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# THERAPEUTIC COMMUNITY ACT OF 1978

GOVERNMENT

## DOCUMENTS

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## HEARING

BEFORE THE

SUBCOMMITTEE ON

PENITENTIARIES AND CORRECTIONS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 3227

PART 2

AUGUST 18, 1978

Printed for the use of the Committee on the Judiciary



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**THE THERAPEUTIC COMMUNITIES ACT OF 1978:  
S. 3227**

FRIDAY, AUGUST 18, 1978

U.S. SENATE,  
SUBCOMMITTEE ON PENITENTIARIES AND CORRECTIONS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 5110, Dirksen Senate Office Building, Senator Paul G. Hatfield (chairman of the subcommittee) presiding.

Present: Senators Hatfield, DeConcini and Wallop.

Staff present: Timothy Hart, chief counsel; Timothy K. McPike, counsel; Edna Panaccione, chief clerk; and Pat Hoff, counsel to Senator Wallop.

Senator HATFIELD. The subcommittee will come to order. This is a continuation of hearings held by the Subcommittee on Penitentiaries and Corrections of the Senate Committee on the Judiciary. This is a hearing on Senate bill 3227—The Therapeutic Communities Act of 1978.

This morning we have four witnesses scheduled. I wish to welcome all of them here today. We will begin now.

Senator DeConcini will be here shortly, but we will begin at this point.

Let us begin with Mr. Gabe Kaimowitz of the Michigan Legal Services. We welcome you to the hearing. Please feel free to present your testimony in any way you feel.

**TESTIMONY OF GABE KAIMOWITZ, COUNSEL, MICHIGAN LEGAL SERVICES**

Mr. KAIMOWITZ. Good morning, Senator. I have supplied the committee with additional documentation of the particular case that brought to my attention the use of behavior modification in prisons.

[The material referred to has been retained by the subcommittee.]

Mr. KAIMOWITZ. I am here today to speak in opposition to Senate bill 3227, and the sanctification provided in that bill for so-called therapeutic communities.

In my more than 10 years of experience in legal service programs for the poor, I have become increasingly concerned about the unquestioning approval afforded to various forms of therapy and the acceptance of the concept that helping professions can provide cures and treatment for societal ills and individual misfits.

Only the judiciary appears to remain as a bulwark to safeguard constitutionally protected rights and liberties of minorities, including the misfits, from the onslaughts of the helpers who show little respect for individual beliefs and for other people's privacy in their rush to create a therapeutic state in a world that exists in Skinnerian terms beyond freedom and dignity. The helpers seem to ignore the most precious of rights—the right to be left alone—alluded to by Justice Brandeis and explained by author Nicholas Kittrie.

Particularly since 1968 when Supreme Court Justice Marshall, in the case of *Powell v. Texas*, 392 U.S. 514, 526, 529, speaking for a majority of the court, inveighed against imposed treatment on alcoholics and warned that calling jails "hospitals" would not make them so, the courts have looked with a jaundiced eye at claims, often made by my colleagues, of a right to treatment for everything from housewively depression to murderous mania, for "diseases" that used to be referred to as social and economic problems. This was referred to in the *Bell v. Wayne County General Hospital*, 384 F. Supp. 1085, n. 10, at 1095 (three-judge court, E.D. and W.D. Mich. 1974) case.

I have taken an opposite tack, with some degree of success in Michigan where I have been an attorney with what is now a Legal Services Corporation support center for 8 years.

I imposed myself in 1973 to prevent the use of psychosurgery on an institutionalized person who had consented—volunteered—to participate in a study of the then experimental surgical technique. A three-judge State court determined that a person in prison could not consent competently, knowingly, and voluntarily to participate in such an experiment. This was the case of *Kaimowitz v. State Department of Mental Health*, 2 Prison L. Report. 433 (July 31, 1973, three-judge court, Wayne Co. Cir. Ct., Mich.). Under the circumstances, it could be presumed, as it was by an international tribunal which formulated the Nuremberg Code, that such a person in the hands of the State could not act voluntarily.

By 1974, in the case of *Bell v. Wayne County*, supra, at 1099-1100, and 1102, a three-judge Federal court decided in Michigan that persons said to be mentally ill did not have to face any physically intrusive treatment until they legally were found to be dangerous to themselves or others. In that same year, I also initiated litigation that effectively has halted the use of institutionalized children for biomedical and behavioral research done under State sponsorship. I refer to the case of *Jobes v. State Department of Mental Health*, 74-004-130-DC (Wayne Co. Cir. Ct., Mich., filed Jan. 19, 1974, and still pending), and discussion of said case in Mitchell "Experimentation on Minors," 13 *Duquesne L. Rev.* 919, 932, at notes 51 and 52 (1975).

Finally, I already have presented to the staff of this committee a summary of facts stipulated to by me and the attorney general for Michigan in a legal action brought on behalf of prisoners who supposedly had volunteered for a behavior modification program at the Michigan Intensive Program Center in a State prison. This was the case of *Swearinam v. Johnson*, M-56 CA. (W.D. Mich. opinion of January 20, 1978). There also is a 1978 opinion in that case calling for the establishment of a panel of experts who will examine two questions which should be uppermost in the minds of this committee and others

who are considering the efficacy of so-called therapeutic communities in prison settings:

First, should a program designed to change or modify behavior of institutionalized persons be considered accepted therapy? That is, as I will allude to in a moment, as compared to as experimental therapy—or an experiment—because the distinction is important, I think, as I will point out later, in how it is viewed both by courts and by people approaching the project itself. I am particularly concerned about the legislation in this respect and its preamble in making certain assumptions about various forms of therapies as if it was conclusively proved that they had validity. Or, as I have come to believe, is it still to be regarded as experimental and therefore subject to closer scrutiny, especially when its introduction may “tinker” with individual thought processes that heretofore have been considered sacrosanct and constitutionally protected?

Over the years, I have looked in vain through the literature for assurance that therapeutic communities or other so-called treatment modalities do effect the kind of long-term change that would prompt us at large in society to come rushing forward to, say, stop smoking, or give up antisocial acts, say, like practical jokes. Meaning that, if we treated it on its most harmless level and determined that these techniques would not endanger beliefs or concepts or intrude on privacy, my view might be different. I do not know, as I have indicated, of such studies over a long-term period. Though I would not agree, such results might provide the Government with a compelling interest to override the first amendment rights of institutionalized persons. Instead, I find only studies of immediate “wonder” results still fresh off the presses, whether it’s “EST” in a given week, transactual analysis the next week, or whatever the modality is called the week after.

How can I tell those cures or treatments don’t exist? Because if they did, my record in court in Michigan would not have been as successful as it has been, especially when the only experts I use tend to be those who debunk the latest theory or expert. Let me explain that when I sought it out in a psychosurgery situation. It was most unusual for a lawyer to do what I did, and it may years later appear even to me to be somewhat unethical. There had been a consent between a person who had been in an institution for the so-called criminally insane for something like 18 years to participate in an experiment. He had signed the form that basically said that he understood that he might die, be paralyzed, go blind, suffer other convulsions as a result of the experiment, but he participated. After approximately 3 weeks of trial the court not only did not believe him, but he no longer believed it himself. He had changed his position, and he had changed it not from understanding the project, not from understanding the problem I would suggest, but in the course of the trial he had an opportunity for release. Given the release, the incentive that had existed previously disappeared, and he took a different look and a different perspective at a project that he had clearly consented to.

I had intruded. I had no client at the time, so to speak. That to my mind is particularly of concern with regard to S. 3227.

That is, once the communities get set up, there will be no effective way to determine whether or not somebody had, in fact, volunteered.

For example, this legislation would be comparatively easy to chide in a court of law. Nowhere, despite its frequent use, is "therapeutic community" defined, except by example of certain therapies that have been embraced by that term.

My colleague, Wayne State University Social Work Prof. David Wineman, author of "Children Who Hate," suggests that the term is incapable of definition—although he assisted for 18 summers in the operation of what was considered a therapeutic community for delinquent boys.

Then, and perhaps most dangerously, although drugs, shock treatments, psychosurgery, or other such procedures may not be used within the framework of this legislation, the treatment modalities suggested herein would open the door to the application of such techniques as a last resort should the misfit undergoing, for example, psychosurgery flunk out of the program. This was referred to in the case of *Kaimowitz v. State Department*, supra, when counsel for plaintiff John Doe successfully argued that psychosurgery should not be attempted on this particular prisoner, because his record of 18 years of incarceration proved that the State had not exhausted all of the psychotherapeutic modalities available at the time. Had defendants established that all other therapies had been tried, they might have convinced the three judges that psychosurgery could be used as a last resort. After all, if nothing else works, such techniques might.

The fallacy of the example I have just given lies in the assumption that: (1) rehabilitation is possible in an institution; (2) that if anything can be done, certainly the helpers acting in good faith to control the therapeutic communities are the ones to do it; and, (3) finally, if there is failure, it is the individual being treated who is the failure, not the program itself.

I would suggest it would be relatively easy to establish in a court that: (1) we don't know if rehabilitation is possible in an institutional setting; (2) we don't know, if it is possible, whether those in the field of psychology and related arts are the one to do it; and, (3) we don't know if the program or the individual has failed.

Programs will appear to be much like emperors, until some little boy comes along and points out that they are naked, bereft of tangible value.

But then aren't whatever we call therapeutic communities simply harmless at worst, even if I'm correct that they provide little benefit? Hardly, if we consider the second question raised by the introduction of anything called a therapeutic community into an institutionalized setting controlled by the government.

The second question is: Assuming that such communities can be statutorily introduced in such a way as to pass constitutional muster, can those said to be volunteering for the program consent to participate?

Or must we assume that their capacity to consent has sufficiently diminished in a setting where they hardly can decide when and where to go to the bathroom? Has it diminished to the point where it cannot be construed to be voluntary?

The lessons of the introduction of the behavior modification program at Marquette Prison in Michigan to which I alluded to earlier would seem to indicate that consent cannot honestly be given for participation in a state-run program whose outcome is uncertain.

For example, a prisoner might be able to consent to get a high school equivalency diploma, or treatment for appendicitis or a broken leg because he can recognize a clear-cut benefit or be reliably informed about past effects of such offerings on the population at large. No such assurance can be given by the therapeutic community as the example at the Michigan Intensive Program Center reveals.

The program was started in 1973 with the hope of getting persons who volunteered rehabilitated to the point where they could function on the outside of prison. The prisoners, suspicious that the program might lead to the application of psychosurgery, shock treatment, punitive medication, rioted and prevented the program from being implemented by its behavior modification creators.

Though far more expensive than any other rehabilitation program, this Michigan Intensive Program Center program at Marquette was continued under the auspices of Freudianly oriented psychologists—meaning that we have now shifted from the behavior modificationists who had started the program to a continuation of the program because it already existed with the personnel that was available who happened to be Freudianly oriented psychologists who did not espouse or adhere to the behavior modification model. These psychologists offered high school equivalency as a reward to induce volunteers. They were no longer even going to suggest punitive measures or aversive therapy, and they haven't to my knowledge to date.

But the prison had its own needs, especially when too few volunteered. Some men then were given the choice of volunteering for the program, or facing solitary to which they already had been consigned. That's the rationale parenthetically as to why it was considered at that point still voluntary because they were facing solitary, and they could opt either to go on with solitary, or choose to accept the program.

Hardly a voluntary choice. But worse was to come. When sufficient numbers still weren't attracted, and the prison filled up the program with volunteers, the program was shifted in emphasis to the more realistic goal of returning hard-core offenders to the general prison population after they had been processed through the program, and what I'm trying to point out by this, gentlemen, is that simply prisons and prison officials have their own needs as to which prisoners would benefit most from a therapeutic community. There may be a great deal of disagreement.

For example, I think one of my colleagues here, Mr. Posquoll, alludes to the fact that homosexuals, for example, in one institutional attempted therapeutic program were excluded. But that was assumed not to be desirable. They may be perhaps very necessary.

But the difficulties then begin to undercut the true voluntary nature of the program and starts to allow the institution to make certain assumptions about who should or should not be in the program. The material I provided—and I am alluding to both the court opinion and the stipulation of facts by the attorney general and myself in Michigan about the MIPC program—will show there was hardly a true volunteer in anyone's terms by 1975 when I and my colleagues and an assistant attorney general and his associates toured the facility.

Yet the program continues to this day at exorbitant expense without any appropriate study of its efficacy—more than 5 years after its inception. The MIPC officials lament they haven't got the mechanism to validly trace the program graduates through the idiosyncratic system—let alone outside of it.

Perhaps it can be argued that it is too early to measure the performance of such therapeutic communities, especially since they have been tried in few prison settings. True, but there have been therapeutic community concepts used in juvenile institutions in Michigan for years under a variety of names—positive peer culture (PPC), guided group interaction, and encounter.

PPC innovator Harry Vorath, who, by the way, if the committee pursues this legislation, I would urge that they call him because he is considered an exponent of doing away with institutional settings for juveniles and moving toward these kinds of programs. Consulting in Michigan from his position in Minnesota, heralded the coming of a new age when peers could learn to interact together, even if it was only to form a car-theft ring on the outside, and that I would strongly suggest to the committee that in the concept of a therapeutic community as S. 3227 has it, there are no goals as to what a therapeutic community is supposed to accomplish. That, in fact, somebody makes progress, somebody improves, somebody gets better, but nobody is certain as to what that means.

On one particular occasion, at a gathering at which I was present, Mr. Vorath, who I regard as one of the believers and innovators in therapeutic community concepts, put it on the line. His work is designed to get children functioning together, and he believes very strongly that if they did interact, eventually they would choose more positive goals. But he could accept that his program was a concept if they simply learned to cooperate with one another, because he had found that their individual attitudes were probably more destructive. Which may or may not be true, I'm just pointing that out as a relationship to S. 3227 in the sense that the latter does not have specifically declared goals, nor do I believe it could.

But, regardless of the worth or lack of worth of the goals, the concepts themselves have never been tested, although there have been disquieting notes from Vorath's early associates in Michigan who complain that the runaway rate from training school has been as high as ever, and that the quiet, shy individual who once could be rehabilitated now gets drowned out by the articulate inmates who manipulate any therapeutic community for their own purpose. And that is something again that I would suggest has not been considered because a therapeutic community at its best cannot really function 24 hours a day and prison population still continues to exist, and other factors still continue to be at play. And I think this is forgotten when we try to think about isolating a group in a therapeutic community.

When I was at the forefront of trying to empty Michigan juvenile institutions of its neglected children and status offenders—what I'm pointing out there is that at one time particularly Michigan crowded together in various juvenile facilities children who had no delinquent record or what we would recognize as a delinquent record in an inmate population, but who were exposed to various concepts, both

positive and negative—I had occasion to represent a native American who was too proud to participate in group interaction. His culture did not permit him to revel in his life history. As a result, he remained silent. Oh yes, he chose not to volunteer. The price he paid was to remain institutionalized as long as any other child I have known, inasmuch as he was not in a program in which he could be said to be making progress.

In other words, one of the dangers that I would fear in a therapeutic community is that once it were institutionalized, that lack of participation doesn't really count against you, but it doesn't count for you. And at that point what happens, you have in a sense volunteered to opt out of the program. And at that point you have a particularly dangerous situation. He came into the system because he ran away from home, that is at the juvenile level. Today, having been exposed to a variety of concepts, he is in Jackson prison serving a sentence for a felony conviction. I have been referring to the case of *Kaimowitz v. Lincoln*, No. 194-199-R (Wayne Co. Cir. Ct., Mich. Order of April 25, 1974), cited in 1 Prison L. Mntr. 19 (June 1978).

He and others I could mention clearly are isolated examples. But I don't have the burden of proving therapeutic communities don't work. The helping professions should be required to prove they do work with validated studies of experiments involving adults who truly volunteer from the populace at large, before Congress gives them the green light to do what they will with a captive population, unfortunately, as Senate bill 3227 would do for the so-called helpers.

Parenthetically I would like to add that I had occasions several years ago to testify in front of the Commission for the Protection of Human Subjects in Biomedical and Behavioral Research and many of the people who testified for this subcommittee and others admitted to that commission that, in fact, they could not assure that the experimental program would work. They simply needed the opportunity to try it.

When asked why they couldn't use volunteers from the populace at large, they admitted frankly that there were real problems. Meaning that you and I may go into a program but we don't really fully participate; that is, we will not come in ourselves to 24 hours round-the-clock if we have spouses, children on the outside, or family interests, or jobs, or the like. Our minds, in fact, are elsewhere. And where they can use the only group to validate their experiments are on an institutional population, I would suggest that that gives rise to the fact that we are introducing therapeutic communities in institutionalized settings before their efficacy has been proved at large. That's my primary concern.

Thank you.

Senator HATFIELD. I would like to introduce Senator Wallop from Wyoming and Senator DeConcini from Arizona.

I wish you would elaborate a little bit more on what you said. I understand what you are saying, and I understand, too, that it would be difficult to get someone to volunteer to be in effect institutionalized for 24 hours a day. There would be the same effect. As you can say, you can call a hospital a jail, but if you call it a therapeutic community, or whatever you want to call it, then if it's 24 hours a day, then you have lost the freedom.

You say you would like to have the experiment done outside an institution. By the very nature of the beast, it would seem to me that you have institutionalization in order to get at the concept.

But you are saying that in order to get some freedom of choice that you would require this to be demonstrated outside of a formal institution.

Mr. KAIMOWITZ. As I have indicated, the fact that I believe it cannot be done for the reasons that you are reinforcing is my problem, particularly with the introduction of S. 3227. It is for that reason, I think, that the preamble is very clear that we are beyond that experimental stage because they will not face the reality of what I think you are alluding to and what I stated. It cannot be done.

