

Flew: Crime of Disease?

Rodney J. Blackman

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Rodney J. Blackman, *Flew: Crime of Disease?*, 23 DePaul L. Rev. 1454 (1974)
Available at: <https://via.library.depaul.edu/law-review/vol23/iss4/6>

This Book Reviews is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

CRIME OR DISEASE? by ANTONY FLEW. Scranton, Pa.: Barnes & Noble. Bibliography; index; notes. 1973. Pp. xii+129. \$6.50 cloth.

*Rodney J. Blackman**

Professor Antony Flew, a well-respected British philosopher writing in Canada, has put forth a short work dealing with the relationship between crime and mental disease. The book is illuminating and provocative. It is also theoretical in nature and sometimes diffuse and difficult in style. Thus, while the work is intended to have a wider audience, it probably would appeal most to the philosophically trained or to the motivated psychologist, psychoanalyst or penologist.

The primary question posed by Flew is whether all crimes can be characterized accurately as having been committed by mentally diseased persons. The proffered answer is a short no. The alternative view would allow states to treat any socially disapproved behavior (here called disfavored behavior) which is made into a crime as a manifestation of a mental disease, and to act accordingly. One absurd possible consequence of putting this alternative view into practice would be that a person who violated the U.S. Civil Rights Act of 1964 could cure himself of this manifested 'mental disease' simply by moving to South Africa where his similar acts would not violate the law. Further, this view could be used to justify the treatment of political dissidents or of those engaging in disfavored life styles by potentially harmful means, such as electro-convulsive therapy or drugs such as aminazin.¹ Also, if each convicted criminal were put into the hands of a psychiatrist for "cure," and no "cure" were effected, then the incarceration logically could be indefinite in duration. This is because if the only criterion for terminating the confinement were the criminal's "cure," then there could be no appeal to the notion of justice or fairness as requiring that the period of confinement not go on indefinitely but rather should bear a reasonable relationship to the crime.² Finally, because this treatment leaves the person with no choice, "direct and unrequested physiological manipulation, however well-intentioned, however humane its methods, must be . . . an outrage against the freedom and dignity of 'responsible and autonomous man'" whereas "to be punished, however severely, because we have deserved it, because we "ought to have known better," is to be treated as a human person. . . ." ³

Flew would preclude these untoward consequences by denying that all criminal acts manifest mental illness. He does this through an analysis of

* Assistant Professor of Law, DePaul College of Law. B.A., University of Michigan; M.A., University of Chicago; J.D., Harvard Law School. Ph.D. (cand.), University of Wisconsin.

1. A. FLEW, CRIME OR DISEASE?, 84, 89 (1973).

2. *Id.* at 83, 111.

3. *Id.* at 86, quoting B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 19 (1971) and C.S. LEWIS, UNDECEPTIONS 242-43 (1972).

the term 'mental illness' which he determines has a limited application that does not include ordinary criminal conduct. Mental illnesses can be subdivided into two groupings, namely, those illnesses clearly associated with identifiable cerebral abnormalities (organic) and those illnesses not (or not yet) so associated (functional). Flew is relatively sympathetic with Freud's analysis of obsessional neurosis and seemingly also with hysteria as core or paradigm examples of functional mental illness.⁴ And Flew disagrees with what he regards as Dr. Szasz's view that there are only organic illnesses.⁵ While the term 'mental illness' (or 'mental disease') does have functional application, it does not apply to all those who engage in criminal acts. Coming by way of analogy from Flew's analysis of what constitutes physical disease, 'mental illness' is to be defined by contrast with an inclination toward disfavored behavior. One is not mentally ill simply because he or she engages in disfavored behavior, but only if he or she is unable to inhibit his or her inclination toward this behavior. Thus, mental illness or disease is to be defined in terms of capacities and incapacities (inabilities to inhibit inclinations toward disfavored behavior) rather than in terms of the disfavored behavior itself.⁶ While Flew does not spell out clearly what incapacities are relevant to his definition, he does refer to "afflictions which reduce the rational capacities of the patient" as well as (other) "acquired incapacities [which] are the expressions of unconscious motives."⁷ As part of this requirement (or perhaps as an additional requirement) the criminal act which manifests disease is to be compulsive, that is, "(more or less) uncontrollable."⁸ The other requirement (which Flew admits can be doubted) is that the diseased condition should be regarded by the patient as bad. The patient with this condition would find himself a victim of the condition rather than a (totally free) agent.⁹ Of course, Flew is not asserting that what is not mental illness could not be treated as if it were mental illness. Flew's analysis would not prevent the state from turning over mentally healthy prisoners to psychiatrists for treatment on the ground that even healthy prisoners could "benefit" from treatment and thereby become trained not to engage in the disfavored behavior. But if such treatment were offered in lieu of punishment, it probably would reduce the deterrent effect on others which the current system of punishment now provides.

