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# Legal Limitations on Correctional Therapy and Research

Bruce J. Winick

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# Legal Limitations on Correctional Therapy and Research†

Bruce J. Winick\*

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\* Professor of Law, University of Miami School of Law. This Article is an expanded version of a paper commissioned by the Panel on Research on Rehabilitative Techniques of the Committee on Research on Law Enforcement and the Administration of Justice of the National Research Council. The commissioned paper will appear in volume entitled *The Rehabilitation of Criminal Offenders: New Directions for Research*, to be published in 1981 by the National Academy Press. I would like to thank my colleagues at the University of Miami School of Law for their comments on an earlier draft of this Article presented at a faculty seminar and Professor Edward Ewin of the University of Miami Department of Philosophy for his helpful comments concerning the issue of intrusiveness. I would also like to acknowledge the research assistance of Muriel C. Efron, class of 1981, University of Miami School of Law.

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## I. INTRODUCTION

The failures of the existing prison system<sup>1</sup> have sparked a widespread movement toward community-based alternatives for the rehabilitation of offenders.<sup>2</sup> Increasing numbers of half-

1. See, e.g., N. MORRIS, *THE FUTURE OF IMPRISONMENT* 5-6 (1974); W. NAGEL, *THE NEW RED BARN: A CRITICAL LOOK AT AMERICAN PRISONS* 138-39 (1973); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 397 (1967) [hereinafter cited as *CHALLENGE OF CRIME*]; STRUGGLE FOR JUSTICE 23 (American Friends Service Committee 1971). See also L. CARNEY, *PROBATION AND PAROLE: LEGAL AND SOCIAL DIMENSIONS* 208 (1977); *The Role of Prisons in Society: Hearings Before the Subcomm. on Penitentiaries and Corrections of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 98 (1977) (statement of Dr. Robert B. Coates); *Therapeutic Community Act of 1978: Hearings on S. 3227 Before the Subcomm. on Penitentiaries and Corrections of the Sen. Comm. on the Judiciary*, 95th Cong., 2d Sess. 9 (1978) (statement of Senator Dennis DeConcini) [hereinafter cited as *Hearings on S. 3227*]. Indeed, it has been suggested that the modern prison, throughout its 150-year history, has been and inevitably must be a failure. See M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 271-72, 276-78 (A. Sheridan trans. 1977). These criticisms of the prison are remarkably durable, and are not limited to an American version. See *id.* at 264-68.

2. See generally *ALTERNATIVES TO PRISON* (G. Perlstein & T. Phelps eds. 1975); P. HAHN, *COMMUNITY BASED CORRECTIONS AND THE CRIMINAL JUSTICE SYSTEM* (1975). These extra-institutional rehabilitation approaches have developed in response to concern that rehabilitative efforts that have been tried within prisons have not worked. See *CHALLENGE OF CRIME*, *supra* note 1, at 412. See generally D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975); Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974); SUBCOMM. ON PENITENTIARIES AND CORRECTIONS OF THE SEN. COMM. ON THE JUDICIARY, ANNUAL REPORT, S. REP. NO. 95-909, 95th Cong., 1st Sess. (1978). But see T. PALMER, *CORRECTIONAL INTERVENTION AND RESEARCH* 15-36 *passim* (1978). Although noting that more recent programs may show more promise, a recent study of offender rehabilitation performed under the auspices of the National

way houses, residential treatment centers, short-term custodial facilities, and other community-based placements<sup>3</sup> are evidence of the correctional community's strong desire to avoid the isolation, institutional culture, and severing of family and other non-criminal ties that mark prison life.<sup>4</sup> This trend includes the diversion of defendants from the criminal justice system at the entry point, by redirecting them to a variety of community treatment settings such as drug rehabilitation programs, community mental health clinics, state mental hospitals, sex offender programs, alcohol treatment programs, and day treatment centers.<sup>5</sup> Judges are even permitted, under statutes such as the Parole Commission and Reorganization Act, to sentence convicted defendants "to the custody of the Attorney General for treatment and supervision."<sup>6</sup> Part of this development includes more extensive use of probation<sup>7</sup> and early or

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Academy of Sciences found Lipton, Martinson, and Wilks' conclusions "reasonably accurate and fair." See PANEL ON RESEARCH ON REHABILITATIVE TECHNIQUES OF THE NATIONAL RESEARCH COUNCIL, THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS 5 (L. Sechrest, S. White & E. Brown eds. 1979) [hereinafter cited as REHABILITATIVE TECHNIQUES]. However, Palmer's "optimistic view cannot be supported . . ." *Id.* at 31. The Panel study concluded that:

The entire body of research appears to justify only the conclusion that we do not now know of any program or method of rehabilitation that could be guaranteed to reduce the criminal activity of released offenders. Although a generous reviewer of the literature might discern some glimmers of hope, those glimmers are so few, so scattered, and so inconsistent that they do not serve as a basis for any recommendation other than continued research.

*Id.* at 3. A recent critical analysis of the evaluation literature found most studies inadequate for failure to measure the "strength" or intensity of the treatment, or its "integrity" or consistency in administration. See Sechrest & Redner, *Strength and Integrity in Evaluation Studies*, in HOW WELL DOES IT WORK: A REVIEW OF CRIMINAL JUSTICE EVALUATION 1978 19 (1978).

3. For a comprehensive bibliography concerning alternatives to institutionalization, see J. BRANTLEY, ALTERNATIVES TO INSTITUTIONALIZATION: A DEFINITIVE BIBLIOGRAPHY (1979).

4. See generally N. MORRIS, *supra* note 1, at 5-9; CHALLENGE OF CRIME, *supra* note 1, at 384-98.

5. See generally NATIONAL PRETRIAL INTERVENTION SERVICE CENTER OF THE ABA COMM'N ON CORRECTIONAL FACILITIES AND SERVICES, PRETRIAL CRIMINAL JUSTICE INTERVENTION TECHNIQUES AND ACTION PROGRAMS (2d ed. 1975); R. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION (1974); Carter, *The Diversion of Offenders*, FED. PROBATION, Dec. 1972, at 31; Vorenberg & Vorenberg, *Early Diversion from the Criminal Justice System*, in PRISONERS IN AMERICA 151 (L. Ohlin ed. 1973); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974). The Law Enforcement Assistance Administration has aided the movement toward early diversion by providing federal funding for the development of community corrections programs. Vorenberg & Vorenberg, *supra*, at 163.

6. 18 U.S.C. § 5010(c) (1976).

7. See *United States v. Mercado*, 469 F.2d 1148, 1152-53 (2d Cir. 1972)

partial release programs, including work release, educational release, furloughs, and contract parole, all of which frequently are tied to some form of community-based treatment.<sup>8</sup>

Indeed, major portions of the criminal justice system have undergone a "process of divestment" and whole classes of social deviants find themselves under the control of a new "therapeutic state."<sup>9</sup> As a result, an enormous potential for abuse has emerged as relatively innocuous counseling programs have been replaced, both in the prison and in the community, with increasingly more sophisticated rehabilitative programs that utilize neurological technologies, behavior modification, and other controversial therapies.<sup>10</sup> Whether these alternative therapies are more effective than traditional incarceration is an empirical question that has received increasing attention by social scientists, but remains unresolved.<sup>11</sup>

Nevertheless, the demand for alternative programs continues to grow. A recent survey<sup>12</sup> revealed that 71% of the public favors research to develop tests that predict violent behavior and 64% would favor the coercive administration to violent of-

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(court may condition probation on offender's application for treatment); Moore v. United States, 387 A.2d 714, 716 (D.C. 1978) (probation conditioned on mental examination).

8. See ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO PROBATION § 3.2(c)(v) (tentative draft 1970); A. SCULL, DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW 45-49 (1977); See generally L. CARNEY, *supra* note 2.

9. N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCY AND ENFORCED THEORY 4-8, 39-44 (1971). For critical perspectives on the diversion and deinstitutionalization process, see generally A. SCULL, *supra* note 8; Szasz, *Psychiatric Diversion in the Criminal Justice System*, in MENTALLY ILL OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM 54 (N. Beran & B. Toomey eds. 1979).

10. See generally J. MITFORD, KIND AND USUAL PUNISHMENT (1973); Halleck, *Psychiatry and Social Control: Two Contradictory Scenarios*, in MENTALLY ILL OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM 24 (N. Beran & B. Toomey eds. 1979); Delgado, *Organically Induced Behavioral Change in Correctional Institutions: Release Decisions and "New Man" Phenomenon*, 50 S. CAL. L. REV. 215, 217-18, 223-38 (1977); Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605 (1974); Rothman, *Behavior Modification in Total Institutions*, 5 HASTINGS CENTER REP. 17 (Feb. 1975); Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972).

11. See generally P. LERMAN, COMMUNITY TREATMENT AND SOCIAL CONTROL (1975); J. McCord, Consideration of Some Effects of a Counseling Program (June 11-13, 1979) (unpublished paper presented at Conference of the Panel on Research on Rehabilitative Techniques of the Comm. on Research on Law Enforcement & Criminal Justice, Nat'l Research Council).

12. The survey was conducted through the NATIONAL COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, SPECIAL STUDY: IMPLICATIONS OF ADVANCES IN BIOMEDICAL AND BEHAVIORAL RESEARCH (1978) [hereinafter cited as SPECIAL STUDY].

fenders of a drug purported to prevent violence.<sup>13</sup> An additional 10% of the public, while against forced medication, favors the availability of such a drug as an alternative to prison.<sup>14</sup>

Several important issues are raised by such alternative treatments, as well as by the research that inevitably precedes, accompanies, and evaluates them. The most fundamental issue is whether offenders have a right to refuse any of the treatment techniques, and if so, which ones. Resolution of this issue will determine whether judges can sentence offenders to treatment in lieu of prison or as a condition of probation, whether parole boards can condition parole on participation in these therapy programs, and whether corrections authorities can require prisoners to participate simply as part of their confinement. An important related issue is whether offenders have the capacity to give informed consent to treatments they may have a right to refuse, and if so, what procedures are necessary to ensure that consent is properly obtained. Similarly, procedural due process guarantees must be examined against the whole range of treatment stages: when, if at all, are notice and a hearing required and what should be the scope and structure of the hearing? The legal limitations on correctional research that tests the efficacy of these alternative dispositions and new experimental approaches, or the validity of new hypotheses concerning the causes and correlates of criminality, must also be explored.

The law is just beginning to deal with these difficult issues. In 1974, Congress created the National Commission for the Protection of Research Subjects of Biomedical and Behavioral Research (National Commission),<sup>15</sup> and directed it to conduct a special study of the ethical, social, and legal implications of advances in biomedical and behavioral research and technology. Although this special study has now been issued,<sup>16</sup> it hardly begins to deal with the legal implications of the new technologies. A successor commission—the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, established in 1978<sup>17</sup>—is charged with study-

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13. Policy Research Inc. & Center for Technology Assessment, *A Comprehensive Study of the Ethical, Legal, and Social Implications of Advances in Biomedical and Behavioral Research and Technology*, in SPECIAL STUDY, *supra* note 12, at 174.

14. *Id.*

15. National Research Service Award Act of 1974, Pub. L. No. 93-348, § 201, 88 Stat. 342.

16. SPECIAL STUDY, *supra* note 12.

17. Act of Nov. 9, 1978, Pub. L. No. 95-622, § 301, 92 Stat. 3437 (codified in 42 U.S.C. § 300v (Supp. II 1978)).

ing these same issues and making recommendations for legislative and administrative action.

This Article first reviews the existing framework of legal restrictions on correctional treatment and research. It then proposes a continuum of intrusiveness along which the various treatment techniques could be arrayed and analyzes the legal implications at several junctures on the continuum. The suggested framework avoids singular, all-encompassing answers, demonstrating instead that the balance between governmental interests and individual rights of offenders may be struck differently for particular treatment approaches. After analyzing the offender's right to refuse treatment along the continuum of intrusiveness, the issues related to informed consent, procedural due process, and limits on correctional research are also examined in light of the continuum framework. As with the right to refuse treatment, these legal issues are resolved differently at various points along the continuum. Although others may define points along the continuum differently than they are defined here, it is hoped that the framework presented will direct the inquiry away from the current static, conclusory analysis and instead encourage examination of the degree of intrusiveness of individual treatments.

## II. SOURCES OF LEGAL LIMITATION

Legal limitations on treatment, rehabilitation, and the design or implementation of research on offenders, both within and outside the prison, derive from a number of sources.

### A. STATUTORY LIMITS

Both state and federal statutes pose some limitations on treatment or research dealing with offenders. A survey conducted by the staff of the National Commission<sup>18</sup> reveals that at least nine states have legislation on biomedical research with prisoners, and ten have legislation concerning behavioral research.<sup>19</sup> Of these states, only Oregon has imposed a flat statutory ban on both types of research with prisoners.<sup>20</sup> Several states place statutory limits on coercive treatment of mental

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18. NATIONAL COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, RESEARCH INVOLVING PRISONERS (1976) [hereinafter cited as PRISONER RESEARCH].

19. See *Survey of Present Status of Prison Inmate Involvement in Biomedical and Behavioral Research in State Correctional Facilities*, in PRISONER RESEARCH, *supra* note 18, at 17-5 to 17-6 app. [hereinafter cited as *Present Status*].

20. See OR. REV. STAT. § 421.085 (1973).

patients, but only a few of these statutes apply to prisoners.<sup>21</sup> The federal Privacy Act<sup>22</sup> and similar state statutes<sup>23</sup> may limit agency disclosure of records compiled in correctional research and guarantee subjects access to such data.

California has been the forerunner in adopting limits on therapy and experimentation and currently has the most extensive statutory approach to these problems. A pioneering statute limits the use of "organic therapies" on prisoners and mental patients by declaring that all persons "have a fundamental right against enforced interference with their thought processes, states of mind, and patterns of mentation."<sup>24</sup> The statute guarantees that, with certain exceptions, competent persons may refuse "organic therapies," including "the use of any drugs, electric shocks, electronic stimulation of the brain, or infliction of physical pain when used as an aversive or reinforcing stimulus in a program of aversive, classical, or operant conditioning."<sup>25</sup> To administer any organic therapy to a person not capable of consenting,<sup>26</sup> the state must first obtain a court order<sup>27</sup> based upon a showing that the proposed therapy will be beneficial, that its administration is supported by a compelling state interest, that there are no less onerous alternative therapies available, and that the therapy is in accordance with medical-psychiatric practice.<sup>28</sup>

In 1977, the California statute was amended to include a provision dealing with biomedical and behavioral research on

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21. See Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461, 504-25 (1977) (statutory compilation).

22. 5 U.S.C. § 552a (1976). Other federal laws protecting the privacy of patients or research subjects include the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. No. 91-616, § 333, 84 Stat. 1848 (codified at 42 U.S.C. § 4582 (1976)), and the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18 U.S.C.). See Madden & Lessin, *Privacy and Confidentiality of Social Science Research Information*, in PROCEEDINGS AND BACKGROUND PAPERS: CONFERENCE ON ETHICAL AND LEGAL PROBLEMS IN APPLIED SOCIAL RESEARCH 3-1 (R. Boruch, J. Ross & J. Cecil eds. 1979).

23. See, e.g., LA. REV. STAT. ANN. § 15:574.12(D)(3) (West Supp. 1980); VA. CODE § 19.2-389 (Supp. 1980). For a compilation of state statutes, see Madden & Lessin, *supra* note 22, at 3-13.

24. CAL. PENAL CODE §§ 2670-2680 (West Supp. 1970). See generally Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974).

25. CAL. PENAL CODE § 2670.5(c)(3) (West Supp. 1970-1979).

26. *Id.* at § 2670.5(b). Psychosurgery is prohibited altogether for persons lacking the capacity for informed consent. *Id.* at § 3507.

27. *Id.* at § 2675(a).

28. *Id.* at § 2679(b).

prisoners.<sup>29</sup> This new provision affirms the fundamental right of competent adults to decide whether to participate in such research<sup>30</sup> and restricts the type of behavioral research<sup>31</sup> allowed to "studies of the possible causes, effects and processes of incarceration and studies of prisons as institutional structures . . . which present minimal or no risk and no more than mere inconvenience to the subjects of the research."<sup>32</sup> Behavioral research within the coverage of the statute may not be conducted without the informed consent of the subjects unless an institutional review board concludes that consent would be unnecessary or would significantly inhibit the research.<sup>33</sup> To authorize research generally, the review board must determine that the risks to participating prisoners are outweighed by the benefits to the prisoner and the importance of the knowledge to be gained.<sup>34</sup>

Other provisions of the California statute limit the use of psychotropic medication and behavioral techniques on prisoners.<sup>35</sup> Psychotropic drugs may be used only when they are a part of the prisoners' conventional medical treatment and are carefully monitored and evaluated, or when they are needed for research designed to test the pharmacological or chemical properties of the drugs but then only if there is no serious risk to the prisoners' mental or physical well-being.<sup>36</sup> Behavioral techniques may be used only if they are "medically and socially acceptable" and do not inflict permanent physical or psychological injury.<sup>37</sup>

Biomedical research, defined broadly to include any re-

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29. Act of Oct. 1, 1977, ch. 1250, § 3, 1977 Cal. Stats. 4276-81 (codified in CAL. PENAL CODE §§ 3500-3524 (West Supp. 1970-1979)).