But, because something cannot be done does not mean that we then proceed to do it in a situation where other results and other dangers are clearly present. That is my difficulty.

I admit it cannot be done, but I would suggest that the fact that I think it cannot be done does not mean that we therefore say "OK, if it cannot be done in that setting, then let's move it over here where it can be done." The difficulty with that is that you create a situation of presumption; that is, that a therapeutic community undefined can in fact work in a closed situation. There is no model outside to contradict that. I would suggest that you lead to the same kind of fallacies that earlier medical experiments led to, that if you did not know about terms you had to do the best you could. So we would leech or bleed or do whatever in order to help cure or curb the illness that took place.

There was no proof. There was no system. There could not be until the establishment of a term. It did not validate the kind of work that preceded the finding by Pasteur. That is a stage that I think the communities are at.

Senator WALLOP. If the gentlemen would yield, that strikes me as almost the ultimate in the absurd. Had we stopped with leeches, or had we said "We don't know what leeches do, and so there's no reason to proceed a step further" we would be without leeches.

I can't imagine that you advocate standing still.

Mr. KAIMOWITZ. Senator, I'm not. I'm saying there are other avenues of approach and of experimentation. Part of the difficulty, as again came out in the national commission I alluded to before, is that scientists tend to work in particular areas. For example, one thing that I would require is animal studies on the same kind of therapeutic community that we're talking about setting up here.

Senator WALLOP. Animal studies?

Mr. KAIMOWITZ. Yes. Harry Harlow of the University of Wisconsin some years ago established—whether I believe it or not—a concept that mothering has to take place or certain ill effects will befall a baby monkey. Whether it is so or not, as I say, I am not imbued with the literature, but the fact is that there are other steps that can be taken.

I would suggest also that you could give a voluntary population sufficient incentive. In other words, if you paid volunteers salaries like \$25,000 or \$30,000 or \$50,000 to participate in an outside experiment that it would be possible to conduct it under those circumstances also. The fact that it is too difficult or too costly should not dissuade us that we should move from the population at large to the population inside.

All I'm saying is this. Given our current concepts of inducing a population at large, I know why we cannot get that population. I do not think that that is impossible.

I think a voluntary population could be gotten. I think it could even be authored by the same people such as Von Eckart who espoused EST. All I'm asking is that EST be tried out for a sufficient period of time under outside scrutiny. The same for any of those programs. And I would suggest that you do that historically. None of them have allowed what, for example, is so necessary in cancer research, that we do not allow everybody to plunge ahead whether it is with Laetrile or whatever. We do demand certain studies. Whether they can be done or not the Commission says that is the burden of the investigator.

I would say the same is true here. You cannot do what is done in S. 3227, which is jump the gap and simply announce that Congress finds that "significant advances in the behavioral sciences have led to the development of new modalities of psychotherapy." I don't know that to be true at all. I do not know it's an advance.

Senator DeCONCINI. Can you refute that statement?

Mr. KALMOWITZ. No. That's why I said throughout my statement that it's battling whether or not there is a God. That's not my burden. The burden, since you are suggesting introducing this, is on the social scientists and is on the psychologists who prove with some population that it does work. Each of them has had populations under their control.

Senator DeCONCINI. How are you going to teach animals transactional analysis if you try to do that with an animal colony?

Mr. KALMOWITZ. If you look at the work of Jane Goodall, of Conrad and Lorenz, you can at least start to postulate some theories about this behavior.

Senator DeCONCINI. They've done that. Have you read their books?

Mr. KALMOWITZ. If you can show me the link between that animal work and the human work as there was in the Harlow experiments relating the mothering of primates to the mothering of human beings, then I might defer.

I do not know of literature that fills in the gap and that tries to create a bridge between, let's say, Lorenz and Janoff and that tries to create a bridge between Goodall and Eckart.

Senator DeCONCINI. Are you familiar with some of the successful therapeutic communities that are operating now and the studies?

Mr. KALMOWITZ. From our perspective, no.

I have one colleague that has worked for 18 years successfully or he used to—

Senator DeCONCINI. Do you refute that TA and EST are not successfully used outside of an institution?

Mr. KALMOWITZ. I would argue strongly that the only thing that I can show is that there are charismatic programs that are successful for short periods of time.

Senator DeCONCINI. Are you suggesting that TA is a charismatic program?

Mr. KALMOWITZ. That's right. But I suggest strongly that it depends as to whether or not the administrator of the TA program is charismatic. In other words, it would depend on the individual.

That is very dangerous in terms of allowing that kind of program in institutional setting. That is why I suggested there are no programs that have withstood study that I know of which can show that they will be repeated in one location, another location, and so on. This is regardless of who the particular administrator is as long as the administrator is well trained in that particular art.

I think that is absolutely necessary. Just the word you used, Senator, I would have to shudder at: "Do I know of successful therapeutic communities?"

I don't know what it is.

Senator DECONCINI. You don't think there are any?

Mr. KAIMOWITZ. I don't know what it would be. I do not know what the outcome would be which could define something as successful and therapeutic.

Senator DECONCINI. Would you not agree that if the recidivism rate was less for people who are convicted felons in institutions who have been in a community versus those who have not, then that certainly would lead you to some conclusion that perhaps there was some merit?

Mr. KAIMOWITZ. If you could come up with a study—and this we argued out in my time in the psychosurgery case—of releasing two groups of prisoners with ones who had been exposed to a therapeutic community with ones who had not and each having been a rough sample and a control group, and if you found persistently that the therapeutic community recipients or beneficiaries committed less rape than those who had not been exposed to it, then I would say that this legislation might be feasible.

Senator DECONCINI. Would you suggest that we would have to be that specific about rape or just that they were not recidivist in the criminal justice system?

Mr. KAIMOWITZ. I'm suggesting the difficulty. You would have to repeat the same 3 weeks of trial that we had on psychosurgery, or the same 2 weeks that we had on institutionalized children. What breaks down is a lot of the note-taking by the administrator falls apart when subjected to scrutiny by a person who looks at the record for the first time. A person wanting a program to work will laud an individual occurrence with a persistence that does not show up if you have the kind of experiment I'm talking about.

All I'm suggesting is that could be done with a prison population, if we are willing to wait.

But the answer is not to rush on to the next technique with the assumption that it will work. That's my concern.

Senator DECONCINI. How do you get started if if you do not begin a program. The bill provides for outside evaluation, so it's not going to be an in-house closed shop. How do you get to the process of trying something to improve? Obviously the criminal justice system is not working. In my opinion it's not.

Mr. KAIMOWITZ. I would agree.

Senator DECONCINI. I have been in the criminal justice system long enough. I am not sure this is the answer, but I have seen at least two programs which work very well.

This leads me to more than a preliminary conclusion that it is worth expanding on a restricted basis, as this bill suggests.

I find that in contradiction to what I think you are saying, and that is that we need to isolate it someplace and do it. I do not see the real distinction between that and this bill.

Mr. KAIMOWITZ. I would suggest two things. One, as I have stated in my prepared testimony, the problem is an assumption to begin with that the therapeutic communities do work. If they would be regarded as experimental, then I think that would help to begin with.

Senator DECONCINI. Excuse me for interrupting you, but I would like to get this clear. Are you suggesting that if we referred to it as an experimental program within the legislation, that would satisfy your concerns?

Mr. KAIMOWITZ. Yes, my first concern.

This may seem rather surprising, but this is my second concern. I might have to explain this. We should get away from the idea that it will be voluntary, but there is no way, I would suggest, that it will be voluntary.

If you can reconcile yourselves to the idea that this is being imposed in the same way that many other programs are imposed in prisons, then I can live with it.

What I'm suggesting is that the two-pronged attack, that is that it be regarded as experimental, and that it be regarded not as voluntary, will at that point have an arbitrary study formulated by whatever therapeutic communities would be built in first under Federal legislation.

The difficulty with this bill is that it takes the dream and assumes it as reality.

I am saying that we should prove the dream and prove it and recognize it as an experiment and run it in two or three or all of the Federal systems if you think that is necessary, given the provision that there be no psychosurgery and no forced intrusive treatment of any kind. That would be fine.

Run it as an experiment. Run it without pretending that it is voluntary.

The danger is that this kind of legislation furthers the belief, as I indicated earlier, that what we want to work will work. Because we want a cure for cancer, then there must be one. Therefore, we start assuming its existence. That, to me, is the most insidious danger right now of S. 3227.

Senator DECONCINI. However it has worked. Take transaction analysis. I'm satisfied that it works for some people outside of institutional care.

It is not mandatory. It is voluntary to people who want to participate. They get involved in it whether it is a charismatic leader or not, but they get something out of it. They think their life has improved, but there is no way of testing whether it has improved or not.

So, if you impose that same standard in an institution on a voluntary basis in just that one process or technique, then it seems to me that is about all you can do, if you want to try to improve things.

If you do not want to, and if you want to sit back and take an attitude that there's not much that we can do except try to continue what we're doing, then I don't know that that's getting us anywhere.

Mr. KAIMOWITZ. Senator, I have not suggested continuing what we're doing, but trying an experiment. What you have alluded to, to me proves the point I am trying to make.

If a person simply believes that they have progressed under transactional analysis, that is akin to me to an emperor believing that he is wearing new clothes regardless of the fact that he stands naked in front of you.

The point of view you have to look to is not that of the subject and certainly not that of the experimenter or the innovator, but of a third party.

That is not an evaluator as you described the person in this program.

The assumption of the evaluator would be "Is this program working or not?", not whether it should work or not or whether it is possible to work, but we will start within the framework of the legislation having to face the idea that the assumption is that therapeutic communities undefined are a possibly attractive mechanism.

I am suggesting that if you can show me studies that transactional analysis in fact in your terms "works"—I'm not sure I understand what you mean by "works." It makes me feel better?

Senator DECONCINI. I have talked to people involved in it and I have seen reports which show that they exercise a better social life than they did before in their minds and in the close social contacts with the people that deal with them.

That is a standard I have set myself, and I have read about it. So, I'm not an authority.

However, to me that is very important. The person involved is satisfied they are getting something out of it.

Maybe in your judgment they are not, but they have that view. The people involved with them in their social life are satisfied that they have improved.

To me, that is a success in reality. It may not be a success medically, but in reality if you have moved somebody to believe that they feel better about themselves and have more confidence about themselves and that their relations with other people are better based on what the other people feel, have you not succeeded in doing something?

Mr. KAIMOWITZ. The clearest example is the case that brought me into this work to begin with. Most case studies of psychosurgery showed that in a sense as you are talking about it worked. The patient felt better. The patient was often relieved from attacks and the like.

The difficulty was when subject to scrutiny the patient showed a marked loss of intelligence—not by the persons on definition—a loss of memory, certain side affects that could not be controlled—the same being true of medication that is often used in mental institutions—but in instance after instance the person might say "I feel better." But anybody looking at it as an individual from the outside would say "Wait a minute, I don't know what this individual was before, but we have a vegetable now."

But the individual felt better. If you accept the kind of individual testimony as being desirable, then all I can say, Senator, that you and I on that point do disagree. Because that kind of self-serving statement to me is not science. It is not advancement from leeches to oerms to cures, but it is simply, to put it bluntly, a form of religion alluded to by Dr. Thomas Zacz with regard to mental illness that "I feel better

that I need help, and if I talk this out my problem will go away." That may be one way of looking at it.

Then I would suggest to you that the prison population is a very strange one to choose for that because I don't think we're trying to make prisoners feel better. I think we're trying to get prisoners to the stage where none of us want to see them commit additional crimes.

Senator DECONCINI. Is not that making them feel better about themselves? Making them realize what their action is and what their responsibility in life is in choosing right now without blaming their lawyer, their mother, their psychiatrist, or whatever?

Mr. KALMOWITZ. The difficulty with that is that what you're adding is a value judgment in addition to what we want them to stop doing.

For example, the example I used earlier was this. In society we now have come to tolerate the individuals who accept homosexuality. In that present setting is that right or wrong? In other words, an individual goes through "transactual analysis" and the individual therapist will talk it out and work at it. However, if that individual by the end has given up homosexuality I do not know that I at least would call that success.

Or smoking, or something else. That then becomes a matter of the value judgment.

What I want him to do is to stop committing antisocial acts against me. That is in no way assured by him feeling better. That's what I would suggest.

There is no relationship between the two.

He may feel better and continue to commit antisocial acts, or, as I have suggested with the native American child who, for a long time, did not commit antisocial acts but became literally catatonic and he removed himself from the process and stayed isolated—and I would suggest the prisoners most likely to benefit would often be the ones who are least likely to volunteer or be volunteered for a therapeutic community.

Senator DECONCINI. Do you think that you can succeed in convincing a prisoner or even someone outside an institution that being a homosexual is not in his best interest or her best interest, and in fact they do make that decision change, then you don't think that has a social benefit?

Mr. KALMOWITZ. Then I think we have problems with other things: I can convince him about communism and about work habits or non-work habits. Then I could convince him a doctor is a superior person to a ditchdigger or whatever.

At that point I am submitting values. I'm not saying whether I would espouse any of those. I would not frankly, but I'm saying they are values. People may have them; that one man—

Senator DECONCINI. Isn't our society run on values even though you may disagree with me and I with you as to what values should be placed on top or given the top priority? Isn't that what life's all about, which is a set of values?

Mr. KALMOWITZ. That may be true, except where they are Government imposed. There's a case in Pennsylvania. I don't know its outcome, but I do know there was a kind of transcendental meditation that could be called a therapeutic value being introduced in the Pennsylvania public schools. The argument by the State in that case

was "No, no. In fact you were offering a religion and never mind it did not have a God-head, it did not have anything we would recognize as a religion, but it was an imposed value." What I'm suggesting is that you are working with a group of people under Government control and at that point if you start imposing values then I have difficulty in perceiving how we can differentiate. I don't want to get into a United Nation Ambassador's problem, but I have difficulty differentiating—

Senator WALLOP. If the gentlemen would yield. I don't understand what you're talking about when you say when they are under the control of the Government then the Government is imposing values.

Aren't they there because the Government has imposed the value?

Mr. KALMOWITZ. I would suggest not.

Senator WALLOP. They have crossed some kind of a value line, have they not?

Mr. KALMOWITZ. They have violated the law. Hopefully they have not just violated a value system. This means that they were told that if they did act then they would be punished for it.

Senator WALLOP. Then the law is not based on a value system?

Mr. KALMOWITZ. It is, absorbed over, as far as I know, eight centuries slowly going one way or the other. That's quite a different flow than having them in a given situation having immediate values at a given time imposed so that we say "Today's values are what you have to face in prison."

Senator WALLOP. I don't think you have any understanding at all, if you forgive me, of what is to be achieved within this legislation. I don't see any signs here where anybody's imposing anybody's system.

I've been down to the program at Fort Bragg, and I didn't see anybody imposing values. I saw people improved.

Senator DeConcini would have better statistics on the record of achievement of those people.

But I suggest to you that if you look at both the things you're looking for have taken place. They feel better about themselves. Also, those on the outside that have come into contact with them on the outside feel better about them as well.

It seems to me that that's a big step up over turning some guy out so he can mug somebody within the first 3 weeks and be right back where he is.

Mr. KALMOWITZ. I don't know the Ft. Bragg situation. What I allude to by knowledge is a Black Muslim community in the State prison at Marquette where, as a group, black leaders discourage their membership from joining the behavior modification program at Marquette.

Senator WALLOP. They don't have to go.

Mr. KALMOWITZ. I understand, but what I'm saying is that there is a difference between not having to go and another person saying to Johnny, "You do not go. You're going to be in trouble with our Black Muslim sect if you go."

Therefore the prison authority steps in and says:

Wait a minute. You do not have the right to discourage that individual from going into therapy just because you want him to have the value of being a Black Muslim. He is going because he wants to go, and not only that, we are going to separate him from the Black Muslim sect where he has been absorbed up to now.

I would suggest at that point that you are clearly interfering with people's religious practices whether they are coercive or not. It may not show up that way in the example that you give because we may see it simply as an individual choosing a therapeutic community.

We're now only helping him to get into it. Yet, his religion up to the point the therapeutic community was offered was Muslimism, and his colleagues or cohorts said "You stay within our religious framework." I could put it on a Jewish level, but I don't know the specific example in actuality.

Senator WALLOP. This is one Senator's opinion. But I think it's the height of paranoia about the things one might do on behalf of trying to improve a system that is not working well. I do not see anything in this bill which would indicate that this is going to be the only access to rehabilitation by those who are in confined settings. If you could show me where that is, I'd be happy to look at it.

There is no point to belabor this. I think you are seeing devils in the night where none are. I think you would prefer to stay with the leeches.

Mr. KATMOWITZ. My statement clearly indicates why I see devils in the night. My experience in Michigan, a State that I would regard as a progressive and advanced State, would indicate that there are devils in the night whether they are psychosurgery, forced medication shock treatment, all of which I have dealt with, and all of which were offered therapeutically and beneficially. So, I would suggest that you are talking about an entire concept of a society that D. F. Skinner rightly described as being one that he would find acceptable beyond freedom and dignity. If you find this society desirable that has that kind of a value system, then we simply disagree on that point.

Senator DECONCINI. Let me ask one further question.

How could the bill be drafted to prevent positive harm that occurred in the past program such as psychosurgery?

Mr. KATMOWITZ. Very specifically, I would want the entire preamble deleted to begin with.

Second, I would want it designated somewhere as an experimental project not an assumed successful therapeutic community.

Third, that the voluntary aspect be deleted and that it be recognized that at least for some time that prisoners in this situation cannot volunteer, but that the legal case histories of other situations show that people in those situations cannot volunteer.

At that point if you want to run the imposed rehabilitation program, then I, for one, would not object because clearly that kind of attempt at rehabilitation and experimentation goes on in prisons all the time.