This analysis obviously only hints at the richness of Professor Flew's thought. And it hardly suggests his extensive use of, and often penetrating commentary on, much of the literature. But this summary does focus

4. *Id.* at 58-63; S. FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 219-20 (1922).

5. A. FLEW, *supra* note 1, at 65-66; T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961). Flew argues against Dr. Szasz by pointing out that it would be awkward to deal with what had been considered functional but which further evidence shows to be organic.

6. FLEW, *supra* note 1, at 50, 65-66.

7. *Id.* at 64.

8. *Id.* at 66.

9. *Id.* at 17, 54-55.

on what appears to be the primary motivation for much of this book, namely, Flew's humanism and his resulting abhorrence of the way prisoners can be and are treated when regarded as mentally ill, particularly when they are turned over to psychiatrists for unrequested physical manipulation. The reviewer shares this attitude.

But there are some questions and possible criticisms worth discussing. Several criticisms can be leveled at the publisher. One is that the book contains several typographical errors. Also, while the book contains an index of names, a standard index including topics and ideas would also prove helpful. A relatively minor criticism of Flew is that he appears to use the terms 'mental illness', 'mental disease' and 'mental deficiency' more or less interchangeably without so indicating. (The first two terms will be used interchangeably here.)¹⁰

Turning to more substantive issues, questions can be raised about, and arguments presented against, Flew's stated requirements for mental illness: the person's incapacity and compulsion, and his regarding the condition as bad. Flew develops these requirements, not only because he regards them as genuinely applicable, but also because he regards them as needed to eliminate the misuse of the term 'mental illness'. But a number of simple, common bad habits could meet these requirements: heavy cigarette smoking, heavy drinking,¹¹ gum chewing, nail biting and overeating. Still, not everyone would agree (particularly some of those who have these habits) that such habits are manifestations of mental illness. Thus, it can be argued that even Flew's limiting requirements for mental illness allow for the inclusion of questionable items, including socially disapproved habits. While the possible inclusion of bad habits within Flew's requirements is not a very telling argument against the positing of them, it does indicate that these requirements are not as limiting as Flew seems to have supposed.

Dealing with Flew's specific requirements, the problem with requiring that the person himself regard the condition as bad is that it is false in

10. 'Defect' indicates a lack or absence of something. 'Disease' and 'illness', which THE OXFORD ENGLISH DICTIONARY classifies as synonymous with "disease") indicates an abnormal condition. Where 'defect' and 'disease' appear to differ in meaning is that in 'defect' the focus is on a comparison of the individual with a general human norm, whereas in 'disease' the focus is on a comparison of the current state of the individual with a healthy state of the same individual. If the condition is organic from birth, and apparently untreatable, then the more useful reference is to 'mental defect.' For example, a Mongoloid idiot ordinarily would be referred to as mentally defective rather than mentally diseased. While otherwise generally synonymous, 'mental illness' differs from 'mental disease' in that it can be used to refer to a functional (non-organic) condition, whereas 'mental disease' seems to imply an organic disorder. See J.C. CHAPLIN, *DICTIONARY OF PSYCHOLOGY* 124, 139 (1968). (To be strictly consistent with the above analysis, this review should use 'mental disease' only when referring to organic illness. But because Flew did not so restrict its use but apparently used 'mental disease' and 'mental illness' interchangeably, it is easier to follow his lead.)

11. Flew recognizes a more extreme form of this habit—alcoholism—as a mental illness.

many instances. The happy person for whom no organic illness has been found who regards himself as Jesus Christ or Napoleon appears sick to most of us and is not rendered less sick by virtue of being pleased with his station in life. Nor does the autistic person for whom no organic illness has been found appear the less sick when his condition precludes his voicing any unhappiness with his condition.¹² Nor does the hypochondriac appear any less sick because the only illness he will recognize is his imaginary cancer. It seems that in terms of our ordinary, everyday understanding there are so many falsifying instances that the requirement ceases to be applicable.¹³

One can ask why Flew introduces as a requirement for mental illness something which seems so clearly false. One answer would focus on his motivation—his intense dislike of a doctor's performing physical manipulation on an unwilling patient. If the patient's view of his condition as bad is made a requirement for regarding his condition as a manifestation of mental illness, then it becomes less likely that a doctor could justify manipulating an unwilling patient on the ground that he was curing mental illness. Of course, assuming that this laudable motivation induced Flew to set up this requirement, this does not make the requirement correct.