30. CAL. PENAL CODE § 3501 (West Supp. 1970-1979).

31. Behavioral research is defined to include studies involving "the investigation of human behavior, emotions, adaption, conditioning, and response in a program designed to test certain hypotheses through the collection of objective data." *Id.* at § 3500(a).

32. *Id.* at § 3505. Excluded from this restriction is the use of statistical data to evaluate "programs to which inmates are routinely assigned, such as, . . . education, vocational training, productive work, counseling, recognized therapies, and programs which are not experimental in nature." *Id.* at § 3500.

33. *See id.* at § 3505.

34. *Id.* at § 3515(a). Equitable procedures must be followed in the selection of prisoner research subjects and legally effective informed consent must be obtained. *Id.* at § 3515. Such consent is valid only after the subject has had both an oral and written explanation of all procedures and risks involved. *Id.* at § 3521.

35. *Id.* at § 3507.

36. *Id.*

37. *Id.* at § 3508.

search relating to or involving biological, medical, or physical science,<sup>38</sup> is prohibited altogether without informed consent.<sup>39</sup> The statute's focus on the type of research rather than on its effects on subjects, however, may result in too sweeping a prohibition on biomedical research. For example, research on genetic influences on criminality that compares criminality among twins or among adoptees and their adoptive and biological parents<sup>40</sup> would appear to be prohibited without informed consent. Yet such studies invade only informational privacy and do not violate the physical or even mental integrity of the research subject. Moreover, limiting participation to those who consent may well have the effect of contaminating the sample studied, with the result that it may be impossible to meet accepted standards of research methodology.<sup>41</sup>

Although this difficulty exemplifies the problems that can attend quick statutory solutions, on the whole this kind of legislative experimentation with solutions is commendable. Statutory solutions also have the advantage of being amenable to revision based upon the enlightenment that occasionally comes with the passage of time. By contrast, judicial solutions provided by the Supreme Court through the expansion of constitutional doctrine are more rigid, subject to change only if the Court overrules its own precedent or through the rarely invoked constitutional amendment process.

In addition to California, a few other states have attempted statutory approaches to the problems of therapeutic intervention or experimentation with offenders;<sup>42</sup> but generally, few statutory controls exist. Despite legislative reports,<sup>43</sup> hearings,<sup>44</sup> and proposals,<sup>45</sup> no federal statutes presently govern

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38. *Id.* at § 3500(b).

39. *Id.* at § 3502. Indeed, willful failure to obtain a subject's informed consent, in any experiment that involves a risk or physical or psychological harm, is a misdemeanor. CAL. HEALTH & SAFETY CODE § 24176(c) (West Supp. 1979).

40. See generally BIOSOCIAL BASES OF CRIMINAL BEHAVIOR (S. Mednick & K. Christiansen eds. 1977); Farrington, *Longitudinal Research on Crime and Delinquency*, in 1 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 289, 314-17 (N. Morris & M. Tonry eds. 1979).

41. See Riecken, *Overview of Solutions to Ethical and Legal Dilemmas of Social Research*, in PROCEEDINGS AND BACKGROUND PAPERS: CONFERENCE ON ETHICAL AND LEGAL PROBLEMS IN APPLIED SOCIAL RESEARCH 2-7 (R. Boruch, J. Ross & J. Cecil eds. 1979).

42. See *Present Status*, *supra* note 19, at 17-5 to 17-6 app.

43. E.g., STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SEN. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., INDIVIDUAL RIGHTS AND THE FEDERAL ROLE IN BEHAVIOR MODIFICATION (1974).

44. E.g., *Hearings on S. 3227*, *supra* note 1.

these matters. The newly formed President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, however, is charged with making recommendations for legislative action.<sup>46</sup> As the trend toward therapeutic intervention and correctional research grows, there will undoubtedly be more state and federal legislative approaches to these issues.

## B. REGULATORY LIMITS

Another source of legal control of the treatment of and research on offenders is regulatory law—rules adopted by federal, state, or local corrections agencies, or other administrative units, to regulate treatment or research efforts that involve prisoners or offenders in community programs. Certain regulations of the United States Department of Health, Education, and Welfare (HEW), for example, mandate institutional review boards and other procedures designed to ensure that informed consent of research subjects is obtained.<sup>47</sup> Under these regulations, HEW support of biomedical and behavioral research on prisoners is permitted only if the research is approved by an institutional review board on which prisoners or their representatives must serve.<sup>48</sup>

HEW regulations also restrict the purposes of such research to (a) study of the causes, effects, and processes of incarceration and criminal behavior, (b) study of prisons as institutional structures or prisoners as incarcerated persons, (c) research on conditions particularly affecting prisoners as a class or on social and psychological problems affecting prisoners, and (d) research on practices intended to improve the health or well-being of the prisoner-subject.<sup>49</sup> The first two areas may be investigated only if the proposed study presents no more than minimal risk and inconvenience to the subject;<sup>50</sup> the latter two are permitted only after HEW consults with appropriate experts and gives advance notice in the Federal Register of its intent to approve such research.<sup>51</sup> Except for research in

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45. *E.g.*, S. 3227, 95th Cong., 2d Sess. (1978), reprinted in *Hearings on S. 3227*, *supra* note 1, at 125-32.

46. The Commission was established by the Community Mental Health Extension Act of 1978, Pub. L. No. 95-622, § 301, 92 Stat. 3437 (to be codified in 42 U.S.C. § 300v).

47. *See* 45 C.F.R. § 46 (1979).

48. *Id.* at §§ 46.301-306.

49. *Id.* at § 46.306(a)(2)(A)-(D).

50. *Id.* at § 46.306(a)(2)(A)-(B).

51. *Id.* at § 46.306(a)(2)(C)-(D).

these areas and under these procedures, "biomedical or behavioral research conducted or supported by DHEW shall not involve prisoners as subjects."<sup>52</sup>

The National Commission's Study on Research Involving Prisoners cites several states in which experimentation on prisoners has been barred or limited by agency regulation.<sup>53</sup> After the National Commission began holding hearings in connection with its prison study, the Federal Bureau of Prisons announced an indefinite moratorium on nontherapeutic biomedical experimentation in federal prisons.<sup>54</sup> Although regulatory limits on biomedical and behavioral experimentation or on correctional therapy are still the exception, increased regulation at both federal and state levels can be anticipated. Indeed, the flexibility and specialized expertise of agencies in general may make them the most appropriate forum for innovation.

### C. INTERNATIONAL LAW LIMITS

International customary or common law and treaties to which the United States is a party are also possible sources of restrictions on correctional treatment and research. The Nuremberg Code,<sup>55</sup> for example, provides a comprehensive statement of the requirements of informed consent to human experimentation, and broadly asserts that the consent of the subject is "absolutely essential." The Code specifies that such consent must be competent, voluntary, informed, and understanding.<sup>56</sup> It is unclear whether the Code, which is assertedly based on "the principles of the law of nations,"<sup>57</sup> has the force of international law.<sup>58</sup> Some commentators argue that the

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52. *Id.* at § 46.306(b).

53. *See Present Status*, *supra* note 19, at 17-5 to 17-6 app.

54. Branson, *Prison Research: National Commission Says "No, Unless . . ."*, 7 HASTINGS CENTER REP. 15, 16 (Feb. 1977).

55. The "Code" is actually the ten principles on human experimentation set forth in the judgment of the Nuremberg Military Tribunal in the case of *United States v. Karl Brandt*. *See The Medical Case*, in I & II TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1949) [hereinafter cited as NUERNBERG TRIALS], reprinted in J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS 292 (1972). The principles set forth in the *Brandt* case—the trial of 23 German physicians for war crimes involving experiments with prisoners of war and civilians—have come to be known as the "Nuremberg Code." *See* II NUERNBERG TRIALS, *supra*, at 181-82, J. KATZ, *supra*, at 305-06.

56. *See* II NUERNBERG TRIALS, *supra* note 55, at 181-82, J. KATZ, *supra* note 55, at 305-06.

57. *See id.* at 183, J. KATZ at 306.

58. *See* Jonnes, *The Nuremberg Lawyers*, Nat'l L.J., Jan. 7, 1980, at 1 (disagreement among former Nuremberg prosecutors as to the status of the Nuremberg principles in international law).

Code and its progeny, the Declaration of Helsinki,<sup>59</sup> have been incorporated into international customary or common law,<sup>60</sup> but this conclusion is not yet widely accepted. Moreover, the Nuremberg Code may not be independently binding; historic precedent suggests that American courts may not apply international customary law even if domestic practices are found to violate it.<sup>61</sup>

Nevertheless, the Nuremberg Code and the Declaration of Helsinki have been and will continue to be influential in the formulation of policy and law in this area. Many HEW regulations on the protection of human subjects, for example, are derived from the Code, as are the Food and Drug Administration regulations restricting the investigational use of new drugs and the Army Department regulations on the use of volunteers as subjects of research.<sup>62</sup> A Michigan trial court adopted the Code's requirements for informed consent in *Kaimowitz v. Michigan Department of Mental Health*,<sup>63</sup> an influential opinion on the use of psychosurgery. Furthermore, because the Nuremberg Code and the Declaration of Helsinki may be regarded as formal expressions of agreed-upon medical ethics in the conduct of experimentation, their principles may be absorbed into tort law standards governing medical malpractice. It is questionable, however, whether the Code will be held to be an independently binding source of law limiting correctional practices. Moreover, although the Code speaks broadly of all human experimentation, it was adopted in the context of nontherapeutic medical experimentation and its application outside of this area—to therapeutic medical research, behavioral research, or survey research, for example—seems doubtful.

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59. Reprinted in PRISONER RESEARCH, *supra* note 18, at 21-1 to 21-6 app. The Declaration was adopted by the Eighteenth World Medical Assembly in Helsinki, Finland, in 1964, and was revised by the Twenty-ninth World Medical Assembly in Tokyo, Japan, in 1975. See CONTEMPORARY ISSUES IN BIOETHICS 4-5 (T. Beauchamp & L. Walters eds. 1978).

60. See G. ANNAS, L. GLANTZ & B. KATZ, INFORMED CONSENT TO HUMAN EXPERIMENTATION: THE SUBJECT'S DILEMMA 8 (1977); R. WOETZEL, THE NUREMBERG TRIAL IN INTERNATIONAL LAW 239 (1962).

61. See generally Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970). But see *The Paquete Habana*, 175 U.S. 677, 700; *Fillatiga v. Piña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

62. See Veatch, *Ethical Principles in Medical Experimentation*, in ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION 32-33 (A. Rivlin & P. Timpane eds. 1975) [hereinafter cited as ETHICAL AND LEGAL ISSUES].

63. No. 73-19434-AW, slip op. at 23-25 (Wayne County [Mich.] Cir. Ct. July 10, 1973), reprinted in A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902, 913-14 (1974).

## D. JUDICIAL LIMITS

1. *Tort Law*

Tort law may also provide a source of legal limitation on unwanted therapy or participation in research. The law of battery, for example, recognizes a remedy in damages for deliberate touchings or other invasions of bodily integrity that are not legally privileged or to which the victim has not consented.<sup>64</sup> Thus, any medical procedure performed without first obtaining the informed consent of the patient is, with few exceptions, an actionable tort.<sup>65</sup> As Justice Cardozo stated in his classic formulation of the principle: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."<sup>66</sup> This tort principle was applied in the prison context in *Irwin v. Arrendale*,<sup>67</sup> when a prisoner sustained injuries incident to an x-ray performed without his consent. Stressing the consensual nature of the physician-patient relationship even within prison, the Georgia court held that the x-ray procedure constituted a battery, but noted that compulsory medical examination to protect the health of other inmates or of the public would be permitted.<sup>68</sup>

Several other tort theories may apply to correctional treatment or research. Any treatment performed in a negligent fashion and causing injury, for example, would be actionable malpractice, even if consent had been obtained.<sup>69</sup> The law of negligence may also hold researchers liable for injuries inflicted by procedures that deviate from standard and accepted research practice.<sup>70</sup> Indeed, some commentators have suggested that strict liability should apply when any harm results

64. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 165 (4th ed. 1971).

65. *Id.* at 165-66. If consent was not obtained, the patient may recover damages even if the procedure did not result in harm. *Id.* See Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 691 (1975).

66. *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 133 N.Y.S. 1143 (1914).

67. 117 Ga. App. 1, 159 S.E.2d 719 (1967).

68. *Id.* at 8, 159 S.E.2d at 725.

69. W. PROSSER, *supra* note 64, at 162-63. See generally J. KING, THE LAW OF MEDICAL MALPRACTICE IN A NUTSHELL 36-80 (1977); D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶¶ 3.01-3.22 (1977).

70. See Jaffe, *Law as a System of Control*, in EXPERIMENTATION WITH HUMAN SUBJECTS 203-04 (P. Freund ed. 1969).

from nontherapeutic experimentation.<sup>71</sup> Other traditional torts, such as invasion of privacy and intentional or negligent infliction of severe emotional distress, might also provide grounds for a claim.<sup>72</sup>

The question remains whether policies favoring rehabilitation or the expansion of knowledge with respect to the causes and treatment of criminality render treatment or research privileged that would otherwise be tortious. These issues have been rarely litigated in the prison context and even less so in noninstitutional settings. Because participating prisoners usually "volunteer" to avoid more restrictive conditions and generally lack the resources to press damage actions against their keepers, challenges to correctional rehabilitation or research may be rare. Moreover, correctional officials are clothed with immunity from liability for tortious conduct occurring in good faith.<sup>73</sup> For these and other institutional reasons, slowly developing tort law is not likely to prove an adequate source of limitation on correctional research and therapy.

## 2. *Constitutional Law*

By far the most important source of legal restriction on correctional therapy and experimentation is the United States Constitution and, to varying degrees, state constitutions. As recently as the mid-1960s most courts applied a "hands off" policy with respect to prisoners seeking judicial remedies against prison authorities,<sup>74</sup> but there has been a near revolution in the area of prisoners' rights since that time. Courts have increasingly extended constitutional protections to state and federal prisoners and have fashioned judicial remedies for the violation of constitutional rights,<sup>75</sup> exhibiting a degree of activism recently approved by the Supreme Court: "The deplorable conditions and draconian restrictions of some of our nation's prisons are too well known to require recounting here, and the federal

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71. See C. FRIED, *MEDICAL EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY* 27-28 (1974). See also Calabresi, *Reflections on Medical Experimentation with Humans*, in *EXPERIMENTATION WITH HUMAN SUBJECTS* 178-96 (P. Freund ed. 1970).

72. See Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 55 (1975). See generally W. PROSSER, *supra* note 64, § 12 (intentional infliction of emotional distress), § 54 (negligent infliction of emotional distress), § 117 (invasion of privacy).

73. See, e.g., *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978).

74. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

75. See generally Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

courts rightly have condemned these sordid aspects of our prison systems."<sup>76</sup>

It is now generally recognized that prisoners "retain all of their constitutional rights except for those which must be impinged upon for security or rehabilitative purposes."<sup>77</sup> The Supreme Court has held that due process protections apply to prisoners subjected to additional deprivations of liberty or property,<sup>78</sup> that prisoners generally enjoy freedom of speech and religion under the first amendment,<sup>79</sup> and that they are protected against both invidious racial discrimination under the equal protection clause<sup>80</sup> and cruel and unusual punishment under the eighth amendment.<sup>81</sup>

Although there are few cases applying these rights in the context of correctional therapy or research, a growing body of recent case law<sup>82</sup> and commentary<sup>83</sup> suggests that involuntarily committed mental patients have a constitutional right to refuse certain types of mental health treatment. The essential notion involved in these cases is that people retain a core residuum of personal liberty—of privacy, bodily integrity, and unimpaired mental processes—that the Constitution protects from governmental invasion. Protection of this personal liberty may derive

76. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

77. *Jones v. Wittenberg*, 323 F. Supp. 93, 98 (N.D. Ohio 1971), *enforced*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom. Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). The Supreme Court recently reiterated that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979). The Court, in holding the protections of due process applicable to prisoners subjected to additional deprivations of liberty and property, had previously affirmed that "there is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1976).

78. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 488-91 (1980) (due process hearing required for prison-hospital transfers); *Bounds v. Smith*, 430 U.S. 817, 817-18 (1977) (due process right of access to the courts); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (minimal due process proceedings required for certain prison disciplinary proceedings).

79. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (speech); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (religion).

80. *See, e.g.*, *Lee v. Washington*, 390 U.S. 333, 333 (1968).

81. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976). *See also* *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979) (punishment of pretrial detainees would violate substantive due process).

82. *See, e.g.*, *Scott v. Plante*, 532 F.2d 939, 945-46 (3d Cir. 1976) (drug treatment); *Knecht v. Gillman*, 488 F.2d 1136, 1139-40 (8th Cir. 1973) (aversive conditioning); *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-19434-AW, slip op. at 22-40 (Wayne County [Mich.] Cir. Ct. July 10, 1973), *reprinted in* A. Brooks, *supra* note 63, at 912-21 (psychosurgery).

