

COMMENTARIES

SINGLING OUT BEHAVIOR MODIFICATION FOR LEGAL REGULATION: SOME EFFECTS ON PATIENT CARE, PSYCHOTHERAPY, AND RESEARCH IN GENERAL

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Abuses charged to behavior modification have aroused justifiable public concern. The abuses have occurred in prisons, mental institutions, and other institutions where commitment and release are controlled by legal rules and administrative discretion rather than by patient or prisoner volition. Concern over charges that inmates in these institutions have suffered abuse at the hands of behavior modification therapists has led to a variety of suggested corrections. The proposals by Paul Friedman¹ attempt to distinguish between practices

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1. Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39 (1975).

The revised and edited version of Friedman's article differs from the version to which the author originally addressed this Commentary, and it raises points which the author would have liked to discuss in greater detail. To cite one example, much of Friedman's discussion regarding judicial review of treatment of mental patients centers around four cases, and in his conclusion he cites "*Kaimowitz, Knecht, Mackey, and Wyatt*" as indicative of "a new and more activist judicial scrutiny of enforced therapy." Friedman, *supra* at 94. However, the first of these involved psychosurgery, and the second and third involved the administration of drugs. As will be noted in the discussion, these are medical procedures not associated with the discipline of applied behavior analysis. Yet, following this conclusion, Friedman proposes a legislative act designed specifically and only to "govern applied behavior analysis." *Id.* at 95.

The fourth case is cited mainly with reference to use of aversive conditioning as the only behavior modification procedure in these cases. However, this case is a complex one, and is generally cited "as a landmark case in which . . . [the court] ruled that involuntary mental patients have a constitutional right to treatment" in addition to spelling out the rights they retain. See B. ENNIS & L. SIEGAL, *THE RIGHTS OF MENTAL PATIENTS: THE BASIC ACLU GUIDE TO A MENTAL PATIENT'S RIGHTS* 311 (1973). This decision was welcomed by applied behavior analysts, and the effects of Friedman's proposal upon such treatment rights are a considerable part of the author's discussion.

engaged in by professionals who legitimately identify themselves with the behavior modification field and those practices also designated as behavior modification, but which are engaged in by others. He proposes standards for the former practices which he presents in the form of a legislative act or regulations.² Generally, Friedman's article comes as somewhat of a relief from the confusion about behavior modification generated by persons and institutions of Friedman's outlook.³ As Friedman notes, one outcome of this confusion has been that responsibility for the abuses of other behavior changing procedures has been laid at the doorstep of behavior modification.⁴ Another outcome has been that practices by those not trained in behavior modification procedures have been ascribed to behavior modification.⁵

Behavior Modification

Friedman correctly notes that "when behavior modification is used to refer only to the end product of the treatment—a change in

It should also be noted that in *Wyatt v. Stickney* the court proposed "committees who shall have review of . . . all rehabilitation programs." See B. ENNIS & L. SIEGAL, *supra* at 314. This point, somehow overlooked by Friedman who chooses to single out applied behavior analysis for committee review, is critical to the discussion.

2. Friedman, *supra* note 1, at 95.

3. For example, a Senate subcommittee reported that "of all the methods of behavior control and modification, psychosurgery is the most direct, most permanent, and most controversial." STAFF OF THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *INDIVIDUAL RIGHTS AND THE FEDERAL ROLE IN BEHAVIOR MODIFICATION* 11 (1974). Psychosurgery is not a behavior modification procedure. Additionally, in the report, amygdalotomy, prefrontal lobotomy, induction of vomiting, and drug-induced respiratory arrest and muscular paralysis are part of the horrors lumped with positive and negative reinforcement, which are techniques of behavior modification. *Id.* at 13-14. Other examples may be found. One commentator includes within the definition of behavior modification or control "isolated confinement, the application of heavy stress or repeated pain, and the use of drugs, electrodes, and even psychosurgery." N.Y. Times, Feb. 10, 1974, § 4, at 7, col. 1-2. Indeed, the American Civil Liberties Union, at least in the publication of its Illinois chapter, extends the confusion even further. It associates behavior modification with the Puritan stocks and with obedience training of dogs at the White House. THE BRIEF, Nov. 1974.

4. See Friedman, *supra* note 1, at 47.

5. One institution, the Patuxent Institution in Maryland, has described itself as a "total treatment facility" and has a graded tier system through which advancement is contingent on progressive inmate changes, determined by the staff. See Goldfarb, *Stimulus/Response: American Prisons: Self-defeating Concrete*, 7 PSYCHOLOGY TODAY, Jan. 1974, at 20. For this and other reasons it is often described as a behavior modification facility. See Holland, *Behavior Modification for Prisoners, Patients, and Other People as a Prescription for the Planned Society*, 1 MEX. J. BEHAVIOR ANALYSIS 20 (1975); A. Saunders, *Behavior Therapy in Prisons: Walden II or Clockwork Orange?* 21 (unpublished paper delivered at the 8th Annual Convention, American Association for Behavior Therapy, Chicago, Ill., Nov. 1-3, 1974). However, when the author was shown through the facilities in the late 1960's, well after the procedures were established, there was not a single professional trained in the operant procedures underlying the application of the contingency system purportedly used. The institution is run by a psychiatrist and "about one-fifth of all the psychiatrists in the United States in full-time correctional work are at Patuxent" according to Goldfarb, *supra* at 85. Indeed, the procedures are rationalized in a humanist-psychiatric manner. See Stanford, *A Model Clock-Work Orange*, N.Y. Times Magazine, Sept. 17, 1972, at 9, 74, 84. Similarly, prison programs located in Illinois involve a variety of psychological-psychiatric interventions by professionals untrained in behavior modification. Nevertheless, the abuses have been charged to behavior modification. See THE BRIEF, Nov. 1974.

behavior—it includes almost all therapeutic approaches.”⁶ Indeed, as I have noted elsewhere, “behavior can be changed or modified by psychoanalysis, Gestalt therapy, primal scream, . . . lectures, books, jobs, [and] religion.”⁷ Since the scope of the term behavior modification—originally coined to refer to “the *explicit* and *systematic* application of procedures derived from . . . [certain] conceptual systems”⁸—has been so severely distorted in the popular and legal press, Friedman dispenses with the term. Instead he proposes use of the term applied behavior analysis;⁹ but it is not clear what he means by this term. Applied behavior analysis refers to only one of the three major branches of behavior modification.¹⁰ That Friedman’s target is only the so-called “Skinnerian” branch is suggested by his definition of applied behavior analysis as that body of approaches whose underlying principle is that behavior is primarily under the influence of its consequences.¹¹ However, this does not accord with his specification of subsumed techniques: “positive reinforcement, token economy programs, shaping, modeling, aversive conditioning, overcorrections, extinction, and systematic desensitization.”¹² Modeling, aversive conditioning, and systematic desensitization are not associated with applied behavior analysis,¹³ but rather with the other two branches of behavior modification, neither of which assumes that influence by consequences is necessary to behavior change. Friedman’s target, however, appears to be behavior modification in general, as is suggested by his characterization of applied behavior analysis utilizing “a model of social reinforcement under which it is recognized that other human beings are a source of meaningful stimuli that alter, direct, or maintain the individual.”¹⁴ This statement covers the entire field of behavior modification, as well as other psychological and psychiatric

6. Friedman, *supra* note 1, at 47.

7. Goldiamond, *Toward a Constructional Approach to Social Problems: Ethical and Constitutional Issues Raised by Applied Behavior Analysis*, 2 BEHAVIORISM, Spring 1974, at 1, 38.