Another answer would focus on Flew's analogizing from physical illness to mental illness. Since a person who is physically ill ordinarily recognizes that his condition is bad, the same should hold for mental illness. Of course, Flew himself is aware that not everyone who is physically ill recognizes that his condition is bad. To illustrate: the illness may not yet be at a stage when the person is in discomfort and as a result, if confronted with the doctor's diagnosis, he may refuse to accept it; or the person may be a Christian Scientist who does not accept the existence of physical illness.

But one may push further and ask whether the analogy is sufficiently helpful to be employed at all. Flew would justify its use by asserting that the term 'mental disease' is derivative from the term 'physical disease'.¹⁴ Though this may be true, one term may be derived from another without having the same range of use. To assert that 'physical disease' is prior and 'mental disease' is derived from it does not by itself justify using the analogy. Contrary to Flew's understanding of the proper range of the use of the term 'mental illness', this term has a broader range of application than 'physical illness'. Thus, rather than describing how the terms 'mental illness' or 'mental disease' are used, he is prescribing how these terms ought to be used. Flew would prefer that the term 'mental illness' not be used to refer to disfavored behavior which the actor does not regard

12. See B. BETTELHEIM, *TRUANTS FROM LIFE* 495 (1955).

13. In fairness to Flew, it ought to be noted that he admits that this second requirement also could be regarded as the usual contingent fact of mental illness rather than a necessary condition of such illness. He states that he sets up this requirement to point out the difference between a doctor's treating a patient who wants treatment and the doctor's treatment of a patient who does not want treatment. FLEW, *supra* note 1, at 55.

14. *Id.* at 26.

as bad, such as, (sometimes) juvenile delinquency and homosexuality. But some people do on occasion use the term 'mental illness' to refer to such behavior. It might be better (in the sense of preferable or even more correct) if they did not do so. But it begs the question to assert that this term is misused because its use does not satisfy a requirement borrowed by analogy from the realm of physical illness without an articulated rational justification for the adoption of this analogy. Since Flew seeks to tighten the looseness of language by limiting the use of 'mental illness' to situations analogous to those where 'physical illness' is used, it is up to him to show that physical and mental illnesses are relevantly similar so that what is required of one reasonably ought to be required of the other. He does not do this.

Turning to an examination of Flew's first requirement, the assertion is made that in order for a person to be mentally ill he must be incapable of inhibiting an inclination toward disfavored behavior rather than simply manifesting this behavior. A behaviorist could object that a "lack of capacity" has no meaning other than a reference to certain manifested behavior, that is, what really is being asserted about a person who lacks capacity is that his previous behavioral manifestations, including any verbal utterances, indicate that he will follow a certain pattern in the future. From the point of view of the behaviorist, the dichotomy between behavior and capacity is a false one.

Still, as Flew points out (though not in response to the above argument), his emphasis on lack of capacity is consistent with the law's treatment of the criminally insane under the M'Naghten Rule, the Model Penal Code and the Durham Rule.¹⁵ The Model Penal Code, quoted by Flew, states that:

A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.¹⁶

Despite this support for Flew's emphasis on capacity rather than simply focusing on behavior, there remain some problems. One of these is that Flew seems to weaken his position by coupling it with an assertion that a person who is mentally ill is under a compulsion. Describing a person as compulsive seems more like characterizing his behavior than characterizing some lack of capacity.

Other problems flow from Flew's belief that his incapacity requirement precludes the labeling which can result when mental illness is based solely on disfavored behavior. As Flew views his requirement, homosexuality would not be regarded as a manifestation of mental illness:

There is surely, at least typically, no incapacity by which the deviant can be distinguished from the straight. . . . [E]ven the exclusive homosexual is presumably as able, albeit as disinclined, to engage in heterosexual

15. *Id.* at 51-53.

