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# THE Right TO BE Different

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Deviance and Enforced Therapy

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Foreword by Thurman Arnold

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## THE RIGHT TO BE DIFFERENT

*For the memory of my grandfather,  
a man of God and law  
who lost to tyranny his life but not his faith*

# FOREWORD

The administration of criminal law to be respected and accepted by the public must represent to the average citizen his ideal of justice. As late as a half century ago the public consensus was that a man who committed a crime should get the punishment he "deserved." That and only that was justice. The defense of insanity was recognized. A criminal penalty ought not to be imposed unless it could be shown there was moral guilt. Moral guilt, of course, meant the consciousness of wrong doing.

It was generally conceived that there were two little men in the top of every individual's head. One was called Reason, the other Emotion or Impulse. Everyone had, to a greater or less extent, evil impulses. It was the duty of the little man called Reason to keep his foot on the neck of the little man called Impulse to prevent him from having his way. If Reason did not succeed in doing so the man was a criminal. Only if an individual lacked the capacity to reason could he be excused of his crime on the ground of insanity.

Within the last half century these simple ideas so satisfying to a former generation have become confused. According to the modern science of psychiatry, of which the public was unaware a half century ago, thinking is a form of behavior—there is no little man in the top of anyone's head called Reason who is separate from or in control of

another little man called Impulse. The right and wrong test was judicially repudiated in some states led by the decision in the *Durham* case in the District of Columbia.

Yet the Durham Rule, logical as it may seem from a scientific point of view, has led to confusion and curiously contradictory results. If a criminal defendant is convicted in the District of Columbia he is sent to St. Elizabeths for therapeutic treatment. The net result has been in some cases to keep him incarcerated at the whim of the board of psychiatrists for a much longer time than would have been possible had he not been acquitted on the ground of insanity.

For example, in a case in my office the accused had been caught with a small arsenal of guns and ammunition in the back of his car. The maximum penalty for the crime was six months. Unfortunately for the defendant, he was acquitted on the ground of insanity and sent to St. Elizabeths. Since his offense involved dangerous weapons the psychiatrist at St. Elizabeths refused to take the responsibility of releasing him. He brought habeas corpus; there was the usual conflict of psychiatric testimony. The case went up to the Court of Appeals on denial of habeas corpus by the lower court. The lower court's ruling was affirmed. The case came up the second time. Habeas corpus was then granted on a narrow procedural ground. The net result was that the defendant was incarcerated for over four years.

It is this sort of conflict between modern humanitarian ideals and practical results in the administration of criminal law which the author discusses in this book. He asserts, and I think correctly, that among intellectuals and reformers in criminal law a new ideal has become dominant, which the author describes as the ideal of the therapeutic state. He says:

The implications of the therapeutic state for the treatment of crime and criminals are dramatic, representing a departure from the moral-religious concept that crime and other antisocial behavior are manifestations of "evil" and should therefore be suppressed and punished as a means of purging the evildoer as well as society. . . . As the moral-religious preoccupation with moral guilt (as manifested to this day in the concept of *mens rea*) now gives way to the concept of sanctions mainly as a tool of social defense, the door is also opened to new experiments with the treatment of offenders.

The book contains a brilliant analysis of the practical difficulties and conflicts which are created by the acceptance of the ideal of a

therapeutic state. The problems raised by alcoholism and drugs and juvenile delinquency are treated in depth. The procedural safeguards necessary to prevent the ideal of a therapeutic state from lodging uninhibited power in psychiatric boards are carefully analyzed. There is an elaborate discussion of methods of meeting the population explosion which conform to due process. The book comes to no doctrinaire conclusion. It is fully aware of the difficulties, both ideological and practical. The author's prediction is as follows:

... For a long time to come, both the system of criminal justice and the therapeutic state are likely to coexist as dual modes of social control. Increasingly, however, the therapeutic state will receive those offenders and deviates with whom society is willing to experiment through newer programs of rehabilitation and therapy. The therapeutic state is therefore likely to show the road toward more effective treatment techniques.

Some time, in an uncertain future, both modes are destined to merge into a unified system of social sanctions where individual guilt will be relatively irrelevant.

The author deserves the congratulations of all persons interested in this complex field. It is in my view by far the best treatment of the problem of the therapeutic state that has yet appeared.