8. *Id.* at 40 (emphasis added).

9. Friedman, *supra* note 1, at 44.

10. For a discussion of these three branches, see text accompanying notes 17-20 *infra*.

11. Friedman, *supra* note 1, at 44.

12. *Id.* For a discussion of each of these procedures, except overcorrection, see A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION (1969). For a discussion of overcorrection, see Azrin & Wesolowski, *Theft Reversal: An Overcorrection Procedure for Eliminating Stealing by Retarded Persons*, 7 J. APPLIED BEHAVIOR ANALYSIS 577 (1974).

13. A sampling, of one issue from each of the eight volumes of the *Journal of Applied Behavior Analysis* produced not a single reference to these terms, nor did a scanning of the first issue of the newly inaugurated *Mexican Journal of Behavior Analysis*. In contrast, they were often found in behavior modification journals which include other orientations.

14. Friedman, *supra* note 1, at 44.

fields of inquiry and change. Further, the entire paragraph which introduces his definition of applied behavior analysis would apply to *all* branches of behavior modification, and might be considered an excellent abstract of Bandura's first chapter.¹⁵

If, by applied behavior analysis, Friedman intends only the so-called Skinnerian branch, his discussion should be restricted to its rationales and procedures and to that part of the public uproar attributable to their use. If, however, Friedman intends behavior modification in general, he is engaging in the behavioral equivalent of designating all psychotherapeutic procedures, including Gestalt therapy and primal scream therapy, as psychoanalytic therapy. The issue, however, is not simply terminology. As any student of law is aware, to insist on precise definitions is neither legal obscurantism nor quibbling when social and legal consequences turn on such definitions. The popular confusion surrounding behavior-changing techniques can be resolved only by reference to the definition of the different conceptual schemes or behavioral science orientations employing them.¹⁶

At least three different schools, with sharply divergent orientations, legitimately share the broadly encompassing term behavior modification. Both systematic desensitization and aversive conditioning derive from one orientation; modeling derives from yet another; positive reinforcement and the remaining examples given by Friedman from a third.

The basic differences and commonalities among these orientations are best understood in the context of their common origins in the learning laboratories of experimental psychology. The three schools evolved from experimental procedural differences which led to, and were also derived from, different explanations of learning and behavior. A shared value was the importance of research and empirically-validated theories which allow different interpretations of similar phenomena to be resolved by experimental outcomes. The laboratory approaches were considered frameworks for the establishment of a science of human behavior with laws whose generality extended far beyond the laboratory. Although animal subjects were often used, their use followed the same rationale as it does in medical research.

The most classic of these orientations derives from the conditioning procedures developed by Pavlov and extended by Hull. This is the "S-R formulation" of classical conditioning and classical learn-

15. A. BANDURA, *supra* note 12.

16. See Goldiamond, *supra* note 7, at 40.

ing theory, which the popular press still equates with behaviorism. In classical conditioning, an antecedent stimulus elicits and controls a response. If a second stimulus with a second response is repeatedly paired with the first stimulus, the second stimulus, on its own, may eventually serve to elicit the first response. The classic example is food, which may elicit salivation. Thus, a tone paired with the food may come to elicit salivation. A variety of procedures, including systematic desensitization¹⁷ and aversive conditioning, are based on this classic system. For example, as aversive conditioning is used clinically in aversion therapy, application of electrical stimulus to an individual may elicit unpleasant emotions. Projection of a slide showing a child, coupled with application of an electrical current, may elicit these unpleasant emotions and thereby inhibit lust. In time, the slide itself may serve first to elicit anxiety related to the original response to electrical stimulation, and then serve to free the person from his fears that he may molest a child. As can be seen, the consequences of behavior play no role in the S-R formulation.

Under a second basic behavioral orientation, the consequences attached to behavior play a critical role. This is an "R-S formulation" or an "S-R-S formulation." In this formulation, an antecedent stimulus controls behavior only because of the behavioral consequences then in effect. A familiar example is traffic control. There, the antecedent stimuli, traffic lights, control traffic flow because of the consequences then in effect: driving through a red light may be disastrous in heavy traffic, as well as legally punished. Since the behavior is instrumental in obtaining a consequence, or operates in its environment to do so, the system is called instrumental or operant. The term applied behavior analysis refers to the practical application of this system only. Programmed instruction, where the consequence of having correctly answered or responded to one question is advancement to the next question, is a common application of this system.¹⁸

17. In systematic desensitization, an ordered series of anxiety-provoking situations is established with a patient. The patient, who has been trained to relax, is then told to do so, and the least-provoking situation is presented. Further situations are presented until anxiety is reported. The stimulus is then removed, and the patient is again told to relax. The patient goes through the progression until the negative reaction is neutralized for the event which is considered to be representative of, or which actually is, the life-situation in which the anxiety appears. See A. BANDURA, *supra* note 12, at 430; J. WOLPE, *THE PRACTICE OF BEHAVIOR THERAPY* (1973).

18. None of this should be taken to imply that any person or any system which seeks to change, modify, or influence behavior by means of rewards and punishments is applying behavior modification. For example, the fact that a prison system can be rationalized or better understood by concepts derived from the experimental analysis of punishment does not mean that behavior modification entered into the design of that system.

Under the third orientation, the model is an "S-M-R formulation." In this formulation, learning or conceptual organization mediates between stimuli and behavior. Consequences are not considered necessary for learning, although they may be necessary for performance. A person may learn by observing others who have either personally performed the act or experienced its consequences. In modeling, which derives from this orientation, the model demonstrates the correct performance to the subject. The terms applied here include social learning theory and vicarious learning.