16. *Id.* at 53.

intercourse as the comparably exclusive heterosexual is able, yet not willing, to undertake any homosexual endeavor.¹⁷

There are problems with this assertion. Accepting *arguendo* Flew's requirement of lack of capacity, it seems unlikely that the exclusively homosexual person is as able to engage in heterosexual conduct as homosexual conduct. But even assuming *arguendo* that the exclusively homosexual person is just as able though disinclined to engage in heterosexual conduct, it seems likely that he gets more pleasure out of his homosexual conduct than out of heterosexual conduct or else he would pursue heterosexuality. But the ability to obtain greater pleasure from homosexual encounters than heterosexual ones can be regarded as a lack of capacity to obtain equivalent pleasure from heterosexual encounters. It follows that homosexuals generally have greater capacity to obtain pleasure from their homosexual activities. To use Flew's terminology, practicing homosexuals cannot inhibit their inclination toward seeking the greater pleasure of engaging in the disfavored behavior. Thus, contrary to Flew's hope, it can be argued that homosexuals lack capacity. If so, homosexuals would meet one of Flew's requirements for mental illness.¹⁸

Flew also mentions as a requirement for mental illness that the person act compulsively.¹⁹ He asserts that "we have to ask whether the resulting homosexual desires are peculiarly irresistible."²⁰ Only if this is so and if the other requirements are met (the person lacks capacity and regards his condition as bad) would the homosexual be regarded as ill under Flew's schema. Flew finds that ordinarily the homosexual does not act compulsively. It is interesting to compare Flew's shift in emphasis from his relatively relaxed understanding of compulsion in the abstract ("(more or less) uncontrollable," "(unusually hard or) impossible")²¹ with his more demanding understanding of compulsion in the concrete of homosexual expression ("peculiarly irresistible"). This change of emphasis suggests that Flew is not so much engaging in a disinterested exercise as developing distinctions for the purpose of producing a desired end, namely, reducing the adverse effect of labeling homosexuals as ill. But such an effort, however humane, does not always produce the most persuasive philosophy.

Indeed, Flew's thesis that homosexuality seldom involves compulsion can be questioned. If compulsion means that which is "uncontrollable" or "irresistible" and if homosexuality is defined most broadly as "sexual

17. *Id.* at 69.

18. Flew himself seems to hedge somewhat in several places. He suggests the possibility of homosexuality as a lack of capacity when he refers to it on page six as an "[expression] of personality failure." And he also implies a possible lack of capacity by asserting that "as a character trait, homosexuality is not under the immediate control of the subject." *Id.* at 70.

19. It is not clear whether Flew means this as a part of the requirement of lack of capacity or as a separate requirement.

20. *Id.* at 70. Presumably, Flew means this as a part of the requirement of lack of capacity or as a separate requirement.

21. *Id.* at 66.

attraction towards individuals of the same sex"²² or "sexual feelings for a person of the same sex, with an impulse towards genital expression,"²³ then a person who has predominately homosexual fantasies could be regarded as homosexual. Thus, under these definitions, in order for one who previously engaged in exclusively homosexual activity to avoid being categorized as *compulsively* homosexual, he would have to be able to give up not only the behavior but also the thoughts. But sexual thoughts are difficult to give up.

Even if homosexuality is defined in terms of practice rather than thoughts, attraction or feeling, a person may find himself under a compulsion to engage. Gandhi, for example, is supposed to have stated that he always wanted to practice (hetero)sexual abstinence but could not manage it until he was 65.²⁴ And we have it on the authority of Saint Paul that "one may burn with vain desire"²⁵ if he is not able to obtain sex. While Flew feels that a person is not compelled to have sex because he can choose to abstain, for many people abstinence is not really a choice in any meaningful sense.

From this analysis it would follow that many homosexuals could be labeled compulsive. But if this is so, then many homosexuals could be labeled as mentally ill: the exclusively homosexual person could be regarded as fitting within the requirement of lack of capacity, and the requirement that the person must regard his condition as bad has been shown above to be inapplicable. Thus, dealing with Flew's own requirements, the label 'mentally ill' could be applied to many homosexuals.²⁶ But this is precisely the kind of conclusion that Flew sought to avoid. Another conclusion that would follow from these remarks is that heterosexual conduct would escape being regarded as a manifestation of mental illness only because it is not disfavored behavior. If the requirement that the person must regard his condition as bad is eliminated as inapplicable, then, except for the fact that heterosexual conduct is socially approved, the heterosexual is roughly in the same position as the homosexual. The heterosexual would lack the capacity to engage in or enjoy homosexual acts as much as he does his heterosexual acts. Further, the heterosexual would be regarded as compulsive in the same way as the homosexual is regarded. Thus, while the homosexual can be considered mentally ill, the heterosexual avoids this characterization only because what he does is socially approved. But this kind of value judgment based solely on the relative social approval or disapproval of the conduct involved is pre-