83. *See generally* Friedman, *supra* note 72; Plotkin, *supra* note 21; Shapiro, *supra* note 24; Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIF. L. REV. 81 (1973); Note, *supra* note 10.

from a variety of constitutional sources, but central to the concept are the right of privacy and the first amendment right to freedom from interference with one's mental processes.

In *Kaimowitz v. Michigan Department of Mental Health*,<sup>84</sup> a defendant charged with murder and rape was held in a state mental hospital under the Michigan sexual psychopath law. The defendant was transferred to a clinic for experimental psychosurgery aimed at the treatment of uncontrollable aggression.<sup>85</sup> The proposed experiment, funded by the Michigan Legislature, sought to compare the aggression-reducing effects of surgery on a portion of the brain with the similar effects of a drug which affected male hormone flow. Although the defendant/patient signed an "informed consent" form to become an experimental subject, and although the procedure was approved by both a scientific review committee and a human rights committee, the court ruled that performing the surgery on an involuntarily detained patient would violate both the first amendment and the constitutional right to privacy.<sup>86</sup> The court reasoned that "[t]o the extent the First Amendment protects the dissemination of ideas and the expression of thoughts, it equally must protect the individual's right to generate ideas."<sup>87</sup> Concluding that the psychosurgery would violate the constitutional right of privacy, the court noted that "no privacy [is] more deserving of constitutional protection than that of one's mind," and that "[i]f one is not protected in his thoughts, behavior, personality and identity, then the right of privacy becomes meaningless."<sup>88</sup>

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84. No. 73-19434-AW (Wayne County [Mich.] Cir. Ct. July 10, 1973), reprinted in A. BROOKS, *supra* note 63.

85. *Id.*, slip op. at 2-3, A. BROOKS at 902-03.

86. *Id.* at 32-40, A. BROOKS, at 916-21.

87. *Id.* at 35, A. BROOKS at 918. The court's holding finds support in language contained in Supreme Court opinions that, although in contexts unrelated to imposed therapy, suggest the existence of first amendment protection for an individual's thoughts and mental processes. In *Stanley v. Georgia*, 394 U.S. 557 (1969), for example, the Court, holding that the Constitution places limits on the power of the states to make criminal the private possession of obscene materials in an individual's home, stated that:

Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. . . . Whatever the power of the state to control public dissemination of ideas inimical to that public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

*Id.* at 565-66.

88. No. 73-19434-AW, slip op. at 38, reprinted in A. BROOKS, *supra* note 63, at 920.

Early Supreme Court cases referred to "the right of every individual to the possession and control of his own person." *Union Pac. Ry. v. Botsford*, 141 U.S.

More recently, courts have employed the first amendment and the constitutional right to privacy to protect the right of patients to refuse other types of interventions. Several lower federal courts have found a first amendment limitation on involuntary administration of antipsychotic medication to state mental hospital patients.<sup>89</sup> In *Runnels v. Rosendale*,<sup>90</sup> the right to privacy was applied in the prison context to permit a damage action under the Civil Rights Act for a state prisoner subjected to hemorrhoid surgery without his consent and over his expressed objections. In *Runnels*, the Ninth Circuit court found a "constitutionally protected right to be secure in the privacy of one's own body against invasions by the state except where necessary to support a compelling state interest."<sup>91</sup> Other cases have invoked constitutional privacy to protect the right of mental patients to refuse electroconvulsive therapy and psychotropic medication.<sup>92</sup>

Thus, there clearly is a core of personal liberties that prisoners retain under the Constitution and that courts will intervene to protect. Whether any particular treatment or research project can be conducted over the objection of its patient-subjects, however, is a more complex question.

Before analyzing this issue, two additional but more lim-

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250, 251 (1891). Mr. Justice Brandeis, in a celebrated dissenting opinion, spoke of the "right to be let alone" as applying "to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). More recent cases have explicitly recognized a constitutional right of personal privacy, employing it to protect from government interference a woman's decision whether to have an abortion, *Roe v. Wade*, 410 U.S. 113, 147-64 (1973), and a patient's decision to decline life-sustaining treatment. *Superintendent of Belchertown School v. Saikewicz*, 373 Mass. 728, 738-42, 370 N.E.2d 417, 424-27 (1977); *In re Quinlan*, 70 N.J. 10, 40-41, 355 A.2d 647, 663, cert. denied, 429 U.S. 922 (1976); *In re Eichner*, 73 A.D.2d 431, —, 426 N.Y.S.2d 517, 537-40 (1980). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886-990 (1978).

89. See, e.g., *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979).

90. 489 F.2d 733 (9th Cir. 1974).

91. *Id.* at 735.

92. For a constitutional right to refuse electroconvulsive therapy, see *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085, 1100 (E.D. Mich. 1974); *Price v. Sheppard*, 307 Minn. 250, 257, 239 N.W.2d 905, 910 (1976). For a constitutional right to refuse drugs, see *Scott v. Plante*, 532 F.2d 939, 946 (3d Cir. 1976); *Davis v. Hubbard*, No. C73-205 (N.D. Ohio Sept. 16, 1980), summarized at 49 U.S.L.W. 2215 (1980); *Rogers v. Okin*, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff'd in part*, 28 CRIM. L. RPT. 2397 (1st Cir. 1980); *Rennie v. Klein*, 462 F. Supp. 1131, 1143-44 (D.N.J. 1978) (preliminary injunction), 476 F. Supp. 1294, 1307 (D.N.J. 1979), *appeal docketed*, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980); *Souder v. McGuire*, 423 F. Supp. 830, 832 (M.D. Pa. 1976); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085, 1100 (E.D. Mich. 1974); *In re K.K.B.*, 609 P.2d 747, 750 (Okla. 1980).

ited sources of constitutional protection should be noted. The first is the eighth amendment's ban on cruel and unusual punishment which has been held to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>93</sup> Mr. Justice Brennan defined the core prohibition of the eighth amendment as "the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."<sup>94</sup>

The chief difficulty with applying the eighth amendment is distinguishing "punishment" from "therapy." A fairly clear case was presented in *Knecht v. Gillman*,<sup>95</sup> where the vomit-inducing drug apomorphine was employed in an involuntary aversive conditioning program. Inmates were injected with the drug for "not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying."<sup>96</sup> After injections the inmates were exercised and would vomit for a period lasting from fifteen minutes to an hour. Rejecting the state's contention that the program was "treatment" and as such insulated from eighth amendment scrutiny, the Court of Appeals for the Eighth Circuit held that the program constituted cruel and unusual punishment when administered without informed consent. In *Mackey v. Procunier*,<sup>97</sup> the Ninth Circuit similarly applied the eighth amendment to prohibit the use of succinylcholine—a paralyzing drug that produces sensations of suffocation and drowning—on fully conscious prisoners in an aversive conditioning program. Other courts have found eighth amendment violations in the involuntary administration of psychotropic drugs in state hospitals and juvenile facilities.<sup>98</sup>

Nonetheless, it is readily conceivable that some forms of "therapy" may not sufficiently shock the conscience to trans-

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93. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

94. *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring). See also *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (eighth amendment prohibits penalties that "transgress today's 'broad and idealistic concepts of dignity, critical standards, humanity, and decency'") (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

95. 488 F.2d 1136 (8th Cir. 1973).

96. *Id.* at 1137.

97. 477 F.2d 877 (9th Cir. 1973).

98. See *Scott v. Plante*, 532 F.2d 939, 946-47 (3d Cir. 1976); *Souder v. McGuire*, 423 F. Supp. 830, 832 (M.D. Pa. 1976); *Pena v. New York Div. for Youth*, 419 F. Supp. 203, 207-10 (S.D.N.Y. 1976); *Nelson v. Heyne*, 355 F. Supp. 451, 455 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

gress the eighth amendment standard<sup>99</sup> but may still constitute impermissible invasions of first amendment and privacy rights. Moreover, carefully crafted programs could be designed to appear less punishment-oriented and more therapeutic, thus making application of the eighth amendment questionable. In *Bell v. Wolfish*,<sup>100</sup> for example, the Supreme Court implied that the eighth amendment inquiry may turn not on the effect of the intervention, but on the intent with which it is administered. Although the Court agreed that, under the due process clause, a pretrial detainee may not be punished prior to an adjudication of guilt, it held that not every disability imposed during pretrial detention amounts to "punishment" within the meaning of the Constitution. In language that seems equally applicable in the eighth amendment context, the Court discussed what "punishment" means in the constitutional sense:

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose . . . . Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned [to it]." . . . Thus, if a particular condition or restriction . . . is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment . . . .<sup>101</sup>

By stressing their rehabilitative functions, a court, applying the *Wolfish* analysis, could find that aversive stimuli applied in a clinical behavior therapy program serve a legitimate governmental purpose other than punishment.<sup>102</sup> The Court's "purpose" approach, however, will not prevent even treatment procedures from being considered punishment when applied in prison disciplinary contexts—the purpose for which the procedure is used, not its effects, will be decisive.

Even if a technique is claimed to be for treatment purposes, however, certain potent aversive stimuli could be considered sufficiently excessive or severe, in relationship to the objectives of the rehabilitation program and in view of the

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99. See generally *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958).

100. 441 U.S. 520 (1979).

101. *Id.* at 538-39 (citations omitted).

102. Cf. Symonds, *Mental Patients' Rights to Refuse Drugs: Involuntary Medication as Cruel and Unusual Punishment*, 7 HASTINGS CONST. L.Q. 701, 717-22 (1980) (arguing that the eighth amendment should apply broadly to medical treatment involving inmates).

availability of other less drastic conditioners, to be deemed punishment for eighth amendment purposes. Lower federal courts in cases decided before *Bell v. Wolfish* have employed the eighth amendment's cruel and unusual punishment clause to condemn a variety of extreme practices that were sought to be justified as rehabilitation,<sup>103</sup> and the *Wolfish* opinion clearly leaves this possibility open. It is also possible that therapeutic approaches which are totally ineffective as treatment will be still considered punishment;<sup>104</sup> ineffective techniques are "arbitrary or purposeless" and "not reasonably related to a legitimate goal [other than punishment]," justifying an inference that the government's purpose was punishment.<sup>105</sup> In any event, these difficulties with applying the eighth amendment severely limit its utility as a source of constitutional restriction on correctional therapy.

Finally, the free exercise of religion clause may create a right to refuse treatments in at least some circumstances. In *Winters v. Miller*,<sup>106</sup> a Christian Scientist who objected to the administration of psychotropic medication at a state mental hospital to which she had been involuntarily committed was held entitled to bring a damages action for violation of her right to freedom of religion under the first amendment. A similar claim by a prisoner was rejected, however, when the plaintiff failed to demonstrate that he was a sincere adherent of an established religion that prohibited the use of such drugs.<sup>107</sup> Thus, important as this right may be, the broad scope of prisoners' rights will not turn on the free exercise clause.

### III. THE RIGHT TO REFUSE TREATMENT EXAMINED

It is neither helpful nor appropriate to analyze rehabilitation techniques by postulating a broad right to refuse treatment. Although the various forms of rehabilitation may present certain common legal questions, they differ in ways that are significant to constitutional analysis. Certain rehabilitation techniques, for example, may implicate first amendment

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103. See note 98 *supra*. See also *Knecht v. Gillman*, 488 F.2d 1136, 1139 (8th Cir. 1973); *Vann v. Scott*, 467 F.2d 1235, 1240-41 (7th Cir. 1972); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1365 (D.R.I. 1972).

104. See Schwitzgebel, *Limitations on the Coercive Treatment of Offenders*, 8 CRIM. L. BULL. 267, 305 (1972).

105. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

106. 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). *Accord*, *In re Boyd*, 403 A.2d 744 (D.C. 1979).

107. See *Sconiers v. Jarvis*, 458 F. Supp. 37, 40 (D. Kan. 1978).

or privacy rights but not other constitutional guarantees. Some may not present sufficient physical or mental intrusion to violate any constitutional prohibition, but may nonetheless require that some kind of hearing or other procedure be afforded before they may be applied.<sup>108</sup> For constitutional purposes, a certain threshold of intrusiveness may be posited that must be exceeded before the various constitutional rights come into consideration. Different thresholds, defined by reference to the nature and effects of the technique used, may be necessary to trigger different constitutional provisions.

#### A. A CONTINUUM OF INTRUSIVENESS

It is useful to construct a continuum of intrusiveness along which the various rehabilitative techniques may be roughly classified. Only at certain points on the continuum will certain of the constitutional provisions be implicated. Even for these techniques that present sufficient intrusiveness to merit constitutional consideration, there may be instances in which the governmental interest is sufficiently important to outweigh the offender's assertion of a constitutional right to resist treatment. If a therapy invades a fundamental right, the government may also have to satisfy the "least restrictive alternative" principle, which in this context would require demonstration that the proposed therapy is generally necessary to accomplish a compelling governmental interest and that no less intrusive alternative exists.<sup>109</sup>

In constructing a continuum of treatments, the key variables are the extent of physical or mental intrusion accompanying application of the technique; the nature, extent, and duration of the treatment's effects; and the extent to which these effects may be avoided or resisted by unwilling subjects.<sup>110</sup> Although the continuum will provide a general frame-

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108. See text accompanying notes 317-476 *infra*.

109. See notes 238-68 *infra* and accompanying text.

110. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 911-12 (1978); Shapiro, *supra* note 24, at 262; Note, *supra* note 10, at 619-20. A partial but by no means exhaustive list of the therapeutic characteristics or effects that seem relevant to the inquiry—having in common perhaps no more than that, in varying degrees, reasonable subjects would find them repugnant—includes the extent to which the technique (a) causes pain; (b) produces harmful side effects of any kind; (c) causes irreversible organic damage; (d) invades bodily or psychological privacy; (e) involves deprivations of amenities to which the subject is usually entitled; (f) involves procedures that are perceived as embarrassing or degrading; and (g) produces annoyance, frustration, anger, fear, anxiety or boredom. Needless to say, some of these features will be perceived as more repugnant than others, and the degree of repugnance will vary with the specific

work for analyzing the constitutional issues, it will be rather rough and oversimplified since the placement of any particular therapy may turn on empirical questions concerning the effects of the technique and the ability of the offender to resist these effects—questions that remain in some cases unresolved, untested, or perhaps untestable. Moreover, the ranking of therapies along the continuum requires value judgments concerning which effects are more or less offensive both to the relevant constitutional values and to the individual offender. Nevertheless, for purposes of analyzing whether a particular therapy creates a sufficient threshold of intrusiveness to implicate a fundamental constitutional right, judges will have to weigh these considerations on as objective a scale as is possible. Once such a threshold has been found to be met, however, the subjective value preferences of individual offenders will become significant in applying the least restrictive alternative principle.<sup>111</sup>

The necessary categorization of therapies is itself problematic. Traditional categories are used for purposes of simplification, but these categories may contain treatments with varying degrees of intrusiveness. For example, some of the behavioral techniques can be viewed as more intrusive than some of the psychotropic medications; others can be viewed as less intrusive than most forms of verbal therapy. Thus, because the broad categories below substantially overlap, attention should be focused on the effects of the particular technique employed rather than on its place within a general therapeutic category.

### 1. *Verbal Rehabilitative Techniques*

This lower end of the intrusiveness continuum is comprised of the most common rehabilitative approaches—educational or vocational programs, counselling, and individual or group psychotherapy. The focus of these techniques is some kind of verbal or nonverbal communication between the offender and a teacher, counselor, or therapist. Although these techniques may create substantial opportunities for offenders who seek to change their behavior, those who seek to resist such interventions, but who must participate on an involuntary

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nature of the technique applied, the duration of its effects, and the individual value preferences of the subject. The term "intrusiveness" is thus a stipulated term intended to capture a roughly weighted sum of these features, and is accordingly an inherently inexact measure that will vary with individual value preferences and the assessments of judges and other decision-makers.

111. See text accompanying notes 219-23, 238-68 *infra*.

basis, seem readily able to frustrate these approaches and avoid their effects simply by withholding cooperation.

Even psychotherapy, which may have a massive impact on a patient's mental processes and can be used as a potent means of behavior control,<sup>112</sup> tends to work slowly, affording the patient time to contemplate the meaning of behavior change and to accept or resist such change.<sup>113</sup> There is wide agreement that psychotherapy is usually not effective unless the patient participates voluntarily and genuinely seeks change.<sup>114</sup> This view was confirmed for correctional psychotherapy by a recent review of thirteen studies of psychotherapy in institutional and community settings, which concluded that such therapy is more likely to be effective "when the subjects are amenable to treatment rather than nonamenable."<sup>115</sup> Moreover, even a generally cooperative patient can avoid the gradual effects of therapy with a minimal degree of mental resistance: "[I]n the psychotherapy scheme one may go through treatment as a form of game playing, such as showing up for appointments and even making verbal utterances, in the absence of the type and degree of commitment required for a meaningful therapeutic relationship."<sup>116</sup>

Certainly if a patient in psychotherapy can resist or avoid the effects of this technique at will, an offender can even more easily avoid the intrusions of the general "counseling" provided by counselors who lack the professional abilities of one administering "psychotherapy." Educational and vocational programs are no more effective or intrusive for those disinterested in learning. In fact, much inmate participation in educational programs may be motivated by little more than the desire to "chalk-up attendance marks so as to satisfy The Man on the Pa-

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112. See Rogers & Skinner, *Some Issues Concerning the Control of Human Behavior*, 124 SCI. 1057, 1063 (1956).