THURMAN ARNOLD



# PREFACE: THE DYNAMICS of THE THERAPEUTIC STATE

Like the five blind men, each grasping a different part of the fabled elephant and each describing a different beast, so the perceivers of the therapeutic state have seen in it diverse realities. Some have viewed it as a humanistic boon. Others have portrayed it as the first rational endeavor for the scientific control of deviant behavior. Still others have compared it to the infamous Star Chamber proceeding—the royal Tudor court that dispensed arbitrary punishments without proper regard for the safeguards that the law usually provided for the liberty of the subject.<sup>1</sup>

Widely diverse elements in society—psychologists and sociologists, psychiatrists and social workers, lawyers and law enforcement experts, humanitarians, social reformers, and pragmatic politicians—have joined together under the therapeutic banner for an allegedly joint endeavor. While all subscribe academically to the overall non-penal philosophy, each has some particular aims it seeks to accomplish, ranging from greater tolerance of deviation and the deviant to the institution of more stringent societal controls for social defense. How the therapeutic state has grown and how it operates in present-day America is reported later; but the reader should preliminarily be

<sup>1</sup> C. L. Scofield, *Court of Star Chamber* (1900).

aware of the complex forces that have molded the therapeutic state and how each segment sees within this framework the means to accommodate its own primary purposes.

## THE VISION OF THE PRAGMATIC POLITICIAN

On June 18, 1969, three black assemblymen from Harlem and the South Bronx, along with sympathetic white colleagues, were considering reviving a proposal that the state set up "health camps" for narcotic addicts to curb soaring crime rates by "getting them off the streets."<sup>2</sup> One of these leaders, the Reverend Oberia D. Dempsey, described narcotic addiction as a national problem which assumes the proportions of an epidemic. "If we can draft our young men and send them to camps in Vietnam, we can draft our addicts and send them to therapeutic communities in health camps for 10 years, 20 years—as long as it takes to cure them of the drug habit," he said.

Two years earlier, similar voices were heard in the New York legislature during debates on a proposed law providing that addicts be involuntarily committed to special institutions until cured. Speaker after speaker voiced frustration at the failure of both criminal law and medical science to find a cure for narcotic addiction. Then Max Turshen, Democrat of Brooklyn, expressed the feelings of colleagues on both sides of the aisle when he said: "We haven't got the medical answer. So we got to do the next best thing. We've got to keep these people off the streets." Responding in opposition Albert Blumenthal, a Reform Democrat, asked rhetorically: "Perhaps we should tell the public that we're faced with a threat as great as bubonic plague—and until we find a cure we're going to set up a concentration camp in every community."<sup>3</sup>

## THE VISION OF THE IRREPRESSIBLE THERAPIST

Designating undesirable conduct, a condition, or even views, as illness rather than crime has been a major earmark of this century's therapeutic state. The measure of the transition from a penal to a therapeutic model is dramatically illustrated by a recent interim report of The National Institute of Mental Health's Joint Commission on Mental Health of Children, which concluded that racism is the

<sup>2</sup> Lissner, "Harlem Leaders Weighing Plan for Camps to Restrain Addicts," *New York Times*, July 18, 1969, p. 36.

<sup>3</sup> *Ibid.*, March 31, 1966, pp. 1 and 28.

number one public health problem facing America today.<sup>4</sup> Traditionally, the commission noted, a public health problem is defined as a problem (1) that threatens a large number of people, (2) that costs a large sum of money, (3) that is impossible to treat on an individual basis, and (4) that could cause chronic sustained disability. On all of these counts racism was found by the commission to be a most compelling health hazard. But what is to be done to remedy this problem? Does the remedy lie primarily in educational campaigns to produce more racial understanding, or in the outpouring of resources, both financial and human, to ameliorate grievances? And if racism is a contagious illness, should its most dominant carriers be isolated for individual treatment so as to stop the spread of the epidemic?<sup>5</sup>

### THE VISION OF THE APPREHENSIVE PATIENT

The clients of the therapeutic state increasingly recognize it as a two-edged sword. They fear that the label of treatment engenders in the public as much suspicion and hostility toward the one who is being treated as does the criminal label; they fear that in the name of therapy society seeks to impose controls over people and behavior that should be free of societal intervention; and they fear, finally, that the therapeutic state possesses tools of human control that far exceed in their threat to individual liberty the sanctions possessed by the criminal model.

Peter Hutt, a District of Columbia attorney specializing in alcoholism law and seeking a test case in order to challenge the local law which made public intoxication a crime, soon discovered that chronic alcoholics were as fearful of therapeutic labels as they were of criminal sanctions. To alcoholics his proposed argument that they were ill and should not be punished had many undesirable implications. Reports Hutt: "Every person, of 50 I talked with, said, 'You aren't going to call me insane?' I said, 'No.' They said, 'I'm a chronic alcoholic, but no one is going to put me in the looney business. I'm perfectly alright in appearance, but I just like to drink.'"<sup>6</sup>

<sup>4</sup> *Washington Free Press*, no. 48, January 16-31, 1969, p. 8.