22. J. DREVER, A DICTIONARY OF PSYCHOLOGY 122 (1952).

23. THE AMERICAN COLLEGE DICTIONARY (1958).

24. Unfortunately, the reviewer cannot now find the source of this quotation. But he has found a report related by Erik Erikson that at the age of 77-78 Gandhi slept with naked women stating that his purpose was to test his ability not to become aroused. Unfortunately, for reasons stated in his book, Erikson did not take Gandhi's statement as an accurate reflection of what he was doing. E. ERIKSON, GANDHI'S TRUTH 404 (1969).

25. *Corinthians* 1:8-9.

26. Flew reluctantly accepts this possibility for some homosexuals. FLEW, *supra* note 1, at 70.

cisely what Flew sought to avoid. Again, the possibility of reaching conclusions that Flew presumably would reject suggests a certain weakness in his schema.

Flew also can be questioned about his narrow view of the meaning and use of the term 'mental illness'. At times he appears to assimilate the notion of mental illness to the law's narrower definition of insanity. Although Flew undoubtedly is aware that the notion of criminal insanity is narrower than the notion of mental illness,²⁷ he sometimes gives the appearance of treating them as coextensive in applicability.

Another indication of the narrowness of Flew's conception of insanity is his treatment of irrationality (or what he calls a defect of reason). For Flew deviancy in wants from ordinary wants does not show mental illness.²⁸ Also, mad imprudence is not sufficient to manifest mental illness, for if so, then a political dissident fighting against odds or an altruist could be characterized as ill.²⁹ What apparently would show mental illness is that the person have beliefs which are without foundation, and which can be decisively disconfirmed.³⁰ Flew admits that he had set up criteria which would include "only peculiarly flagrant kinds" of cases.³¹ He asserts that he does this because the implications of characterizing someone as mentally ill are serious. But the effect of this narrow basis for finding irrationality indicative of mental illness is that rather shocking examples can be given which under this schema do not indicate any mental illness. Flew gives us several of these examples which he finds not at all troubling. One such example is that of a James Cooper who went to the apartment of his former fiancée. Before ringing the bell, he released the safety catch of his automatic. When the lady came to the door, he shot her nine times. He then immediately gave himself up to the police. When questioned about his intent, he said: "I fired to blow her fucking head off. How many times do you want me to tell you." At the trial Cooper refused to plead insanity and asserted: "It is my opinion that any decision other than guilty, guilty of murder in the first degree, with no recommendation for leniency, is a miscarriage of justice." Although the jury agreed and the judge passed sentence of electrocution, there was sufficient psychiatric opinion to the contrary so that on appeal his sentence was commuted to life imprisonment. Cooper then hung himself.³² Flew finds no mental illness here, no indication of lack of capacity or sufficient irrationality. So far as Cooper's beliefs are relevant, the beliefs appear rational enough. Certainly, Cooper's belief that if he shot his former fiancée a sufficient number of times she would die was not without foundation. Nor was it subject to any disconfirmation.

But what Flew refused to regard as relevant and what is troubling about this example is that Cooper's conduct appears to the neutral outside ob-

27. *Id.* at 93.

28. *Id.* at 92-93.

29. *Id.* at 9-10, 93.

30. *Id.* at 94.

31. *Id.*

32. *Id.* at 90-91.

server as irrationally related to any understandable non-self-destructive wants or goals that Cooper might have had. Certainly, Cooper appeared to be in touch with reality and not suffering from any delusions. But a person may be mentally ill, though less severely so, even if he is in touch with reality. From an everyday understanding it appears that a person whose acts are irrational in relation to any understandable non-self-destructive wants or goals is somewhat mentally ill. And such irrational conduct can be distinguished from the other kinds of examples that Flew seeks to protect from the charge of mental illness, particularly, political dissidence, altruism and socially disapproved behavior, such as homosexuality, which causes no (substantial) harm to others. This disapproved behavior is here sometimes called self-regarding disfavored behavior.