Each of the orientations is considerably more complex than presented. Additionally, systematizers in each may include, within their framework, the approaches of the others,¹⁹ defining them accordingly. To someone not professionally familiar with the systems involved, many of the procedures of one are indistinguishable from those of another.²⁰ The overlap between these and procedures of

19. Thus, to cite but one example, what Bandura calls modeling is identified as imitation and subsumed under a consequence-necessary approach by Baer, Peterson, and Sherman. Compare A. BANDURA, *PSYCHOLOGICAL MODELING: CONFLICTING THEORIES* (1971), with Baer, Peterson & Sherman, *The Development of Imitation by Reinforcing Behavioral Similarity to a Model*, 10 J. EXPERIMENTAL ANALYSIS OF BEHAVIOR 405 (1967).

20. For example, aversive controls, as distinguished from aversive conditioning, has been used by some writers in the field of applied behavior analysis as a grab bag which refers to the escape and avoidance contingencies of negative reinforcement, to punishment, and, in some cases, to extinction. Escape refers to the conditions when a behavior terminates a negative reinforcer, and avoidance to the contingencies in which behavior postpones a negative reinforcer until the next time, as in blackmail payments. Extinction refers to absence of contingencies, in which case the behavior simply becomes ineffectual, and no different from any other effects. Extinction does not necessarily eliminate behavior, as Friedman assumes. If the behavior has been reinforced, positively or negatively, extinction will result in its decrease over time. However, if the behavior has been suppressed through punishment, extinction can result in an increase in behavior.

Aversive conditioning, a classical term, is distinguished from aversive control, a consequential term, in several ways:

(1) Aversive conditioning involves nonconsequential pairing. Aversive control involves present or former consequences.

(2) Aversive conditioning is used to decrease behavior, but aversive control involves either increasing or decreasing behavior.

(3) The programs set up by the investigator differ. In aversive conditioning, since the electric shock is to be delivered when the subject is emotionally aroused, the investigator must set up the conditions to provoke such arousal, for example, the slide showings of the child. The investigator arranges these pairings at his convenience, so to speak. In the punishment form of aversive control, however, punishment is not applied unless and until the behavior to be punished occurs. The investigator does not "entrap" the patient so that he may punish him. Consequently, the investigator must be continually on the alert and ready to apply the consequence immediately when the behavior does occur.

(4) The nature of the behavior implicated in the conditioning or punishment differs. In aversive conditioning, the behavior conditioned is seldom the socially problematic behavior. In the punishment form of aversive control, it is seldom not the problematic behavior. In aversive conditioning, the emotional or penile responsiveness to a child or image of a child is paired with delivery of shock. Neither of the reactions is socially problematic, legally reprehensible, or necessarily undesirable. They enter into the realm of constitutionally-protected privacy. The social target behavior is actually child molestation, which is presumably then affected. In the punishment form, however, the behavior punished is the target behavior of child molestation. Thus, punishment can clearly be differentiated. The case of Friedman's autistic head-banger, see Friedman,

the more conventional psychotherapeutic endeavors can have considerable legal implications.

Legal Implications of Regulation

1. *The Overlap Between Behavior Modification and Psychiatry.* While the overlap among the various behavior modification orientations may seem to be of concern only to students of psychological systems, its legal implications, when regulations are applied to one orientation but not another, are considerably more far-reaching. Consider, for example, a case of increased privileges made contingent on progress. This occurs in every psychiatric institution. How different is this in principle from a graded tier system or a token economy? In a token economy, progressive increase in tokens earned progressively purchases more privileges. It is not easy to distinguish among applications of such principles in a penal institution by prison officials, in a mental hospital by a humanist psychiatrist, in a token economy by an operant behaviorist, or in advancement through the grades of school by an educator. Yet, in all these systems consequences are applied when behavior changes. Thus, they come within Friedman's definition of applied behavior analysis. Consequently, it will be difficult for each of these professionals to know whether his practices are regulated.

Is the issue whether the therapist believes that the change is due to consequences he provides, or whether he believes that the changes have occurred some other way and he merely increases freedom as a consequence? Stated otherwise, does he believe that the behaviors change because of anticipated or actual consequences, or that the consequences were presented because the behaviors changed? The operations are identical in both cases, and legal examination also should be.

Friedman's proposals rely on the equation of certain procedures to the applied behavior analysis field.²¹ He thereby faces some definitional difficulties.²² While this equating can be done in some

supra note 1, at 101-02, provides another example. In such a case, the electric stimulation is applied if and only if the target behavior occurs, that is, when the child bangs his head. This is punishment. The electric stimulation is not applied when the child has the image of banging his head, as would be the case with aversion therapy or aversive conditioning.

21. See Friedman, *supra* note 1, at 44.

22. Even the "specific" techniques which Friedman associates with applied behavior analysis are not truly specific. They refer to both the very general relations between events and to the effects they produce. For example, positive reinforcement, one of these so-called techniques, is a broad category of procedures which refers to increases in the likelihood of behavior, an effect, when that behavior has been followed by a consequence—called a reinforcer. A monetary payoff, a singular honor, or a hum-

areas, such as medicine, it becomes extremely difficult when one turns to psychotherapy and behavior modification in all its forms and disciplines. Then the differentiation of practices becomes one of orientation and conceptual systems rather than of procedures.²³

Difficult questions are raised when a procedure with application to two or more orientations is regulated when employed in one orientation or profession but not in another. If procedures presently associated with routine psychiatric practice are operationally identical to the regulated procedures of behavior modification, the question arises whether the psychiatrist also must apply for prior clearance.²⁴ Indeed, as behavior modification expands and moves away from the model of the animal laboratory, an increasing number of procedures in the more classical approaches will be subsumed by its concepts. Similarly, if a given procedure, considered to be a behavior modification procedure, is identical to a procedure also considered to be a standard humanist procedure, and if legal regulation is required in the first case but not in the second, grounds for legal action exist. Arguably, equal protection of the right to practice psychotherapy is denied.

Consider as another example a token economy supervised by a

ble smile are all positive reinforcers if they function in the manner cited. Punishment, on the other hand, refers to a decrease in the likelihood of behavior, also an effect, following some behavior-contingent consequence—a negative reinforcer or aversive stimulus. These events can include a gentle reprimand or reminder to try some other course of action next time, as well as the same payoff or smile that also can serve as a positive reinforcer, depending on the conditions, see Azrin & Holtz, *Punishment*, in *OPERANT BEHAVIOR: AREAS OF RESEARCH AND APPLICATION* 380 (W. Honig ed. 1966), and the pairing in aversive conditioning, to extend the list to classical conditioning, can be of a verbal expression of displeasure and a grimace. Thus, these terms make sense only in the context of the discipline from which they arise and which they help to order, in accordance with the requirements of the system. It would not make sense for the law to try to systematize its procedures in accord with the definitions or terminologies of another discipline. Its systematization must be otherwise and would examine the specific procedures, how they were applied, with whom, under what conditions, and the constitutional and other legal issues involved. What the law puts together into categories must differ from what psychology would do.