113. See Halleck, *Legal and Ethical Aspects of Behavior Control*, 131 AM. J. PSYCH. 381, 381 (1974); see generally Michels, *Ethical Issues of Psychological and Psychotherapeutic Means of Behavior Control: Is the Moral Contract Being Observed*, 3 HASTINGS CENTER REP. 11 (April 1973).

114. See N. MORRIS, *supra* note 1, at 17; Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 776-77 (1969). A recent review of studies involving involuntarily committed patients, juvenile offenders, and adult prisoners subjected to psychotherapy concluded that "the evidence for the effectiveness of traditional psychotherapeutic methods for the reduction of antisocial behavior is not very persuasive." Schwitzgebel, *The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936, 946 (1974).

115. D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 2, at 213.

116. COMM. ON PSYCHIATRY & LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30s TO THE 80s* 889 (1977).

role Board."<sup>117</sup>

Even the strong verbal exhortation of prison inmates, bordering on threats of physical abuse and typical of direct confrontation-style programs, such as the Juvenile Awareness Project at Rahway State Prison portrayed in the film "Scared Straight", are within the complete power of the listener to accept or reject.<sup>118</sup> Prison confinement may itself produce profound changes in attitude and behavior. Nevertheless, confinement alone, whatever its effects on mental processes, is not thought to violate the first amendment or other constitutional guarantees.<sup>119</sup> This is so in part for reasons that apply as well to verbal rehabilitative approaches—the changes in attitude and behavior they produce, if any, are gradual and capable of being resisted.

We speak of prisoners who "take advantage" of these rehabilitative programs, implying that the choice is largely voluntary. Although the presumed rewards of participation may be difficult to resist, participation in verbal rehabilitative efforts does not ensure accomplishment of program goals, particularly for those prisoners for whom participation is a mere facade.<sup>120</sup> Thus, even if the rewards appear to coerce participation, the prisoner is still free to reject any substantial intrusion or permanent change in his or her mental processes.

Only two reported decisions have involved challenges to the involuntary application of purely verbal techniques; both suits arose from compulsory attendance at prison education classes in Arkansas. In *Rutherford v. Hutto*,<sup>121</sup> the prisoner claimed compulsory attendance violated rights protected by the first amendment and constituted cruel and unusual punishment in violation of the eighth amendment. The prison school required eight hours of attendance one day a week; classes

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117. STRUGGLE FOR JUSTICE, *supra* note 1, at 45.

118. Two evaluations of the Juvenile Awareness Project bear out this observation. J. Finckenhauer & J. Storti, Juvenile Awareness Project Help: Evaluation Report No. 1 (1979) (unpublished); J. Finckenhauer, Juvenile Awareness Project Evaluation Report No. 2 (April 18, 1979) (unpublished). Completed under the auspices of the Rutgers University School of Criminal Justice, the evaluations compared attitude and behavior changes in a group of juveniles who had attended the Project with a control group who had not. The results were mixed, with no significant changes in attitude or behavior shown conclusively to be due to participation in the Project. Thus it would seem that the participants were able to accept or reject what the program offered, with no profound changes occurring in participants.

119. See L. TRIBE, *supra* note 110, at 911.

120. STRUGGLE FOR JUSTICE, *supra* note 1, at 97-98.

121. 377 F. Supp. 268 (E.D. Ark. 1974).

were ungraded, and students were permitted to move along at their own pace. The court noted that "no particular pressure [is] put on any student to achieve or to achieve at any particular rate. No sanctions are imposed if a student performs poorly."<sup>122</sup> Although it noted that an inmate "cannot be forced to learn," the court concluded that the state may "lead the horse to water even though it knows that the horse cannot be made to drink."<sup>123</sup> In view of the state's authority to compel the performance of uncompensated labor, the court could find nothing constitutionally objectionable in compelling participation in the school program. Declaring there is no "constitutional right to be ignorant" or "to remain uneducated," the court rejected the prisoner's constitutional challenge.<sup>124</sup>

In the second Arkansas prison education case, *Jackson v. McLemore*,<sup>125</sup> a prisoner was placed in segregated confinement for refusing his teacher's order to spell certain words. The district court dismissed the complaint, which had asserted a "constitutional right to be let alone," and the Court of Appeals for the Eighth Circuit affirmed.<sup>126</sup> Expressing agreement with the approach taken in *Rutherford*, the circuit court stressed that "[i]t would defeat the purpose of rehabilitation if access to [rehabilitative] programs could be at the option of the prisoner."<sup>127</sup> The court limited its holding to the type of rehabilitative program before it, however, finding that no showing had been made that the program was "being purposefully used to infringe upon protected constitutional rights."<sup>128</sup> Moreover, the court indicated that although a prisoner may be required to participate in the school program, a prisoner "may not be punished simply because he failed to learn, either through inability or lack of motivation."<sup>129</sup>

A 1952 Supreme Court case, involving a captive audience of a quite different kind, suggests that unwanted verbal exhorta-

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122. *Id.* at 271.

123. *Id.* at 272.

124. *Id.*

125. 523 F.2d 838 (8th Cir. 1975).

126. *Id.* at 840.

127. *Id.* at 839.

128. *Id.* Although not mentioned by the court, one constitutional limitation on such programs and general rehabilitation efforts would prohibit offenders from being required to affirm their belief in any officially held view on a matter of religion, politics, or opinion. See *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977); *Abington School Dist. v. Schempp*, 374 U.S. 203, 222-24 (1963); *Engel v. Vitale*, 370 U.S. 421, 425, 435 (1962); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

129. 523 F.2d at 839.

tions may not create constitutional difficulties.<sup>130</sup> A transit company regulated by an agency of the District of Columbia installed FM radios in its buses and streetcars, and broadcast special programs consisting of 90% music, 5% news, and 5% commercial advertising. Two passengers protested in the federal courts, but the Supreme Court rejected their claim that, as captive auditors, their first amendment or fifth amendment privacy rights had been violated.<sup>131</sup> Although public buses and public prisons have little in common, the effects of mandatory "verbal programming," in terms of the listener's ability to resist, are nonetheless substantially similar.

Thus, it may be concluded that the typical prison or community rehabilitative program involving largely verbal approaches violates neither a first amendment right to be free of interference with mental processes nor a due process right to privacy. Of course, if new verbal techniques are developed that are so sophisticated in their application that mental processes and attitudes may be changed without the subject's cooperation, the analysis would probably differ. The typical verbal program will also fail to violate the eighth amendment, both because such programs do not seem to be "punishment,"<sup>132</sup> and

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130. *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952).

131. *Id.* at 461-63. The dissent emphasized the "right to be left alone" and contended that subjecting a captive audience to the radio program violated its right to privacy:

The present case involves a form of coercion to make people listen. . . .

. . . .

One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and try *not* to listen.

When we force people to listen to another's ideas, we give the propagandist a powerful weapon.

*Id.* at 468-69 (Douglas, J., dissenting). The prisoner is certainly more of a captive audience than the streetcar passenger who is always free to leave the streetcar if he finds the radio message offensive. Yet the Supreme Court has more recently recognized that even the radio listener at home, whom Mr. Justice Douglas noted was free to turn off an offensive program, may have his privacy invaded by the mere fact of the program's broadcast:

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away from the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

*FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978).

132. *Friedman, supra* note 72, at 63. *See, e.g., Price v. Sheppard*, 307 Minn.

because, even if considered punishment, these approaches would not qualify as "cruel and unusual": they are not "so bad as to be shocking to the conscience of reasonably civilized people."<sup>133</sup>

Finally, although religious objections to participation in such programs may present closer questions, successful challenges on these grounds will be rare. The offender must be opposed to the verbal program on genuinely religious grounds, not merely philosophical or personal ones, and must demonstrate both the sincerity of his or her beliefs and that they are essential to the practice of the religion involved.<sup>134</sup>

## 2. Behavioral Techniques

Somewhat higher on the continuum of intrusiveness than the verbal techniques are the behavioral approaches that are being utilized with increasing frequency in prison and community-based programs. Behavior therapy, often called behavior modification, involves clinical application of experimentally derived principles of psychological learning theory, using systematic manipulation of the environment to teach adaptive behavior or modify maladaptive behavior.<sup>135</sup> Although still controversial, behavioral approaches are now in wide use in a variety of institutional and noninstitutional settings and show considerable promise in the treatment of diverse problems.<sup>136</sup>

Behavioral approaches include positive reinforcement—the provision of rewards or reinforcers on the occurrence of behav-

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250, 255-56, 239 N.W.2d 905, 909 (1976) (unconsented electroconvulsive therapy administered for treatment would not constitute punishment for eighth amendment purposes). See text accompanying notes 100-01 *supra*.

133. See *Holt v. Sarver*, 309 F. Supp. 362, 372-73 (D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

134. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (holding that, in view of the central role of religion in Amish belief, Amish had right to keep their children out of a compulsory school program); *L. TRIBE, supra* note 110, at 859-65. Compare *Winter v. Miller*, 446 F.2d 65 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971) with *Sconiers v. Jarvis*, 458 F. Supp. 37 (D. Kan. 1978).

135. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, BEHAVIOR MODIFICATION: PERSPECTIVES ON A CURRENT ISSUE 3 (1975); Brady, *Behavior Therapy*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1824 (A. Freedman, H. Kaplan & B. Sadock eds. 2d ed. 1975) [hereinafter cited as COMPREHENSIVE TEXTBOOK]; Shah, *Basic Principles and Concepts*, in CORRECTIONAL CLASSIFICATION AND TREATMENT 123, 129-32 (Am. Correctional Ass'n Comm. on Classification & Treatment 1975).

136. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 3. See also RESEARCH TASK FORCE OF THE NAT'L INST. OF MENTAL HEALTH, RESEARCH IN THE SERVICE OF MENTAL HEALTH 325-26 (1975) (discussing the increase in behavior modification research and training).

ioral responses sought to be established or strengthened;<sup>137</sup> aversion therapy—the application of unpleasant stimuli on the occurrence of inappropriate or maladaptive behavior;<sup>138</sup> systematic desensitization—an attempt to reduce maladaptive anxiety reactions by gradually exposing the patient to the anxiety-generating situation paired with relaxation;<sup>139</sup> as well as a variety of other techniques.

Two of the positive reinforcement techniques, the token economy<sup>140</sup> and the tier system,<sup>141</sup> have been used frequently in adult and juvenile institutions as well as in alternative community-based programs. In the token economy, the subject receives tokens as rewards for instances of desired behavior and the tokens may be exchanged for various items or privileges that otherwise are unavailable. Inappropriate behavior results in the loss of tokens. A 1974 survey revealed that 14 states utilized token economy systems in their prisons.<sup>142</sup> The Federal Bureau of Prisons has also used token economies in the treatment of delinquents at two of its facilities.<sup>143</sup>

A variation on the token economy, the tier system, grants privileges on the basis of the prisoner's place in a system of tiers. The inmate earns his or her way from an orientation level, where privileges are scant or nonexistent, upwards

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137. See A. BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* 217-92 (1969); B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 4-6.

138. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 6-8; S. RACHMAN & J. TEASDALE, *AVERSION THERAPY AND BEHAVIOR DISORDERS: AN ANALYSIS* xii (1969).

139. See A. BANDURA, *supra* note 137, at 424-500; B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 8-9.

140. See generally T. AYLLON & N. AZRIN, *THE TOKEN ECONOMY, A MOTIVATIONAL SYSTEM FOR THERAPY AND REHABILITATION* (1968); A. KAZDIN, *THE TOKEN ECONOMY: A REVIEW AND EVALUATION* (1977); Wexler, *supra* note 83.

141. See *Clonce v. Richardson*, 379 F. Supp. 338, 344 (W.D. Mo. 1974) (project START); Carlson, *Behavior Modification in the Federal Bureau of Prisons*, 1 NEW ENG. J. PRISON L. 155, 159-63 (1974); Wexler, *supra* note 83, at 87-88.

142. See Blatte, *State Prisons and the Use of Behavior Control*, 4 HASTINGS CENTER REP. 11 (Sept. 1974). See generally Geller, Johnson, Hamlin & Kennedy, *Behavior Modification in a Prison*, 4 CRIM. JUST. & BEHAVIOR 11 (1977); Milan & McKee, *The Cellblock Token Economy: Token Reinforcement Procedures in a Maximum Security Correctional Institution for Adult Male Felons*, 9 J. APPLIED BEHAVIOR ANALYSIS 253 (1976); Petrock & Walter, *Behavior Modification in Corrections: Implications for Organizational Change*, 1 NEW ENG. J. PRISON L. 203 (1974).

143. See Carlson, *supra* note 141, at 158-59. A community-based residential treatment home for court-involved delinquents in Kansas-Achievement Place, which utilizes a token economy and other behavioral procedures, has been widely copied. See Phillips, Phillips, Fixsen & Wolf, *Achievement Place: Modification of the Behaviors of Pre-delinquent Boys Within a Token Economy*, 4 J. APPLIED BEHAVIOR ANALYSIS 45 (1971).

through a ranked series of tiers with increasingly more desirable privileges and conditions. This model was utilized in the controversial Federal Bureau of Prisons' Project START. In that program the prisoners at entry level were denied such basic privileges as daily showers, exercise, visitors, reading matter, personal property and commissary privileges—all of which could be regained only by behaving in conformity with program goals.<sup>144</sup> Project START, although discontinued by the Federal Bureau of Prisons, is being used as a model for other prison programs.<sup>145</sup>

A 1974 survey indicated that at least seven state prison systems used aversive conditioning in their corrections therapy.<sup>146</sup> More extreme examples have been the use of succinylcholine, a paralyzing drug, in a California prison program,<sup>147</sup> and a program for child molesters in a Connecticut prison which paired electric shocks to the prisoner's groin area with arousal experienced while viewing slides of naked children.<sup>148</sup> Thus, concern related to behavioral approaches is not speculative. Token economy programs, tier programs, and aversive conditioning programs have been applied on an involuntary basis in prisons and community settings, and some commentators have urged their increased use on a coercive basis for offenders, arguing that by violating the law, the offender has forfeited any right to an "antisocial personality."<sup>149</sup>

To classify these behavioral techniques on the continuum of intrusiveness, one must consider the extent of physical or mental intrusions accompanying their application; the nature, extent, and duration of their effects; and the extent to which these effects may be resisted by unwilling subjects.<sup>150</sup> Yet proper classification is particularly difficult because behavioral

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144. See *Clonce v. Richardson*, 379 F. Supp. 338, 344 (W.D. Mo. 1974); Carlson, *supra* note 141, at 159-63. Because the reinforcer frequently used in the tier program is the removal of unpleasant conditions, it may more aptly be termed a program of negative reinforcement. See Shah, *supra* note 135, at 128. Another controversial program using a tier system is Maryland's Patuxent Institute for "defective delinquents." *Editors Commentary to Patuxent Institute*, 5 BULL. AM. ACAD. PSYCH. & L. v-vi (1977) (symp. issue).

145. See Gaylin & Blatte, *Behavior Modification in Prisons*, 13 AM. CRIM. L. REV. 11, 25 (1975).

146. Blatte, *supra* note 142, at 11.

147. See *Mackey v. Procunier*, 477 F.2d 877, 877-78 (9th Cir. 1973).

148. See Wolfe & Marino, *A Program of Behavior Treatment for Incarcerated Pedophiles*, 13 AM. CRIM. L. REV. 69, 77-78 (1975).

149. McConnell, *Stimulus/Response: Criminals Can be Brainwashed—Now*, 3 PSYCH. TODAY 14, 74 (Nov. 1970).

150. See note 110 *supra* and accompanying text.

techniques differ substantially in regard to these factors. Some aversive techniques, such as the use of drugs that cause nausea or apnea, or electric shocks, involve direct, substantial physical intrusion. Other techniques, however, such as forfeiture of privileges, verbal disapproval, or isolated confinements, are not at all physically intrusive. The techniques utilizing positive reinforcement do not involve physical intrusions, nor do they present serious mental intrusions any greater than, for example, psychotherapy.<sup>151</sup>

The effects of behavioral techniques are the first point for analysis, particularly in terms of the extent and duration of their impact on subjects. Although the empirical evidence is far from clear, a large number of case studies report strikingly high success rates with behavioral techniques in the treatment of a wide variety of conditions.<sup>152</sup> As with psychotherapy, however, there is evidence that behavioral treatment works only with cooperative patients and that successful treatment cannot be forced on patients against their will.<sup>153</sup> Although conditioning techniques are frequently portrayed as having the dramatic power to induce change automatically without the cooperation of the subject,<sup>154</sup> these techniques do not in fact have such powerful effects.