The political dissident may be madly imprudent by conventional standards because it is very unlikely that he or she will effect any revolutionary changes. But under the test suggested here this would not indicate that the dissident manifests mental illness so long as he or she is in touch with reality and, given the alternatives, his or her behavior is not an irrational means to his or her goal. Further, as a pragmatic matter all labeling of political dissidents as mentally ill by those in control of the political structure should be suspect automatically as an attempt to discredit their goals, causes, etc. Similarly, the altruist may be imprudent by conventional standards, but is not manifesting mental illness if he or she is in touch with reality and, accepting his or her desire as a given, his or her act is not irrationally related to it. Also, although different experts have reached different conclusions,³³ the same position can be taken with respect to such self-regarding disfavored behavior as homosexuality. Assuming that the homosexual is not otherwise manifesting mental illness and accepting his or her homosexual desires as a given, if his or her behavior is not irrationally related to his or her desires then he or she would not be characterized as mentally ill. But an unwillingness to apply the label 'mentally ill' to such behavior which the person cannot easily change also can be justified even if it meets some test of mental illness. This justification rests on a balancing of interests, namely, the value of such labeling is outweighed by the harm caused the person by a pejorative reference to a condition which he or she cannot easily change.

But where the person's behavior would harm others and is narrowly self-centered in motivation rather than the result of genuine political, ideological, cultural or other non-self-centered motivation, then there is no good reason not to examine the behavior carefully to determine whether it manifests mental illness. If it can be posited that the human organism seeks to maintain and fulfill itself, then, contrary to Flew's analysis, the irrational pursuit of self-destructive wants by a physically healthy person, which pursuit serves no other purpose, seems to indicate mental imbalance. A crime syndicate figure who eliminates a rival without fear of any sanction would not be mentally ill under this test, nor would the terminally ill person who kills himself, or the daring sportsman or political activist who

33. See Gould, *What We Don't Know About Homosexuality*, N.Y. Times, Feb. 24, 1974, § 6 (Magazine), at 12.

risks death. But a physically healthy person with apparent possibilities for fulfillment who kills himself or herself only because he or she prefers death does suggest mental illness by this act. From this it would follow that the apparently physically healthy person who kills his ex-girl friend, turns himself over to the police and virtually asks to be killed by the state *prima facie* does not appear to be engaging in a rational pursuit of non-self-destructive wants. Flew's narrow concept of mental illness and his narrow notion of irrationality seem ill-fitted for examples of this nature.

Flew finds his categorization adequate because he seeks to preserve man as an agent responsible and accountable for his acts. Man has free will and dignity. Flew asserts that man would have free will in several relevant senses even if general determinism were shown to be true and all man's acts were found caused by his heredity or environmental influences.³⁴ These senses relate to man as a voluntary agent rather than a passive recipient. One sense in which man has free will is that at times he has movings of his limbs rather than only motions. At these times he has "a full sense that he is voluntarily performing the action"³⁵ rather than the action being performed by someone else, say, by a doctor tapping the knee to elicit a knee-jerk reflex. Another sense in which free will is used is in contradistinction to compulsion, where something is done because of a threat from outside.³⁶ Another way in which free will is used is to refer to intentional acts rather than unintentional ones.³⁷ Under Flew's view these senses of free will would continue despite a showing that general determinism was true; even then "there will be no call to detheoreticize the meanings of any everyday terms"³⁸ like free will.

But this does not appear to be so obviously the case as Flew suggests. Admittedly, even if there is a finding that everything man does is caused by something else, we still could notice differences that we notice now, such as, the difference between man as the agent of his actions and the passive recipient of external forces, between movings and motions, between acts under compulsion and those not, and between intentional and unintentional behavior. The distinctions may continue but they would lose their relevance. Under such circumstances, if one were informed that a person acted without compulsion, a reasonable response would be: "So what? His behavior still was caused by something else; there was nothing else he as a self-causing agent could have done." Unlike the present situation, where man often views himself or herself emotionally as a free agent somehow able to stand outside the causal chain of events and make a difference in what happens, if determinism were shown to be true, man would come to an awareness that everything he or she did was caused by something else (external force, heredity, environment). Man still would be aware of the difference between an external force causing his or her acts and heredity as the cause, but the difference would be ir-

34. FLEW, *supra* note 1, at 95-103.

35. *Id.* at 101.

36. *Id.* at 99.

37. *Id.* at 103.