23. The term behavior therapy was originally coined to distinguish it from other forms of psychotherapy, and like the more general term, is applied in clinical contexts. The "first use of the [former] term . . . was in a 1953 status report by Lindsley, Skinner & Solomon." See Krasner, *Behavior Therapy*, in *ANNUAL REVIEW OF PSYCHOLOGY* 484 (1971). When applied behavior analysis, considered an application of the concepts and procedures of the experimental analysis of behavior, is applied in a clinical context, it is often considered as a branch of behavior therapy. However, it can also be applied to educational subject matters, as in programmed instruction; to autonomic changes, as in biofeedback; to institutional settings, as a branch of behavior modification; to self-management and self-direction, as a branch of self-control; and, increasingly, to social behavior. See *THE EXPERIMENTAL ANALYSIS OF SOCIAL BEHAVIOR* (R. Ulrich & P. Mountjoy eds. 1972); G. FAIRWEATHER, D. SANDERS, D. CRESSLER & H. MAYNARD, *COMMUNITY LIFE FOR THE MENTALLY ILL: AN ALTERNATIVE TO INSTITUTIONAL CARE* (1969) [hereinafter cited as G. FAIRWEATHER]; Goldiamond, *supra* note 7, at 38.

24. Similarly, suppose that a behavior modification specialist, aware of the special procedural obstacles confronting him, simply redefines his procedures in accord with humanist language. This raises the question whether previously scrutinized procedures become unscrutinized.

psychologist in a private mental hospital. Suppose that a psychiatrist in a state mental institution decides that this practice has merit and decides to utilize it. He is then warned that if he institutes a token economy, he must go through review committees, obtain clearances, and fill out forms—all of which he must do under Friedman's standards and none of which he is presently required to do. The psychiatrist's failure to use this procedure because he would have to go through channels can contribute to malpractice liability. In other branches of medicine, the effects of malpractice suits have produced defensive medicine, that is, excessive testing procedures, professional conservatism, refusal to handle certain problems, or use of alternative and less effective procedures.²⁵ These adverse effects suggest that the issues being raised are not simply "iffy" ones. Psychiatry should not have to shun the advances of a related discipline because attempts to incorporate new programs could prove burdensome. Moreover, in order to comply with regulations, the psychiatrist should not have to be wary of the precision in definitions of the concepts and procedures comprised by another regulated orientation, such as applied behavior analysis.²⁶

Friedman's analysis of legal issues which may be generated by the practices of behavior modification is a valuable and impressive contribution. He notes as well that these might be applicable to all forms of psychotherapy. Indeed, the foregoing discussion of the problem of categorizing procedures underscores this. To surround procedures and practices with legal constraints simply because they relate to a given orientation system or role model raises grave questions. The questions are rendered more critical by the fact that some orientation systems are unpopular in some quarters and wrongly considered malicious or illegal in others.

Certain procedures may be viewed as constituting cruel and unusual punishment. Other procedures, such as making access to religious worship contingent on system-defined behavior, also conflict with constitutional guarantees. Whether other therapeutic procedures, such as electroconvulsive shock therapy, constitute an invasion of privacy and whether informed consent can freely be given for these treatment procedures either inside or outside an institution²⁷ will be the subject of litigation. Individual rights may conflict with social

25. According to a recent account "some younger pediatricians are debating whether it might be wiser to let an infant die rather than try to save its life through extraordinary measures and thereby risk a malpractice suit." N.Y. Times, Apr. 20, 1975, § 1, at 1, col. 2.

26. The major contribution of applied behavior analysis is its explicitness, rather than its specific body of therapeutic procedures. See Goldiamond, *supra* note 7, at 40.

27. For a discussion of coercion, see text accompanying notes 41-52 *infra*.

needs, as they often do. The legal resolution will come through examination of the particular procedure as it relates to these issues and the particular circumstances.

2. *Regulation and the Quality of Patient Care.* The discriminatory regulation of applied behavior analysis is not detrimental just to professional practice. Singling out behavior modification procedures for legal regulation may detrimentally affect the quality of treatment available for patients. Consider, for example, the case of a grade school girl who was institutionalized for head banging. In the institution, a football helmet was placed on her head, and her hands were bound to prevent removal of the helmet. She had torn out her hair and bruised her face. Her neck was almost as thick as a horse's. She was subsequently placed in a carefully designed behavior modification program using many reinforcers, but without success. The therapists tried a variant of a procedure used by parents for countless generations. In desperation, when she banged her head a sharp slap was delivered to her cheek simultaneously with the command "don't." Presumably this approach would have been subject to regulation under Friedman's standards. After less than a dozen slaps, the word "don't" yelled from across the room was sufficient to stop the head banging. Shortly thereafter, the head banging completely ceased. The helmet was removed, her hair grew back, the bruises healed, her neck regained its normal size, and she began to socialize. Upon discovering that she had been slapped, her parents removed her from the program. In short time, it was necessary to strap her to her crib, bind her hands, and replace the helmet. Her hair was torn out and her face bruised; her neck became almost as thick as a horse's.²⁸ The original procedures, when reinstated, reproduced the outcomes they originally produced and reversed when different procedures were tried.

Under Friedman's standards, the relationship between patient outcome, therapeutic conduct, and legal consequences to the institution in the foregoing case would be as follows:

| <u>Treatment</u> | <u>Patient Outcome</u> | <u>Legal Consequences</u> |
|---|---|---|
| 1. Occasional punishment, constructional program | Progression towards human developmental norms | Legal regulation, advance approval of treatment |
| 2. Physical restraints, positive program not possible | Development frozen, human monstrosity | No legal regulation, approval not required |

It would require considerable naivety about institutions and commensurate faith in the institution's dedication to assume that under

28. This is a summary of an actual case history documented by a former colleague. For further discussion of this case, see Goldiamond, *supra* note 7, at 62-63.

such conditions course 2 would not be favored over course 1, with its attendant effects upon patient care. Concern over child care sufficient to override bureaucratic barriers would have to be dramatic, and its proponents would have to be strident for their voices to be heard. It is easier to continue things the way they are than to be troubled with extra paper work, committees, writing requests, attending meetings, and waiting for approvals. Thus, under the above regulatory scheme, there are bound to be adverse effects on the continuation of behavior modification practices and on the establishment of new treatments. This will ultimately affect patient care and the social commitment to the support of mental health systems.

If therapeutic procedures are to be selected on the basis of patient welfare rather than administrative convenience, differential treatments should be divorced from differential legal requirements for evaluation. This can be done in one of three ways.