It is the cover that is given to the so-called helping professions and the idea that people in institutions can volunteer. That is particularly frightening to me particularly as in the last colloquy among us when values are changed deliberately by the State without control as to which values will be changed. It's the idea of deleting the acceptance of the therapeutic community as a goal, and second, the claim that you can have volunteers.

I would suggest that the material I supplied to the committee with regard to the Michigan center would indicate that voluntariness in the terms that you are talking about is simply impossible.

Senator DECONCINI. You don't have a fear of coersiveness? You don't have a concern of coersiveness if you take out the volunteer aspect?

Mr. KAIMOWITZ. In prison I assume that is a coersive atmosphere. That has been my assumption for 5 years.

Senator DECONCINI. That certainly imposes another set of values.

Mr. KAIMOWITZ. That's right. But at least what happens there is that it is done openly and clearly and one can be forewarned that this is being tried on you and that we don't know if it works.

It is different from saying, "We are offering this program which we know works, and it's up to you if you want to benefit from it or not."

Then what happens is that the program maintains responsibility and under this legislation I would suggest that the failures will be the individual prisoners, but that to me becomes scary, because then I do see the devils in the night.

At that point if you have exhausted all three modalities and all programs have not worked, then you still have the little children, and at that point psychosurgery becomes the treatment of last resort.

Senator DECONCINI. Have you visited any of these programs that are operating?

Mr. KAIMOWITZ. I have spent a considerable amount of time at the Marquette center, and I have visited every juvenile institution in Michigan at considerable length. I have visited innumerable hospitals for the mentally ill, and for the chronically ill in nursing homes. My speciality is institutionalization.

Senator DECONCINI. Have you visited therapeutic communities operating now?

Mr. KAIMOWITZ. Yes; if that's what you mean by working then I agree that there are those that work.

Senator DECONCINI. Thank you.

Senator HATFIELD. Any further questions?

Thank you.

Our next witness is Matthew Myers, chief staff counsel, national prison project of the American Civil Liberties Union. We welcome you Mr. Myers. You may proceed in any way you choose.

**TESTIMONY OF MATTHEW L. MYERS, CHIEF STAFF COUNSEL, THE NATIONAL PRISON PROJECT, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.**

Mr. MYERS. Thank you very much. I appreciate the opportunity to testify before you today. For those of you unfamiliar with the national prison project of the American Civil Liberties Union Foundation, the national prison project is a national project which seeks to strengthen prisoners rights and improve overall prison conditions and to develop rational, less costly, and more humane alternatives to incarceration.

We are also possibly the largest legal group which has attempted to study the problems of participation of prisoners in various experimental programs, whether they be medical, behavioral, or psychological of any sort.

First, I would like to commend the committee and Mr. DeConcini particularly for his efforts to develop this legislation intended to improve the rehabilitation process.

However, it is my opinion and the opinion of our organization that S. 3227 creates more problems than it's going to solve, that it's not likely to accomplish the benevolent purposes that you intended, and that it is virtually certain to invite the sort of abuse, which I think you would oppose. The bill's simplicity masks a number of serious difficult issues in my opinion.

In particular, the bill raises serious definitional problems and fails to adequately deal with the consent issue.

S. 3227 recognizes the need for making participation in these programs voluntary but fails to adequately take into consideration the deep-seated problems in attaining a truly voluntary consent for participation specifically in the proposed programs in the Federal prison system as it operates today.

Briefly I would like to explore a few of those coercive concerns.

First, at present almost all Federal prisoners are serving indeterminate sentences and depend upon the parole board or some other arbitrary selective body for their release. Whatever prisoners are told, whatever a single sentence in the legislation may state, they will continue to believe that their participation in programs such as therapeutic communities represents the best and often only opportunity to speed up their date of release, unless they have been given some form of fixed release date long before that decision to participate.

Three examples illustrate my point. First, several years ago in Connecticut a well-meaning psychologist set up a behavioral program for child molesters. He informed every potential participant that participation was voluntary and that it would not be held against them if they did not participate. As a result of concerns raised by most members of that program, we subsequently became involved and obtained the transcripts from the parole board, a board which was beyond the reach of the psychologists and the correction officials. We discovered, not to our surprise, that numerous parole board officers were telling potential participants that they would never be released unless they went through this program. Others were told that they would serve substantially longer periods of time unless they participated in the program. That is the most blatant abuse, one that this bill cannot control in its present form.

Second, a more subtle abuse comes about from a program I observed in Maryland in which prisoners participated in medical experiments, something slightly different, but for this purpose the issue is identical. Again, the individuals in charge of the program told virtually every individual that their participation would have no effect on their date of release.

Members of my staff interviewed literally hundreds of people who had participated in that program. Not surprising to me because prisoners think constantly about release, most of them told us that they felt the parole board would look so positively on their participation in their program that they believed that the participation could not but help speed up their date of release.

The third example is a witness who testified before you several weeks ago, Mr. Smith. As you know, Mr. Smith is one of the success stories of the particular programs. As you also know, Mr. Smith's condition of confinement were improved dramatically as a result of his participation, and perhaps more importantly, he was one of the few people ever successfully considered for Executive clemency under the Federal prison system. He is a walking, talking, living example of the reason why, under the present system, without some form of substantial change prisoners in the Federal system are going to believe and strongly believe that this program and participation in the program is essential to speeding up the date of their release and that their refusal to participate in what would seem as such an important program would be looked upon negatively.

Senator DECONCINI. Excuse me, have you had a chance to talk to Mr. Smith or one of these successful people who have been through the system, and, in fact, have been paroled?

Mr. MYERS. I have not spoken with Mr. Smith, but what I have done is spoken to a number of people who were involved in the Marion program, and I have spoken at length with Mr. Moran the former commissioner in Arizona who I believe you know and spoke highly of you at the time.

Senator DECONCINI. The reason I asked is because their testimony touched on this, maybe not at great length, but the fact that when the prisoners become involved in the administration of the program, they believe, and I believe them, that they can pick out those prisoners far better than anyone else who is using this to get out early. They are quite up front about that. You find Smith saying when he was there he tried every program there was. He would have gone to calisthenics if that would have helped him get out a little earlier, or make a better impression. And why did he go to this is because it was kind of the last shot. He said "Sure it might help me to get out, and it might improve me." It happened to improve him. It may not have been his sole motive, but even if it was, if the person is improved is that not a success, or the test of success?

Mr. MYERS. What you are saying to me essentially is that you are willing to go the next step. If you are satisfied with some of the results in some cases, and I've read everything about the Fort Bragg program, and am familiar with the Marion program and have spoken to Mr. Moran and a number of other people involved in therapeutic communities elsewhere.

If you are willing to give up the "voluntariness" aspect of the thing, which you're saying may be true, however for numerous reasons I don't think we can give that up. What I'm suggesting is that the bill seems to admit that you believe that it is important for that program to be voluntary. I can give you those reasons. I was going to deal with them a little bit later, but I can briefly go into them now if you would like.

Senator DECONCINI. Go right ahead if you like.

Mr. MYERS. Let me jump over the next part of my testimony simply saying the indeterminant sentence and the desire for release is one of many coercive and I would suggest inherently coercive aspects that would force or undermine voluntariness in this setting at this time. Living conditions in the Federal Bureau of Prisons at the present

time are another substantial coercive impact. As overcrowdedness increases, the quality of life decreases. As overcrowding has increased, the level of violence within the institutions is increased. More people are going into protective custody. I have spoken to several people who are in the Marion program, and many of them told me that one of the reasons, the very specific reason, they got into this was they were afraid to live where they were living. That the living conditions at the other place were so substantially better that that by itself justified any loss of liberty or particular risk to them of getting in.

Idleness in the Federal prison system, noise, lack of sanitation, all of the things that you find in prisons which have crept into the Federal prison system today, all act as curious coercive factors.

The net result, as far as I'm concerned, is that participation under the present conditions as it's laid out in the bill will in fact not be voluntary and therefore should not be allowed to proceed in its present form because the committee has recognized up to this point that participation should be voluntary, because I think that the program is still experimental as the committee has noted and because virtually every penologist and correctional expert in the country will tell you to be successful in the program on a wide scale, the program has got to be voluntary.

So, I suggest that as it is presently laid out, the bill is not acceptable for that reason and for that reason alone.

I'd like to read just briefly to you a quote from Prof. Norval Morris, the dean of the University of Chicago.

Senator WALLOP. Excuse me for interrupting, but let me make this point. It would strike me that the only way that one could get this to be voluntary in terms of your description is either to rebuild every Federal prison prior to instituting the program, or see to it that those involved in the program have as abysmal a life as anyone else. Is there any alternative?

Mr. MYERS. You have stated it in gross terms. There are very difficult problems, and I would suggest almost insurmountable problems that may or may not be as insurmountable as you have talked about. Again without necessarily endorsing the ideas of Professor Morris, I think he offers a much better alternative, a more considered alternative than this bill does in its present form. One of the things that I'm urging is that I just don't think the bill has considered all of the factors it has to in detailed form.

Professor Morris would say that the first step would be that before you begin to institute any sort of experimental programs, in order to have any program with any sort of success, the individual must be given a fixed release date before he is forced to make a decision in or out. That's the only way to guarantee that that decision will be voluntary.

Senator WALLOP. I can appreciate that. I appreciate an approach which would try to find a means of making it work rather than simply rejecting it out of hand.

I don't think that either Senator DeConcini or I have any intention of saying that this is a piece of wisdom that will be engraved in marble and cannot be changed.

Mr. MYERS. It cannot even be considered to put a program like this in an institution that does not in fact meet some substantial minimum

standards of which many of the Federal Bureau of Prisons do not at present meet. What I am suggesting to you is that there are certain types of programs, experimental programs with potential dangers in them, which I will discuss in a few minutes, that should not be placed in a system or an institution where the external coercive pressures are so great and that that, in fact, may mean that the committee's attention at the same time should be directed to either improving conditions or decreasing the number of people in those institutions or insuring that programs like this take place only in certain types of institutions, institutions where a certain amount of public scrutiny is possible. I suggest with the maximum securities facilities of the Bureau today that is impossible. It may be possible in institutions where the quality of life is not as deplorable as it is in most Federal institutions. You don't want the person in that program because the living conditions are better in that program. You want them in that program ostensibly because of the program. So the living conditions should be virtually identical, the privileges should be virtually identical.

Senator DECONCINI. That could be done easily legislatively, very easily. Right?

Mr. MYERS. I would agree that that potentially it could be done, but not very easily.

Senator DECONCINI. In the legislation you could write it in. That is that there would be no difference in the standard of living.

Mr. MYERS. Let me suggest to you what you are now proposing is what the National Commission for the Protection of Human Subjects, the organization that Mr. Kaimowitz mentioned a few minutes ago, spent a substantial amount of time doing. I propose to you that before you take the next step you carefully review their materials, because what they initially attempted to do is precisely what you're talking out. They laid out about four pages of standards which they felt were necessary to deal with precisely this consent problem.

Senator WALLOP. I apologize again for interrupting. Why is it so necessary that you deal with the details of standards of living and everything else if the sentencing is there? You talked about the determined sentence, the fixed sentence.

Mr. MYERS. You might say the first day that you don't want to be in it.

Senator WALLOP. Yes. How about the other thing? I'm talking about the standard of living conditions and the separateness. Is that much of a critical criteria?

Suppose there is that inducement and still people are finding some benefit.

Suppose that there are people actually getting benefits and displaying benefits. Why is it wrong to have that?

Mr. MYERS. It's wrong for the same reason. In your first breath you're telling me that for a number of reasons—which you have not necessarily stated and which I would like to talk about in a few moments—you think it's important that participation be voluntary. I suggest that it is important from a civil liberties standpoint as well as for the ultimate success of the program. In the second breath you are willing to say to me that you are willing to dilute that with one factor, although you find another factor acceptable. And what's the

difference? I suggest that the differences are that you may see the release factor to be more powerful, and it is very powerful. But what I am suggesting to you is that you have to look at the total picture of what is motivating or what is coercive.

Senator WALLOP. I probably do disagree with you there. I've never been one to think that reward is in any way an evil offering.

Mr. MYERS. What you're saying to me is that you're willing to buy the person's participation. We can always make the distinction between inducements to participate and the penalties for not participating so great that the whole concept of voluntariness becomes a mockery. For numerous reasons I think it is extraordinarily important that if these programs are to exist in any fashion that the committee should go to great lengths to guarantee that participation will be voluntary. I think what the literature shows you now, what all the corrections people who studied the issue find, what the National Commission for the Protection of Human Subjects, a blue ribbon panel of researchers, found, and what Secretary Califano found in his proposed regulations on experimental programs is that living conditions and the potential coercion coming out of them is an extraordinarily important factor in a decision whether or not to participate.

So that to say: "Yes, I agree with you, I want it to be voluntary," but to say: "No; I'm only going to look at a third of the picture," doesn't make sense.

Senator WALLOP. I appreciate what you're saying. I guess having seen one, and only one, it leaves me, of course, not very knowledgeable I will grant you. However, there were some other things about the program that were plainly not pleasant. Ft. Bragg had things that were not present but yet the living conditions were different. I have never been in prison, but I don't know whether they were better or worse. Down there it did not appear that they were essentially different.

Whatever privileges they had on one side were certainly balanced by hard circumstances on the other.

Mr. MYERS. There are two aspects to that too and that is once you are in the program whatever you say there is in fact a penalty for leaving the program. The penalty is that somewhere in your record that's going to be reflected. The penalty is that the parole board is going to know that you failed, that you didn't get through it.

But you switched me a little bit, so let's get into the second aspect of the question.

I submit that the first aspect of the questioned consent—voluntariness—is not thoroughly covered by this bill. That although the bill takes into consideration the issue, it stops way short. And if you're serious about any program, not just this one, I suggest that it is an issue that has got to be probed more thoroughly, and that any legislation coming out of this subcommittee should deal with the problems in a very considered, detailed manner. Only after that should the committee go forward with any experimental program or any program that I think has some of the problems that this one has. Let me go on to that next phase.

I title the next phase of my discussion "What Does S. 3227 Really Authorize and What's Its Potential for Abuse", two concerns which I think the committee has got to face.

The bill authorizes the establishment of therapeutic communities but nowhere does it define that term. In fact from the earlier testimony and from what I now know, the committee had looked at a couple of specific programs, heard a couple of success stories and spoken with a couple of the individuals involved. While the bill prohibits certain medical procedures, it gives no further protection what precise techniques may be used under the auspices of the bill. As I read the legislation, and as I search through the literature for a definition of "therapeutic community," I find that a therapeutic community really means little more than putting people in a separate living area and providing whatever techniques someone may label to be therapeutic to the program. Therefore, as I read the legislation, a slightly modified version of the much-criticized Start program could, in fact, be considered to be a therapeutic community as drafted in this bill.

Yet I think no one on this committee would be in favor of the sorts of things that went on in the Start program—the idea of chaining a prisoner to his bed, the idea of depriving an individual of items of personal hygiene.

Senator DECONCINI. Are you suggesting that if this were legislated that the Bureau of Prisons might include such a program as a therapeutic community?

Mr. MYERS. What I'm suggesting to you is a couple of things. That the bill is 100 percent open-ended; that the preamble of the bill as it is presently written is in effect a defense to a lawsuit should someone try to bring one challenging what's going on. The experience with the Bureau at the present time indicates that there is a potential for abuse—intended or unintended. The Start program is a good example. The Bureau has never said that the Start program was wrong, or that anything in it that was done was wrong. What the Bureau has said is that it was closed for two reasons; one, economic; and two, public relations. Therefore, given a specific authorization by Congress, I don't see any reason to suspect that the Bureau wouldn't say, "This may be an opportunity to try something new, to try something different."

Let me also suggest that the open-ended nature of the bill will, in fact, lead to the sort of abuse which has been found to exist much more recently—as a matter of fact, this spring with another Bureau program—that program being what the Bureau calls its long-term control unit at Marion.

Senator DECONCINI. How would we draft it to prevent dangers of some certain forms of "therapy"? How would you suggest we draft it to reduce or minimize coerciveness, et cetera?

Mr. MYERS. Let me deal with the first question first, and that is how would you draft a bill to reduce these dangers.

This bill, as it presently states, does not define anything. It simply says therapy is a good idea in a separate setting. It may or may not be a good idea. What is essential is to draft with precision the precise techniques you want to be tried out. If it is to be an Asklepieion program, or something like that, that should be drafted with a great deal of precision, albeit I think it has numerous problems. This bill does not do that.

As I read this bill, a myriad of things could happen. The Federal Bureau of Prisons operates on a decentralization basis. In its existing therapeutic communities the central office issues no guidelines, provides no training. That was made clear during testimony before the House Select Committee on Narcotics Abuse. Only a month ago the Bureau testified about its therapeutic communities for drug abuse and admitted that it had no idea what was going on in the different institutions. They had never given any training to any of its people and did not monitor day to day operation of these programs.

So, no matter what programs you suggest, you have got to build in a central monitoring device and then you have to build in an adversarial monitoring device to guarantee that it will work.

Second, you've got to build in criteria for whom these programs are intended. The fact of the matter is that prisoners are not in prison because they are sick. They are imprisoned because they have committed a crime. In almost all instances we don't know why people committed a crime. More importantly, we're totally incapable of predicting who's going to commit future crimes. Therefore you have to build in some mechanism to guarantee that you get into the population you want to reach and that it's not abused. Judge Foreman in the Federal district court in Illinois found very recently that the control unit in Marion had in fact been used to silence critics. It had, been used to punish people with what various lower-level personnel—and it becomes more dangerous as you become lower—felt were apparitions of religious beliefs. It punished people who filed lawsuits. What you've got to guarantee is that what you're doing is reaching a specific population and that the criteria for entry cannot be abused.