Rather than occurring automatically, conditioning is now thought to be "cognitively mediated." Albert Bandura, a leading behaviorist, has dispelled the "mechanistic metaphor" long associated with the process of conditioning:

Explanations of reinforcement originally assumed that consequences increase behavior without conscious involvement. The still prevalent notion that reinforcers can operate insidiously arouses fears that improved techniques of reinforcement will enable authorities to manipulate people without their knowledge or consent. Although the empirical issue is not yet completely resolved, there is little evidence that rewards function as automatic strengtheners of human conduct . . . . After individuals discern the instrumental relationship between action and outcome, contingent rewards may produce accommodating or oppositional behavior depending on how they value the incentives, the influencers and the behavior itself, and how others respond. Thus reinforcement, as it has become better understood, has changed from a mechanical strengthener of conduct to an informative and motivating

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151. See R. SCHWITZGEBEL, *LEGAL ASPECTS OF THE ENFORCED TREATMENT OF OFFENDERS* 66 (1979) (contending that behavioral techniques are less intrusive on mental processes than the verbal techniques).

152. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 10-11.

153. See E. ERWIN, *BEHAVIOR THERAPY: SCIENTIFIC, PHILOSOPHICAL, AND MORAL FOUNDATIONS* 180-81 (1978); Marks, *The Current Status of Behavioral Psychotherapy: Theory and Practice*, 133 AM. J. PSYCH. 253, 255 (1976).

154. See, e.g., A. BURGESS, *A CLOCKWORK ORANGE* (1963).

influence.<sup>155</sup>

Reinforcers, then, may be regarded as "motivators," depending for their success on the "incentive preferences of those undergoing change."<sup>156</sup> Certainly there are reinforcers so desirable and aversive stimuli so unpleasant that few would feel able to resist, whatever their incentive preferences. However, correctional programs are not likely to use aversive stimuli so distressing that offenders will find it impossible to avoid behavior change—particularly after the strongly negative publicity surrounding the abuses involved in recent cases and the consistent judicial condemnation of these practices in prison aversive programs.<sup>157</sup>

More politically palatable positive reinforcement methods are more likely to be used. Certainly some inmates may find some of these reinforcements too tantalizing to resist—color TV, air conditioning, better physical conditions, monetary rewards, or the approval of the parole board, for example. Yet it is doubtful that these inducements to change would trigger constitutional condemnation. Society outside of prisons is pervaded by governmental incentives designed to induce a variety of behaviors.<sup>158</sup> Even within the prison, inmates are granted credit toward parole for good conduct and participation in rehabilitative programs as "a tangible reward for positive efforts made during incarceration."<sup>159</sup> Although in each case rewards are provided by the government with the explicit purpose of inducing or reinforcing certain behavior, few would contend that these positive reinforcements jeopardize constitutional privacy or first amendment freedom of thought.<sup>160</sup> Although the use of reinforcers in a structured behavior modification program may induce behavior change more effectively than outside such an environment, it is difficult to see how an offender who decides

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155. Bandura, *Behavior Therapy and the Models of Man*, 29 AM. PSYCH. 859, 860 (1974).

156. *Id.* at 862.

157. See, e.g., *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973).

158. To note just a few of these incentives, businessmen are offered an investment tax credit, and army recruits are given bonuses and other incentives to induce their enlistment.

159. 17 N.Y.C.R.R. § 260.1(a) (1974).

160. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

*Mahe v. Roe*, 432 U.S. 464, 475-76 (1977).

to alter behavior in order to obtain a color TV or other reward could argue that any constitutional rights have been violated—at least where the rewards are not those basic rights or privileges that are constitutionally guaranteed to all.<sup>161</sup> Moreover, there is considerable evidence that whatever effects positive reinforcement may have, these effects are short-lived, and perhaps restricted to the controlled clinical setting in which conditioning occurs.<sup>162</sup>

Positive reinforcement procedures involving substantial entry-level deprivations may merit different treatment, however. Token economies and tier systems, for example, sometimes make basic personal requirements available contingent upon behavior that conforms with program goals.<sup>163</sup> Recent decisions which hold that the Constitution requires minimum conditions and standards for prisoners,<sup>164</sup> severely limit the use of these basic rights and privileges as reinforcers in positive reinforcement programs. Moreover, administrative regulations, such as those of the Federal Bureau of Prisons specifying minimum conditions and privileges for prisoners,<sup>165</sup> may also render such reinforcers legally unavailable in token or tier programs.

Thus, although positive reinforcement techniques may be more difficult to resist than those employing only verbal approaches, they do not appear to work in such a direct and intru-

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161. See notes 150-51 *supra* and accompanying text. Where token economies or tier programs start offenders off in a situation of severe deprivation that may be remedied only by behavior in conformity with program goals, the reinforcers used may indeed be irresistible. See Shah, *supra* note 135, at 127 ("[T]he old saying that you can take a horse to water but you cannot get him to drink, is not necessarily correct. If the horse were fed salt, or allowed to stand in the sun and went without water for a while, one could indeed get him to drink.").

162. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 7; Gruber, *Behavior Therapy: Problems in Generalization*, 2 BEHAVIOR THERAPY 361, 361-78 (1971). This is particularly true for offenders released in a community in which the contingencies of reinforcement are quite different from those within the prison or community setting in which they were conditioned. See Budd & Baer, *Behavior Modification and the Law: Implications of Recent Judicial Decisions*, 4 J. PSYCH. & L. 171, 205 (1976).

163. See Wexler, *supra* note 83, at 84-90.

164. *E.g.*, James v. Wallace, 533 F.2d 963 (5th Cir. 1976). See Wexler, *supra* note 83, at 93-95. An offender wishing to participate in a behavioral program involving the use of basic rights or privileges as reinforcers, provided the conditions of informed consent are satisfied, should, however, be able to waive his or her right to resist such a program and consent to at least the temporary withholding of such privileges. See notes 269-315 *infra* and accompanying text. See also Budd & Baer, *supra* note 162, at 205.

165. 28 C.F.R. §§ 540-551 (1979).

sive fashion as to deprive the offender of effective control over his or her own behavior. In view of the ability of the subject to resist behavioral approaches that utilize positive reinforcement, it seems unlikely that application of these techniques without the offender's consent will be found to violate either the first amendment right to be free of interference with mental processes or the right of privacy. Nor could these techniques be viewed as involving cruel and unusual punishment.

The aversive techniques present greater difficulties. First, some of the aversive techniques may inflict serious damage on patients, including "pain, frustration, increased aggressiveness, arousal, general and specific anxieties, somatic and physiological malfunctions, and development of various unexpected and often pathological operant behaviors."<sup>166</sup> An extreme example is use of the drug succinylcholine in an aversive conditioning program, which was condemned in *Mackey v. Procunier*.<sup>167</sup> The drug, characterized as a "breath-stopping and paralyzing 'fright drug,'" resulted in the prisoner-subject regularly suffering "nightmares in which he relives the frightening experience and awakens unable to breathe."<sup>168</sup> These allegations of mental intrusion and effect were sufficient for the court to rule that the prisoner's complaint raised serious constitutional questions of "impermissible tinkering with the mental processes."<sup>169</sup>

Several aversive techniques could constitute cruel and unusual punishment<sup>170</sup> inasmuch as some of them are identical to prohibited punitive sanctions. Social isolation, for example, is the functional equivalent of the strip-rooms and solitary confinement condemned as violating the eighth amendment in a number of cases.<sup>171</sup> Administration of electric shocks to the body, sometimes used in aversive programs, also has been considered cruel and unusual when used for prison discipline.<sup>172</sup> The mild slapping used in some aversive programs seems little

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166. Bucher & Lovas, *Use of Aversive Stimulation in Behavior Modification*, in MIAMI SYMPOSIUM ON THE PREDICTION OF BEHAVIOR, 1967: AVERSIVE STIMULATION 77, 78 (M. Jones ed. 1968).

167. 477 F.2d 877 (9th Cir. 1973). See note 97 *supra* and accompanying text.

168. 477 F.2d at 877.

169. *Id.* at 878.

170. See Note, *Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment*, 49 S. CAL. L. REV. 880 (1976).

171. See, e.g., *LaReau v. MacDougal*, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); *Gates v. Collier*, 349 F. Supp. 881, 894-95 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); *Inmates of Boys Training School v. Afleck*, 346 F. Supp. 1354, 1366-67 (D.R.I. 1972); *Landman v. Royster*, 333 F. Supp. 621, 648 (E.D. Va. 1971).

172. See, e.g., *Gates v. Collier*, 349 F. Supp. 881, 900 (N.D. Miss. 1972), *aff'd*,

different than the corporal punishment held to be cruel and unusual punishment in prison and juvenile cases.<sup>173</sup> Some of these techniques are thus sufficiently offensive to prevailing standards of decency to implicate eighth amendment concerns. However, if employed for therapeutic or rehabilitative purposes, they may not, under the Supreme Court's approach in *Bell v. Wolfish*,<sup>174</sup> be considered "punishment" in the constitutional sense, at least if not considered excessive in view of the availability of less drastic conditioners.

Except for use of these extremely intrusive stimuli, however, aversive techniques generally are like the other behavioral and even verbal approaches. For example, aversive techniques seem ineffective with uncooperative subjects.<sup>175</sup> Although changes in behavior of brief duration may be accomplished through these techniques by inducing the cooperation of the offender, absent the offender's willingness, there is little evidence that such changes will persist outside the coercive setting.<sup>176</sup> Any behavioral changes accomplished against the offender's will are thus impermanent and reversible. In this respect, the behavioral approaches are quite distinct from the more direct, physically and mentally intrusive organic techniques, which do not depend for their effects on the subject's cooperation.

Although some of the techniques may involve intrusions on privacy, mere discomfort not involving bodily intrusion has been found insufficient to implicate the fundamental right of privacy in a related context. In *Bell v. Wolfish*,<sup>177</sup> the Supreme Court rejected a due process challenge to the practice of "double-bunking" in pretrial detention, noting that "the detainee's desire to be free from discomfort . . . simply does not rise to the level of those fundamental liberty interests delineated in [the Court's prior privacy cases]."<sup>178</sup> Moreover, most of

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501 F.2d 1291 (5th Cir. 1974); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

173. See, e.g., *Jackson v. Bishop*, 404 F.2d 571, 579-80 (8th Cir. 1968); *Nelson v. Heyne*, 355 F. Supp. 451, 454 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

174. 441 U.S. 520 (1979). See text accompanying notes 100-01 *supra*.

175. See Bandura, *The Ethical and Social Purposes of Behavior Modification*, in *ANNUAL REVIEW OF BEHAVIOR THERAPY: THEORY AND PRACTICE* 16 (C. Franks & G. Wilson eds. 1975); Note, *Aversion Therapy: Its Limited Potential for Use in a Correctional Setting*, 26 STAN. L. REV. 1327 (1974).

176. See B. BROWN, L. WIENCKOWSKI & S. STOLZ, *supra* note 135, at 14.

177. 441 U.S. 520 (1979).

178. *Id.* at 530.

these techniques, even if somewhat unpleasant, simply do not invade the individual's freedom of thought or interfere with mental processes in any irresistible, pervasive, or permanent fashion.

Thus, both the more drastic aversive conditioners and the use of basic rights and privileges as positive reinforcers appear to be so intrusive of fundamental liberties that their constitutionality is doubtful. With these exceptions, however, rehabilitative programs employing behavioral techniques do not seem significantly more intrusive than verbal techniques, absent the development of sophisticated approaches able to effect behavioral and attitudinal change without the willingness of the subject.

### 3. *Organic Techniques*

Far more intrusive than the behavioral or verbal techniques are the organic therapies, characterized by direct physical intervention into the body of the subject and by effects that are incapable of being resisted.<sup>179</sup> In ascending order of intrusiveness, these organic techniques include medication, electroconvulsive therapy, electronic stimulation of the brain, and surgical interventions such as castration for sex offenders and psychosurgery.

#### a. Psychotropic Medication

Virtually all prison rehabilitative programs using medication have involved the use of psychotropic drugs—compounds affecting the mind, behavior, intellectual functions, perception, moods, and emotions of the subject.<sup>180</sup> One survey of correctional treatment studies reveals programs that have used stimulants (dextro-amphetamine); antipsychotic drugs or “major tranquilizers” (trifluoroperazine/Stelazine); antidepressant drugs (nortriptyline/Aventyl); and other antianxiety drugs or “minor tranquilizers” (diazepam/Valium).<sup>181</sup> The coercive and at times punitive use of these drugs in prison and alternate settings has been documented in the literature,<sup>182</sup> in congressional

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179. See Katz, *supra* note 114, at 776-77; Shapiro, *supra* note 24, at 240-44.

180. See V. LONGO, NEUROPHARMACOLOGY AND BEHAVIOR 182 (1972).

181. D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 2, at 330, 479. For an analysis of the different categories of psychotropic drugs and their effects, see Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. BAR FOUNDATION RESEARCH J. 769, 774-89.

182. See J. MITFORD, *supra* note 10, at 129. See generally Bomstein, *The Forcible Administration of Drugs to Prisoners and Mental Patients*, 9 CLEARING-

studies,<sup>183</sup> and in cases.<sup>184</sup> Some commentators have even advocated the use of long-acting tranquilizers implanted beneath the skin of offenders—a means of “chemical incapacitation”—as an alternative to prison.<sup>185</sup>

Most of these drugs intrude directly on mental processes. Cognitive functions may be little affected once the subject has become habituated to<sup>186</sup> antipsychotic drugs, but in early periods of administration, the subject often experiences heavy sedation, clouding of consciousness, and impairment of judgment.<sup>187</sup> Moreover, antipsychotic drugs are frequently accompanied by toxic reactions and adverse side effects, some of which are quite serious and irreversible. These include autonomic reactions, disorders of the motor system (including tardive dyskinesia, a persistent neurological syndrome for which there is no known effective treatment), hypersensitivity reactions, reported cases of sudden death, sedation, convulsions, metabolic, and endocrinologic changes, and a variety of behavioral effects.<sup>188</sup> The antidepressant drugs produce similar, although less serious side effects.<sup>189</sup>

Thus, the primary and side effects of many of these drugs are both physically and mentally intrusive, occur rapidly, and

HOUSE REV. 379 (1975); Opton, *supra* note 10; Rundle, *The Dilemma of a Prison Doctor: Institution v. Ethics*, 2 HASTINGS CENTER REP. 7 (Nov. 1972); Sitnick, *Major Tranquilizers in Prison, Drug Therapy and the Unconsenting Inmate*, 11 WILLIAMETTE L.J. 378 (1975).

183. See, e.g., STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SEN. COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., *INDIVIDUAL RIGHTS AND THE FEDERAL ROLE IN BEHAVIOR MODIFICATION* (1974).

184. See, e.g., *United States ex rel. Wilson v. Coughlin*, 472 F.2d 100 (7th Cir. 1973); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

185. See Lehtinen, *Controlling the Minds and Bodies of Prisoners—Without Prisons*, 6 BARRISTER 11, 54 (Fall 1979); Lehtinen, *Technological Incapacitation: A Neglected Alternative*, 2 Q.J. CORRECTIONS 31, 35-36 (1978).

186. See Solow, *Drug Therapy of Mental Illness: Tranquilizers and Other Depressants*, in AN INTRODUCTION TO PSYCHOPHARMACOLOGY 289, 307 (R. Rech & K. Moore eds. 1971).

187. See Jarvik, *Drugs Used in the Treatment of Psychiatric Disorders*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 151, 167 (L. Goodman & A. Gilman eds. 1970); Winick, *supra* note 181, at 783.

188. See T. DETRE & H. JARECKI, MODERN PSYCHIATRIC TREATMENT 579-84 (1971); American College of Neuropsychopharmacology—Food and Drug Administration Task Force, *Neurological Syndromes Associated with Antipsychotic Drug Use: A Special Report*, 28 ARCHIVES GEN. PSYCH. 463 (1973); Davis & Cole, *Antipsychotic Drugs*, in COMPREHENSIVE TEXTBOOK, *supra* note 135, at 1921, 1933-34; Jarvik, *supra* note 187, at 165; Winick, *supra* note 181, at 782.

189. See T. DETRE & H. JARECKI, *supra* note 188, at 602-06; Cole & Davis, *Antidepressant Drugs*, in COMPREHENSIVE TEXTBOOK, *supra* note 135, at 1941, 1944-48; Jarvik, *supra* note 187, at 174-86; Winick, *supra* note 181, at 786-89.

are not capable of being resisted. Although the primary effects of the drugs may last only several hours or days, the side effects of some last much longer and in some cases are irreversible. Not surprisingly, patients frequently consider the side effects of at least some of these drugs highly unpleasant, painful, and debilitating.<sup>190</sup> Psychotropic drugs must for all of these reasons be considered more intrusive than the behavioral or verbal approaches. Since bodily integrity is directly invaded by forced medication in a way that cannot be considered de minimus, the fundamental constitutional right of privacy seems clearly implicated. Moreover, because these drugs by definition directly affect mental processes and intellectual functioning in a way incapable of being resisted, the first amendment right to be free of interference with mental processes is seriously invaded.