The first of these methods would involve the legal regulation of all therapeutic and related procedures, regardless of orientation, and may be depicted as follows:

| <u>Treatment</u> | <u>Patient Outcome</u> | <u>Legal Consequences</u> |
|--|----------------------------|---------------------------|
| 1. New therapeutic procedures | Specific outcomes produced | Legal regulation |
| 2. Conventional therapeutic procedures | Specific outcomes produced | Legal regulation |
| 3. No therapeutic procedures | Specific outcomes produced | Legal regulation |

Legal regulation of behavior modification requires reference to other available programs, either therapeutic or nontherapeutic. The costs of each of these procedures should be evaluated against the demonstrated results of each. Otherwise treatments will be continued with greater damage than those inflicted in the dramatic case of the head-banging child.²⁹ Imperiled by discriminate regulation are the adequacy of patient care, restoration of liberty, and nonrecidivism of maladaptive behavior. If the practices of behavior modification are subjected to scrutiny and regulation, so too should be the present practices of other systems.

29. The conventional treatment program described in the little girl's case is not unusual. Self-inflicted injuries by such children have included blindness and irreversible brain damage. The reason given for withdrawing the child from the behavioral program described is frequently the rationale given at other institutions: "We must wait patiently until she attains rationality so that we can discuss these things with her. In the meantime, we must be patient, and constantly show and communicate our love and concern." A question unanswered by Friedman is why conventional approaches such as this would escape review and a demonstration that they are effective and safe before they are permitted in any given case. See Friedman, *supra* note 1, at 95-100.

The issues involved in the child's case can be expressed in terms of alternative sets of contingencies. Institutional behavior is in the first column. Two effects of its behavior on the child are in the second column.

The second alternative is to legally require that the institution disclose its evaluation of the subject, its proposed procedures, and the actual outcomes:

| <u>Treatment</u> | <u>Patient Consequences</u> | <u>Legal Requirements</u> |
|--|-----------------------------|--|
| 1. New therapeutic procedures | Specific outcome produced | Disclose institutional evaluation and outcomes |
| 2. Conventional therapeutic procedures | Specific outcome produced | Disclose institutional evaluation and outcomes |
| 3. No therapeutic procedures | Specific outcome produced | Disclose institutional evaluation and outcomes |

Steps towards these procedures are being considered in at least one state where proposed administrative regulations would require that each program define the outcomes desired and procedures to be used and compare these with the actual outcomes obtained.

The third choice is to continue the currently prevailing practices. There are simply no legal or administrative requirements for the regulation or evaluation of programs. What occurs is left to the good faith, competence, and reputation of the institution and its staff.

3. *Reverberations in Scientific Research.* Until now, discussion has focused on the effects of the legal regulation of behavior modification on professional practice, patient care, and delivery systems. There are scientific ramifications, as well. These may redound upon

I. AGENCY BEHAVIOR

1. Occasional punishment
2. No punishment, physical restraints
1. Constructional applied behavior analysis program, reflections of interest, smiles
2. Explanation of restraints, reflections of concern and hope for change

II. CHILD EFFECTS

A. *Eliminative Pair*

- No head banging
- No head banging

B. *Constructional Pair*

- Progression toward human developmental norms, increased smiling
- Development frozen, human monstrosity, head twisting and huge neck

With regard to the agency behavior (col. I), only the eliminative behaviors were of primary interest to the parents and the institution. Punitive agency behavior was condemned as inhumane, and the program was terminated. The underlying logic apparently was that since both alternative agency behaviors (1 and 2) were effective in producing immediate cessation or prevention of head banging, and since a simple restraint was considered, to use the legal term I have learned from Friedman, less intrusive than a slap, the program containing the slap was halted. The inequality of the two eliminative behaviors was overlooked; the punishment could have been phased out rapidly while the restraints were essentially permanent. Additionally, the ensuing inequality of institutional behaviors for supplying constructional programs was overlooked. Similar outcries made against the eliminative aspects of behavior modification procedures when applied by qualified professionals may lead to similar tragic omissions. See text accompanying notes 38-42 *infra*,

scientific research and understanding, and indeed, also upon patient care.

One adverse consequence which could result from Friedman's proposal is the impediment of scientific research and development. In applied behavior analysis, advances in research are especially dependent on advances in treatment. Hindrances to treatment must hinder advances in understanding and improved patient care. All the existing techniques are new, and newer ones are constantly emerging and will undoubtedly continue to emerge unless the field is frozen and the flow is thereby stopped. Friedman's standards threaten to freeze the field.

Consider, for example, Friedman's proposals as they apply specifically to his case of Bob, for whom electric stimulation is proposed to terminate self-destructive behavior.³⁰ This proposal is presented to a Peer Review Committee. The first question raised is "whether there is evidence in the professional literature that the procedure proposed would be effective to extinguish Bob's self-injurious behavior."³¹ Under Friedman's scheme, approval by the committee must "be based on a finding that the procedure is effective for strengthening or weakening specified behaviors"³² Indeed, evidence of effectiveness will be found—starting in 1966. The findings of this committee then go to a Human Rights Committee. Finally, according to Friedman, "The standards and procedures for review of aversive conditioning having been complied with, Bob's individual conditioning program is begun shortly thereafter."³³

Friedman's proposal threatens to have adverse effects on the development of scientific knowledge—knowledge upon which the evaluation and approval of the recommended treatment depends. Suppose the treatment had been proposed in 1965, just 10 years ago. There then would have been no evidence of effectiveness for these procedures. The proposal would have been rejected, along with proposals for token economies and, indeed, practically every behavioral procedure imaginable, with the possible exception of systematic de-

30. Friedman, *supra* note 1, at 101-04. Contrary to Friedman's text, a punishment procedure rather than an extinction procedure was used.

31. *Id.* at 101.

32. *Id.* at 96.

33. *Id.* at 104. To anyone acquainted with committees or administrative review, the word "shortly" comes as a surprise. The congested courts have tended to make a mockery of constitutional requirements for a speedy trial. Since only behavioral procedures would require legal review, one way for an institution to avoid such congestion is to have very few behavioral programs, regardless of their value. Indeed, institutions about to hire behavioral specialists would pause before doing so, since they would be aware of the extra problems they might then introduce for themselves. Eventually, there might be no one around to suggest behavioral programs for Bob.

sensitization. It requires little imagination to envisage the effects which this would have had on the development of new techniques. If these procedures were proscribed 10 years ago, they could not have provided the basis for advances in research and understanding which are present today.

Bob would have been consigned to spend the rest of his life under restraints—if he did not destroy himself first. Most probably, as he grew older, chemical sedation would replace the physical bonds. Psychosurgery might have been applied. Eventually he would be shuffling around a back ward or the grounds of a state institution, wasted because the social system lacked the knowledge and procedures to help him.