The third thing that I think is essential touches on something that Mr. Kaimowitz said. Because we don't know why people commit crimes because people are not in prison for specific illnesses and because these programs are not geared to deal with specific illnesses, they often tend to seek to replace a prisoner's value system with that of the therapist. In many cases that means your white, middle-class individual explaining to a black urban ghetto person how he or she should be living. The fact of the matter is that there are different value systems which do not relate to the commission of a crime. Anything that a program seeks to alter on an individual should be directly related to the issue of will this prevent the commission of a crime rather than will this program remake the person in our image. Again, the present legislation not only does not prevent that abuse, it virtually invites that abuse, an abuse which has been found to occur at various institutions which have been said to utilize offshoots of the therapeutic community. One example nearby is an institution in Maryland called Patuxent which for many years was operated on numerous therapeutic models, one of which was a therapeutic community. Correctional psychologist after psychologist who reviewed the Patuxent program found that what was really happening was that those persons who were willing to conform to a stated set of values unrelated to why they committed a crime, unrelated to the likelihood that they would commit a future crime were those that got through the program successful, those that did not languished for years and years.

I might also suggest that a particular problem with doing this in anything but a community facility or minimum security facility is the fact that in most Federal prisons, the primary goal and concern of prison administrators is control and security. Over 90 percent of the funds we spend on corrections is spent on control and security. In fact the public does not care what happens to prisoners as long as they don't riot or escape.

Consequently, when you read the reports of numerous individuals who have attempted the sorts of programs you're discussing or other sorts of therapeutic programs in maximum and medium security facilities, they report that their programs had been abused at every opportunity. What they found is that those people who work in the system did everything they could to use their program to increase security, did everything they could to use the program to increase their control. Constantly the psychiatrist or the professional therapist raised the question "Who is my client, the prison or the prisoner?" Most often the prison didn't give him that option. His job is reporting back to the prison officials. Not only is therapy in that situation impossible, abuse is inevitable. More importantly, in secure institutions it may very well be that the type of goals of the therapeutic community you're discussing is trying to obtain are impossible precisely because of the security control needs. Prison officials need to imbue in prisoners, passivity, blind obedience, conformity and all of those traits are traits which are most likely to prevent the person from being successful upon release. All of those traits will inevitably be forced down a therapist's throat in the institution's concern for security.

What I'm suggesting at this point is that I have raised five, possibly six, concerns of issues which I call abuses which may undermine the therapeutic program you're discussing. None of which are addressed in this legislation and all of which I suggest have to be addressed before this subcommittee suggests any specific therapeutic model.

I might also add I'm concerned about a subcommittee of the Congress suggesting a particular therapeutic model based upon either limited experience or exposure to any particular mental health or correctional professionals. I think that this committee would be better served by allocating sufficient money to the Bureau or to other experts who would look into particular groups of people who need particular assistance, whether it be drug addicts or those with other particular problems. But for the committee based upon limited experience to endorse a particular therapeutic program seen in a limited setting is extraordinarily dangerous in my opinion.

Senator HATFIELD. I don't mean to interrupt, but that's a direct contradiction to what you just asked us to do, as I understand what you said. You said that we had to be specific, that we couldn't just rely on due process standards to avoid these abuses, but the Bureau of Prison's experience up to this point in their experimentation has been abusive, you say, in the Start program and others, or did I misunderstand you?

Mr. MYERS. No, no you heard me correctly. I don't think what I'm saying is inconsistent. What I'm saying is two things. One is if this committee is going to go forward and propose any specific therapeutic models whatsoever, all of the concerns I raised earlier have got to be dealt with. On the other hand, I'm equally concerned about Congress coming out and endorsing a particular therapeutic model, both because

I'm not sure Congress has that sort of expertise and, second, because I'm not sure that that's the appropriate role of this legislative body.

Senator HATFIELD. Somehow I feel those are conflicting statements and are really irreconcilable.

Mr. MYERS. I'm not sure this bill should be passed at all because of a philosophical belief about what Congress should be doing. On the other hand, I'm saying if you do it, then all of the things I said earlier have got to be considered and I don't think are covered adequately in this bill at the present time.

Senator HATFIELD. You think in the area of the voluntariness that there should be some sort of review or, for instance, friends of the court or friends of the prisoners should be an advocacy situation, especially with regard to the voluntariness about the original admission. Would you have a friend of the prisoner or guardian—

Mr. MYERS. I think some sort of public scrutiny is essential. I would break it into two different categories.

The first is I think that programs like this or any program in which you are concerned about voluntariness should only take place in an open institution. That in my opinion would exclude maximum security institutions because in fact members of the public, members of the press have extraordinarily limited access to those institutions, a limited access in which the Supreme Court has unfortunately endorsed.

Second, I would suggest that it is essential that there be an organized monitoring group made up of prisoners, ex-prisoners, and individuals whose sole job is to be the advocate for prisoners to monitor entrance in, participation in and entrance out of any program in which you're concerned about voluntariness. That doesn't affect the quality of voluntariness but it prevents the abuse that I think is inherent in a closed institutional setting.

Senator HATFIELD. I take it that you're for fixed sentences.

Mr. MYERS. Yes, sir, I am sir.

Senator HATFIELD. How about probation per se? Are you for that or parole?

Mr. MYERS. Probation, absolutely.

Senator HATFIELD. How about parole?

Mr. MYERS. Parole, I'd suggest, is a system that has failed completely in this country at the present time. And it is a system that I think stands in the way of real progress within the institutions and stands in the way of the sorts of programs you're talking about.

As Professor Morris indicated when he drafted his landmark book entitled "The Future of Imprisonment," he suggested that for successful rehabilitation to ever take place, you have to have fixed sentences. I might add that the parole process as it presently exists in light of the difficulty of making predictions about who is going to commit future crimes and who is not in an inherently arbitrary process which only exacerbates the already inherently arbitrary sentencing process. Rather than ameliorating that problem as parole was intended, it has made it worse.

Senator HATFIELD. Any further questions, Senators?

Do you have any more details on the monitor group you have proposed for the program?

Mr. MYERS. What I can suggest to you is either of two things, because I think it is something that has to be worked out in a great deal

of detail if it's utilized at all. I know I spent hours with members of the staff of the National Commission for the Protection of Human Subjects. I have drafted materials which I would be happy to supply you. The Commission itself has drafted materials which I'm sure they would be happy to supply you rather than trying to go through all the specifics at the present time.

Senator HATFIELD. Thank you.

Mr. HART. Mr. Myers, for the record, the substance of your testimony that Judge Foreman's findings in *Bono v. Sawbe* give the implication that that was this spring, but in fact that suit was filed in 1974 was it not?

Mr. MYERS. The suit was filed in 1974, but the decision was issued this spring.

Mr. HART. Second, to expand on the issue of voluntariness, the previous witness in your testimony seems to imply that it is your belief that an inmate cannot constitutionally give consent in a coercive or penal setting, by virtue of his status or condition, the very fact that he is in by commitment in an institution. Is that true? Is that your belief?

Mr. MYERS. That goes further than I would. What I would suggest to you is that the consent question is a qualitative one which varies with the inducements to participate versus the coercive factors inherent in the setting. The ability to give or not give consent depends upon looking at both the inducements and the punishments of not participating so that I would not argue to you that a prisoner because of his status could never agree legally to do anything within an institution. I think that's wrong.

What I would suggest to you is that certain factors offer inducements which are so great that they bring us below the line which we find acceptable.

I would also add to you that the civil liberties concern about the quality of a consent become last as the potential dangers, the potential risks, the potential harms of that particular program become less. Let me give you an example.

If you were proposing today to require all prisoners to go the first grade, those who have not completed any schooling, I would be opposed to the involuntary nature of it, but you wouldn't hear me screaming about consent. However, when you are dealing with psychological programs which do have a potential for going well beyond what you want them to do—programs which have a potential danger to prisoners, programs which are experimental—I think it is fair to say that we should demand a quality of consent that is unquestioned in anybody's mind.

So, the impact of my testimony today is not that no prisoner may ever give consent. The impact of my testimony today is that for the programs you are suggesting, given the totality of conditions that surround the consent in this case and given the risks, the quality of consent in my opinion cannot stand scrutiny.

Mr. HART. Is it fair for the members of the committee to conclude that you feel that most of the conditions or controls that would result in abuses in a program such as this are external, rather than internal—that is, living conditions, administrative control, conditions for entry

and for participation into the program imposed by administration rather than peers.

Mr. MYERS. That's correct.

Mr. HART. But you've added a new element—internal. This is something else that is going to come out the testimony. Internal tension. Internal conflict. The fact that—

Mr. MYERS. Excuse me. When I said internal, I meant external. I would include pressures put by other prisoners one way or another on the prisoner. When I consider internal pressures, I'm speaking purely about a prisoner's desire to participate in the program for the reasons you would want him to participate. Anything else would be external as far as I'm concerned. Ninety percent of the external controls are held in the hands of the prison officials. Some of them are held obviously in the hands of his peer.

Mr. HART. Supposing that this program were instituted on a voluntary basis, that is, it does not affect the length of sentence, work assignments, living conditions, except segregation in the sense that those in the community would live apart from the others, but in the same sort of living conditions, same privileges, the same disciplinary rules, so forth and so on. Assuming all those things to be true then in the therapeutic community setting—

Mr. MYERS. Then they could impose sufficient safeguards to guarantee that those things were not abused as most often are in an institutional study.

Mr. HART. Assuming that's all true, is it legitimate to deny an inmate the selection of that type of a program as an alternative, say as opposed to entering a GED program, or vocational training program, or lifting weights?

Mr. MYERS. I would suggest to you that no it's not. If you can in fact guarantee voluntariness, what I'm cautioning you is that it is an extraordinarily difficult project.

Mr. HART. But not impossible.

Mr. MYERS. Probably not.

Mr. HART. Thank you.

Senator DECONCINI. If you can't guarantee it absolutely then you think it better off not to take any risk of trying to approach the problem on a different basis?

Mr. MYERS. I'm not sure I understand your question.

Senator DECONCINI. Well, if you can't satisfy the absolute voluntariness, do you think it's better off not to have this type of legislation, or these types of programs?

Mr. MYERS. I would suggest to you that that's probably the case. This type of program in my opinion is sufficiently experimental at this time and it does have—

Senator DECONCINI. I find that so contrary to what I believe the ACLU believes and that is to improve life and to take certain risks which the history of your organization, which I have been a member of for a long time, and that's why because they are willing to take those risks, and they lose a lot of them, and what's important is that they believe in the system. They believe that it's worth taking some chances, and that means chances for themselves and for the people that they—

Mr. MYERS. What you're suggesting is potential social engineering at the sake of a civic liberties value. I am willing to take risks, and I am willing to say "I'm not opposed to any particular program, if I can be sure that it's voluntary," but what you're suggesting to me is that I should be willing to subject an individual involuntarily—taking the other extreme for you—to a potentially hazardous program.

Senator DECONCINI. No, I'm suggesting that if the program does the best it can to underscore voluntariness, but cannot make it absolutely certain because I don't think you can, then should it be tested and should the program be operative, and I gather from what you say "No, you shouldn't take the change unless you can be absolutely sure." I don't think that's what the ACLU does in its practice, and I'm glad that it doesn't. I'm glad it isn't absolutely certain each time that it is going to help some individual out because lots of times it doesn't and that individual ends up losing, going back in the hole and may be never heard from again.

Mr. MYERS. You're suggesting what I consider to be an inappropriate analogy. The ACLU obviously takes risks and potentially losing causes, that's why I'm standing here today trying to convince you to change what you're doing. That doesn't mean that the ACLU is willing to risk somebody's civil liberties for the sake of a social change idea which somebody else has.

As a matter of fact, the express purpose of the ACLU is to insure that those civil liberty values are considered first and foremost in this democratic Nation before we go on to social engineering. All I'm suggesting to you today is that putting that concern first and foremost, this legislation as it exists now is severely wanting and that we have a long way to go before the level of voluntariness is sufficiently sure that I can feel comfortable.

Senator DECONCINI. I get a strong feeling that if you had an opportunity to witness and experience one of these programs or more than one of them, you would feel that first the voluntariness is there, and that you would witness sitting through a session as I have on several occasions of someone getting up and not taking it and leaving, and no one saying anything. And maybe coming back and maybe not. Total voluntariness. It troubles me that the ACLU, which I believe has tremendous credibility, not withstanding the criticism that is fostered upon you many times, but has tremendous credibility, would not go out and seek out and make a determination after experiencing and witnessing the actual operation. I would urge you to do so and as a matter of fact would make arrangements for you to do so, if you would like.

Mr. MYERS. I would be delighted to. Let me suggest to you two things.

First, I have, in fact, seen a therapeutic community in juvenile settings.

Second, I have spoken with a number of people who have participated.

Third, I made it a point after the earlier hearings to spend some time talking with John Moran, who testified in favor of them to get his viewpoint.

My testimony today does not say to you that this program is a bad program, that this program does not work for somebody. My

testimony today says to you that as a result of my experience with these programs that I have looked at and the people I have spoken to that in fact I think the voluntariness as it is presently laid out is an illusion. And that the dangers are such that we have got to go a long way further than this legislation goes to be sure that we are protecting people's rights, and that we are not just imposing something upon them. This is something I think—my sense in this thing is that I think that your goal and my goal is not that far apart.

Senator DECONCINI. I would just like to add in, Mr. Chairman, that if you are interested, or your group is, we could make arrangements for you to visit at least a couple of these programs that I know of, and I think you will come, perhaps, to a conclusion that the voluntariness there is as pure as it can be.

Mr. MYERS. We would certainly be willing to take up your invitation and come back to you at a later time and let you know whether or not our opinion has been changed. I have no intention of forming an opinion on which you think to be inadequate knowledge. We are open-minded on this. The issues are ones that are endemic to these programs as they have existed in the many institutions I have seen.

Senator DECONCINI. For one would welcome your suggested language of voluntariness.

Mr. MYERS. I would be glad to work with this committee staff to see if something could be devised that would be acceptable to both the ACLU and to you, if possible. I certainly don't guarantee that we are not going to reach a roadblock in which we ultimately say we disagree violently or that we don't think it can be done.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator HATFIELD. Thank you.

Mr. Myers, without objection, at this point in the record we will insert your prepared testimony.

[The prepared statement of Mr. Myers follows:]

PREPARED STATEMENT OF MATTHEW L. MYERS

My name is Matthew L. Myers, I am the Chief Staff Counsel of the National Prison Project of the American Civil Liberties Union Foundation. The National Prison Project seeks to protect and strengthen prisoners' rights, to improve overall conditions in the nation's prisons and to develop rational, less costly and more humane alternatives to traditional incarceration. We are the largest prisoners' rights group devoting a substantial amount of effort to the problems caused by behavioral and biomedical therapy and research on prisoners.

I want to commend Mr. DeConcini and all of the Members of the Subcommittee for your efforts in developing legislation intended to improve the rehabilitative opportunities offered to prisoners confined in federal correctional institutions. However, S. 3227 creates more problems than it solves, is not likely to accomplish the benevolent results intended and is virtually certain to invite abuse. The bill's simplicity masks a number of serious issues which I shall discuss which requires me to oppose its passage. In particular, the bill raises serious definitional problems and fails to adequately deal with the consent issue.

S. 3227 recognizes the need for making participation in these programs voluntary but fails to adequately take into consideration the deep seeded problems in obtaining a truly voluntary consent for participation in the proposed programs in the federal prison system at it operates today. Briefly, I shall explore some of those factors which I believe will prevent participation in the proposed programs from being voluntary.

First, almost all federal prisoners are serving indeterminate sentences and depend upon the parole board for their release. Whatever prisoners are told, they will continue to believe that their participation in programs such as therapeutic communities, represents their best and often only opportunity to speed up their

date of release as long as that date has not been immediately fixed prior to their decision to participate. The single sentence in S. 3227 announcing that membership in a therapeutic community "shall not affect the length of incarceration of any inmate" will not alter either the subjective impact on prisoners or the likely impact on parole boards of participation.

Three examples illustrate my point. Several years ago Connecticut instituted a "voluntary" behavioral program for child molesters. The psychologist in charge told every potential participant that entry was voluntary. However, from the beginning prisoners believed that participation would enhance their chance for parole and, in fact, transcripts from parole board hearings revealed that prisoners who did not participate were being made to serve substantially longer. In Maryland prisoners have "volunteered" to be given cholera, typhoid fever and malaria. Why? When asked many of the so-called volunteers admitted that they felt their participation would substantially increase their chance for an early parole. The case of Bill Smith, the prisoner who testified before this Subcommittee several weeks ago is another case in point. As a result of his participation in the Asklepion program, he was first transferred to a more humane facility and then granted executive clemency. As long as prisoners must meet the parole board the coercive effect caused by this danger makes a mockery of the concept of voluntary consent.

The barren nature of prison life in the federal system is another coercive factor which will affect a prisoner's decision to participate in the proposed therapeutic community program. Overcrowding has reached crisis proportions in many Bureau institutions. As overcrowding increases in these institutions the quality of life further deteriorates and the level of violence increases. Many prisoners constantly fear for their safety and the question of how to handle the protective custody prisoner is one of the most difficult issues confronting the Bureau today. Many prisoners are condemned to spend the majority of their day idle. In its 1976 annual report, the Federal Prison Industries stated that just 5,400 prisoners of a total federal prison population of 28,000 were employed on an average daily basis. A 1974 General Accounting Office report found that most of the Prison Industries were wasteful and used antiquated machinery. The same report found that at the Federal Correctional Institution in Petersburg, Virginia, young men put wires into holes in little boxes. They are told that their little boxes are then shipped someplace else where the little boxes are put into bigger boxes but nobody knows what the boxes are used for. In Atlanta, prisoners work in an outmoded mattress factory, a sign factory, a brush factory and a factory that makes mail bags. In Lewisburg, prisoners in F.P.I. work either a clothing factory or a plant that makes metal wastebaskets. The situation is the same elsewhere. The few modern industrial programs which teach skills which may be useful upon release can employ only a minute fraction of those who would like to work.