<sup>5</sup> Significant in this connection is a statement attributed to United States Deputy Attorney General Richard Kleindienst: "If people demonstrated in a manner to interfere with others, they should be rounded up and put in a detention camp." Evans and Novak, "U.S. Seeking to Retain Authority for Detention Camps in Wartime," *Washington Post*, October 16, 1969, p. A21.

<sup>6</sup> Hutt, "Comments," *S.C. L. Rev.* 347 (1967).

Speaking one evening in November 1967, at an American University symposium on *The Homosexual and the Law*, Dr. Franklin F. Kamney, past president of The Mattachine Society, reported his organization's work for improving the status of the homosexual in America. Complaining of discriminatory employment practices and the oppressive criminal law which makes homosexuality a crime, Dr. Kamney was urging greater social understanding and acceptance of his group's needs and right to be different. Upon the completion of the formal papers—in which the viewpoints of medicine, religion and the law were presented—questions and comments were entertained from the student audience. A young man stood up and earnestly expressed support for Dr. Kamney: "Yes, I agree that homosexuality between consenting adults should not be a crime. These people lack the power to change their behavior. What they need is medical and psychiatric treatment, not punishment." There were flashes of color and anger in Dr. Kamney's face as he vehemently responded to the sympathetic youth. "No, this is not my view! No, it is not proper for society to substitute forced therapy for criminal punishment! Merely because someone deviates sexually from majority norms does not make him 'ill,' anymore than deviation from the majority's religion would justify such designation. Society must permit deviation unless it poses an actual threat to somebody else's life or safety." As the moderator of that evening's symposium, this author for the first time fully realized that to some members of society the dangers of the therapeutic response to deviation appear more real than the hazards of the traditional criminal process. The Mattachine Society, in this case, was well aware that due to changing social and police attitudes criminal sanctions are rarely invoked for homosexual violations, unless the offense is publicly committed or involves youthful participants. On the other hand, the new possibility of a designation of mental illness and compulsory therapeutic measures loomed much more ominously.

### THE VISION OF THE UNBELIEVERS

As each of the blind men had a different concept of the elephant's esthetics, similarly today's society is certainly short of consensus regarding what an illness is, who should determine its criteria, and how we are to measure its adverse public effects.<sup>7</sup>

<sup>7</sup> A recent Harris Survey of a cross section of 1895 American households to determine what nonconforming behavior is considered most harmful to American life disclosed that 67 percent viewed prostitutes as harmful and 63 percent so

On station WNBC-TV, in a program titled "For Women Only," moderator Aline Saarinen one morning in March of 1969 interviewed a group of practicing homosexuals.<sup>8</sup> The following exchange took place on the program.

Woman (in audience): "Do homosexuals want to be cured?"

Female homosexual: "Well, most of us do not want to be cured because we don't regard our activities as disease. If I enjoy going to bed with another woman, and this is pleasurable and does not debilitate me in any way, if I can fulfill my functions on my job, and enjoy myself, and subjectively feel that I am having a good time, I don't see where the disease is. . . ."

### THE VISION OF REALITY

Recent interviews of 100 persons, including physicians, various other professionals, judges, lawyers, former addicts, and members of the newly heralded New York State Narcotic Addiction Control Board, disclosed the overwhelming opinion that the therapeutic programs instituted under the board were more like prison confinement than rehabilitation.<sup>9</sup> When these programs were first proposed in the New York state legislature, state Senator Manfred Orenstein likened the proposed program to "establishing a leper colony—just to isolate these people from society." After two years of watching the commission's work, he concluded, however, that "it is worse than a leper colony—at least leper colonies try to cure."

These, then, are some dimensions of the dynamics of our particular elephant—the therapeutic state.

The study of human deviation and deviants has increasingly become popular in the psychological and sociological circles. There has in fact been for some time now a sharp competition for predominance in this arena by the various behavioral and social sciences.

Yet despite the fact that the law offers the framework of controls and sanctions within which the other disciplines frequently must work,

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viewed homosexuals. At the same time 69 percent considered atheists harmful, 8 percent considered "bookworms" harmful, 59 percent viewed Vietnam protesters harmful, and 46 percent similarly viewed working mothers. *Washington Post*, October 20, 1969, p. A4.

<sup>8</sup> Kent, "For Women Only?" *New York Times*, March 30, 1969, p. D21.