A second adverse consequence which could result from the imposition of Friedman's proposals would be the resultant decrease in the general body of available scientific information. What singles out behavior modification, and especially applied behavior analysis, from other psychotherapeutic approaches is its explicitness, which arises from its heritage in the laboratories of experimental psychology. This was noted by Friedman through his reference to its use of "operationally-defined" variables.³⁴

The behavioral approaches, unlike the more conventional approaches, specify outcomes, procedures, and relations in explicit terms which provide for continual evaluation and inspection. Conceivably, this is why they are being singled out. But it should also be noted that these approaches, as they move toward some of the genuinely complex problem areas considered in more conventional approaches, are not necessarily competitive with them. The behavioral approaches may provide tools for explicitness which are useful to the more conventional approaches, and whose general absence has been one of *their* major concerns. Increasing explicitness may, in time, provide data for comparative cost-benefit analyses in a variety of areas. Among these are the comparison of psychotherapeutic methods with other methods of dealing with similar problems, and the focusing of attention on mental health problems as opposed to the other social problems facing a society confronted with limited resources. If the solutions are in any way to be based on rational decision outcomes, information is needed. The behavioral approaches are supplying needed information. This is useful not only for the societal purposes noted, but also for evaluation, development of validated intervention procedures, advances in patient care, and in gen-

34. See Friedman, *supra* note 1, at 44.

eral understanding, hopefully for both the behavioral and the conventional approaches.

Indeed, one of the problems of research in the evaluation of procedures and outcomes of conventional psychotherapeutic procedures in noninstitutional settings has been the lack of explicitness. This has imposed difficulties on assessing the theories from which the procedures and distinguishing concepts derive.³⁵ One commentator, summarizing the results of a national conference on research in psychotherapy, reported that "the tenor of the discussion strongly suggested that 'outcome' research was generally scorned . . . [and] as if by some tacit agreement the issue of outcome was skirted by the conference."³⁶ In refreshing contrast are the tables presented by a commentator from one branch of behavior modification, in which patients seen, as well as the results of therapy, are itemized.³⁷ The tradition of explicitness has been followed by writers in all branches of behavior modification and the empirical analyses have been extended from outcome to include the effectiveness of procedures during treatment and the relationship to the underlying theory. Whatever decisions are made, their rationality must ultimately depend on the extent to which the necessary information has been made available. Legislation which would regulate the practices of only one system, the only system that enhances explicitness, does not appear to be helpful in this regard. Not only the patient, but society as well, deserves the right of informed consent before it accepts such limitations.

4. *Is There A Clear and Present Danger Which the Proposed Standards and Procedures Meet?* It is granted that abuses in the name of behavior modification have occurred, that in its name outrageous offenses have been committed against helpless victims, and that action should be taken. The question which remains, however, is how many of the abuses attributed to behavior modification have been committed by professionals trained in behavior modification. Does the incidence of abuse of behavior modification by qualified professionals create a clear and present danger which necessitates legislation with implications as widespread as Friedman's proposals?

A rational decision usually involves at least two intersecting sets, as in the intersections of rows and columns in a table. Each set is subdivided into at least two mutually exclusive subsets, giving the

35. For a critical evaluation of the efficacy of conventional methods in noninstitutional settings, see A. BANDURA, *supra* note 12, at 52-57.

36. M. PARLOFF & E. RUBINSTEIN, *RESEARCH IN PSYCHOTHERAPY* 276 (1959).

37. J. WOLPE, *PSYCHOTHERAPY BY RECIPROCAL INHIBITION* 208 (1958).

familiar two-by-two table. One set represents alternative courses of action, for example, enactment or nonenactment of particular legislation, or legislation of one type rather than another. The other set is the set of circumstances, of which there are at least two. Each of the four cells, the entries in the two-by-two table, contains the outcome, or consequence, of one course of action when one circumstance pertains, the outcome for the same course when the other circumstance pertains, and so on. *For a rational decision, minimally, all four outcomes must be considered.*

Presumably, one important circumstance for Friedman is violation of the civil liberties of patients. Enactment of his proposals might result in a decrease in the number of violations, actual or potential, as opposed to maintenance of the status quo. But this is not sufficient information for a rational decision. What is in the other row? We might use adequate treatment of patients, that is, treatment which produces normal functioning in the community outside. Indeed, at least one court has raised the issue of a right to treatment.³⁸ It has been noted that behaviorally-oriented treatments, in contrast to those now prevailing, may begin to provide data which can tell us how well we are fulfilling treatment obligations to the patient. Such evaluation permits continual improvement of treatment procedures, and implementation of Friedman's proposal could attenuate such gains. His proposals may also support and extend current practice and its consequences.

For a rational decision to be made, we need information on what gains and losses each course of action provides. All four outcomes, if there are not more, may then be weighed against each other for a resolution. If the benefits of Friedman's proposals are that we shall be relieved of the abuses which have been publicized, a first question is how many such abuses, committed by people qualified to engage in the procedures designated, and who meet the role model to be regulated, will be prevented. We also must ask whether the presently prevailing procedures will then enhance the civil liberties of patients and how the outcomes of treatment will compare under the alternative sets of procedures.

If Friedman's proposals are intended to stimulate discussion and indicate the need for information, he has done us a service.³⁹

38. See Friedman, *supra* note 1, at 41 n.2.

39. As discussed in the text, however, Friedman's proposal would actually tend to limit the flow of information needed for rational decisionmaking by inhibiting the development of experimental analysis, which is presently the major area capable of providing the necessary information.

The effects of examining only one course of action are evident from the discussion

Otherwise, such legislation, addressed to only one course of action in the rational decisionmaking process, will suffer from effects similar to laws which, in the past, have been addressed to a particular grievance without attention to other relevant factors. They boomerang, and the public interest suffers all the more.⁴⁰

Behaviorally-Defined Voluntariness

1. *Contingencies of Coercion.* Friedman devotes considerable discussion to the question whether a prisoner or mental patient can give legally valid informed consent to certain behavioral procedures.⁴¹ In the course of this discussion, he analyzes such issues as competency, voluntariness, and knowledge; this section, however, will address only the issue of voluntariness. As Friedman observes, since the environment of prisons and mental institutions is inherently coercive, there may be situations where the consent given is not truly voluntary.⁴² It is the purpose of this section to define situations of coercion and noncoercion through use of a contingency analysis.⁴³

Coercion has been defined in terms of negative reinforcement, that is, maintaining the target behavior by withdrawing or postpon-

of the head-banging girl who was slapped. Her case can be considered in terms of a decision matrix in which the courses of action were either referral of the child to a behavioral therapist or to more conventional ones, and the circumstances were either eliminative or constructional treatments. The decision was based on evaluation of only one treatment, mainly, the eliminative and the unfortunate consequences described then resulted.