Almost uniformly, prisoners live in noisy, unsanitary, over crowded cellblocks with no privacy, subject to hostile guards and in constant fear of assault. Participation in therapeutic communities and programs provides an escape, albeit temporary, from these unbearable conditions. Several prisoners who were at Marion have told me that better living conditions and a safer existence were the primary factors in their decision to participate. Recent studies by the National Commission for the Protection of Human Subjects bear out these concerns:

"The prisoners who volunteered for such studies were moved to a special part of the prison where they were treated more like members of a free society. Clean liens were provided, there were beds instead of bunks, the quality of food was better, and food was available twenty-four hours a day. When asked, most of the prisoners described the general living conditions in the prison as "impossible situations." More than fifty percent indicated that their decision to volunteer was based in part on their desire for better living conditions. Most of the volunteers were "loners" who were not members of any of the cliques that were found in the prison. The third factor was the general level of fear within the prison. Many prisoners stated that it was safer in the research project than in the prison itself. One prisoner stated that you could go to sleep without being afraid that someone would bust you in the head" or "set fire" to your bunk while you were asleep."<sup>1</sup>

<sup>1</sup> "The Law of Informed Consent in Human Experimentation", "Research Involving Prisoners", The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, Gary Annas, J.D., M.P.H.; Leonard Glantz, J.D.; Barbara Katz, J.D., 1976.

The combined impact of a prisoner's desire for parole and his desire to escape intolerable living conditions should not be underestimated. As Norval Morris wrote in "The Future of Imprisonment":

"Why should such stress be placed on the prisoner's right to reject a training program, free of sanction in terms of the duration or conditions of his imprisonment? After all, in most of our dealings out of prison, most of our efforts at advancement or self-development, coercive pressures bear on us . . .

"The point has appeal but it underestimates the overwhelming force of the imprisoning power, the isolation, the helplessness, the subservience, of the prisoner. The lawyer is accustomed to drawing a threshold, even an arbitrary threshold, at some point on a continuum. On the continuum of coercion from unfettered and anonymous freedom to physical compulsion, the lines of commitment to a prison by order of a criminal court is of such dramatic force and of such labeling consequence that it is a rational line to draw. Operationally, if the prison is to be set free to provide rehabilitative retraining for its inmates, it is a necessary line to draw.

"The total institution has such massive impact on its charges, its authority is so annihilative of free choice, that it is essential for us to protect, so far as we can for his sake and for ours, the prisoner's freedom not to be in any treatment programs. We may properly try to persuade him to participate, to lure or cajole him, to tell him of the advantages to him and to us of his participation; but if we are to be free to pursue such persuasions we must guarantee that he will not suffer in prison time or prison conditions from rejecting our advice."

#### WHAT DOES S. 3227 AUTHORIZE AND WHAT IS ITS POTENTIAL FOR ABUSE?

S. 3227 authorizes the establishment of therapeutic communities in 10 federal institutions, but nowhere does it define the term "therapeutic community". While Section 4065(b) prohibits the administration of certain medical procedures as therapeutic modes in any program established as a result of this bill, it gives no further direction what precise techniques may be used under the auspices of this bill. As I read this legislation, a slightly modified version of the much criticized START program might be justified by prison officials as part of a program authorized by S. 3227.

The term "therapeutic community" by itself has no fixed meaning and no fixed limitations. Once the director of a so-called therapeutic community moves the members of the community into a living area separate from the general population and labels its purpose therapeutic, the legislation gives its endorsement to any "technique" which the Director may so devise. As part of the program many members of the community deprive others of basic essentials for personal hygiene? exercise? the right to read whatever he/she wishes? May they tie a prisoner to his bed until he "learns self-control" or punish him for having political views different from theirs? Nothing in the legislation would prohibit these actions.

By simply authorizing "therapeutic communities" S. 3227 virtually invites abuse. A number of prisoners who came into contact with the Marion program felt strongly that the unstated and perhaps unconscious goal of the program was to alter the prisoners' value system to comport with the value system of the white, middle class therapists rather than to simply assist them to live a crime free life. Similar allegations were made by many prisoners in a state institution named Patuxent in Maryland, an institution whose program could be justified under this legislation. These allegations are not without foundation as many professionals who have observed them have noted<sup>2</sup> and for at least two reasons are probably inevitable at the present time. First, the existing indeterminate sentencing structure makes release dependent upon convincing the parole board and, therefore, your therapist that you are "rehabilitated". In the therapeutic context likely to occur as a result of this bill, this means convincing your therapist that you have adopted his or her value system. Second, individuals are in prison because they have committed a crime, not because they are sick. The truth is that we don't know why one person commits a crime while another does not and we are totally incapable of predicting who will com-

<sup>2</sup> Kennedy, R. "Behavior Modification in Prisons," printed in Craighead, Kazdin, Mahoney, "Behavior Modification: Principles, Issues and Applications" (1976).

Meister, J. "Patuxent Institution" 5 Hastings Center Report (February, 1975).

Holland, J., "Behavior Modification for Prisoners, Patients, and Other People as a Prescription for the Planned Society," Presented at Eastern Psychological Association (April, 1974).

mit future dangerous acts.<sup>3</sup> Therefore, therapeutic judgments about what equals rehabilitation or who is rehabilitated are both inaccurate and totally subjective.

This inherent potential for abuse is exacerbated by the prison environment in which these programs must operate. Prisons in this country are closed and isolated institutions. Access by members of the public and press is extremely limited. Mail is often read by prison officials and many prisoners are fearful of criticizing their keepers. On more than one recent occasion these fears have been shown to be justified. For example, this Spring the Federal Court in Illinois found that prisoners at the federal penitentiary at Marion, the birth-place of the Asklepieon program, had been placed into long term segregation because they had been unduly critical of the administration. As Judge Foreman noted:

"[The control unit] has been used to silence prison critics. It has been used to silence prison critics. It has been used to silence religious leaders. It has been used to silence economical and philosophical dissidents. And it has been used when no other rationale was available to justify incarceration in the control unit. Often no showing was made as to how these persons disrupted the orderly running of the institution." *Bono v. Sawbe*, No. 74-31-E (E.D.Ill. Mar. 19, 1978) Slip op. at pp. 13-14.

We must also never lose sight of the fact that control and security are the paramount concern of prison administrators. More than 90 percent of all monies appropriated for corrections in this country is spent on control and security.<sup>4</sup> In most cases the public cares little about what happens to prisoners as long as they don't escape or riot. Consequently, a number of respected therapists have reported their inability to work successfully in a prison setting because of the institutions' efforts to use their efforts as simply another mechanism for control. As one noted psychologist wrote:

"Whereas the ethic underlying the rehabilitative approach is founded upon the recognition of each man's individuality and worth and the systematic attempt to encourage individual growth, the correctional tradition, quite to the contrary (notwithstanding official pronouncements from wardens), is founded upon principles of uniformity for administrative orderliness and safety. These principles of uniformity demand equal treatment for all inmates regardless of individual needs and/or differences, for the prison institution and its traditions are structured so that the overall security of the prison complex must precede any consideration of individual need, whether of inmates or of staff. While this approach maintains the highest level of security with a minimum of distress or overt disturbance it often appears to force the prison institution into an abdication of its rehabilitative responsibilities.

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"Clinical psychologists usually are clear about whom they serve—they are hired by patients in distress and charged with the responsibility of relieving that distress; or they are hired by an institution and requested to relieve the distress of the inmates of that institution (although as is obvious, conflicts emerge in mental hospitals also). Functioning in the community, and specifically in a maximum security prison, the situation was entirely different. The institution saw us as its agents, whose responsibility was to serve it; dealing with inmates was merely incidental to the task."<sup>5</sup>

The Start program with which I am sure you are all familiar is an excellent example of the abuse of the rehabilitative model to further control and security. Nothing in S. 3227 would prevent such abuse.

<sup>3</sup> American Psychiatric Association Task Force on the Clinical Aspects of Violent Individuals (1974).

Rubin, Dr. B., "Prediction of Dangerousness in Mentally Ill Criminals," 27 Arch. General Psychiatry" 397 (1972).

Wenk, Robinson, and Smith, "Can Violence Be Predicted?" 18 "Crime and Delinquency," 393 (1972).

Dr. Bernard Diamond, "The Psychiatric Prediction of Dangerousness," 123 University of Pennsylvania Law Review 439 (1974).

Morris, Norval, "The Future of Imprisonment," (1974).

<sup>4</sup> See generally, David Rothman, "Decarcerating Prisoners and Patients," The Civil Liberties Review (Fall 1973); Robert Martinson, "What Works?—Questions and Answers about Prison Reform," The Public Interest, No. 35, Spring 1974 (Published in 1975 by Praeger in an expanded version as "The Effectiveness of Correctional Treatment"); Edward M. Opton, Jr. "Psychiatric Violence Against Prisoners: When Therapy is Punishment," 45 Miss. L.J. 605 (1974).

<sup>5</sup> Katkin, E. "Psychological Consultation in a Maximum Security Prison: A Case History and Some Comments," printed in Golann and Eisdorfer, Handbook of Community Mental Health (1972).

The danger of abuse of S. 3227 is particularly acute in the Bureau of Prisons. As was noted earlier this year in testimony before the House Select Committee on Narcotic Abuse and Control on July 25, 1978, the Bureau's Central Office provides virtually no control, supervision or guidance over its already existing drug abuse therapeutic communities and provides no training whatsoever to the counselors in these programs. Instead, program content and staff training vary from institution to institution.

In conclusion, while we endorse the Committee's efforts to improve the quality of life in the federal prison system and increase the number of rehabilitative opportunities available to prisoners, we oppose S. 3227. On behalf of the National Prison Project, I would like to thank the Subcommittee for the opportunity to testify today and I will be glad to answer any questions.

Senator HATFIELD. Our next witness is Mr. James Potts, editor of the Prison Law Monitor.

Welcome, Mr. Potts. You may proceed.

#### TESTIMONY OF JAMES L. POTTS, EDITOR, PRISON LAW MONITOR

Mr. POTTS. My name is James L. Potts and I am the editor of the Prison Law Monitor which is published by Institution Educational Services, Inc., of which I am president. I have been involved in the effort to improve the conditions which exist in our prisons for a number of years both as a prisoner of 12 years in the State of Texas and Federal prison systems and as a citizen outside. While in prison I was able to assist those prisoners who were less knowledgeable of the law than I with their legal problems. After my release in June 1976, I began working with the national prison project of the American Civil Liberties Union where I wrote the Prisoners' Self-Help Litigation Manual. I also attended the Antioch School of Law and have been certified as a paralegal. Currently, apart from publishing the Prison Law Monitor, Institution Education Services attempts to educate prisoners and the public about the civil rights of those confined.

The points I will elaborate on below in my discussion of the bill presently before this subcommittee, which would authorize Asklepion-type therapeutic programs in 10 Federal prisons, relate to: (1) Informed voluntary consent of the program participants; (2) How such a program is perceived by the majority of the prisoners among whom these programs will exist; (3) the divisive effect of this particular type of behavior modification program in a closed prison setting; and (4) professional peer review of the program.

I would like the committee to keep in mind first and foremost that Fort Grant is a relatively new minimum security institution. It is certainly not the stereotype of your average penitentiary. In the Federal system you have McNeil Island built in 1860, you have Leavenworth, Kans., which was opened in 1906, and you have the Atlanta Federal Penitentiary, which was opened in the late 1800's.

All of these institutions house over 2,000 inmates, most of whom have long sentences. The U.S. penitentiary at Marion when I was there had an average term of sentence of 38 years.

Members of this subcommittee are well aware of the problem of overcrowding in American prisons, including the Federal Bureau of Prisons. Bureau of Prisons Director Norman A. Carlson recently testified before this subcommittee that the Federal prison system currently has a population in excess of 28,000. He further testified that

the system is designed to hold only 22,000, which means the Federal system is currently in excess of 6,000 prisoners over its design capacity.

This condition of overcrowding is common to virtually every penal institution in the United States and cannot be overlooked when discussing such matters as obtaining the voluntary consent of a prisoner to participate in the various psychological behavior modification programs being placed in our institutions. Further, it cannot be forgotten that the Bureau of Prisons sets the model for many States in implementing their own programs.

First, overcrowding in a prison means further physical restrictions. What does overcrowding mean to a prisoner? It means that every aspect of his or her physical existence within the prison will be more restricted than would otherwise be the case. Because it takes longer to count and release cellblocks one by one for the evening meal, for example, "yard time" or "free time" is restricted. Free time is also the period when prisoners involve themselves in self-help programs such as education, vocational training, cultural study, et cetera.

Movement is restricted because of administrative regulations that are implemented to facilitate prison security. An example of movement restrictions is the USP in Marion, Ill. All of the corridor grills are locked after 4 p.m. and are opened one time each hour for 5 minutes to permit movement from one point in the prison to another. Within the cellblocks, cell doors are locked and are only opened during the hourly movement. One can remain in his cell or out; but not both. There are further restrictions on the number of persons who may be in one cell at a time. Movement now exists in just about all of our Federal prisons at the present time. Once in the yard or in the recreation building, recreation equipment becomes more difficult to obtain because more people must share it. Likewise, admission to educational programs becomes more difficult because there are more applicants. If scholarship funds are available for higher education, they will be either allocated to fewer individuals by ratio or lesser amounts per capita, either situation resulting in fewer people being able to participate in these types of programs which are very important, considering the high percentage of prisoners who are either totally or functionally illiterate.

Overcrowding also extends into one's living area. Housekeeping regulations are promulgated in order to create more space for more prisoners. For example, restrictions are placed on the number of personal items a prisoner is authorized to possess: The number of books the number of pairs of shoes, the amount of personal clothing, the number of photographs and where they must be kept—in other words, in a locker and not on top of it—how much commissary may be stored, all are reduced. Bedspreads become prohibited; paintings must be removed from the wall and sent home; and access to telephone becomes more infrequent.

While these items may seem insignificant outside, they mean much to prisoners, first because their possession has such a strong identity value, and second, because possession of personal items is limited only to a few authorized items—which means only items sold in the commissary or issued by the prison, in other words, clothing. Any item not authorized is considered contraband, the possession of which constitutes a violation of prison regulations that warrants imposition of disciplinary sanctions.

Overcrowding, of course, severely invades personal privacy. If a prison designed to house 500 people in single occupancy cells has a population of 600, then 100 prisoners are going to have cellmates. There is no personal privacy when two or more people share 48 square feet of floor space, including the toilet and wash basin, bunk beds and lockers. In the USP Leavenworth I lived in a cell 8 feet by 25 feet which housed eight prisoners and their possessions.

Finally, as more courts are beginning to find through expert testimony in many recent lawsuits which have challenged overcrowding "there is a direct correlation between overcrowding and violence." I am referring to the case of *Battle v. Anderson*, 447 F. Supp. 516, 525 (Ed Okla. 1977) (citations omitted). Thus, the insurance of personal safety becomes a 24-hour conscious exercise of precaution for every-one who lives inside a prison.

Second, I turn now to voluntary and informed consent.

Whether it is true or not, prisoners believe that their participation in any program in prison will be viewed favorably by the parole board. An example is a discussion I had at Leavenworth with a professor who taught there at night. He stated to me that it was a shame so many people were attending the college program simply to impress the parole board. This showed up in the manner people prepared for class and the very average grades when people were probably much more capable of doing better. I submit that the hopes for parole based upon involvement with other programs such as Asklepieion equally stimulate participation based on the belief that such will be favorably received by prison officials who recommend parole by the parole board and by the parole board who makes the ultimate decision to release a prisoner on parole.

Senator Sam Ervin, addressing the Subcommittee on Health in its March 1973 hearings concerning the "Quality of Health Care—Human Experimentation" pointed out that:

Testimony before the Health Subcommittee has revealed that in the coercive atmosphere of a prison, inmates are more than willing to submit to drug experiments and other experimental programs in order to secure money or a change of location and conditions or to please the parole board by a record showing cooperation with the prison authority. The use of behavior modification in such a setting poses serious threats to constitutional liberties. Behavior modification is not simply an experimental concept. It is a treatment to which a prisoner is asked or ordered to submit.

This hearing transcript is found in volume 3, page 1029, dated March 8, 1973.

I doubt seriously that I could add much to Senator Ervin's statement above or to the current legal, ethical, and philosophical debate over the question of whether one can provide a truly voluntary consent to participate in an experimental medical/psychological program while in prison.

For brevity, therefore, I defer to the theoretical, ethical, and legal analyses of the question of voluntary consent contained in the statements of Messrs. Kaimowitz and Myers which have been provided to this subcommittee today, and with which I concur.

Against their analysis of the legal and ethical problems involved with the question of voluntariness, I will discuss the question based upon my practical experience at the U.S. penitentiary at Marion, Ill. where the Asklepieion Society was established and developed by Dr. Martin G. Groder.

In the case of Asklepieion, we must first consider the physical plant of its unit, which contrasted remarkably from the physical plant of the other cellblocks within the general population for the prison. I have already described many of the aspects of prison life generally, and they existed at Marion, just as they existed in other prisons.

While Marion was not overcrowded and was considered by most prisoners to be physically the most tolerable of the Bureau's prisons insofar as cleanliness, programs, and so forth, were concerned, cellblock A, which housed the Asklepieion community, was quite different than the rest of the cellblocks.