38. *Id.* at 106.

relevant with respect to any notion of criminal accountability or responsibility. If man knew that everything he or she did were caused by something, he or she would have no more reason to believe that he or she was responsible for acts caused by his or her heredity than for acts caused by someone wielding a gun. The notions of criminal responsibility and accountability would become meaningless.³⁹

Even if it cannot be shown that all behavior is caused, if it can be shown that a criminal's act was somewhat irrational in relation to his non-self-destructive wants, and if treatment might effect a positive change in him, then there is good reason to treat him rather than simply lock him up. This would be so even if the prisoner's degree of irrationality is not so great as to meet the standard of mental illness proposed either by Flew or by this reviewer. The assumption here is that a person who can learn to pursue his wants in a non-criminal fashion would be acting more rationally by pursuing these wants non-criminally rather than criminally if there was any significant chance that his pursuing his wants criminally would lead to a jail sentence. This is because a jail sentence precludes the fulfilling of most wants. But since those already in jail have indicated some inability to avoid jail, there is some inductive support for the conclusion that if they are freed and engage in criminal acts again, they may again be unable to avoid jail. From this it would follow that common prisoners probably would be better off if they could be treated and retrained to pursue their wants through non-criminal means. Certainly, society would benefit from a reduction of the recidivism rate if prisoners could be retrained.

Checks could be built into the structure of the treatment to protect against the kinds of abuses which Flew notes. One way to do this would be to restrict treatment to primarily non-physical therapy, such as verbal psychotherapy, psychoanalysis, group sessions and encounter groups. To preserve the prisoner's dignity, any therapy on unwilling patients should be prohibited. Further, because prisoners can be manipulated to accept permanent physical changes which they otherwise might not accept if they were not prisoners, any decision to effect physical therapy should require a determination that the prisoner actually was mentally ill, as well as the approval of those not involved in the therapy, such as doctors, lawyers, pastors and those trained in the humanities. Finally, as Flew indicates, it seems unfair to incarcerate a prisoner indefinitely, regardless of the seriousness of the crime, just because he or she has been found to be mentally ill or otherwise irrational and because a psychiatrist has determined that he or she has not responded to treatment.⁴⁰ Our notion of fairness requires that there be some symmetry between the incarceration

39. Flew asserts at several points that such a position would lead to a "categorical catastrophe." *Id.* at 77-78, 109. This is true, but is also irrelevant.

40. Flew believes that the notion of justice does not apply when the person is not found to be a responsible agent, that is, when he is found to be mentally ill. From this Flew concludes that the notion of justice could not be a check on indefinite incarceration of mentally ill prisoners. But the very fact that Flew is bothered by the notion of indefinite sentencing for the mentally ill indicates that he regards such sen-

and the crime. The way to produce this symmetry is to provide a maximum sentence beyond which the prisoner would not be detained, regardless of the progress of his or her treatment. Of course, to protect the public, those who commit serious, violent crimes would be given high maximum sentences ranging to life imprisonment.

Flew makes one other argument for a very limited notion of mental illness as it relates to crime. Flew asserts that "the proper primary purpose of a penal system is: neither retribution on offenders; nor the reformation or cure of offenders; but rather the prevention of offences."⁴¹ Flew admits that the high rate of recidivism indicates that the system has failed to reform. But he seems to believe that the present system, which is based on the assumption that criminals ordinarily are responsible agents, has a deterrent effect on others; whereas a penal system that recognized many criminals as mentally unbalanced in some way or otherwise irrational, and treated them accordingly, might not have such a deterrent effect. Flew, quoting from Lady Wootton, asserts: "It is futile to uproot one blade of grass by methods which encourage the proliferation of others."⁴² But Flew is just conjecturing. He has not shown why this deterrent effect might diminish. Indeed, the present high crime rate and high recidivism rate suggest that the present system based on punishment due to responsibility has failed to deter. A change might be for the better as well as for the worse. Flew takes the position that people refrain from crime because they are afraid of getting caught and incarcerated. And Flew assumes that if people knew that once they got incarcerated after engaging in a crime they would be treated rather than simply punished, they would be more likely to engage in crime. Flew's fear seems plausible only if people would commit crime in order to get treated. But if this were the case, the appropriate remedy would be to expand public mental health services. Under the version of the proposal that Flew attacks, which is presented above, people still would be incarcerated after being convicted of a crime. The only difference between the version of the present system

tencing as unfair. The reviewer shares this attitude, but is not convinced that the notion of justice is irrelevant here. Unfairness in sentencing seems to be an aspect of what would constitute injustice. The notion of justice could be regarded as requiring some rough symmetry between the crime and the incarceration, regardless of the criminal's responsibility.