40. One source of information that might be tapped in order to aid rational decisionmaking is the behavior modification profession itself. Many years ago, the American Psychological Association proposed to establish an empirically-based code of ethics. It asked its members to supply examples of ethical problems they had encountered, along with a summary of how they had been resolved, if at all. Hundreds of examples were submitted, sifted, and categorized. General rules and examples were formulated and published. As a result, the occasional violations in the practice are now dealt with on national and state levels.

For behavior modification to do likewise, first would require an inquiry by those whose familiarity with the professional literature goes beyond mere summaries and publications intended for the general public. Unfortunately, attempts in this direction presently are scattered and only tentative. If behavior modification does not attend to its own house, and if it develops, therefore, that professionals who are otherwise competent engage in abusive practices to such an extent that the gains from regulation would override nonregulation of the profession, then the decision that a clear and present danger exists which can be overcome only by proposals such as Friedman's is rational.

41. Friedman, *supra* note 1, at 80-87.

42. *Id.* at 80-81.

43. The definition of behavior by its consequences under certain conditions is a contingency. Thus, behavior analysis can possibly be more appropriately referred to as contingency analysis. A contingency analysis requires inspection of the contingencies into which at least two behaviors enter. One of these is the target behavior, the behavior pattern desired by the social agency which establishes the functioning contingencies. The law also makes use of contingency analysis in its quest for evidence and explicit definition. For example, in murder, motive may be defined by the consequences accruing to the suspect upon demise of the victim, *avoir la femme ou l'argent*, and the opportunity and means. Both the behaviorist and legal examples are, of course, oversimplified. It would, indeed, be worthwhile to pursue this and other relations between legal and behaviorist experience, but the present discussion will be confined to the problems of consent and coercion.

ing a noxious state when desired behavior occurs.⁴⁴ This definition has been expanded to include positive reinforcement, that is, obtaining or maintaining target behavior by rewards.⁴⁵ Negative reinforcement has been considered intrinsically coercive. There is no quid pro quo. The person's performance is not maintained by the prospect of receiving something desirable. Rather, he gets nothing in kind for his labor. On the other hand, it is argued that positive reinforcement is benign; there is a quid pro quo. The exchange may not be the best, but it is there.

In the experimental laboratory and, at times, outside it, positive reinforcement is not always so benign. The pigeon will stop working for food if he gets the requirements necessary to maintain his body weight, a phenomenon called satiation.⁴⁶ Accordingly, the bird is often reduced to 70 percent normal body weight, and the daily allotment he earns by his labor is never sufficient to raise it materially. What seems to be a choice between working and not working may be a choice between survival and starvation. When the agency acts in this manner to use the positive reinforcer for its behavior ends and sets up a system which makes it potent, that is, produces the deprivation, coercion is severe.⁴⁷

2. *Contingencies of Noncoercion.* We must all live with conditions under which no genuine choices exist. Such situations may be described by examining the "alternatives" then available. One alter-

44. See Goldiamond, *supra* note 7, at 54.

45. See Goldiamond, *Alternative Sets as a Framework for Behavioral Formulations and Research*, 3 BEHAVIORISM (1975) (in press).

46. Satiation is precisely defined as loss of effect on behavior by a consequence because of continual delivery. Surprisingly, this occurs with punishment as well. Continual delivery of an aversive stimulus, unless lethal or extremely intense, results in satiation; the consequence loses its effect on behavior. The behavior then increases, since the effectiveness of punishment is defined by the decrease it produces. Thus, prison data on the positive relation between length of sentence and rate of recidivism comes as no surprise to behavior analysts.

47. Even if positive reinforcement is benign, adverse outcomes may still result. In the laboratory, where a nonshaping positive reinforcement procedure is in effect, the investigator literally does nothing until the target behavior occurs. He can afford such benign neglect partly because his equipment will patiently wait until activated by an appropriate response from his subject. Similar institutional behaviors may be found in prisons and mental institutions which "throw away the keys and let them rot." Indeed, the institutional behaviors of humanist psychiatrists and other psychotherapists often employ this same type of not-so-benign neglect. Here the approach is that nothing will be done for the mental patient until he asks for treatment. Then they will warmly embrace him. In the meantime, the autistic head banger bangs his head and, to keep him from producing irreversible eye or brain damage, a football helmet is strapped to his head and his hands are tied; or an adult may be sedated with tranquilizers.

Legal review of such cases, requiring hard evidence that these not-so-benign procedures are beneficial before they may be initiated, can go much further toward relieving human suffering and protecting basic human rights than control of the minority of applied behavior analysts who use a limited amount of punishment in attempting to develop and deploy constructional programs. Cases of actual abuse by qualified applied behavior analysts are rare. Neglect by qualified professionals of other persuasions is not at all rare.

native, the target behavior, is well-defined—we report to work in the mines. In cases where there is no genuine choice, however, a second alternative and its consequences are not well-defined. The alternative is describable only as the vast expanse of “anything else”—we are unemployed. Choice ensues only when we have at least two well-defined sets. The more such sets, the greater is the choice and the greater the freedom—we may work in the mines or at the farm and so on.

Given two well-defined sets,⁴⁸ each with the same consequences attached, a positive reinforcement contingency is established as follows:

- | | |
|--------------------------------|--|
| 1. Target behaviors occur | Discrete presentations |
| 2. Alternative behaviors occur | Discrete presentations |
| 3. Neither behavior occurs | No such presentations, prevailing arrangements |

A negative reinforcement contingency is established as follows:

- | | |
|--------------------------------|--|
| 1. Target behaviors occur | No presentations, prevailing arrangements |
| 2. Alternative behaviors occur | No presentations, prevailing arrangements |
| 3. Neither behavior occurs | Presentations delivered at intervals or continuously |

If, under the foregoing schemes, the likelihood of either the target behavior or the alternative behavior is increased, positive and negative reinforcement contingencies are defined. The presentations are then reinforcing events, positive and negative, respectively.

Under these schemes, the target behavior can decrease in likelihood since the alternative behavior may preempt the reinforcing arrangements.⁴⁹ Where this is possible, an increase in the target behavior has not necessarily been obtained through coercion. The individual always has another option. To the extent that other options are available, increase in degrees of freedom may be defined.⁵⁰

48. These sets are set up in order to increase or maintain the behaviors of interest. The two sets are the target behavior and the alternative behavior which is a well-defined alternative not necessarily desired by the system. Neither behavior is the ill-defined residual of both. See Goldiamond, *supra* note 45.

49. The question arises why a person should exhibit the target behavior the system desires when he can obtain the same consequences by exhibiting the alternative behavior. Indeed, where the alternative behavior is more readily available, or is available at less cost, it can preempt the target behavior. Cheating, stealing, and lying exemplify such patterns. As yet, it is unclear why target behaviors are exhibited in preference to alternatives and vice versa.