It was the only open dormitory in the prison. By prison standards, it was plush. It was partitioned into living cubicals, which were carpeted, to insure maximum individual privacy and convenience. It was well stocked with tape recorders, typewriters, various learning aids, et cetera, which had been permanently "borrowed" from the educational department by and for the use of the Asklepieion inhabitants and to the exclusion of the rest of the population.

There were even hot plates in the unit with which to concoct meals from food stuffs, either bought in the commissary or brought into the unit from the kitchen. All of these items would be considered contraband if found in any other cellblock in Marion. Especially the typewriters and tape recorders.

A good number of the Asklepieion participants were not assigned to regular institutional jobs. Ostensibly, their work assignment and their job was to participate in the program. Anyone else would receive a disciplinary report if they failed to maintain a regular work assignment.

Various other small privileges which mean a lot to a prisoner were visited upon Asklepieion participants. For example, while I know that Dr. Groder has stated that the program received much pressure from guards and prisoners alike in its infancy, by 1972 the guards accorded the Asklepieion participants virtually total deference. Generally, when an officer witnessed a small rules violation such as stealing food from the kitchen, he would look the other way in the case of a member of the community; a regular prisoner would be given a disciplinary report and sentenced to the segregation unit for punishment.

Further, people from the free world came into the unit frequently to participate with the group in its therapy sessions. Some of the outside people, I have been told, spent the night in the unit, perhaps for the all night sessions. This was certainly a privilege not extended to the rest of the population, who would have relished the opportunity to talk and mingle with people from outside the prison. Similarly, I believe Mr. Cliff Anderson testified that he spent a week in the Asklepieion unit at Marion.

Finally, the Asklepieion unit was secure. No prisoner was allowed in the unit who was not assigned to live there or who was not given express permission to enter it for a special purpose. Thus, the prisoners living therein were safe.

In Marion, which is the maximum security facility in the Federal prison system, and which was designed to replace Alcatraz, the Asklepieion unit was certainly an appetizing prospect for any prisoner; and especially those weaker individuals who did not know how to

cope with all the vagaries of life in such an intense, explosive, unnatural living situation—where the average sentence being served was 38 years. For them the unit meant, if nothing else, that they would stand a chance of being released in one piece or, more importantly, alive.

Of course, such an individual requested, without being ordered, to become a part of the unit. But in the legal sense which Mr. Kaimowitz and Mr. Myers have dealt with quite extensively this morning, such is clearly a coerced decision: coerced by the fact of the conditions of confinement, not the nice, clean, new minimum security facility at Fort Grant, which by definition contains prisoners who are probably not so violent or are not quite so prone to be violent as those in the average medium or maximum security prisons in the Federal prison system. I would qualify that statement by saying that much of the violence, and so forth, is probably created by those conditions. In any case, who would prefer living in a 6-foot by 8-foot cell that could be entered or exited only one time per hour and which contained only those few items of personal possession that were authorized over the plush accommodations found in the Asklepieion unit where one had the freedom to move around, even when all the other gates in the prison were locked, and where one could listen to his favorite music on the stereo recording equipment borrowed from the education department while eating a hot meal especially prepared on a hot plate? All of this in a safe environment. This is what Senator Ervin was addressing in the quotation above; this is the matrix of the legal/ethical debate on voluntary consent as discussed by Messrs. Myers and Kaimowitz in their statements.

Apart from these physical accommodations of the Asklepieion community unit is the fact that no matter what the bureau represents to the participant or applicant, insofar as how the program will effect his or her chance of parole release, the participant believes that participation will indeed enhance his chances for parole. And is it any wonder?

I have read the testimony and documents submitted by some of the previous witnesses who testified before this subcommittee concerning the Asklepieion Society. One example of an expectation of parole based upon his participation has to be indicated in the documents submitted to this subcommittee by William Smith. These documents conclusively demonstrate that Mr. Smith had every reason in the world to believe that his participation would result in an earlier release date. I specifically refer to first, a memo from C. Kenneth Bowles, Ph. D., coordinator of mental health programs to J. S. Petrovsky, chief, classification and parole, dated July 25, 1975: After recommending a section IX award of \$100 for his exceptional services, Bowles requested that the memo be placed in Mr. Smith's file to "be considered during the preparation of Mr. Smith's annual review" for the parole board.

Second, a memo from Dr. Martin G. Groder to Warden Pickett, dated March 6, 1972: With only 4 years served toward a life sentence, Dr. Groder recommended Smith for a transfer to FCI Terminal Island which was unheard of for the "average" prisoner serving a sentence of over 5 years. Dr. Groder stated that a transfer to the lesser security institution would allow Smith the chance "to demonstrate his skills, responsibility, and administrative capacity which

was crucial to him being afforded the opportunity for some reconsideration of the time that he would normally serve on such a lengthy sentence."

Third, a letter from Dr. Groder to Mr. Clay, Member of Congress, dated June 7, 1973:

I see this man as being a benefit to any community he would now enter, but suffering under the severe detriments of a severe and lengthy sentence. I am personally involved in early efforts to eventually get him executive clemency vis-a-vis a reduction of sentence which would make him at least parole eligible or even just a change in sentence that would make him parole eligible.

Fourth, a memo from Dr. Groder to Larry Traylor, pardon attorney, dated October 26, 1973:

I strongly recommend that Smith be positively considered for clemency with a reduction of sentence to 25 years which would make him eligible for parole in approximately 3 years. I think that after a year or more of work at the Butner, N.C., Behavioral Research Center, of which Dr. Groder was Warden Designate at the time, he will be fully ready to go before the parole board with a recommendation based on 6 years of intensive involvement in a highly effective program plus his prior 2 years of incarceration.

I am certainly glad that Mr. Smith is no longer in prison. However, these documents certainly present questions as to what one participating in the Asklepieion experiment might have expected. Future participants serving life sentences have every reason to believe that their involvement might lead to their release, just as it did in the case of Mr. Smith, who stated in his testimony before you that he was beginning a new life sentence at 43 and had no hope of ever being released from prison again.

As to whether the consent is informed, and this will refer to some of the members' questions to Mr. Kaimowitz and Mr. Myers concerning how the program will be operated with the sterile safeguards that can be included in the legislative act, I would refer only to the experiences I have witnessed with respect to the encounter sessions. I had occasion to live in I-Unit at Marion for some time, about 16 months in fact while I was in segregation. Directly across from my cell was the hospital unit, and particularly, the room on the first floor of the hospital where some of the encounter sessions were conducted. I presume they were the outpatient sessions.

In these sessions the person being attacked would be screamed and yelled at by the group of 20 to 30 other participants. The occasion that comes most directly to my mind was a session wherein one of the group was accused of reading the book "Che Speaks," a book about the revolutionary guerilla fighter who assisted Fidel Castro in the Cuban revolution.

The group persisted to scream at the individual "You are a revolutionary. You are a revolutionary. You broke your contract \* \* \*" et cetera. The individual continued to deny that he was a revolutionary, and after he failed in persuading the group, he broke down and cried after persistently denying that he had in fact been reading that book. The thing that came to my mind because I had just read Dr. Edward Skein's paper entitled "Man Against Man" which dealt with North Korean brainwashing of American GI's, was the fact that this was the same thing, had the same brain-scrambling effect as it would have on one who's locked in a small closet with a foghorn bellowing at him for the amount of time that this group was screaming at the individual.

Senator DECONCINI. Mr. Potts, was he free to leave at any time, do you know?

Mr. POTTS. That's debatable. If I had been in the program. This individual did leave a couple of months later.

Senator DECONCINI. Voluntarily?

Mr. POTTS. Yes. After the court ordered all the people who had been locked up with myself, that is after the court order to be released from segregation after 16 months, the individual, who coincidentally, I found out because I was working in the laundry, was the one that I had in fact heard people screaming at in the group because he was relating the story to me. He did leave but only after some agonizing self-questioning as to whether his getting out of the group at that time would in fact hurt him when he went up for parole because he went into the group to get released.

Senator DECONCINI. Could he have left when they were yelling at him?

Mr. POTTS. Yes, certainly.

I will address this point later in my testimony. This goes to the discussion of the pros and cons of whose values are the most appropriate in this setting.

Probably a stronger individual would leave and a weaker individual might not. There's protection, of course, against assault and rape by another prisoner, but that person would probably have to stay there and cope with that type of thing.

I witnessed the same tactics with respect to a person who was suspected of being a homosexual. Homosexuals were not permitted to participate in the Asklepion program at all.

I don't believe that individuals inquiring about the program are informed that their political and social values will be so stringently questioned by the group. It is apparent in the documents submitted by William Smith, referred to above that the changing of such values is a paramount purpose of the program, and that the values required to be met are those of Dr. Groder, and I have had personal experiences with Dr. Groder in which Dr. Groder questioned my values frequently each month when I went in for my periodic 30-day review before the disciplinary committee. I was an active jailhouse lawyer. I was litigating one case in Marion at the time and helping other people on several cases. I was also writing articles on the rights of prisoners and about the prison movement generally at that time in 1973.

Parenthetically I was also in a program called CARE which was developed in the control unit, and which I did not know I was a participant until I had been in there 6 months before the committee had informed me that I had in fact been in a program. For each 30-day review I would sit in front of the committee and they would tell me that my conduct was fine but I had a poison pen, I was antiadministration because I was bringing lawsuits, which incidentally I won, and further, that while my conduct had been acceptable I had been displaying "silent contempt." I don't know what silent contempt was. In any case, values in these types of programs are very, very stringently questioned by the group.

The problem of the attempt in corrections to impose white middle class values on prisoners who, for the most part, come from urban ghettos has always been a problem, and a reality, in prisons, whether

you have a program or just a routine prison regime of going to the dining room and back, you have people placing their values, and imposing their values on other people simply because they have the control and authority to do so.

This, in fact, was an underlying factor in the Attica rebellion a few years ago that resulted in the deaths of 49 people.

Third, I turn now to the question of how Asklepieion was perceived by the general population.

Asklepieion was perceived as a sinister effort to brainwash Federal prisoners. This attitude, which created all the pressure on the program from the prisoners, was based on two primary factors: (1) distrust of the program, its coordinators and participants; and (2) the elitist attitude of the staff overseeing the program and the program participants.

The distrust of the program stems from several factors. First, it has always been billed as something of a training center which equipped its trainees to go out into the free world to set up other such programs and to encourage more programs in all the prisons, which is what's happening here today, I believe. The atmosphere of the prison based upon the efforts of the Bureau of Prisons to implement various forms of behavior modification programs had much to do with what has been referred to as the brainwashing paranoia.

However, this was during 1973 when the BOP created the Start program at Springfield, which Dr. Groder helped develop and which a Federal district court ultimately found violated the due process rights of the prisoners sent to it, the CARE program in the Marion control unit, in which I stated that I was an involuntary participant and was not even informed that I was until I had been in the program for 6 months, and the construction of the behavior research center in Butner, N.C., where Dr. Groder was warden-designee at the time.

It was believed that the Butner facility would perform various kinds of experimentation on politically active prisoners to change their way of thinking. Dr. Groder did not help the matter at all by his consistent refusal to define the types of programs that would exist at Butner, which included the Asklepieion community, how people would be selected for the program, and the type of professional peer review that would occur. To date this information has still not been provided to the Subcommittee on Constitutional Rights which was chaired by Senator Ervin in 1973 and I might add there are volumes and volumes of hearings transcripts and papers concerning such programs as Asklepieion.

Second, one aspect of an "encounter" group, as it was practiced by the Asklepieion Society, required that participants inform on one another as to "negative behavior"—often referred to as breaking a "contract." Informing on other prisoners is taboo within the present system of prisons in this country, and it always has been since the days of the proverbial "Convict Code."

Whether the Asklepieion-type program should be precluded because of prisoners present attitude concerning "snitching" is not the question here. The reality is that the attitude concerning prison informants has always existed and will continue to exist for some time. Therefore, any program that encourages one prisoner to inform about another's activities, for whatever reason, is going to cause tensions and danger.

I have already referred to the various behavior modification plans that were being undertaken by the BOP. The greatest distrust of such programs generally arose from the fact that all of them were primarily aimed at those prisoners who were politically active in any manner. For example, all of the prisoners who were transferred involuntarily to the Start program at Springfield were known among the prison population for their activism in the prisoner's rights movement and/or their revolutionary Marxist ideologies.

Other prisoners who were selected for such programs were jailhouse lawyers and because of their complaints about prison conditions were considered generally as being antiadministration. Please refer to Dr. Groder's memo of March 6, 1972, to Warden Daggett mentioned earlier.

Finally, the Asklepieion Society participants were viewed as being elite. Dr. Groder himself has referred to his group as being comprised of individuals who were the more sophisticated in the prison system. He has also trained them to "function in a stafflike position." Please refer to Dr. Groder's memo to Larry Traylor, pardon attorney, dated October 26, 1973, mentioned earlier in my testimony today.

Of course, the prisoners in the general population could not help but feel as though they were viewed by Dr. Groder and other prison administrators as being something inferior when compared to the sophisticated participants of his programs. Such a feeling could only create the resentment that it did.

As a result of the above attitude of the general population, the Asklepieion members were not trusted and were disliked by the majority. Prisoners of the general population did not speak to them or participate in any sports or other social functions with them, and vice versa. That was the prevalent situation for all of the time that I was in Marion, which was about 2 years. Such an attitude is very dangerous in a prison setting. Anything might spark a violent conflict. In fact, one prisoner was killed as a result of what another prisoner of the general population viewed as an unfair expulsion from the program, and I believe that even at Fort Grant the program participants may suspend a prisoner from the program. The prisoner was angry because the program participant, his friend, had been kicked out solely because he was a homosexual.

I now turn to the fourth item, the lack of professional peer review of the Asklepieion program.

To my knowledge no professional psychiatric or psychological organization has ever reviewed the Asklepieion program to evaluate its techniques and effectiveness. To date, after hundreds of pages of congressional record have been compiled concerning the Bureau's behavior modification efforts—or see, for example, the hearings transcript referred to above—no such peer review has occurred. Senator Sam Ervin I believe in 1973 and 1974 consistently tried to get some indication from the Bureau of the criteria to use to select inmates for programs and to obtain professional peer review.

I recently inquired of the American Psychiatric Association and the American Psychological Association as to whether such programs were recognized by them. Each replied no.

The International Transactional Analysis Association, which all of the previous witnesses place much emphasis on as being the certifying

organization for the program coordinators of the Asklepieion and which certified the Asklepieion participant witnesses, stated that it "stands alone from all psychiatric or psychological associations. It is an entity unto itself." The ITAA further informed me that to get certified one need only be trained for 53 hours, 13 of which were for an introductory course in transactional analysis and the other 40 of which were dedicated to training to be an instructor, a total of 53 hours.

In conclusion, I submit that the Asklepieion-type community has not been shown to be, and probably cannot be shown to be, a totally voluntary program. Assuming that it was, it creates too much division within a prison population to be as beneficial as its proponents make it out to be. We have not seen any hard statistics of its success which has been referred to this morning, and have been reviewed by an independent professional organization with the competence to evaluate such programs.

As to success in terms of recidivist rates, I would submit my own case; I've been to prison five times, I've been released five times and four of those times I went back. Each of the four times that I went back, I was released to the community from which I came, to the same people, the same problems, the same poverty, the same filth, the same police harrassment—everything that goes with living in a lower class neighborhood. This fifth and last time I was released in July or June of 1976, I came to Washington, D.C. I didn't know too many people here. All of my affiliations were professional. All of my social contacts were, at first, work-related in a completely different social context, and I think that I am a success. I think that I am a success because I was given an opportunity to be placed in a completely different social setting after I had been able to attain skills that would allow me to work at a job that interested me as opposed to washing dishes, digging ditches, stuff that didn't interest me before. I didn't require the Asklepieion program for that. I think that the Asklepieion participants may believe in the program, but I think that if the committee really wanted to find out why they're not recidivists, I think it should look at the jobs that those people went to which obviously they're interested in. If they're interested in the Asklepieion program, that's fine. I have no qualms with the Asklepieion program.

Everything I have related this morning has dealt with that type of a program in a very coercive closed institutional setting. That those people, Bill Smith who I referred to above, went out of prison after he had had a life sentence, after being in prison almost all of his life just like me, he went out into a completely different social context. The job was interesting. A job that paid for a nice living situation in the free world. Certainly, he's not going to go back to prison, he's learned a skill, and that's the bottom line. I doesn't take these types of therapeutic communities. On the one hand, are they for ill people? If so, then they need psychiatric counseling. On the other hand, are they just for people to find themselves and/or to learn marketable skills? This can be provided in other programs more meaningful and much more substantive than this type of a program.

As to the peer review, Director Carlson himself testified that only early results were now coming in and "These are only tentative."

Moreover, compared to the total number of Federal prisoners, the hazards inherent in such a program as were experienced at Marion, and of which are unknown due to the lack of any professional assessment of the program by an independent organization of the psychiatric profession, would appear to outweigh any possible benefit of the program to such a select few of the more "sophisticated" prisoners.

Finally, I concur with Senator Ervin's statement before the Subcommittee on Health. Just in 1973 Director Carlson stated that the main problems in the Federal prison system at that time were overcrowding. In 1978 those problems are probably exacerbated because you have several thousand more prisoners and not that much more room. Senator Ervin said that:

The Bureau of Prisons cites overcrowding as the major contributing cause of the dehumanization and violence of Federal inmates. The Bureau, therefore, creates behavior modification programs to institutionalize the inmate and make him amenable to the basic problem of overcrowding.

His statement is reprinted in "Quality of Health Care—Human Experimentation," supra, on pages 1029–1030.

This seems to me to be what the bill is about, or any of these types of programs that I've experienced in my 17 or 18 years in dealing with prison systems.