A number of cases involving civilly-committed mental patients support these constitutional implications by recognizing a constitutional right of competent patients to refuse psychotropic medication. The Court of Appeals for the Third Circuit has found that involuntary administration of antipsychotic medication may interfere with mental processes such that the patient's first amendment right to freedom of speech and association is violated.<sup>191</sup> Moreover, that court has suggested that under certain circumstances, the drugs may give rise to a claim under the eighth amendment's cruel and unusual punishment clause and may also violate a patient's constitutional "right to bodily privacy."<sup>192</sup> Another federal court, rejecting a first amendment claim on the ground that "if forced medication is otherwise proper, the temporary dulling of the senses accompanying it does not rise to the level of the First Amendment violations found in *Kaimowitz*," nevertheless found the constitutional right of privacy violated.<sup>193</sup> Other courts have found that the administration of medication over religious ob-

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190. See generally Van Putten, *Why do Schizophrenic Patients Refuse to Take Their Drugs?*, 31 ARCHIVES GEN. PSYCH. 67 (1974). See also T. DETRE & H. JARECKI, *supra* note 188, at 602-06; Jarvick, *supra* note 187, at 183-86; Winick, *supra* note 181, at 786.

191. Scott v. Plante, 532 F.2d 939, 946 (3d Cir. 1976). Accord, Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979) (the right to produce a thought), *aff'd in part*, 28 CRIM. L. RPTR. 2397 (1st Cir. 1980).

192. Scott v. Plante, 532 F.2d 939, 946 (3rd Cir. 1976).

193. Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978), *appeal docketed*, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980). Other courts have also found that voluntarily committed patients have a right to refuse treatment based on the constitutional right to privacy. See Davis v. Hubbard, No. C73-205 (N.D. Ohio 1980), summarized at 49 U.S.L.W. 2215 (1980); Rogers v. Okin, 478 F. Supp. 1342,

jections violates the first amendment right to free exercise of religion.<sup>194</sup> Finally, still other courts have held that the involuntary administration of psychotropic drugs violates the eighth amendment.<sup>195</sup> Clearly the punitive use of at least some of these drugs would seem offensive to eighth amendment values, although the use of minor tranquilizers such as valium may not reach eighth amendment proportions because the effects associated with such drugs are considerably less distressing and harmful.<sup>196</sup>

Thus, psychotropic medications are readily distinguishable from all of the verbal and most of the behavioral approaches. The drugs invariably represent physical invasions of the subject's bodily integrity, always effect a substantial change in the subject's state of mind, and seriously risk long-term if not permanent changes in the personality or other mental functions of the subject. Most importantly, when administered involuntarily, the effects and risks of these drugs are incapable of being resisted.

#### b. Electroconvulsive Therapy

Electroconvulsive therapy (ECT), frequently called electroshock therapy, involves the passage of an electrical current through the brain by means of electrodes applied to the patient's temples.<sup>197</sup> Muscle-relaxing drugs and anesthesia are

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1365-66 (E.D. Mass. 1979), *aff'd in part*, 28 CRIM. L. RPTR. 2397 (1st Cir. 1980); *In re K.K.B.*, 609 P.2d 747, 751-52 (Okla. 1980).

194. See, e.g., *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *In re Boyd*, 403 A.2d 744 (D.C. 1979). A number of earlier cases involving forced psychotropic medication had rejected constitutional challenges, broadly holding that administration of medical care over the objections of a prisoner did not violate the Constitution; these cases, however, arose in one federal district, which seemed to apply the now discredited "hands off" approach to prison litigation. See generally *Haynes v. Harris*, 344 F.2d 463 (8th Cir. 1965); *Smith v. Baker*, 326 F. Supp. 787 (W.D. Mo. 1970); *Ramsey v. Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970); *Peek v. Ciccone*, 288 F. Supp. 329 (W.D. Mo. 1968). See also *Sitnick*, *supra* note 182, at 389; note 74 *supra* and accompanying text. These cases generally have not been followed elsewhere.

195. See *Souder v. McGuire*, 423 F. Supp. 830, 832 (M.D. Pa. 1976); *Welsch v. Likins*, 373 F. Supp. 487, 502-04 (D. Minn. 1974), *aff'd in part & vacated in part*, 550 F.2d 1122 (8th Cir. 1977); *Nelson v. Heyne*, 355 F. Supp. 451, 455 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). See generally TASK FORCE ON ELECTROCONVULSIVE THERAPY, AMERICAN PSYCHIATRIC ASSOCIATION, ELECTROCONVULSIVE THERAPY (1978); *Symonds*, *supra* note 102.

196. See notes 186-89 *supra* and accompanying text. Of course under *Bell v. Wolfish*, 441 U.S. 520 (1979), when the purpose of drug administration is therapeutic rather than disciplinary, the eighth amendment will not apply. See notes 100-01 *supra* and accompanying text.

197. See T. DETRE & H. JARECKI, *supra* note 188, at 635-55; L. KALINOWSKY & P. HOCH, SOMATIC TREATMENTS IN PSYCHIATRY 128-207 (1961). See generally

administered, the patient loses consciousness, and then experiences electrically induced convulsions. After regaining consciousness, the patient remains in a state of confusion and disorientation for a period of time, and some patients claim persisting confusion and loss of memory.<sup>198</sup> Although the use of ECT is usually restricted to the treatment of severe psychiatric depression, it has been used in prison programs<sup>199</sup> and occasionally for punitive purposes.<sup>200</sup>

Coercive administration of ECT in prison and community programs raises serious constitutional issues. The technique is hazardous,<sup>201</sup> extremely intrusive both physically and mentally, and incapable of being resisted by unwilling subjects. Moreover, its side effects are distressing and, at least in some cases, memory is impaired in a way that may be irreversible.<sup>202</sup> As a result, ECT seems clearly more intrusive than the verbal therapies or behavioral approaches, and is probably more intrusive than at least most of the psychotropic drugs. An intrusion on

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PSYCHOBIOLOGY OF CONVULSIVE THERAPY (M. Fink, S. Kety, J. McGaugh & T. Williams eds. 1974).

198. Some confusion and loss of memory occurs in virtually all cases. See T. DETRE & H. JARECKI, *supra* note 188, at 641-44; Dornbush & Williams, *Memory and ECT*, in PSYCHOBIOLOGY OF CONVULSIVE THERAPY, *supra* note 197, at 199. See generally Harper & Wiens, *Electroconvulsive Therapy and Memory*, 161 J. NERVOUS & MENTAL DISEASES 245 (1975). Whether brain damage and permanent memory loss result from ECT is the subject of dispute. See RESEARCH TASK FORCE OF THE NAT'L INSTITUTE OF MENTAL HEALTH RESEARCH IN THE SERVICE OF MENTAL HEALTH 337 (1975); REPORT OF THE TASK PANEL ON RESEARCH, IV TASK PANEL REPORTS SUBMITTED TO THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 1761-62 (1978) [hereinafter cited as TASK PANEL REPORTS].

199. See D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 2, at 330.

200. See K. WOODEN, *WEeping in the Playtime of Others: America's Incarcerated Children* 147 (1976); DiSpaldo, *Arizona's 'Clockwork Orange' Bill*, N.Y. Times, June 20, 1974, at 39.

201. The risks and complications accompanying ECT have been greatly reduced by the use of muscle relaxing drugs, which prevent the violent muscular contractions that had, in the past, frequently led to bone fractures and dislocations. T. DETRE & H. JARECKI, *supra* note 188, at 640-41; Hurwitz, *Electroconvulsive Therapy: A Review*, 15 COMPREHENSIVE PSYCHIATRY 303, 305 (1974). However, ECT utilizing muscle relaxants presents risks including apnea, a temporary cessation of the breathing impulse some patients experience as a response to the drugs, chest-wall spasms, coughing, spasms of the larynx or the windpipe, aspiration of foreign matter into the lungs, cardiac irregularities, and allergic responses to the medication. Hurwitz, *supra*, at 305. These complications occur in only one out of every 2,600 treatments and are usually relatively benign; they result in fatality, however, in about one out of every 28,000 applications. T. DETRE & H. JARECKI, *supra* note 188, at 640; Hurwitz, *supra*, at 306 (table summarizing mortality studies). An additional risk is the development of psychotic symptoms, particularly for patients with schizoid or schizophrenic-disposing factors. See generally Elmore & Sugarman, *Precipitation of Psychosis During Electroshock Therapy*, 36 DISEASES OF THE NERVOUS SYSTEM 115 (1975).

202. T. DETRE & H. JARECKI, *supra* note 188, at 643.

the subject's constitutional right of bodily privacy is therefore unarguably presented, and in view of ECT's impact on mental processes and particularly on memory, this intrusion should implicate the first amendment as well. Moreover, the punitive use of ECT would raise serious problems under the eighth amendment. A number of cases contesting the involuntary use of ECT on mental patients have either banned ECT without informed consent or prescribed limitations and procedures governing its use.<sup>203</sup>

### c. Surgical Interventions

Treatment employing direct surgical intervention—electronic stimulation of the brain, psychosurgery, and castration for sex offenders, for example<sup>204</sup>—ranks highest on the continuum of intrusiveness. Although rarely applied in prisons or alternative settings, these techniques, if performed without the informed consent of the offender, pose serious constitutional difficulties.

#### (1) Electronic Stimulation of the Brain

Electronic stimulation of the brain (ESB) is a highly experimental technique that involves the surgical implantation of minute electrodes into the brain. When charged, these electrodes stimulate the brain in ways that are designed to induce desired, or inhibit undesired, behaviors and sensations.<sup>205</sup> Although this technique apparently has not as yet been used on prisoners, there have been reports of its therapeutic use with mental patients<sup>206</sup> and speculation as to its use in correctional rehabilitation and parole.<sup>207</sup> One commentator has even sug-

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203. See, e.g., *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Price v. Sheppard*, 307 Minn. 520, 239 N.W.2d 905 (Minn. 1976); *Doe v. Klein*, 143 N.J. Super. 134, 362 A.2d 1204 (1977); *New York City Health & Hosp. Corp. v. Stein*, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (S. Ct., N.Y. County 1972).

204. For discussion of another type of surgical intervention for offenders—plastic surgery—see Kurtzberg, Mandell, Lewin, Lipton & Shuster, *Plastic Surgery on Offenders*, in *JUSTICE AND CORRECTIONS* 688-700 (N. Johnston ed. 1978).

205. See generally J. DELGADO, *PHYSICAL CONTROL OF THE MIND: TOWARD A PSYCHOCIVILIZED SOCIETY* (1969); E. VALENSTEIN, *BRAIN CONTROL: A CRITICAL EXAMINATION OF BRAIN STIMULATION AND PSYCHOSURGERY* (1973).

206. See Heath, *Modulation of Emotion with a Brain Pacemaker*, 165 J. NERVOUS & MENTAL DISEASE 300, 300-17 (1977).

207. See Ingraham & Smith, *The Use of Electronics in the Observation and Control of Human Behavior and its Possible Use in Rehabilitation and Parole*, 7 ISSUES IN CRIMINOLOGY 35, 42-44 (Fall 1972).

gested the use of ESB in conjunction with implanted radio telemetry devices to immobilize or incapacitate criminal offenders.<sup>208</sup>

Although no permanent change in the brain apparently results from implantation of the electrodes,<sup>209</sup> ESB is in such an experimental stage that it must be regarded as hazardous and unpredictable. Moreover it is extremely intrusive both physically and mentally, modifying the state of the brain itself in a way beyond the control of the subject. Such a direct interference with mental processes certainly raises serious questions under the first amendment as well as under the constitutional right of privacy.

## (2) Castration

Another surgical intervention that is occasionally advocated or used for sex offenders is castration.<sup>210</sup> Involuntary castration of offenders would be highly controversial, even if research should reveal that it is effective in the control of certain types of sex crimes. Involuntary castration would clearly invade the constitutional right of bodily privacy and would also interfere with the fundamental right to procreate, long protected by constitutional privacy. In *Skinner v. Oklahoma ex rel. Williamson*,<sup>211</sup> the Supreme Court invalidated on equal protection grounds a state habitual criminal sterilization act, which provided for compulsory sterilization following a third felony conviction involving moral turpitude. In so doing, the Court characterized the right to procreate as "one of the basic civil

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208. See Lehtinen, *Controlling the Minds and Bodies of Prisoners—Without Prisons* 6 BARRISTER 11, 11-12, 54; Lehtinen, *Technological Incapacitation: A Neglected Alternative*, 2 Q.J. CORRECTIONS 31, 35. As an alternative to incarceration, such offenders would be electronically monitored and subjected to ESB administered through an internal telemetry receiver when data suggested the onset of dangerous behavior.

209. See J. DELGADO, *supra* note 205, at 84-85; E. VALENSTEIN, *supra* note 205, at 105.

210. See, e.g., D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 2, at 290 (Danish habitual sex offender program); Klerman & Dworkin, *Can Convicts Consent to Castration?*, 5 HASTINGS CENTER REP. 17 (October 1975) (analyzing a case in which two California child molesters, facing indeterminate sentences, requested castration in the hope that the judge might consider probation); Wexler, *Mental Health Law and the Movement Toward Voluntary Treatment*, 62 CALIF. L. REV. 671, 683 (1974) (discussing the case of a Colorado child molester agreeing, during plea bargaining, to submit to castration); "Chemical Castration": Another Use for Depo-Provera, 9 HASTINGS CENTER REP. 10 (Aug. 1979) ("chemical castration" for sex offenders, utilizing depo-provera and a variety of synthetic female hormones, which may cause permanent impotence).

211. 316 U.S. 535 (1942).

rights of man. . . . fundamental to the very existence and survival of the race."<sup>212</sup> If imposed as punishment, castration might also be considered so shocking to the conscience of society as to violate the eighth amendment's ban on cruel and unusual punishments.

### (3) Psychosurgery

Psychosurgery would seem the most intrusive of all interventions discussed. Still an experimental procedure, it involves the surgical removal or destruction of brain tissue with the intent of altering behavior.<sup>213</sup> There have been some reports of the use of psychosurgery on prisoners to control aggression,<sup>214</sup> and its use has been advocated as a general means of managing violent and aggressive behavior.<sup>215</sup>

Psychosurgery frequently results in intellectual deterioration, emotional blunting, and substantial physical risks.<sup>216</sup> Following extensive expert testimony, one court catalogued the adverse effects of psychosurgery as follows:

Psychosurgery flattens emotional responses, leads to lack of abstract reasoning ability, leads to a lack of capacity for new learning and causes general sedation and apathy. It can lead to impairment of memory and in some instances unexpected responses to psychosurgery are observed. It has been found, for example, that heightened rage reaction can follow surgical intervention on the amygdala, just as placidity can.<sup>217</sup>

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212. *Id.* at 541. *Accord*, *Tulley v. Tulley*, 83 Cal. App. 3d 698, 701-04, 146 Cal. Rptr. 266, 270-71 (1978), *cert. denied*, 440 U.S. 967 (1979).

213. *See generally* V. MARK & F. ERVIN, *VIOLENCE AND THE BRAIN* (1970); *MODERN CONCEPTS IN PSYCHIATRIC SURGERY* (R. Hitchcock, T. Ballantine & A. Meyerson eds. 1979); *OPERATING ON THE MIND: THE PSYCHOSURGERY CONFLICT* (W. Gaylin, J. Meister & R. Neville eds. 1975); *THE PSYCHOSURGERY DEBATE: SCIENTIFIC, LEGAL AND ETHICAL PERSPECTIVES* (E. Valenstein ed. 1980); S. SHUMAN, *PSYCHOSURGERY AND THE MEDICAL CONTROL OF VIOLENCE: AUTONOMY AND DEVIANCE* (1977); E. VALENSTEIN, *supra* note 205; *Symposium—Psychosurgery*, 54 B.U.L. REV. 215 (1974).

214. *See* Shapiro, *supra* note 24, at 247 n.16. *See also* Breggin, *The Second Wave in Quality of Health Care—Human Experimentation, 1973: Hearings Before the Subcomm. on Labor & Public Welfare*, 93d Cong., 1st Sess. 390, 393 (1973).

215. *See generally* V. MARK & F. ERVIN, *supra* note 213.

216. *See* Chorover, *Psychosurgery: A Neuropsychological Perspective*, 54 B.U.L. REV. 231, 247 (1974); Valenstein, *The Practice of Psychosurgery: A Survey of the Literature (1971-1976)*, in NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *Appendix to PSYCHOSURGERY* I-56, I-80 (1977).

217. *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-19434-AW, slip op. at 17 (Wayne County [Mich.] Cir. Ct. July 10, 1973), *reprinted in* A. BROOKS, *supra* note 63, at 909.

Based on these findings,<sup>218</sup> it is difficult to quarrel with the conclusion that involuntary psychosurgery would violate both the constitutional right of privacy and the first amendment. Moreover, if imposed as punishment, the eighth amendment would seem to apply as well. In view of the potential for psychosurgery to severely impair intellectual and emotional capacities and to permanently alter personality in a way incapable of being resisted by unwilling subjects, the procedure must be considered the most physically and mentally intrusive of all techniques surveyed.

#### B. THE GOVERNMENT'S INTEREST AND SCRUTINY OF THE MEANS EMPLOYED

Two conclusions may be reached from the foregoing analysis. First, because the verbal and many of the behavioral techniques are not seriously intrusive, do not result in longlasting effects, and are readily capable of being resisted even when the subject is nonconsenting, these techniques do not so infringe on fundamental rights as to create a constitutional right to refuse the treatments. Second, the therapeutic interventions in the higher range of the continuum do present significant, pervasive invasions of the subjects' minds and bodies with effects that are often longlasting and always incapable of being resisted when the subject is nonconsenting. When applied involuntarily, these techniques invade such fundamental constitutional rights as the first amendment right to be free from interference with mental processes, the due process right of privacy and the fundamental liberty interest associated with bodily integrity.