A similar problem arises in the real world. Behaviors labeled neurotic and psychotic are often alternative behaviors which produce desired interpersonal consequences, albeit at the risk of punishment and considerable loss of other consequences. How the social system programs arrangements so that these patterns are not the norms has yet to be studied. We have been so concerned with pathology and how things fail that we have not paused to systematize, analyze, and capitalize upon the tremendous competence which obviously characterizes the social system and our own personal systems. See Goldiamond, *supra* note 7.

50. As has been noted:

Freedom requires that the alternative contingencies be equally possible. Behavior analysis provides procedures for assessing and ensuring this. To the extent that such equally possible alternatives are a component of the legal requirements for informed consent, behavior analysis can help determine its existence explicitly.

3. *Meaningful Consent Under Conditions Otherwise Coercive.* Under the definitions given, prisons, mental hospitals, and other institutions are coercive. A prison supplies the clearest example why. There, early release is made contingent on participation in and successful progress through an educational or therapeutic program. Such release from the coercive contingencies of the institution also may be contingent on other programs, but participation in these programs is also influenced by societal consequences. Therefore, the choices between the different programs supplied by the institution are not truly choices. Obtaining freedom by escape is the only genuine choice. There is no true choice between programs; program enrollments and progress are maintained through coercion.⁵¹ That is to say, for a program to be fully noncoercive within the confines of an institution which is inherently coercive, program participation or nonparticipation must be divorced from the different consequences society, through its authorized institutional agent, couples with socially desir-

A person who is more free than another may have more response alternatives than the other person. It is in this sense that a well-educated person, who can get support in a variety of ways, is freer than someone who can only dig ditches for a living. This definition of freedom . . . may alert us how to program our environment to maintain and even to extend freedom; it may make us effective as well as well-meaning.

Goldiamond, *Justified and Unjustified Alarm Over Behavioral Control*, in *CHANGING CONCEPTS IN BEHAVIOR DISORDERS* 237 (O. Milton ed. 1965).

However, it should be noted that freedom requires that the alternative contingencies, behavior and its consequences, be equally available in the personal-environmental repertoire; otherwise it is reminiscent of Anatole France's statement on the impartiality of the law, which "in its majestic equality forbids the rich as well as the poor to sleep on the bridges, to beg on the streets, and to steal bread." A. FRANCE, *LE LYS ROUGE* 118 (1903).

Behavior analysis can provide procedures for ensuring that available consequences, which are preferable to the individual, which would require behaviors already available to him, and which he does not engage in because of past history, that is lack of knowledge, can become available, and thereby, the more desirable consequences. Stated otherwise, we can help define informed consent and what is necessary to produce it. See Weiner, *Human Behavioral Persistence*, 22 *PSYCHOLOGICAL RECORD* 82 (1972).

51. In prisons, where the sentence is not indeterminate, the inmate obtains freedom upon the termination of his sentence. Accordingly, mental institutions, where incarceration is indeterminate, are more coercive than prisons.

Indeed, a Patuxent inmate was confined beyond "the five-year sentence levied against him for his crime . . . because he refused to submit to psychiatric examination designed to assess the appropriateness of his release." Goldfarb, *supra* note 5, at 85. In *McNeill v. Director, Patuxent Institute*, 407 U.S. 245 (1972), "a unanimous Supreme Court ruled that such confinement was an unconstitutional denial of the inmate right to due process of law. . . . [T]he court found that the practical effect of the Patuxent procedure was to make confinement indefinite, possibly perpetual." Goldfarb, *supra* note 5, at 85.

able or undesirable behavior. In most cases those consequences are freedom or incarceration.

Despite the coercive nature of these institutions, a qualified "yes" may be given in answer to the question whether a meaningful therapy or other correctional program which is not coercive can be instituted within their walls. One necessary requirement is that the program contingencies must be separated as much as possible from the coercive contingencies of the institution. One manner in which this can be accomplished is to supply consequences which derive purely from the program itself and which are related to outcomes mutually agreed upon by the inmate and the agency as worthy of joint effort. Under appropriate conditions, this procedure meets the criteria for noncoerced participation.⁵²

One type of program outcome which might be considered is one which enables the patient or inmate to function outside the institution in ways which are satisfactory to him and which make reincarceration less likely. The milieux provided by penal and mental institutions already are teaching skills useful on the outside, but many of these are often incompatible with the assumed social missions of the institutions.⁵³ Indeed, applied behavior analysts are displaying increasing concern regarding the world outside.⁵⁴ They are attempting, as the legal profession does, to define the issues and assumptions and to make the procedures explicit and available for inspection by their colleagues. They thereby make these definitions available for public inspection. However, their criteria for classifying and naming differ from those in common or legal usage. Regulation should not be based on terms qua terms.

When explicitness and the ability to be explicit are singled out for legal regulation, it would seem that public interest is not best served. A negative incentive may then be attached, since the power to require extra administrative processing, like the power to tax, is also the power to destroy. Indeed, the alternative behavior to explicitness, namely, the beclouding of issues, or stating them in vague terms, may then be encouraged. The familiarity of this tactic makes belaboring unneces-

52. See Goldiamond, *supra* note 7, at 60-61. Friedman basically accepts these formulations. Friedman, *supra* note 1, at 86 n.214 (citing Goldiamond, *supra* note 7). The effectiveness of this procedure is enhanced when there are a variety of alternative programs producing similar outcomes; for example, therapeutic programs representing different schools.

53. For example, prisons often teach better ways to avoid apprehension for resumed illegal activities.

54. In one such study, a token economy in a mental hospital involved goals set by patients and directed toward communal living on the outside. See G. FAIRWEATHER, *supra* note 23; A. GRAZIANO, CHILD WITHOUT TOMORROW 177, 199 (1974); R. THARP & R. WETZEL, BEHAVIOR MODIFICATION IN THE NATURAL ENVIRONMENT (1969).

sary. Considerable legal effort must then be expended to make the issues explicit. Legal measures which genuinely enhance such outcomes are welcome, but these measures must consider the complexities of the issues involved. These include in addition to the possible benefits produced by the measure, its possible losses, and the gains and losses produced by other alternatives, as well as decision rules for integrating these outcomes.

Otherwise, the regulatory efforts remind one of the drunk who was observed on all fours circling around the only illuminated lamp post on a dark street.⁵⁵ A patrol car stopped by and a policeman stepped out. The drunk explained, upon questioning, that he was looking for his keys. Where had he lost them? "O, somewhere down the block," said the drunk, pointing to the dark street. Then what was he doing looking here? "Where else can I search, officer?" was the indignant reply. "It's the only place that's lighted."

55. This apt anecdote was suggested by Professor Alan Rechtschaffen, of the *De-
tentions and Prisons*, 17 ARIZ. L. REV. 39 (1975).