


Winter 1965

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Recommended Citation

David Sternberg, Legal Frontiers in Prison Group Psychotherapy, 56 J. Crim. L. Criminology & Police Sci. 446 (1965)

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LEGAL FRONTIERS IN PRISON GROUP PSYCHOTHERAPY

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The increasing reliance by prison psychiatrists, psychologists and social workers upon the use of group therapy and psychodrama techniques has led the author to raise new and provocative questions concerning the possible infringement upon the constitutional and civil rights of the prisoners who participate in such therapy programs.—EDITOR.

Discussions about correctional group psychotherapy are legion in today's American criminological and penological literature. Most of them touch on one aspect or another of the central question: How effective is group psychotherapy in the rehabilitation of offenders? Specific issues within the framework of that key question deal with such well-known problems as (1) the most adequate and effective psychotherapeutic approach to use in the groups, e.g., Freudian psychoanalytic or Sullivanian role-oriented, or psychodramatic action-oriented, and (2) the most effective classification and selection procedures for forming therapy groups (e.g., Are groups composed of members possessing a crucial common problem, such as drug addiction, alcoholism or professional thievery, better calculated to generate strong change forces than those comprised of inmates with unlike "criminal behavior systems?").

On the other hand, legal issues or obstacles that might confront American prison group therapy are rarely, if ever, examined in the literature. It is to such legal considerations that I address myself in this Note, and I do so for two reasons.

First, I would contend that the recent extensive development of prison group psychotherapy programs in the United States has brought in its train certain serious questions in the fields of constitutional, administrative and even tort law of which few are yet aware but which could burst into sight and urgently demand answers at any time in the future. Perhaps we can cushion ourselves from a "surprise attack" if we have thought a bit about these possible developments in advance.

My second reason for bringing up legal issues is less direct or practical. I do not think we can regard all of the unanticipated legal consequences

to be depicted below as equally probable or important. Many will no doubt never emerge in actual court cases or in legislative hearings (although I have little doubt that some will). Nevertheless I see the general discussion of a range of possible unforeseen legal results as a useful exercise in what might be called, to paraphrase Everett Hughes,¹ "the criminological imagination." The clashes between specific sections of American law and correctional group psychotherapy that are going to be "imagined" here will perhaps tell us something new about both, something which helps us to take stock of their present individual conditions as well as their relationship to each other at crucial points. If the reader detects signs of an extreme position in what follows (particularly in the first section) it stems from a conviction that the role of devil's advocate is most appropriate when attempting to get the most mileage out of the criminological imagination.

The ideas to be presented apply to most types of prison group psychotherapy that are being carried on today (whether they be psychoanalytic or socioanalytic). They are not, on the other hand, particularly relevant to "group counselling"² programs, which I take to differ from group psychotherapy mainly in that the counselling programs make no attempt to explore and expose the deeply personal feelings (e.g., fears, fantasies, anxieties) of members in the group, whereas such explorations are central to psychotherapy in an individual or group form.

¹ Hughes, *Race Relations and the Sociological Imagination*, 28 AMER. SOC. REV. 889-890 (1963).

² For an account of the distinction between group counselling and group psychotherapy procedures similar to that used in this article, see McCorkle, *Group Therapy in the Treatment of Offenders*, FED. PROB. 22 (Dec. 1952).

I. IS PRISON GROUP PSYCHOTHERAPY CONSTITUTIONAL?

My basic question, which may startle some, is whether group psychotherapy in prison can be construed as violating the federal (and often state) constitutional prohibition against "cruel and unusual punishments." May the state strip an individual of his *psychic privacy*, a stripping which appears to be one of the avowed intentions of nearly all kinds of group psychotherapy programs? The argument may be presented that to force the individual to recall painful and embarrassing incidents in his life, to subject him to the group derision of other inmates in therapy, and to create constant anxiety about his role-performances, is to exceed the bounds of what the state may constitutionally do to a committed offender.

The deprivation of physical privacy in penitentiaries has been upheld, when challenged on legal grounds, along lines of custodial necessity.³ That is, one can demonstrate quite clearly the practical reasons why large groups of men must be herded together for purposes of easy surveillance. But are the justifications for the "psychic herding" which results from group therapy so clear and persuasive as the ones which support the taking away of physical privacy in the prison?