Constitutional rights are not absolute, however, and even fundamental rights must yield to government regulation advancing a "compelling state interest."<sup>219</sup> Courts are required to

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218. The National Commission, however, in its review of psychosurgery, found the *Kaimowitz* court's conclusions concerning the hazards of the newer psychosurgical procedures to be overstated. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, PSYCHOSURGERY 22 (1977). Dr. Valenstein's review of the literature, conducted for the National Commission, rejected the claim that psychosurgery does not result in intellectual change, Valenstein, *supra* note 216, at I-58, but concluded that personality changes are "relatively infrequent and characterized as 'mild' and 'transient,'" *id.* at I-89, and that "[t]he risk of permanent adverse intellectual, emotional, and physical side effects is reported as minimal . . . in sharp contrast to the results from the older lobotomy operations . . ." *Id.* at I-96.

219. *Roe v. Wade*, 410 U.S. 113, 154-55 (1973). In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), for example, the Supreme Court upheld a state program of

balance the nature of the individual liberty affected against the importance of the government's interest. In some cases this balancing includes consideration of whether "less restrictive means" are available that achieve the government's interest. The government's purpose must be found to be at least "legitimate,"<sup>220</sup> and in the case of "fundamental rights," its purpose must be "compelling."<sup>221</sup> Since the constitutional rights infringed by the more intrusive therapies are fundamental rights,<sup>222</sup> government imposition of these therapies on nonconsenting offenders should be subjected to strict scrutiny. Although no court has found a governmental purpose sufficiently compelling to justify the imposition of a treatment found to intrude on fundamental rights,<sup>223</sup> it is not inconceivable that imposition of such treatments on prisoners or offenders to accomplish correctional goals will be upheld.

Legitimate governmental purposes that might be served by these correctional techniques fall into two categories: police power purposes—those protecting the public health, safety, welfare or morals; and the *parens patriae* purpose—government decisionmaking in the best interest of persons who by reason of age or disability are incapable of making such decisions for themselves.<sup>224</sup> The government interest in rehabilitating offenders, expressly asserted in the typical statutory

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compulsory vaccination to prevent an epidemic over petitioner's free exercise challenge. The Court nevertheless found that:

The liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . . "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted . . . . It is . . . liberty regulated by law."

*Id.* at 26-27 (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890)) (citations omitted).

220. See *Kelley v. Johnson*, 425 U.S. 238, 244-49 (1978); J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 382-83 (1978).

221. See *Roe v. Wade*, 410 U.S. 113, 155-56 (1973); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 220, at 382-83; L. TRIBE, *supra* note 110, at 565.

222. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise of religion); *Stanley v. Georgia*, 394 U.S. 557 (1969) (first amendment freedom of thought); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate).

223. See *Friedman*, *supra* note 72, at 72.

224. See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1222-23 (1974) [hereinafter cited as *Developments*]; *Friedman*, *supra* note 72, at 72. See also *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 426-32, 202 S.E.2d 109, 117-20 (W. Va. 1974).

delegation of authority to correctional agencies,<sup>225</sup> might be justified under either category.

The government's *parens patriae* power, however, is not persuasive in the rehabilitation context. Although correctional authorities may attempt to justify rehabilitative programs as being in the best interest of the offenders involved, our constitutional heritage rebels at governmental paternalism when the individual is able to decide his or her own best interests. Historically, the *parens patriae* power was premised on the presumed incapacity of minors and the actual incapacity of the mentally incompetent to protect or care for themselves.<sup>226</sup> Because this power is based on the need for the government to protect the well-being of its citizens when they cannot care for themselves, it may be legitimately invoked only in the case of individuals who, because of age or physical or mental disability, are incapable of determining their own best interests.<sup>227</sup> Except for the small minority of offenders who are mentally incompetent, involuntary rehabilitation that invades fundamental constitutional rights should not be justified solely on the government's assertion of the *parens patriae* power.

Rehabilitation designed to prevent future criminal conduct, however, does serve important police power objectives. As the Supreme Court has noted, "[t]he promotion of safety of persons and property is unquestionably at the core of the State's police power."<sup>228</sup> In most contexts, the government's police power interest has been long considered "compelling."<sup>229</sup> Thus, this governmental interest in rehabilitation might be considered sufficient to outweigh the offender's constitutional right to object. In fact, in a number of cases involving prisoners complaining of violations of constitutional rights, the Supreme Court has required only that prison practices further "an important or substantial governmental interest"—something less than a "compelling interest."<sup>230</sup> In *Pell v. Procunier*,<sup>231</sup> for example, the Court, citing the "paramount objective" of offender

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225. See, e.g., 18 U.S.C. § 4001(b)(2) (1976); ALI MODEL PENAL CODE § 401.2(2)(b) (proposed official draft 1962).

226. See *Developments*, *supra* note 224, at 1212.

227. See Winick, *supra* note 181, at 796-97; *Developments*, *supra* note 224, at 1212-16. See, e.g., *Addington v. Texas*, 441 U.S. 418, 426 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring); *Winters v. Miller*, 446 F.2d 65, 68-71 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

228. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

229. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25-27 (1905).

230. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

231. 417 U.S. 817, 823, 827-28 (1974).

rehabilitation, employed such a standard to uphold a prison ban on face-to-face interviews with members of the press that were asserted to violate the first amendment. "Rehabilitation" was also considered a "substantial governmental interest" in *Procunier v. Martinez*,<sup>232</sup> but in *Martinez*, the Court made clear that it would look beyond the mere assertion of an interest in rehabilitation. The state had cited "inmate rehabilitation" as justification for the censorship of statements in prison mail that "magnify grievances" or "unduly complain."<sup>233</sup> The Court found this contention wanting, noting that the state did not "specify what contribution the suppression of complaints makes to the rehabilitation of criminals,"<sup>234</sup> and that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."<sup>235</sup>

Nonetheless, the governmental interest in rehabilitation in furtherance of the police power goal of protecting community safety can be regarded as a "compelling" interest, and certainly would meet the "substantial" interest test sometimes employed.<sup>236</sup> This alone, however, will not justify the imposition of nonconsensual treatments that invade fundamental rights. The proposed treatment must also be scrutinized to determine whether the treatment in question will actually further the governmental interest in rehabilitation. If the "weight of professional opinion" regards the proposed treatment as ineffective, for example, the courts may well reject the asserted justification for its imposition.<sup>237</sup> More importantly, even if professional opinion regards the proposed treatment as generally efficacious, the courts may prohibit it if alternative approaches exist that are capable of achieving the desired result and are less intrusive with respect to constitutional rights. Stated differently, if alternative means exist which would accomplish the government's interest in a manner that intrudes less on the fundamental constitutional right at issue, the government may not choose the more intrusive means—the "less drastic means" or "least restrictive alternative" must be chosen.

This doctrine has often been applied in first amendment

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232. 416 U.S. 396 (1974).

233. *Id.* at 399.

234. *Id.* at 416.

235. *Id.* at 412.

236. See generally Note, *Standard of Judicial Review for Conditions of Pre-trial Detention*, 63 MINN. L. REV. 457 (1979).

237. *Procunier v. Martinez*, 416 U.S. 396, 412-14 (1974).

cases. In *Shelton v. Tucker*,<sup>238</sup> the Supreme Court struck down an Arkansas statute that required school teachers to disclose all of the organizations to which they belonged. The Court ruled:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>239</sup>

Similarly, in *Dunn v. Blumstein*,<sup>240</sup> in which a durational residence requirement that interfered with the right to vote and the right to travel was held unconstitutional, the Court reiterated:

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'<sup>241</sup>

In the context of civil commitment of the mentally ill, the "least restrictive alternative" doctrine has been applied to require that an individual who meets the statutory standards for civil commitment nevertheless must not be hospitalized if less restrictive alternative placements are suitable.<sup>242</sup> Moreover, courts have recently applied the doctrine to require that, when mental patients refuse a particular therapy, less intrusive therapies be considered before the more intrusive method is imposed. In *Rennie v. Klein*,<sup>243</sup> for example, the district court found that a treatment program consisting of lithium plus an antidepressant drug was less intrusive than the antipsychotic medication proposed by the hospital. Explicitly recognizing the applicability of the least restrictive alternative doctrine to the choice of treatments,<sup>244</sup> the court ordered the hospital to give the patient a fair trial on lithium and the antidepressant drug before seeking to administer antipsychotic medication.<sup>245</sup> The

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238. 364 U.S. 479 (1960).

239. *Id.* at 488.

240. 405 U.S. 330 (1972).

241. *Id.* at 343.

242. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1145-54 (1972).

243. 462 F. Supp. 1131 (D.N.J. 1978), *appeal docketed*, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980). *Accord*, *Rogers v. Okin*, 28 CRIM. L. RPTR. 2397 (1st Cir. 1980).

244. 462 F. Supp. at 1146.

245. "[A] patient 'may challenge the forced administration of drugs on the

Minnesota Supreme Court has also held that before the more intrusive forms of treatments, such as psychosurgery or electroshock therapy, may be used on involuntarily committed mental patients, the authorizing court must determine the necessity and reasonableness of the proposed treatment in light of the availability of less intrusive treatments.<sup>246</sup>

Although the least restrictive alternative principle has been applied generally in the correctional context, the United States Supreme Court has been more deferential to the judgments of prison authorities, particularly when the infringing restriction relates to security needs. For example, in *Pell v. Procunier*,<sup>247</sup> the court refused to invalidate a prison ban on face-to-face interviews with members of the press. Stressing the alternative means of communication that were still available to inmates, the Court contended that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise,"<sup>248</sup> and found that "security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates."<sup>249</sup> Nevertheless, the Court warned that "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties."<sup>250</sup> Similarly, in *Bell v. Wolfish*,<sup>251</sup> the Court conceded that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."<sup>252</sup> The *Bell* Court upheld a rule

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basis that alternative methods should be tried before a more intrusive technique like psychotropic medication is used.'" *Id.* (quoting Winick, *supra* note 181, at 813). *Accord, In re Boyd*, 403 A.2d 744, 753 n.15 (D.C. 1979).

246. *Price v. Sheppard*, 307 Minn. 250, 262-63, 239 N.W.2d 905, 913 (1976).

247. 417 U.S. 817 (1974).

248. *Id.* at 826.

249. *Id.* at 827.

250. *Id.* Cf. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), in which the court sustained regulations permitting membership in a prisoner union but prohibited inmate solicitation of other inmates to join the union, barred union meetings, and banned bulk mailings by the union. The Court deemed these limitations "rationally related to the reasonable . . . objectives of prison administration," *id.* at 129, found first amendment speech rights to be "barely implicated," *id.* at 130, and although conceding that first amendment associational rights were "perhaps more directly implicated," *id.* at 132, found that they nevertheless must "give way to the reasonable considerations of penal management." *Id.*

251. 441 U.S. 520 (1979).

252. *Id.* at 547.

prohibiting inmate receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores, because the rule was a "rational response by prison officials to an obvious security problem,"<sup>253</sup> and because alternative means of obtaining reading material were readily available.<sup>254</sup>

Even allowing for this deferential posture, prison authorities have been subjected to the least restrictive alternative principle. In *Procunier v. Martinez*,<sup>255</sup> the Court held that censorship of prison mail may be justified only as follows: "First, the regulation or practice in question must further . . . one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."<sup>256</sup> Finding the authorized censorship of prisoner mail "far broader than any legitimate interest of penal administration demands," the Court invalidated the restrictions.<sup>257</sup>

The correctional therapies at issue, certain behavioral techniques, and organic treatments, are easily distinguishable from even the cases in which the courts were most deferential to prison authorities. Unlike the security regulations in *Pell* and *Wolfish*, which are best characterized as incidental restrictions on first amendment expression,<sup>258</sup> the more intrusive therapies result in direct, severe invasions of bodily privacy and impede the very capacity to generate ideas.<sup>259</sup> Unlike the interview and mail restrictions, there are no alternative means of exercising the fundamental rights invaded by involuntary imposition of organic therapy. Moreover, at least some of the organic therapies intrude on mental processes and mental and physical privacy in a way that is permanent and irreversible. The fact of confinement and the need for prison security and order may make some first amendment restriction necessary, but these considerations do not justify the imposition of intrusive ther-

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253. *Id.* at 550.

254. *Id.* at 552.

255. 416 U.S. 396 (1974).

256. *Id.* at 413.

257. *Id.* at 416.

258. See notes 247-54 *supra*, 412-15 *infra* and accompanying text.

259. In considering the validity of governmental intrusions on constitutionally protected rights, the Supreme Court has treated the nature and degree of the intrusion as a relevant factor in determining the appropriate standard of review. See Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1074 (1979).

apy. Prison restrictions related to "security considerations . . . paramount in the administration of the prison"<sup>260</sup> are accordingly entitled to considerably more deference than that owed the correctional choice of rehabilitative techniques. Rehabilitation is a less important governmental interest than the need to protect institutional security. Moreover, prison authorities may be expert in matters of security, but in view of the total absence of consensus as to "what works" in the way of rehabilitation,<sup>261</sup> correctional authorities can make no similar claim for judicial deference in their choice of rehabilitative means. Particularly in the case of community-based programs, some of which are not residential, security considerations and the deference they justify would seem minor or even nonexistent.

The least restrictive alternative principle, therefore, should apply to correctional choices of rehabilitative techniques intruding on fundamental rights, just as it has begun to apply to the treatment of civilly-committed mental patients. The continuum of coerciveness, although admittedly oversimplified, can be useful in applying the least restrictive alternative principle. Thus, an offender should be allowed to contend that verbal techniques, for example, should be attempted before the government may impose the somewhat more intrusive behavioral techniques, and that behavioral techniques should be attempted before the imposition of organic therapy.<sup>262</sup> Moreover, a convicted defendant who prefers incarceration over an alternative sentence that involves one of the more intrusive rehabilitative therapies should be able to argue that the least restrictive alternative principle amounts to a right to refuse the proposed therapy. Similarly, this principle should apply to an incarcerated prisoner who would prefer continued incarceration over participation in a treatment program utilizing the intrusive techniques.

An analysis of the relevant governmental interest supports the right of an offender who prefers incarceration to refuse certain intrusive treatments. Because the *parens patriae* interest applies only when a prisoner is not competent to make decisions concerning his or her own best interests,<sup>263</sup> the government's interest with respect to the great bulk of offenders who

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260. *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

261. *See* note 2 *supra*.

262. Should empirical evidence prove that a less intrusive technique is ineffective, however, the technique need not be utilized because it would not be an alternative that would accomplish the government's interest.

263. *See* note 227 *supra* and accompanying text.

are competent is limited to the police power interest in protection of community safety. This interest in community safety, although compelling, can be fully achieved through the continued confinement of the offender.<sup>264</sup> Thus, an offender who chooses confinement over intrusive therapy can reasonably argue that confinement simpliciter is a less restrictive means of achieving the government's interest. Although many offenders may regard continued confinement as more onerous than participation in an intrusive therapy program, some would no doubt prefer incarceration. Because incarceration fully achieves the government's interest in promoting community safety, such offenders should be entitled to elect incarceration to preserve the integrity of their mental and physical processes from serious invasion.

The government might contend that requiring an offender to participate in certain therapy programs would allow an earlier release date and thus would avoid costly incarceration. The government's interest in saving money, however, although certainly legitimate, is not so compelling as to justify the imposition of intrusive treatments that infringe upon fundamental constitutional rights. When states have sought on financial grounds to justify one year residence requirements for receipt of welfare benefits, for example, the Supreme Court has held that in order to demonstrate a compelling interest, the state "must do more than show that denying welfare benefits to new residents saves money."<sup>265</sup> Federal courts have rejected similar contentions when they have been urged to justify prison conditions that fail to meet constitutional requirements.<sup>266</sup> The fundamental right to freedom of mentation and to mental and

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264. See D. WEXLER, *CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS: LEGAL ISSUES OF CONFINEMENT, TREATMENT AND RELEASE* 15-16 (1976); Friedman, *supra* note 72, at 73; Shapiro, *supra* note 24, at 299-300.

265. Shapiro v. Thompson, 394 U.S. 618, 633 (1969). See also United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977) (rejecting cost-saving as a justification for a state's impairment of its contract obligations to bondholders); Bounds v. Smith, 430 U.S. 817, 825 (1977) (holding that prisoners' right of access to courts requires prison to provide adequate law libraries or aid from law-trained persons, the Court noted that "the cost of protecting a constitutional right cannot justify its total denial"); Califano v. Goldfarb, 430 U.S. 199, 204-07 (1977) (administrative economy rejected as a justification for Social Security Act provision treating widowers differently than widows for purposes of survivor's benefits); Bullock v. Carter, 405 U.S. 134, 147-49 (1972) (less restrictive alternatives required even though more expensive); Spece, *supra* note 259, at 1055 n.31.

266. See, e.g., Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

physical privacy should similarly be found to outweigh the government's financial concerns.

