949) (Mr. Justice Jackson concurring opinion).
305. 316 U.S. 535 (1942).
306. *Id.* at 539.
308. Rubin, S., Weihofen, H., Edwards, G., and Rosenzweig, S. *The Law of Criminal Correction.* St. Paul, Minn.: West, 1963, chapter 6.
309. 164 N.W. 2d 253 (Wisc. 1969).
310. *Id.* at 259.
311. 383 U.S. 107 (1966). For a suggestion that different standards of proof for commitment might be required by equal protection for statutes providing treatment in contrast to criminal statutes, see Note, "Defective Delinquent" and Habitual Criminal Offender Statutes—Required Constitutional Safeguards. *Rutgers Law Review*, 20:785–786, 1966.
312. 334 F.2d 506 (4th Cir. 1964).
313. *Id.* at 514.
314. *In re Spadafora*, 281 N.Y.S. 2d 923, 930 (1967) (Treatment for narcotic addiction).
315. 295 N.Y.S. 2d 276 (1968).
316. *Id.* at 281.
317. *Id.* at 282.
318. 300 N.Y.S. 2d 453 (1969).
320. *Id.* at 457.
321. 381 U.S. 479 (1965).
323. 367 U.S. 497 (1961).
324. *Griswold* v. *Connecticut*, 381 U.S. 479, 484. (1965).
325. *Id.* at 486.
326. *Id.* at 487.
327. Warren, S., and Brandeis, L. The Right to Privacy. *Harvard Law Review*, 4:193–220, 1890–1891.
328. *Id.* at 193.
329. Pound, R. Interests of Personality. *Harvard Law Review*, 28:343–365, 1915, p. 362.
330. *Young* v. *Western & A.R. Co.*, 39 Ga. App. 761, 148 S.E. 414 (1929).
331. *Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284 (1961).
332. *Sounder* v. *Pendleton Detectives*, 88 So. 2d 716 (La. App. 1955)
333. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).
334. *E.g.*, *Berger* v. *State of New York*, 388 U.S. 41 (1967).
335. *People* v. *Frazier*, 64 Cal. Rptr. 447 (App. 1967).
336. *People* v. *Aguiar*, 65 Cal. Rptr. 171 (App. 1968).
337. 292 N.Y.S. 2d 514 (1968).
338. Ruebhausen, O.M. and Brim, O.G., Jr. Privacy and Behavioral Research. *Columbia Law Review*, 65:1184–1211, 1965, p. 1189. For a fine history and policy oriented discussion of privacy, *see* Westin, A.F. *Privacy and Freedom.* New York: Atheneum, 1967.
339. Fried, C. Privacy. *Yale Law Journal*, 1968. 77:475–493, 1968, pp. 477–478.
340. Office of Science and Technology, Executive Office of the President. *Privacy and Behavioral Research.* Washington, D.C.: U.S. Government Printing Office, 1967, pp. 8–9.
341. 381 U.S. 479, 484 (1965).
342. 89 Sup. Ct. 1243 (1969).
343. *Id.* at 1248.