At this time a large controversy exists as to the efficacy of group psychotherapy techniques in rehabilitating offenders. Whether it is superior to other kinds of treatment, equally effective, or less effective has not yet been satisfactorily determined. Now the implementation of group therapy programs, and the consequent removal of much psychic privacy for the inmate who participates, stems from convictions (which are frequently not supported by control-group research) on the part of administrators and penologists that such procedures are effective in producing conforming value orientation and behavior patterns in inmates. So long as one can demonstrate that such programs are effective, the "cruel and unusual punishment" argument against them may appear to fall. That is, the programs may in fact be cruel and/or unusual—cruel because they involve painful psychic exposure, and unusual because they involve a revolutionary and still relatively infrequently used method—but they will be construed as therapy and not punishment since they bring

³ Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506, 520-524 (1963).

about positive results. If, however, one were to marshal the professional literature, especially in psychiatry,⁴ which militates against the efficacy of group therapy in both non-correctional and correctional settings, it would become possible to present a serious case that such programs were in fact "cruel and unusual punishments" regardless of the purer therapeutic intentions of the administrators.

Voluntary Participation in Group Psychotherapy

It might be contended that the inmate in group psychotherapy has waived his right to psychic privacy by voluntarily agreeing to participate in the therapy program. But here we are faced with the interpretation of that chameleon term "voluntary". How voluntary is one's decision to participate in a program "recommended" by prison psychiatrists or caseworkers if the inmate believes his refusal to participate in a therapy program will be interpreted by prison officials as the kind of lack of cooperation which might thwart an early parole date or restrict prison privileges? Under those kinds of pressure conditions one might anticipate frequent participations which were voluntary only in a highly formal sense.

Then again, many inmates, unfamiliar with the procedures and probings of group psychotherapy, may volunteer for treatment without appreciating the possible emotional shocks. American courts are beginning to hold that medical doctors must inform patients upon whom they intend to operate about the nature and risks of such surgery. That is, the patient's "blanket" permission to the doctor to operate which has been given without full knowledge of the range of possible outcomes, is now being subject to challenge as insufficient to constitute the kind of "voluntary permission" which will absolve the doctor from possible tort liability.⁵ One might profitably apply the rationale of this recent patient-doctor-operation doctrine when appraising the voluntary agreement to participate in prison group psychotherapy.

These observations should not be taken as an assertion that all, or even a majority, of group therapy programs in prisons fail to implement voluntary participation in a genuine and meaningful sense of that concept. Nevertheless, enough are

⁴ For a discussion of and citations to objections to the use of group psychotherapy that some psychiatrists and psychologists have made, see CORSINI, *METHODS OF GROUP PSYCHOTHERAPY* 50-54 (1957).

⁵ This emerging doctrine in tort law is known as the doctrine of "informed consent."

tinged with factors of discrimination against non-joiners or with ignorance on the part of those who agree to join about the nature of therapy, to make statements about waivers of psychic privacy (which might imply waivers of certain constitutional guarantees) through voluntary participation problematical, and a matter for empirical verification in particular cases.

We can note that the history of judicial relations with American prisons indicates that courts are chary to interfere with post-conviction correctional policy in any event. One major reason for the "hands off" policy that the courts continually employ is that their interference with or questioning of prison administrators' actions would tend seriously to undermine the authority of men charged with the custody of dangerous criminals.⁶ Then too, as part of a state agency, a prison administration enjoys the great degree of discretionary freedom that courts have traditionally accorded administrative bodies in general.⁷ The substance of a convict's constitutional claim has thus to first reckon with unusually heavy opposition concerned with a primary issue, i.e., jurisdiction, before it may be heard on the merits.

II. PRISON GROUP PSYCHOTHERAPY, PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY

The "cruel and unusual punishment" objection to prison group psychotherapy, with whatever force it may or may not be urged, derives from the emotional punishment a member may receive within a therapy group. Different types of unsolved legal tangles emerge when we begin to consider the nature of obligations the therapist has to his inmate patients, and the obligations the inmates have to one another, in keeping therapy session material confidential outside the group. Although we will limit our attention, for the most part to the prison situation, it may strike the reader that some of the problems confronted here have relevance as well for group psychotherapy practised in the free community.

Before we treat the group situation it seems necessary to examine the legal concept of privilege between therapist and patient in individual prison therapy. A privileged communication statute gives a patient the right to prevent his therapist (if the therapist is a psychiatrist or psychologist) from testifying in a hearing or trial about therapeutic or medical matters discussed in treatment.

⁶ Yale Law Journal Note, *supra* note 3, pp. 506-558.

⁷ *Ibid.*, page 509.

Whether privileged communication laws allow a convict to prevent his therapist from testifying in a trial or hearing is uncertain, may well depend on the time element.⁸ But the important point to stress here, I think, is that privileged communication statutes cannot bar the prison therapist from divulging the materials of treatment sessions to the warden or parole board. Prison administrative decisions and parole board meetings are presumably not judicial hearings within the meaning of doctor-patient privileged communication statutes.