41. FLEW, *supra* note 1, at 79. Wittgenstein presents a different and more acceptable understanding of the notion of punishment. He asserts:

Why do we punish criminals? Is it from a desire for revenge? Is it in order to prevent a repetition of the crime? And so on. The truth is that there is no one reason. There is the institution of punishing criminals. Different people support this for different reasons, and for different reasons in different cases and at different times. Some people support it out of a desire for revenge, some perhaps out of a desire for justice, some out of a wish to prevent a repetition of the crime, and so on. And so punishments are carried out.

L. WITTGENSTEIN, *LECTURES AND CONVERSATIONS ON ESTHETICS, PSYCHOLOGY AND RELIGIOUS BELIEF* 50 (C. Barrett ed. 1967).

42. FLEW, *supra* note 1, at 79.

that Flew supports and the above proposal is a change of emphasis from simple incarceration to incarceration plus treatment for mental illness and other irrational behavior. This is not a revolutionary change and already exists to some degree. And it does not seem likely to reduce the deterrent effect.

Finally, given Flew's restrictions on the concept of mental illness, it ought to be pointed out that 'mental illness' is a term with a cluster of different related uses (what Wittgenstein calls a family resemblance concept)⁴³ rather than a term having a single invariant meaning. A physiologist might use the term to refer only to organic disorders in the brain; a Freudian psychiatrist would use the term in a less restrictive fashion, and would include references to functional disorders. And not all psychiatrists agree as to the applicable criteria for mental illness. The current legal definitions differ from the psychiatric definitions. The man on the street uses the term differently as well.

The acceptance of a wide variety of uses of the term 'mental illness' leads to the possibility that Flew feared: the term might be used to refer to disliked, socially unaccepted behavior. The term then becomes (and has become) a weapon wielded by those who dominate society against dissidents and the different.

Various ways of limiting this unfortunate possibility have been suggested. One way is to posit necessary conditions for one's being mentally ill in the manner proposed by Flew. But this was rejected as rather arbitrary.⁴⁴ One way, accepted here, is to argue that the term 'mental illness' ought not to be applied (even if it could be) to certain disfavored behavior, because it causes more harm than good. Another way would be for the state to cease criminalizing or otherwise discriminating against socially disapproved behavior which does not harm others, so that whether or not someone manifests mental illness by virtue of such behavior becomes irrelevant in the public sphere. Another way is to make people aware that the term 'mental illness' can be used so extensively that any conduct which has an adverse effect on the development of the person as a mature being would manifest mental illness. Under this use those who overeat, smoke, drink heavily, fail to exercise or eat high cholesterol foods such as beef or ice cream could be labeled mentally ill because they are acting contrary to the rational goal of life maximization. Once it is recognized that the term 'mental illness' can be used as a handy weapon by anyone against anyone, then everyone has reason to fear that the term

43. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 66-67 (G. Anscombe transl. 1953).

44. It can be argued that the reviewer, as well as Flew, posits an arbitrary condition for the existence of mental illness in that he suggests that from an everyday understanding a person manifests mental illness when his conduct is irrationally related to any understandable non-self-destructive wants or goals. But the appropriate response to this argument is that the reviewer is suggesting a *sufficient* condition for *one* use (an everyday understanding) of 'mental illness' whereas Flew is positing *necessary* conditions generally for *the* proper use of 'mental illness.' There seems to be no arbitrariness in the reviewer's suggestion.

could be used against him. Presumably, this would make people pause before using this term as a weapon to attack and sometimes criminalize what they dislike and fear.

Another possible way of dealing with the anti-humane use of the term 'mental illness' is for those so characterized not to regard it as a pejorative term. Who among us could claim reasonably the label 'totally sane'? An even casual examination of contemporary events leads to the unhappy but easy conclusion that totally sane individuals are in short supply. If this is not so, and the world really can be characterized adequately as sane, then it is not unreasonable to prefer to be regarded as mentally ill. As T.S. Eliot once put it (in the words of Celia, a character visiting her psychiatrist in *The Cocktail Party*):

. . . I should really *like* to think there's something wrong with me—
Because, if there isn't, then there's something wrong,
Or at least, very different from what it seems to be,
With the world itself—and that's much more frightening!
That would be terrible. So I'd rather believe
There is something wrong with me, that could be put right.⁴⁵

45. T.S. ELIOT, *THE COCKTAIL PARTY* 132 (1958).