I would add that Director Carlson also acknowledged in March 1978 in the budget authorization hearings that the root cause of crime is poverty, unemployment, and racial discrimination. I have already addressed the problem of unemployment. If I was unemployed, I would be back in prison today just like a lot of other people are.

About the success, Senator DeConcini stated that he was convinced that it works for some people. But education, I believe, works probably more. A person, in order to get along in this society, has to be educated. Self-understanding is one thing, the hard-core reality that one needs to have an education to survive in this society is something altogether different.

Education, job training, and the ability to go to a place where you can apply those skills without peer pressure from people that you've grown up with all of your life are the types of things that are needed. Those are the types of things that do not exist in the Federal prison system today.

In 1972 at the beginning or the peak of the so-called prisoner's rights movement, penological experts were already stating that the "rehabilitation programs" that had been tried had failed.

In 1972 and in 1968, if one was to have approached me and said that there was any kind of program in the Federal or State prison system, I would have asked where? It was all on paper, nothing was implemented. The drug abuse program at Leavenworth right now is conducted by a steward who has been a steward cooking food in the Federal prison system for 14 or 15 years. Prior to that he was a steward in the U.S. Army for 20 years before he retired.

I don't know how much money is spent, however, I think that the money could be spent in a much better way by not excluding that type of program, but putting more money into teaching people skills and how to deal with society generally. Finally, everybody acknowledges the Asklepion community, which has never been professionally re-

viewed, as experimental. My question is this. Why do we do experiments in prisons? Why do we experiment on prisoners?

The whole pharmaceutical business for years, tried out all of its new drugs on prisoners. Why did they do it? They could not find people to try them out on in the streets.

Participants in the streets who were willing to participate in drug experiments required too much money. Prisoners were cheap. Prisoners were a captive audience. Prisoners were a controlled audience.

That is something that is becoming a thing of the past fortunately. I think the reason is that it seems unfair to me to conduct experimentation of this kind on a captive audience.

I would like to again thank the subcommittee for allowing me to speak on the topic of therapeutic communities, and I'm willing to answer any questions that you might have.

Senator HATFIELD. Thank you.

That was excellent testimony. I think you have stated your position extremely well and ably. I think that brings up the point that in a prison situation setting, it's not a simple and easy thing. There are no easy answers. What we are talking about is developing a constructive life-style or whatever word you want to use.

When you take a piece of it, that doesn't really help you.

Mr. Potts. Yes, you must review the whole system. Whether we're talking about the Federal system, or the State system, the system is decadent and it is a shambles. Rotting buildings is what you have.

When you talk about conducive environments and environments that will assist people in their "rehabilitation," you do not do that. That is a completely unnatural situation.

I spent over 12 years of my life in prisons. When I got out this time I had never dealt with you, for example, Senator, or people like you, or people like the people I was working with. I had no idea in the world of how to relate to those people.

After 2 years I am beginning to learn how to relate. I am beginning to learn how to budget. I am beginning to learn how to do such fundamental things about living in the United States which are usually learned by people in their secondary educational process.

I'm talking about how to learn to develop and work with contacts. This is something completely different. In other contexts it means how to find and acquire and convince somebody to hire you for whatever kind of job you might apply for.

People in prisons are "State-raised kids." In my own case I started out when I was 13. From 1960 to 1976 I had been on the streets 29 months and I knew nothing about what was happening in the United States or the free world. All I had to relate to was walls and bars.

I submit that that is very unnatural. People have real problems acclimating themselves to a freer environment. The bottom line of all that again is jobs.

If you do not have a job you do not have a place to work from. I was fortunate that I had a job when I got out.

As for all the things that were done for Bill Smith to help him with his release, for example, goes to the cooperation. I don't want to criticize anyone, but I had a job. I was 6 months from being released. I had a job with the National Prison project. I had a place to live, I had been accepted in Antioch School of Law. I asked for a transfer to

Lewisburg to help facilitate developing these plans. Also I wanted to be closer to the woman that I was engaged to. I suppose you could say that although we were really not engaged. I am married to her now.

I was denied that transfer. Bill Smith, though, got \$100 for his exceptional services in the Federal prison system. They gave me \$5.30 when I left the Federal penitentiary at Leavenworth, Kans. That was to start a new life on.

Fortunately, I had a lot of support and help from people with whom I dealt over the years when I was in prison. They believed and trusted in me.

Senator HATFIELD. Thank you very much for your testimony.

Our next witness is Mr. John Atthowe, professor of psychiatry, Rutgers Medical School.

**TESTIMONY OF JACK ATTHOWE, PH. D., RUTGERS MEDICAL SCHOOL, COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY**

Mr. ATTHOWE. Thank you, Mr. Chairman. I have material here that I have submitted for the record. I would like to read and expand on various aspects which I think need expanding on, especially in light of the testimony today.

Senator HATFIELD. Yes; without objection, your statement and materials will be accepted for the record.

[The prepared statement and material referred to follows Mr. Atthowe's testimony.]

Mr. ATTHOWE. I first would like to say that the notion or concept of a therapeutic community in its broad sense is commendable. We need something of this type in the penal system and what I'd like to do is deal with particular aspects of the questions that have come up in the bill.

First of all, a statement seems to be very prominent in the bill and the preamble of the bill that past penitentiary rehabilitation programs have not succeeded either in decreasing the incidence of recidivism of the program participants, or for that matter has succeeded as being any deterrent to crime. If we look at the experimental literature, this is fairly well documented in the many reviews of rehabilitation efficacy.

There is little evidence that current rehabilitation programs taken as a whole, have any impact on recidivism. These are statistical findings. Yet I don't think this is a complete answer. Some types and some groups of offenders in particular settings are less likely to return to prison than others. The question that is before all of us—and we have had a little picture today of some statements by other people what some of these different problems are, and what some of these different types of conditions are that may reduce the likelihood of recidivism. These are the issues that we have yet to answer.

When I was at Atascadero State Prison in California in the early sixties, there were treatment programs that were actually paying off, which was unusual in both the penal and mental health facilities in the State of California.

One of the big factors at Atascadero State Hospital which was a part of both the mental health and penal system, was that the hospital catered to people who were first-offender murderers. That is, they had crimes of passion. These people were unusually susceptible to rehabili-

tation. They didn't come back. They didn't have other crimes and the outcome of the rehabilitation program was very positive.

If you go to the literature, there are controlled experimental designs in certain selected areas of corrections that do show positive changes, both in adjustment to prison life and to lessen recidivism. I think what we need to do is to zero in on what these particular problems and areas are.

One of the critical problems is how do we measure success in treatment. I do not feel that adjustment to prison routine is sufficient. It is probably important, but it certainly is not sufficient.

I think the ratings by staff, guards or professionals or ratings by offenders as to whether they felt that a program was successful or not, is also critical. It is important, but frequently the ratings by therapists, staff, or participants in the programs do not correlate with the type of behavior that people show. For example, there is a rather celebrated and well-controlled study back in Cambridge in the early fifties that showed that a large number of therapists and the juvenile delinquents who were involved in the program all rated their therapy and their rehabilitation as successful.

But there was almost no correlation between these rating and actual recidivism or police records.

I think recidivism is obviously of critical concern. Most outcome studies have focused upon recidivism as a measure of success. However, successful rehabilitation in our society means, I think, more. It means adequate social community behavior. I don't want to use the word "adjustment." Adjustment implies a defined set of standards. But there is a way that we can measure and we need to measure successful outcome. This is to measure functioning adaptive and social skills, that is, working, making friends, being able to assert oneself without hostility, handling finances adequately, no police record, and so forth.

Many economists would also add the notion that if you're going to have a program that is cost-effective, we also must have some measure of productivity. In our society with our value system productivity is a necessary component of a successful outcome.

If we are to measure the outcomes of any program, if we are to have evaluations of these programs, or the programs you suggest, I would suggest that there be a number of measures of success not just one, certainly not just measures of how the program affects prisoners within the prison population.

I think it's more important that the critical long-term measures like recidivism, time out of prison and/or jail, adequate social community functioning, and productivity be evaluated. The ex-prisoner needs to get into the job market, get into a satisfactory vocational area in which he has adequate skills—and I'll come back to the latter because I think that's part of the therapeutic community.

I think these measures are important, and I'm glad that the Therapeutic Community Act has indicated in section 4062, part 4 that the Attorney General shall select an appropriate agency upon consultation with the committee to evaluate each program of a therapeutic community established under this chapter. I think it is critical that there be monitoring, and that the monitoring must be broad and that it must deal with societal outcomes as well as those inside the prison.

I strongly recommend that all of the measures above be included within any evaluation, especially those of recidivism, time out of prison or jail, vocational productivity, and social community functioning.

Because of the supposed ineffectiveness of the behavioral sciences in the field of corrections, and I think that this can be quite well documented, treatment or rehabilitation models, as opposed to the traditional punishment model, have been viewed with suspicion. The report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U.S. Senate, 93d Congress, that was referred to before chaired by Senator Ervin, did a very good job, but it has served to create an atmosphere, I believe, of suspiciousness of treatment or rehabilitation.

Experiments on prisoners in violation of their rights, which were often said to be treatment programs, are and were upsetting to everyone. However, the Committee on the Judiciary report, as well as the *Kaimowitz* case, lead to the conclusion that an involuntarily detained person cannot give truly informed consent. And that has been one of the issues today. Can you get truly informed, voluntary consent in an institutional setting?

I think this is a legal problem because of the adversary model. It becomes a question of all or none, can you or can't you. I would like to suggest an alternative. If you think of a continuum rather than purely voluntary or involuntary, it can be argued that if available treatment was totally unrelated to the condition of release, and to any of the rights or privileges within the institution, treatment could be largely voluntary. Obviously this is not in the ideal sense, purely truly informed, voluntary consent. Yet if you take precautions, as section 465A indicates, you are morally and ethically providing voluntary consent. But I would also include a statement that none of the rights or privileges within the institutions be withheld or otherwise manipulated in order to attract or keep members. This should be part of the informed consent that is both told and written for the inmate volunteering for membership in this particular program.

I think the issue of truly informed, voluntary consent is a problem in the operation of any institutional program.

A philosopher by the name of Bedau argues that if we can punish people without their consent, why can't we provide treatment without their consent? But it is necessary to limit the use of treatment at least the misuse of treatment, if the treatment is to be morally acceptable. I think Bedau's argument, and he goes into the philosophical moral for this, may be strongly stated. I believe that confined persons must have a right against treatment techniques being misused on them, and all of the legal concerns within the past 2 years have moved in this direction. There are advocates now in many States both in the penal and other human services areas that are looking at the area of technique misuse. This occurs sometimes unwillingly and I think we need to always monitor this.

There is also the moral good, and if we do not see prisons solely as punishment, then the moral goal both to the person and to the community is to rehabilitate the person confined.

In order to protect one's rights, however, a peer review committee of some type is necessary. If we have treatment programs, as I stated

before, we need some type of evaluation accountability, and constant peer review. I would recommend that such a committee include—and the committee that is created in section 4061 does not include—a behavioral scientist and a lay or correctional person. I would add to your committee a few people outside of the prison system to give a better measure of peer review.

I think these issues are highly philosophical and yet they're very pertinent to the legal tenor of our time. The point is that the legal and legislative developments that we now see occurring from all sides may undercut the process of finding an effective response to crime and criminal behavior. I don't think we can do away with this, but I don't think we need to go overboard on this particular point of view.

Because we have been disappointed with our treatment models, we should not reject any treatment or therapy approach. As the studies indicate, not only is treatment ineffective, but also the means we use to deter crime. If we do away with rehabilitation, we must also do away with penitentiaries.

In one sense I think this bill is doing both, and possibly at the same time creating something better. It is creating an alternative way of confining persons. It may be, in a very limited sense, but it is a step in that direction.

I think it also is an alternative method of providing the opportunity for better rehabilitation. Punishment has not been an effective deterrent to crime. I think we can all agree that punishment provides fairly immediate effects, but punishment or aversive controls also provides many side effects. It is usually accompanied by increased undesirable side effects. There is much documentation of this in the area of learning psychology.

In one experiment—and I gather this was one of a number of programs at the Draper Correctional Center in Alabama—the correctional officers applied the usual methods of control. They wanted to see what was the effect of using the usual methods of control such as isolation, loss of good time, reprimands, et cetera. They studied these methods of control as they related to increased performance of self-management duties.

Now the performance level of self-management skills almost doubled by this imposed punishment, or threatened punishment. But the introduction of these aversive controls produced a marked increase in behavioral incidences. For example, fighting, property destruction, and insubordination rose from 11.8 percent to 47.8 percent—approximately four times in this short period of time. It may be that the harm done to prisoners under the guise of punishment or custody is one of the major factors in not reducing recidivism.

I believe a therapeutic community, even in a limited sense, can move to redo or undo some of those factors. A therapeutic community can and should provide the occasion for more positive attitudes and reinforcements on the part of the staff.

What I'm going to say now I think is very much related to what Mr. Potts was just saying, or at least this is one interpretation that I think is crucial. The most crucial point here is that we can do a lot of things in prisons, and we have done many things in mental hospitals and in retardation centers. Yet, what has happened is that the treatment plans of mental hospitals have almost no correlation with what

goes on in the community outside of the hospitals. I think that this has been so prevalent that recent legislation in the State of Maine in the area of retardation, has required that treatment—medical, psychological and social—be given to retarded citizens in their residential placements in the community. The priority should be not only treatment as the individual moves and is located in the community. I think this has been one of the biggest moves in the whole mental health area. One of the few positive moves when it has been appropriately carried out.

I think the committee should, therefore, think about not just setting up the therapeutic community and the treatment program within the prison. If a therapeutic community is to be effective, it must deal with and be concerned with the movement of the individual back into the community. I think that this is where most of the programs have failed.

You have vocational programs in prisons, and you train prisoners to develop a skill. But then they go out into the community, nobody follows them up, nobody places them in a job, nobody gives them an opportunity or break. They return to the same type of environment from which they came. I think that it is crucial for any successful program that the after-care be built into the treatment within the walls. If we lose sight of this, we will lose sight of any positive outcome.

I haven't really dealt with and I don't want to deal too directly with the particular therapeutic programs that have been advanced here. It was mentioned earlier that they are generally not considered to be part of the conventional, conservative group of therapy programs that have been defined as being used by the qualified mental health professionals. They may be the very best techniques, but the people who are involved in them generally have not had as much training as the professional community would consider appropriate and control studies of the success of encounter groups have not shown any one to be more successful than another.

An issue that the committee might consider is that at least the director of each program should be by definition a "qualified mental health professional" and that the director also should have had some experience, preferably quite a bit of experience, with the prison population.

A problem of therapeutic programs that involve marathon sessions, as most of these do, wearing each other down for long periods of time, is that sometimes when issues such as racial issues and social class issues come up they have boomeranged. In so-called encounter group programs it is not infrequently documented that this can lead to more problems and into conditions that if there was not a qualified mental health professional there it could lead to lessened psychological adjustment and psychotic episodes.

I think there is a necessity to be concerned with the qualifications of the program leaders. These programs may be very productive, but that they are by nature—and it has been expressed here over and over again—experimental. I think therapeutic communities adopting the best points and these and other group therapy programs could be used, and I'd like to see them used if they were well monitored, if there were peer controls and if there was adequate accountability.

But I would hate to see these encounter group techniques used without the monitoring, the peer control, and the strong evaluation.

I think, in conclusion, I would like to say that I believe the committee is doing something innovatively. I agree that I do not like to see the committee specify specific therapeutic approaches. I would rather see them talk about "therapeutic" approaches within this broadly defined therapeutic community. I think there is documentation to indicate that therapeutic communities do work in certain areas.

Before I came down I talked to a friend of mine who is doing a book on the Phoenix House program in New York City, which has a successful therapeutic community program. The results are fairly well documented and are very positive.

There are such programs around the country. There are also a lot of negative programs. That creates the necessity for appropriate monitoring, both in the right to treatment sense, and especially in the outcome sense. Outcome should not be measured 5 years hence, but should be continuously assessed as the program is developed.

I thank you for being here, and I hope that the legislation develops. I feel that there are a number of little points that should be looked at a little more closely by the committee.

Thank you.

Senator HATFIELD. Thank you very very much. We appreciate your testimony.

Any questions?

Mr. HART. Both opponents and proponents of this bill have said that therapeutic communities are undefinable. Mr. Myers said alternatively that it is incapable of definition and that it needs to be specifically defined, that is the community itself and the modes of treatment to lessen abuses. You and others have said that we should resist a restrictive definition to either accidentally or intentionally obviate treatment modes which may be helpful for any given setting. Can the subcommittee rely on you for some professional guidance as to what should or should not be defined? You mentioned that there are some very positive therapeutic communities. On the other hand there have been some failures.

Mr. ATTHOWE. We can deal with both. I think the bill as written should not limit what is to be included within the confines of a therapeutic community or the treatment therein. But I do think that each program—for example, when the program is developed—has to be developed in a very precise manner. There should be a manual that anybody can go to and review what the program is about, its goals, what the procedures are, what measures are being taken, and so forth. That should be in the program guide of every institutional program. That should be reviewed by the proposed committee, especially a broader peer review committee.

But that must be written down before each of the individual programs are developed. I don't believe it should be a part of the bill.

[Prepared statement and further notes submitted by Mr. Atthowe follow:]

PREPARED STATEMENT OF JOHN M. ATTHOWE, JR., PH. D.

THERAPEUTIC COMMUNITIES ACT OF 1978

Mr. Chairman and members of the Committee. I appreciate your invitation to present my views on Senate Bill S. 3227, the "Therapeutic Community Act of 1978." I commend your efforts in this behalf.