Probably, however, as in free community cases, the therapist in prison is duty bound to refrain from divulging intimate information about patients to "improper" persons, such as other inmates and third persons in general who have no official duty of rehabilitation toward inmates. This obligation to keep information confidential is regulated by mechanisms beyond privileged communication statutes: In some cases certain causes of action in tort (e.g., libel or invasion of privacy) may be available. More important, therapists are controlled by private codes of ethics promulgated by therapeutic associations (e.g., the American Medical Association or the clinical section of the American Psychiatric Association) to which they belong. Breaching of professional confidences would bring censure or even expulsion from such bodies. This powerful deterrent applies to institutional, as well as non-institutional, therapy.

The group psychotherapy situation, though, introduces a complicating new variable into the discussion of confidentiality. The fundamental relationship of trust between the therapist and each of the patients is not altered: the therapist is still under the same obligation against divulging materials about each and all of the patients in the group to "improper" persons.⁹ But it would appear that the inmates have no well-defined legal or privately sanctioned duties which prevent them from breaching psychic confidences made in

⁸ That is, whether the trial took place during the prisoner's incarceration, while he was on parole or when his sentence had entirely expired. In many states the deprivation of civil rights connected with conviction of a felony might prevent a convict from exercising a privileged communication objection to testimony while under sentence.

⁹ Prison group psychotherapists will, more likely than not, have their confidentiality duties regulated by group psychotherapy associations such as the American Group Psychotherapy Association. Some will no doubt also belong to professional groups principally concerned with individual therapy as well.

group sessions. Convicts are not threatened, as therapists are, by expulsion from coveted membership in a professional organization. Nor are such tort actions as libel as certain and available for convicts as for free persons, since the right of prisoners to bring law suits may be greatly limited.¹⁰

Thus it would appear that patients are vulnerable to the constant threat or danger that other patients may report on their sometimes damaging personal revelations to inmates not involved in their group therapy, or may even publicize such revelations beyond the prison walls to persons in the free community. The danger that patients will violate confidences is present in non-institutional group psychotherapy as well, but it is peculiarly threatening and ubiquitous in closed social system settings like prisons where grapevine communication is swift and sure and men, unlike patients in the free community, have little chance of avoiding each other in their daily routines.

There is no way of knowing whether challenges concerning the inadequate rules of confidentiality will erupt first in the free community or in some kind of institutional group psychotherapy situation. The fact, however, that group therapy programs have mushroomed of recent years in prisons, combined with the peculiar dangers of breached confidences in a prison society, makes such programs good potential targets for initial battles. Wherever such challenges occur, they are bound to have repercussions along the entire range of free and captive group psychotherapy settings.

Group psychotherapy, both inside and outside of correctional institutions, has brought a host of problems that present legal concepts controlling individual therapy seem inadequate to handle. Should group patients be enjoined from testifying in court as to what transpires in group meetings? If one sees all the members of a group as therapeutic agents for one another (a view very strong indeed in group psychotherapy literature) it becomes reasonable, even compelling, to suggest an extension of the privileged communication law to seal all members' lips in trials and hearings. Beyond the issue of legal testimony, I know of no

¹⁰ TAPPAN, CRIME, JUSTICE AND CORRECTION 427-429 (1960).

case law which defines the rights and duties of group therapy members to each other in general problems of disclosure.¹¹

CONCLUSION

I have tried briefly to indicate some of the legal frontiers toward which prison group psychotherapy may be swiftly moving. To some extent I have attempted to use "criminological imagination" by taking the present state of certain areas of American law (e.g., constitutional and privileged communication law) on the one hand, and the current condition of prison group psychotherapy on the other, and then "imagining" conflicts that could occur between them, assuming they keep moving in their respective directions.

Some of these frontier conflicts seem exclusively pertinent to the captive group therapy situation, e.g., the constitutional question about "cruel and unusual punishments," whereas others, such as the problem of interpatient confidentiality, loom ahead on both free and institutional fronts.

The discussion did not examine particular group therapy programs in particular prisons, nor the specific laws of any states. Rather it dealt with elements of group psychotherapy and law which seem to be more or less applicable from one program to another and one state to another. It is recognized that such a presentation is bound to distort the picture for certain prisons or states. It is thus for the persons concerned with particular group psychotherapy prison programs in various parts of the United States to determine what relevance, or lack of it, the reflections in this article may have for them.

¹¹ The range of possible difficulties and dilemmas here is very great. Just to take one example from private practice group psychotherapy: Member X during the course of a discussion of his anxieties he experiences in his work as a director of Company A happens to reveal confidential financial information about his company. This information is valuable to Member B who is a director of Company B. Is there any legal procedure which could be taken by Member A or his company to prevent Member B and Company B from using such knowledge to the disadvantage of Company A? Further, assuming the information is used, are there any legal causes of action that Member A or Company A has against Member B or Company B to obtain redress?