<sup>9</sup> Severo, "Narcotic Unit Assailed," *ibid.*, April 22, 1969, p. 43.

the legal literature on the control of deviation has reflected limited critical evaluation and assessment of new developments and has often shied away from the major policy issues. This volume is intended to fill the existing gap by synthesizing diverse interdisciplinary approaches and subjecting them to the scrutiny of current legal and constitutional standards. It is intended, however, that this book will not only enlighten the legally trained reader but will further communicate the legal approach to members of the other disciplines concerned with social controls.

My interest in the therapeutic state dates back some fifteen years. While directing, from 1955 to 1958, a national research project on the rights of the mentally ill, under the auspices of the American Bar Foundation, I became aware of the need for a critical review of the legal standards and safeguards applicable to the various borderline territories of social control lodged between civil and criminal law. Subsequently, with the influence of Professor Francis A. Allen of Chicago University, now Dean at the University of Michigan, I became aware of the issues in three related areas—psychopathy, addiction, and juvenile delinquency—and discovered a common trend in the social plan for all four groups, as well as a similarity of legal problems in the relationship between the rehabilitative ideal and due process.

Reflected throughout this study is the lawyer's traditional concern with the excesses of power, in this case the conformity-enforcing zeal of the "therapeutic state." (Clearly, my major purpose has been not to *block* the rehabilitative ideal but to *blend* its unbridled power.) But as this volume neared completion, the fear of societal excesses, which still remains very real, is somewhat dulled by yet another and opposite surge toward a "permissive society," where even fundamental needs of social order and organization fail to achieve broad public consensus and support.

Of particular interest to the reader may be three amicus curiae briefs which were side-products of this study and which cast additional light upon the questions here discussed. The first amicus brief (*Horton v. United States of America*, nos. 17,261 and 17,540, U.S. Court of Appeals for the District of Columbia Circuit, 1963, reported in 317 F.2d 595) dealt with the treatment of drug addicts and was prepared by me as counsel for Drs. Leo H. Bartemeier, Francis J. Braceland, Lawrence Kolb, William C. Menninger, Herbert Modlin, Winfred Overholser, Leon Salzman, and Joseph Satten. The second amicus brief (*Kent v. United States of America*, misc. 824, October term, 1965, Supreme Court of the United States, reported in 383

U.S. 541) dealt with procedural safeguards for juvenile offenders and was prepared by me as counsel for Messrs. Thurman Arnold, Gary Bellow, Elyce Zenoff Ferster, Steven P. Frankino, Robert Edward Goostree, Rufus King, Dr. Verl Lewis, Vernon X. Miller, James E. Starrs, B. J. Tennery, and Arnold Trebach. The third amicus brief (*in re* Gault, Supreme Court of the United States, no. 116, October Term, 1966, reported in 387 U.S. 1) was filed by me on behalf of the American Parents Committee and again concerns the issue of due process in juvenile proceedings.

To Dean Kenneth Pye of the Duke University Law School, Professor Chester J. Antieau of Georgetown University, Judge Orman Ketcham of the District of Columbia Juvenile Court, and Professor Sam Dash, Director of the Georgetown Institute of Criminology, many thanks are due for thorough critiques of the whole work. I was especially fortunate to have the friendship and counsel of Professor Norval Morris of the University of Chicago, who graciously served as an intellectual midwife throughout this study.

This preface would be lacking unless I also expressed my appreciation to my other friends, colleagues, and students who contributed to this study, usually through advice and consultation, sometimes through forbearance and understanding. Among these should be counted: Dean Paul Dean of the Georgetown Law Center; Dean B. J. Tennery, Professor Robert Goostree, and the late Dean John S. Myers of The American University; Professor Richard Arens of McGill University; Professor Arthur Keeffe of Catholic University; Dr. Saleem Shah of N.I.M.H.; Professor Hermann Blei of the University of Berlin; and many others. To Molly P. Rzesutek, Pat Cook, and Sally Maitland I am indebted for secretarial assistance.

Painstaking and able research assistance was furnished by my students: William C. Gardner, Ralph N. Albright, Jr., Philip B. Sklover, Edward J. Black, and Christine Schanes. Leslie L. Gladstone contributed to the updating of the materials and has searched out many of the interesting case illustrations. Eldon D. Wedlock, Jr., now Assistant Professor of Law at the University of South Carolina, was responsible not only for overall rewriting and editorial contributions but also for much of the material on addiction and the modification of man. To Hugh Craig I express my thanks for a thorough editorial review, and Diane Neustadter requires special mention for insisting not only upon a more readable but also upon a more cohesive manuscript. Some assistance for this study came from the Council on Education in Professional Responsibility of the Association of American

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My wife and six-year-old son Orde, three-year-old daughter Norda Nicole, and two-year-old Zachary McNair, who passed too many evenings and weekends without the family head, certainly deserve final recognition.



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