I am a clinical psychologist and currently a Professor of Psychiatry, Rutgers Medical School, College of Medicine and Dentistry of New Jersey. I have conducted both individual and group therapy sessions within a State Prison. I have taught correctional officers general psychological principles, and I have been instrumental in creating and operating a residential program for ex-offenders.

Let me begin by saying that I support the notion of a "therapeutic community" with separate living and treatment facilities, within a prison setting. I would like to present for your consideration some of the issues with which such a proposal might deal.

As you state in Sec. 2., (3) "past penitentiary rehabilitation programs have not succeeded in decreasing the incidence of recidivism among program participants." This is fairly well documented in the many reviews of rehabilitation efficacy. There is little evidence that current rehabilitation programs, as a whole, have any impact on recidivism (Bailey, 1961; Jeffery, 1971; Lipton, 1975; Meehl, 1970; Robison and Smith, 1971; Shireman, Mann, Larsen and Young, 1972, The President's Commission, 1967). Yet, this is not a complete answer. Some type of offenders in particular settings are less likely to return to prison than others. Those who have impulsely murdered, for example, are generally considered good risks and seldom return. Controlled experimental designs in certain selected areas of corrections do show positive changes both in adjustment to prison and in lessened recidivism (Adams, 1974). The rate of recidivism has generally been put around 33-75% depending upon the period of time of follow-up and how recidivism is measured (e.g., Glaser, 1964; President's Commission, 1967).

How should we measure success in treatment? I do not feel that adjustment to prison routine is sufficient. Ratings of guards or of offenders although important often do not correlate with police records or recidivism (e.g., the Cambridge-Somerville Youth Study, Teuber and Powers, 1953). Recidivism is obviously a critical concern, and most outcome studies have focused upon recidivism. However, successful rehabilitation in our society means adequate social-community behavior and productivity. These latter measures have seldom been employed. The "Therapeutic Communities Act" in Sec. 4062, (4) states that the Attorney General shall "select an appropriate agency, upon consultation with the Committee, to evaluate each program of a therapeutic community established under this chapter." I strongly recommend that all of the above measures be included within any evaluation, especially recidivism, productivity and social-community functioning.

Because of the supposed ineffectiveness of the behavioral sciences in the field of corrections, treatment or rehabilitation models as opposed to the traditional punishment model have been viewed with suspicion. The report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary of the U.S. Senate, 93rd Congress (Committee of the Judiciary, 1974) helped to create this suspiciousness. Experiments on prisoners in violation of their rights, often said to be treatment programs, were upsetting to everyone. However, the report as well as the Kaimowitz case (1973) lead to the conclusion that an involuntarily detained person cannot give "truly informed consent". Consequently any treatment program that has not been documented as successful—in this case most if not all behavioral science programs and especially new programs—would probably be deemed experimental and thus consent could not be given. However, it can be argued that if the available treatment was totally unrelated to the conditions for release and to any of the rights or privileges within the institution, treatment can be undertaken S. 3227 in Sec. 4065, (a) deals with this issue by stating that "Membership in a therapeutic community shall not affect the length of incarceration of any inmate, and the director shall so inform all inmates volunteering for membership prior to their selection." I would recommend that Sec. 4065, (a) also include a statement that none of the rights or privileges within the institution be withheld or otherwise manipulated in order to attract members.

The issue of "truly informed, voluntary consent" is a problem in the operation of any institutional program. As Bedau (1975) argues, if we can punish people without their consent, why can we not provide treatment without their consent, but it necessary to limit their use if they (treatment) are to be morally acceptable. Bedau argument may be strongly stated. Confined persons must have a right against "treatment" techniques being misused on them. If we do not see prisons as solely punishment; then the moral goal both to the person and to the community is to rehabilitate the person confined. In order to protect one's rights, however, a peer review committee is necessary. In Sec. 4061, (b) a committee

is created. I would recommend however that such a committee include a few behavioral scientists as well as lay people.

These issues are highly philosophical yet very pertinent to the legal tenor of our times. The point is the legal and legislative developments may undercut the process of finding an effective response to crime and criminal behavior. Because we have been disappointed with our treatment models, we should not reject any treatment or therapy approach. For as all of the studies indicate, not only is treatment ineffective, but also the means we use to deter crime. If we do away with rehabilitation, we must also do away with penitentiaries.

In one sense this bill is doing both. It is creating an alternate way of confining persons and alternate modes of rehabilitation. Punishment has not been an effective deterrent to crime. Punishment or aversive controls may provide immediate effects but it is usually accompanied by increased undesirable side effects (Azrin and Holz, 1966). In one experiment at the Draper Correctional Center (Milan and McKee, 1974), the correctional officers applied the usual methods of control, such as isolation loss of good time, etc., in order to increase performance of self-management duties. The median level of self-management skills were almost doubled, but the introduction of these aversive controls produced a marked increase in behavioral incidents (e.g., fighting, property destruction, insubordination). Incidences rose from 11.8% to 47.8 percent. It may be that the harm done to prisoners under the guise of punishment is one of the major factors in recidivism.

If a person leaves a prison or any type of institution, he generally returns from whence he came. His family or "friends" more often than not will act in the same old ways that partially brought him to the institution or treatment in the first place. Perhaps the ex-patient or inmate may try to live alone. In this latter circumstance, society is more likely to respond to the interloper as an outsider or with fear: consequently, the returnee is more likely to become lonely, to drink to excess, and to isolate himself even more. In either situation we have failed to provide the returnee with expectations of what he would meet, the appropriate behaviors that he will need, and ways of maintaining these new behaviors; and, we have failed to provide society with the necessary skills and the desire to prevent and to remediate human misery.

The ex-drug user or ex-convict who returns to the community with which he formerly identified is especially hard to rehabilitate. The probability is small that his new ways of behaving will be maintained in the face of a strong and already established system of competing stimuli and reinforcers, (rewards).

If our objective is to rehabilitate marginal men, then our goal is clear. We want to change people for the better and still not tamper with their lives or with their environment. We must ask ourselves if we are content to stand idly by while we see human beings discarded into the garbage heap only to be picked up again so they can be discarded again, and, in the interim society suffers.

If we wish to rehabilitate individuals, then we have to modify not only the person but also his relevant social environment. Even more important, we have to modify the behavior of the correctional officers themselves and the punishment connotation of the penitentiary. Rehabilitation and behavior change are not the sole domain of any one individual or any one profession. We are all on the same spaceship. If the professionals, the correctional officers, and the man-in-the-street fail to pool their resources and extend their horizons, if we fail to include the environment and the maintenance of change within our treatment programs, we shall either crash or sail endlessly in space. At present, neither a narrow medical or humanistic or a restricted behavioral change model will suffice (Athowe, 1973). We need a non-punishing therapeutic environment in which the inmate can prepare himself for returning to society. We cannot change society very well, but we can change the way one looks at society. We can provide a substitute society, a therapeutic community in which the milieu connotes hope and the staff become role-models for alternative modes of living. Identification and modeling are integral parts of an effective rehabilitation program. In many cases, frustration with life and a helplessness to right wrongs can create uncontrolled aggression. These are targets which the therapeutic endeavors may attack.

Therapeutic communities could be effective means to attain the goals of adequate community participation and to reduce the costs of recidivism. The number of prisoners who would voluntarily enter such programs are unknown. A start should be made. If the program became effective, other inmates would attempt to sabotage the community. Some concern for the implicit social system run by the prisoners must be taken into account. The existence of a therapeutic com-

munity within the walls of a prison depends on the acceptance of the prisoner's social system. I have seen unique religious and racial groups formed within prison walls and survive. I believe the success of a "therapeutic community" may be more dependent on the acceptance or toleration by the prisoners than by the type of therapy provided. Keeping some distance between the cell-block population and the therapeutic community might be advisable.

The type of therapy is not that important. Whether the treatment is transactional analysis, reality or gestalt therapy or encounter or group therapy is not as important as wise and experienced group and community leaders. Encounter groups have often created more problems when racial or social class problems are dominant, but in certain task-oriented groups they have been successful. Group therapy is generally considered more effective than individual therapy, but the therapist must be experienced. I suspect that someone who has been trained only in est or gestalt or transactional analysis or in the use of encounter groups might be too limited unless they were very familiar with prisoners and prisons.

Many of the therapy programs defined in Sec. 2, (1) are not part of the conventional body of professionals. This may be to their advantage. The therapeutic community, even though it is logically a good idea, must still be considered experimental. This is especially true in prison populations for groups like est, transactional analysis, gestalt therapy and encounter group therapy. Even reality therapy has not been proven as an effective rehabilitation tool in prisons. This should not discourage the "experimental" use of these programs. They are all innovative, and they generate bias comments. What the legislation is proposing is a good idea, but the methods are yet to be proven. Therefore, careful evaluation must be part of every program.

I would suggest that Sec. 2, (1) be written in such a fashion as not to give the impression that these techniques have been demonstrated to be significantly better than their precursors. In Sec. 4064, (a) it is stated that "the director of each therapeutic community shall be qualified in a mental health profession, with training and experience in transactional analysis, gestalt therapy, reality therapy, or other group therapeutic modes." A person with training and experience in any two of these programs would be hard to find. Each program assumes a theory or philosophy of personality and therapy that is different. An experienced person, however, would use aspects of each of these approaches. I believe it would be better if the criteria for a director included: first, a person who was experienced in working with prisoners, secondly, be an experienced mental health professional, and not particularly involved with one type or another of therapy.

In conclusion, I believe a therapeutic community program would be an innovative step in rehabilitating prisoners. Experienced mental health professionals who were experienced in dealing with prisoners should act as therapeutic directors. Specific therapeutic approaches which offer positive growth could be expanded to include T-groups, especially clarification groups, behavioral and system analysis groups as well as the ones defined. None of these group programs, however, have experimentally demonstrated themselves to be more effective than previous rehabilitation programs in reducing recidivism. I believe the possibility is there. These are new and experimental approaches. As such I recommend that at least one of these types of therapy programs be created in different prison settings. With appropriate evaluation, we should be able to make some definitive statements in the near future. The reduction of crime and the rehabilitation of criminals could be greatly enhanced by this bill.

The success of these programs will be the eventual impact on the community. I admire your tolerance and ability to listen. You have found that the area of rehabilitation is far from being an exact science. I thank you for this opportunity. I wish you success in creating this legislation.

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#### FURTHER NOTES REGARDING THE THERAPEUTIC COMMUNITY ACT OF 1978

1. In Sec. 2. (1), the words "significant advances" are controversial. The traditional mental health community would not support statement (1). Group therapy is a neutral term. However, transactional analysis, reality therapy, gestalt therapy, encounter therapy are much more specific and connote a special way of viewing man and thus a delimiting view of psychotherapy. Many of these therapeutic approaches involve an "encountering" or direct and often aggressive verbal assault upon one group member by the group. Within State prison populations such encounters, (if the prisoners were not playing a game), could create problems. The subject of the attack could break down emotionally and need wise and competent guidance or group differences (e.g., ethnic, class, etc.) could be intensified. The marathon aspect of some of these groups, which could last through the day or night also could intensify close-to-the surface emotional conditions. One of the best comparative studies of encounter groups is that by Morton A. Lieberman, Irvin D. Yalom and Matthew B. Miles: "Encounter Groups: First Facts." New York, Basic Books, Inc., 1973. Their conclusions from a rather good comparative study of 17 different groups (206 individuals in all walks of life) indicated that 8 percent of the participants were "psychiatric casualties" suffering actual psychotic episodes or were greatly discomforted and disabled. Eleven percent showed clearly negative effects. Groups differed markedly largely due to the leader and the group atmosphere that was developed. Of the two Transactional Analysis Groups, one was quite positive, the other was not; the same was true of the two Gestalt Therapy Groups included in the sample. Values and attitudes were found more likely to change during the sessions and generally were maintained (75 percent) 6 to 8 months later. Behavioral changes were less stable. The authors conclude.

"... it was concluded that overall, encounter groups show a modest positive impact, an impact much less than has been portrayed by their supporters and an impact significantly lower than participants' view of their own change would lead one to assume." (p. 130).

I would predict less of an impact within a prison setting and more negative effects, including more psychiatric casualties. The Senate Committee should have this book on their reading list. Additionally, I believe Sec. 2. (1) and (2) should be eliminated or drastically rewritten!

2. Sec. 2. (3) is generally true as it stands, my testimony documents this evidence. Rehabilitation programs in prison settings on the whole (statistically)

have not succeeded in decreasing the incidence of recidivism. However, there have always been some individuals who have profited from such programs. As Adams (1974) review, cited in my testimony, indicates that with certain prison populations in certain selected areas of corrections there have been positive changes both in adjustment to prison life and in lessening recidivism.

"If one takes only controlled experimental designs in selected areas of corrections, at least half of the studies will show either statistically significant effects associated with treatment or benefit/cost ratios higher than unity" (Adams, 1974, p. 15).

3. In Sec. 2, (4) and (5) lies the core of the legislation. "Therapeutic communities" are and should be the main focus of the bill. The statement that they are "unlikely suited for utilization in penitentiaries" may be overstating this case. This seems to be a criticism of all of Sec. 2.

Therapeutic communities, in the broad sense, as a total or comprehensive program designed to rehabilitate prisoners, including a living and treatment program which is different or separate from the main prison setting, is well worth a try. However, such a program must be tailored to the prison and to the individuals involved. Any such community must also deal with the problems ex-prisoners will encounter on the outside. There must be a maintenance of the effects of the program. Consequently, the parole system should be involved in the maintenance of the aftercare program.

Therapeutic communities have been attempted in many different settings. It has seldom worked unless the program is quite comprehensive reaching into the prisoner's or client's social, community and vocational life. In other words, the person must be trained within the prison for a realistic life outside the prison, and there must be an aftercare plan which helps the individual in meeting the challenges of community life.

The therapeutic community program of Phoenix House in New York City has been an especially good example of a successful program. This program, designed for drug addicts of whom 80 percent have a criminal record, has been quite thoroughly evaluated by Dr. George DeLeon, Director of Research, Phoenix House in a forthcoming book. I would advise the Senate Subcommittee contact Dr. DeLeon regarding therapeutic communities.

4. One of the major legal issues in this Bill is the use of prisoners who will voluntarily participate in the therapeutic community program. Legal experts following an adversary model contend that new or experimental programs, or even any rehabilitation program, must have "truly informed, voluntary consent" from the participants. When individuals are involuntarily detained as in prisons, "truly informed, voluntary consent" is impossible. Therefore, no new or innovative programs could be tried. However, we can punish people or put them in custody without their voluntary consent. I believe this model must be overturned if our prison system is to move forward. Creativity and progress demands a problem solving rather than an adversary model. Confined persons must have their rights to be protected from inappropriate and misused treatment techniques. A peer review committee both at the local prison and at the Federal level, therefore, is necessary. I believe the legislation should go a step beyond what is contained in Sec. 4065, (a). Not only should membership in a therapeutic community not affect the length of incarceration of any inmate, and they should be so informed prior to volunteering; but also membership or non-membership should not affect the rights and privileges of the inmate in any tangible way. I believe Sec. 4065 (a) should be so reworded.

There is a moral concern both to the prisoner and to the community that persons confined for crimes against society should be rehabilitated and returned to the community with a far less likelihood of committing additional crimes. If we take this moral concern seriously and if we can reasonably predict that therapeutic programs may be helpful in rehabilitation, then it may be morally right to attract members into the therapeutic community program by providing incentives. Again, it may be legally advisable to pick individuals for each therapeutic committee program and thus have no volunteers. Some prisons might use volunteers, others non-volunteers.

5. The most important ingredient in the development of any rehabilitation program is the acceptance and participation by the prisoners themselves. We are well aware that the prisoners have an on-going social system of rights and wrongs, of do's and don'ts, of ways of attaining position and power and ways for losing it. This implicit social system is generally competing with the more explicit social system of the correctional institution itself. Rewards or punishments in

one social system may be seen as entirely opposite in the other system. A therapeutic community must integrate both of these systems and create a new and more rewarding one. This demands experience, experience in the prison system, experience in the mental health field and experience in life.

6. The Committee of Therapeutic Communities is an important element in this Bill. I would add one additional outside professional and one community, correctional person to the Committee. The Committee should establish guidelines for the programs not rigid policies as Sec. 4061, (c), (1) and (3) imply. I would give the local directors of the Therapeutic communities programs more autonomy, reserving review, advice, and limited veto rights to the program administrator. I would also make it clear that the local directors must submit a detailed rehabilitation and aftercare program to the Committee for approval. Neither the Administrator nor the Committee should assume the role of writing a detailed rehabilitation plan.

This implies that each director as well as the administrator be well-qualified. Each director must be well-qualified in the mental health and therapeutic community fields and in corrections. Standards for selection of directors and the administrator should be established by a consulting group of professionals. I would eliminate Sec. 4064, (a) as irrelevant.

7. Good therapeutic practice as well as the taxpayers demand accountability. Programs must have tangible goals and measurable outcomes. Only then can evaluation be effective. I would recommend that program evaluation require an outside group or agency that would help in the formulation of the programs goals, in how to implement them and in how to measure their attainment. If possible a controlled program should be included and evaluated.

8. In Sec. 4064, (b), I am concerned that too broad an interpretation of "other such medical procedures" might exclude some beneficial aspects of the program. I agree in principle with the idea, but I have found that such loopholes have created problems in the past.

9. I would stress the thorough training of all program personnel, which in turn suggests the establishment of a training center. Correctional officers should also be briefly trained in the nature of therapeutic communities and in the values of rehabilitation. As was mentioned in other testimony, overcrowding within the therapeutic communities should be avoided at all costs.

Mr. HART. Thank you, Mr. Chairman.

Senator HATFIELD. We thank you very much. This hearing is adjourned.

[Whereupon, at 12:25 p.m., the committee was adjourned subject to the call of the Chair.]