344. 281 N.Y.S. 2d 884, 891 (1967) (dictum).
345. *Buchanan* v. *State*, 164 N.W. 2d 253 (Wisc. 1969).
346. Note, Unconstitutional Conditions, *supra* note 299.
347. Chayet, N.L. Proposed Legislation—Chemical Testing in Massachusetts—The Need for Implied Consent. *Portia Law Journal*, 1:196–201, 1965.
348. *Supra* note 60.
349. *See* Introduction.
350. *Gerrish* v. *State of Maine*, 89 F. Supp. 244 (S.D. Maine 1950).
351. *Numer* v. *Miller*, 165 F.2d 986 (9th Cir. 1948).
353. *Jackson* v. *Godwin*, 400 F.2d 529 (5th Cir. 1968).
354. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304 (1940).
355. *Fulwood* v. *Clemmer*, 206 F. Supp. 270 (D.D.C. 1962).
356. 288 F. Supp. 329 (1968).
358. *Id.* at 336.
359. *Id.* at 338.
361. Utah Code sec. 26–17–7.
362. 185 Va. 335, 38 S.E. 2d 444 (1946).
364. *Jones* v. *Commonwealth*, 185 Va. 335, 337 (1946).
365. *Id.* at 344–345.
368. Holtzoff, A. The Power of Probation and Parole Officers to Search and Seize. *Federal Probation*, 31:1–7, 1967.
369. 297 P. 2d 451 (App. 1956). *See also Martin* v. *United States*, 183 F.2d 436 (4th Cir. 1950).
370. *Id.* at 457.
371. 71 Cal. Rptr. 105 (App. 1968).
372. *Id.* at 107.
373. *Id.* at 107.
374. 73 Cal. Rptr. 907 (App. 1968).
375. *Id.* at 910.
376. For a discussion of special constitutional problems associated with electronic tracking and monitoring, *see* King, D.B. Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations. *George Washington Law Review*, 33:240–269, 1964. Note, Anthropotelemetry: Dr. Schwitzgebel's Machine. *Harvard Law Review*, 80:403–421, 1966.
377. *See* Slovenko, R. *Psychotherapy, Confidentiality and Privileged Communication.* Springfield, Ill.: Charles Thomas, 1966; Geiser, R.L., and Rheingold, P.D. Psychology and the Legal Process: Testimonial Privileged Communications. *American Psychologist*, 19:831–837, 1964.
378. Supra notes 234, 293. *See also People* v. *Cleveland*, 244 N.E. 2d 215 (Ill. App. 1969) (seventy-two-year-old defendant required to spend 5 months at a State farm).
380. *In re Bacon*, 49 Cal. Rptr. 722 (App. 1966).
381. Teeters, N.K. The Alpha and Omega of the Prison. *The Prison Journal*, 158:3–7, 1968, p. 6.
382. Barnes, H.E. Scientific Treatment. *Virginia Law Weekly, DICTA*, 1:12–15, 1948–1949, p. 15.
383. Menniger, K. *The Crime of Punishment.* New York: Viking, 1968, p. 11.
384. Weihofen, H. *The Urge to Punish. New Approach to the Problem of Mental Irresponsibility for Crime.* New York: Farrar, Straus, and Cudahy, 1956.
385. The President's Commission on Law Enforcement and Administration

of Justice. *Task Force Report: Corrections*, Washington, D.C.: U.S. Government Printing Office, 1967, p. 82.

386. Geis, G. The Community-Centered Correctional Residence. *Correction in the Community: Alternatives to Incarceration.* Sacramento, Calif.: Department of Youth and Adult Corrections Authority, 1964, pp. 19–28.
387. *See* Chapter III, A.
388. *Supra* note 134.
389. Silverberg, H.M. Criminal Reform: A Brief Brief for Coercive Behavior Regulation. Paper, Law and Psychiatry Seminar, University of Pennsylvania Law School, March 30, 1967.
390. Schwartz, R.D. A Learning Theory of Law. *Southern California Law Review*, 41:548–587, 1968.
392. Shah, S.A. *A Behavioral Conceptualization of the Development of Criminal Behavior, Therapeutic Principles, and Applications.* A Report to The President's Commission on Law Enforcement and the Administration of Justice, Washington, D.C.: Center for Studies of Crime and Delinquency, National Institute of Mental Health, 1966, p. 53; for further discussion *see also* Shah, S.A. Changing Attitudes and Behavior of Offenders. *Federal Probation*, 27:20–27, 1963, pp. 26–27.
393. Graubard, S.R., ed., Ethical Aspects of Experimentation with Human Subjects. *Daedalus*, 1969, vol. 98; Schwitzgebel, R.K. Ethical Problems in Experimentation with Offenders. *American Journal of Orthopsychiatry*, 38:738–748, 1968.
394. Szasz, T.S. *Law, Liberty, and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices.* New York: Macmillan, 1963, p. 18.
395. Livermore, J.M., Malmquist, C.P., Meehl, P.E. On the Justifications for Civil Commitment. *University of Pennsylvania Law Review*, 117:75–96, 1968.
396. Silverberg, *supra* note 389, at 4.
397. *Id.* at 4.
398. Phaedrus, Fable 22, 1 (*circa* A.D. 8).

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