Should the government seek to justify intrusive treatment of disruptive prisoners as a means of protecting other inmates from harm, the least drastic alternative principle again applies. Although "one of the primary goals of prison administration is physical protection of the inmates,"<sup>267</sup> this interest may be accomplished by increasing security precautions, by transferring disruptive prisoners to more restrictive settings, or by imposing solitary confinement or physical restraints; all of these measures are less onerous than the intrusive therapies.<sup>268</sup>

A similar least restrictive alternative argument may be made by the offender who seeks to resist a therapeutic intervention that falls high enough on the continuum to merit strict scrutiny and who would prefer some other therapy that is even more intrusive. Provided the preferred therapy is as effective in preventing recidivism, the offender should be permitted to waive his right to resist what would seem the more intrusive intervention. Thus, for example, should a sex offender find castration preferable to aversive conditioning or medication (assuming all three were effective in preventing future sex offenses), he should, if willing to accept castration, be able to resist what most of us would consider the more preferable behavioral or pharmacological option.

In summary, the governmental interests in rehabilitation and in protecting other inmates from harm seem sufficient to justify involuntary imposition of all verbal techniques and at least some of the behavioral techniques; these methods do not, under the previous analysis, invade fundamental constitutional rights. Offenders should be able to assert a constitutional right to refuse the more intrusive therapeutic interventions, however, by arguing that less intrusive techniques must first be attempted, and ultimately, that the right to choose incarceration or restrictive confinement over the imposed therapy is absolute. Such confinement fully serves the police power interest in

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267. *Molar v. Gates*, 98 Cal. App. 3d 1, 18, 159 Cal. Rptr. 239, 249 (1979). Indeed, the failure of prison officials to protect a prisoner from attack by other prisoners may violate the eighth amendment, see *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); *Parker v. McKeithen*, 488 F.2d 553, 555-56 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974); *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973), and the fourteenth amendment. See *Parker v. McKeithen*, 488 F.2d at 555; *Curtis v. Everette*, 489 F.2d 516, 518 (3rd Cir. 1973), *cert. denied sub. nom. Smith v. Curtis*, 416 U.S. 995 (1974).

268. See *Sitnick*, *supra* note 182, at 394.

rehabilitation—it protects the safety of the community and other inmates.

#### IV. WAIVER OF THE RIGHT TO REFUSE TREATMENT— THE REQUIREMENT OF INFORMED CONSENT FOR OFFENDERS

Although offenders may possess a constitutional right to refuse correctional programs employing intrusive techniques, they might desire to waive this right. Criminal defendants who enter guilty pleas, for example, waive fundamental rights under the fifth and sixth amendments, including the rights to effective assistance of counsel, to trial by jury, to confrontation of adverse witnesses, and to avoid self-incrimination.<sup>269</sup> In upholding the constitutionality of plea bargaining, the Supreme Court specified the elements of an effective waiver: "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>270</sup> This formulation is consonant with the Court's traditional waiver standard that requires the government to prove the existence of "an intentional relinquishment or abandonment of a known right or privilege."<sup>271</sup> Essentially the same waiver standard has been applied by the Court in noncriminal contexts.<sup>272</sup>

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269. See *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).

270. 397 U.S. 742, 748 (1970).

271. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (cited in *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970)). See also *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966). The Court has applied a somewhat more relaxed waiver standard in the case of criminal defendants consenting to warrantless searches which would otherwise violate the fourth amendment ban on unreasonable searches and seizures. See, e.g., *United States v. Watson*, 423 U.S. 411 (1976); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). In these cases the Court stressed the voluntariness aspect of waiver, rejecting the argument that consent was invalid absent a showing by the government that the consenting party understood that it could be freely withheld. See 412 U.S. at 227. The Court nonetheless reaffirmed that "consent [may] not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228. The question whether consent is voluntary or the product of duress or coercion is treated by the Court as "a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Knowledge of the right to refuse consent is treated merely as "one factor to be taken into account." *Id.* In considering the totality of the circumstances, the prosecutor has the burden of proving that consent "was, in fact, freely and voluntarily given," a burden that "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). For analyses of waiver in criminal cases, see Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

272. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (standard for waiver of

These elements of constitutional waiver closely parallel the elements of the informed consent doctrine.<sup>273</sup> For example, in *Kaimowitz v. Michigan Department of Mental Health*,<sup>274</sup> the court held that, "[t]o be legally adequate, a subject's informed consent must be competent, knowing and voluntary."<sup>275</sup> Similarly, HEW regulations on the protection of human subjects define informed consent as "the knowing consent of an individual or his legally authorized representative, so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion."<sup>276</sup> Thus, if the decision process is sufficiently free of coercion and undue influence, an offender who receives sufficient information concerning the possible risks of a proposed therapy and alternative therapies, and who possesses sufficient competence and intelligence to comprehend the information, may make a voluntary choice to participate in the proposed therapy.

Specific elements of the informed consent requirements may vary from jurisdiction to jurisdiction, depending upon differing statutory, regulatory, and case law approaches, but these basic principles are common to most formulations.<sup>277</sup> Given the choice to participate in therapies that they have a constitutional right to refuse, most prisoners would be able to meet the requirements for informed consent and thereby waive their constitutional rights. In principle, for example, the elements of

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notice in conditional sales contracts); *D. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (upholding the validity of cognovit note).

273. See generally J. KATZ, *supra* note 55, at 521-88; D. LOISELL & H. WILLIAMS, *supra* note 69, ¶¶ 22.01-.08; LEGISLATIVE AND SOCIAL ISSUES COMM. OF THE AM. ASS'N ON MENTAL DEFICIENCY, *CONSENT HANDBOOK* (1977); Levine, *The Nature and Definition of Informed Consent in Various Research Settings*, in THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 3-1 (National Commission for the Protection of Human Subjects of Biomedical Research 1978) [hereinafter cited as THE BELMONT REPORT]; Meisel, Roth & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. PSYCH. 285 (1977); Roth, Meisel & Lidz, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCH. 279 (1977); Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970).

274. No. 73-19434-AW (Wayne County [Mich.] Cir. Ct. July 10, 1973), reprinted in A. BROOKS, *supra* note 63. See notes 84-88 *supra* and accompanying text.

275. Slip op. at 22, A. BROOKS, *supra* note 63, at 912. In *The Belmont Report*, the National Commission noted that "there is widespread agreement that the consent process can be analyzed as containing three elements: information, comprehension, and voluntariness." THE BELMONT REPORT, *supra* note 273, at 10.

276. 45 C.F.R. § 46.103(c) (1979).

277. See note 272 *supra*.

comprehension and information could be easily met in most situations.<sup>278</sup>

The requirement of voluntariness, however, is more troubling in the correctional context. In its Report on Research Involving Prisoners, the National Commission considered "whether prisoners are, in the words of the Nuremberg Code, 'so situated as to be able to exercise free power of choice'—that is, whether prisoners can give truly voluntary consent to participate in research."<sup>279</sup> Some of the commissioners argued that prisons, by their very purpose and character, make sufficiently free consent to research impossible.<sup>280</sup> Similarly, several participants at the National Minority Conference on Human Experimentation objected in principle to the notion of truly voluntary consent by prisoners.<sup>281</sup> The Commission, however, ultimately rejected the idea that prisons are so inherently coercive that voluntary consent is impossible, and concluded that at least some prison research could be undertaken with appropriate safeguards.<sup>282</sup> The Commission proposed a number of requirements to ensure "a high degree of voluntariness on the part of the prospective participants," including "adequate living conditions, provisions for effective redress of grievances, separation of research participation from parole considerations, and public scrutiny."<sup>283</sup> HEW regulations eventually adopted as a result of the Commission's work include an additional protection for prisoners subjected to biomedical and

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278. Of course, full disclosure of the relevant information to an offender possessing the ability to comprehend does not ensure that the consent obtained is in fact a knowledgeable one. Informed consent procedures typically stress the disclosure of information. Whether this information has been effectively communicated to patients or subjects is rarely studied. Several studies indicate that even where the requisite information is disclosed, subjects rarely understand the risks and available alternatives and do not feel free to refuse participation. See, e.g., Halleck, *supra* note 10, at 29-30; McCollum & Schwartz, *Pediatric Research Hospitalization: Its Meaning to Parents*, 3 *PEDIATRIC RES.* 199, 199 (1969). For discussion of this problem and proposals for reform, see generally Treat, *Proposed Changes for Obtaining Consent from Experimental Subjects*, 1 *L. & HUMAN BEHAVIOR* 43 (1977).

279. PRISONER RESEARCH, *supra* note 18, at 5.

280. Branson, *supra* note 54, at 17 (remarks of Commissioner King).

281. PRISONER RESEARCH, *supra* note 18, at 42, 44. The Conference was held under the auspices of the National Commission. This was also the view of the American Correctional Association. American Correctional Ass'n, *Position Statement: The Use of Prisoners and Detainees as Subjects of Human Experimentation*, Feb. 20, 1976, in PRISONER RESEARCH, *supra* note 18, at 22-1 to 22-2 app.

282. Palmer, *Biomedical and Behavioral Research on Prisoners: Public Policy Issues in Human Experimentation*, in PRISONER RESEARCH, *supra* note 18, at 14-21 app.; see Branson, *supra* note 54, at 16.

283. PRISONER RESEARCH, *supra* note 18, at 16.

behavioral research: "[A]dequate assurance exists that parole boards will not take into account a prisoner's participation in the research in making decisions regarding parole, and each prisoner is clearly informed in advance that participation in the research will have no effect on his or her parole . . . ."284

In the *Kaimowitz* case<sup>285</sup> the court considered the impact of institutionalization generally and of the inducement when release is tied to consent, holding that involuntarily confined mental patients are unable as a matter of law to consent to experimental psychosurgery:

Although an involuntarily detained mental patient may have sufficient I.Q. to intellectually comprehend his circumstances . . . , the very nature of his incarceration diminishes the capacity to consent to psychosurgery.

. . . The fact of institutional confinement has special force in undermining the capacity of the mental patient to make a competent decision on this issue, even though he be intellectually competent to do so.

. . . .

. . . It is impossible for an involuntarily detained mental patient to be free of ulterior forms of restraint or coercion when his very release from the institution may depend upon his cooperating with institutional authorities and giving consent to experimental surgery.

. . . .

Involuntarily confined mental patients live in an inherently coercive institutional environment. Indirect and subtle psychological coercion has a profound effect upon the patient population. . . . They are not able to voluntarily give informed consent because of the inherent inequality of their position.<sup>286</sup>

The court's rationale seems equally applicable to prisoners, whose institutional environment is marked by the same subtle and not so subtle psychological coercion. Similarly, the prisoner who consents in the hope of obtaining parole, or the offender who agrees to community treatment to avoid incarceration, seem indistinguishable from the involuntarily confined patient in *Kaimowitz* who consented to psychosurgery in the hope of obtaining a release from confinement. It is doubtful, however, that the sweeping approach of *Kaimowitz* will be followed by other courts. In fact, the *Kaimowitz* court sought to limit its holding to the experimental psychosurgery that was proposed by stating that consent could be given to conventionally accepted procedures.<sup>287</sup> Notwithstanding this

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284. 45 C.F.R. § 46.305(a)(6) (1979).

285. *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-19434-AW (Wayne County [Mich.] Cir. Ct. July 10, 1973), reprinted in A. BROOKS, *supra* note 63.

286. *Id.*, slip op. at 25-29, A. BROOKS at 913-15.

287. *Id.* at 40, A. BROOKS at 920.

disclaimer, some commentators have suggested that the court's reasoning should be applied to all treatment procedures, whether experimental or not.<sup>288</sup>

Although the *Kaimowitz* court may have reached the right result on the facts of that case,<sup>289</sup> the potential breadth of the court's holding concerning the effects of institutionalization and the promise of release on the capacity to give informed consent could give rise to absurd and constitutionally dubious results. Institutionalization may substantially diminish the ability of some prisoners to decide freely on therapy, and the lure of release or of avoiding incarceration may be so potent that, for at least some offenders, refusal to consent is virtually impossible. These factors, however, should not preclude all offenders from being considered capable of making these decisions voluntarily. If institutionalization per se so diminishes decisionmaking abilities that prisoners are incompetent to elect psychosurgery, how can prisoners be considered competent to make other important decisions? Can they decide to have elective surgery or other medical treatment when needed, to choose particular work assignments that may be more hazardous than others, or to agree to accept certain conditions of parole? Moreover, if the prospect of release renders confined individuals incompetent to elect psychosurgery, how can prisoners be permitted to elect the variety of other prison programs that are likely to result in early release?

The absurdity of a per se rule based upon the impact of institutionalization or the lure of release arises from its sweeping effect. A common example of use of the early release lure to modify prisoner behavior is the virtually universal practice of providing "good time" credit. As the Supreme Court noted in *McGinnis v. Royster*,<sup>290</sup> "the granting of good-time credit toward parole eligibility takes into account a prisoner's rehabilitative performance."<sup>291</sup> The New York Statute involved in *Royster* authorized such good time credit "for good conduct and efficient and willing performance of duties assigned."<sup>292</sup> Under a new rule recently adopted by the United States Bu-

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288. See AMERICAN CIVIL LIBERTIES UNION, NATIONAL PRISON PROJECT, PRISONERS' RIGHTS 1979, 417-26, 612 (1979).

289. See generally Burt, *Why We Should Keep Prisoners from the Doctors*, 5 HASTINGS CENTER REP. 25 (Jan. 1975).

290. 410 U.S. 263 (1973).

291. *Id.* at 271.

292. *Id.* at 266-67 n.5 (quoting *Royster v. McGinnis*, 332 F. Supp. 973, 974-75 (S.D.N.Y. 1971)).

reau of Prisons, an award of "extra good time" may be made for, among other things, "[v]oluntary acceptance and satisfactory performance of an unusually hazardous assignment."<sup>293</sup> Yet if the *Kaimowitz* approach is broadly construed, the decision of prisoners to accept such assignments or participate in such programs could be considered involuntary as a matter of law.

The approach in *Kaimowitz* also seems unduly paternalistic. Offenders who genuinely desire to participate in a therapy program could be deemed legally unable to do so. Yet to deny access to a particular therapeutic program that an offender "voluntarily" and competently elects may, in effect, impose additional confinement, and may even violate the offender's constitutional right of privacy.<sup>294</sup> For these and other reasons, broad application of the *Kaimowitz* doctrine has been roundly criticized by commentators and at least implicitly rejected in a number of subsequent cases.<sup>295</sup>

In an analogous situation, plea bargaining, the courts have rejected the notion that the opportunity or even the assurance

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293. 28 C.F.R. § 523.16(a)(2) (1979). See also 44 Fed. Reg. 55,004 (1979) (to be codified in 28 C.F.R. § 2.60) (rule of United States Parole Commission permitting advancement of presumptive release date for "superior program achievement" in "educational, vocational, industry, or counselling programs").

294. In certain circumstances the right of privacy protects health decisions made between individuals and their physicians from governmental interference. See *Aden v. Younger*, 257 Cal. App. 3d 662, 679-82, 129 Cal. Rptr. 535, 546-48 (1976); Wexler, *supra* note 210, at 681-84. But see *Rutherford v. United States*, 399 F. Supp. 1208 (W.D. Okla. 1975), *aff'd on other grounds*, 542 F.2d 1137 (10th Cir. 1976), *rev'd on other grounds*, 442 U.S. 544 (1979), *rev'd*, 616 F.2d 455 (10th Cir. 1980).

295. See NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, *PSYCHOSURGERY* 19, 22 (1977); R. SCHWITZGEBEL, *supra* note 151, at 56-57; Murphy, *Total Institutions and the Possibility of Consent to Organic Therapies*, 5 HUMAN RIGHTS 25, 25-28 (1975); Singer, *Consent of the Unfree, Part II*, 1 L. & HUMAN BEHAVIOR 101, 148-61 (1977); Wexler, *supra* note 210, at 677-84. See also N. MORRIS, *supra* note 1, at 24-26. Professor Singer, in the most extensive discussion of these issues, concludes that "the confined, assuming competency, can indeed consent to any and all kinds of experimentation or behavior change, including psychosurgery." Singer, *supra*, at 101. With the exception of cases in which the offender, as a means of inducing his consent, has been charged with an offense in excess of that which the facts of his alleged crime would warrant, and with the further exception of prison systems in which the conditions of confinement are not minimally acceptable or in which the release system is inequitable, Singer concludes that "participation motivated by early release . . . would be both morally and legally viable." *Id.* at 162. He finds the argument that institutionalization per se should invalidate consent to be without factual evidence to sustain it. *Id.* Moreover, he expresses concern that acceptance of the argument might lead to unwarranted intrusions upon other rights of prisoners. *Id.*

of a shorter sentence necessarily renders a guilty plea involuntary. In *Brady v. United States*,<sup>296</sup> the defendant had attacked the validity of his guilty plea, arguing that it was entered to avoid the possibility of the death penalty. Under the statute involved, the death penalty could be imposed following a jury determination of guilt but could not be imposed when a defendant waived trial and pled guilty. Stressing that "[t]he voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it,"<sup>297</sup> the Court rejected the coercion claim:

Even if we assume that Brady would not have pleaded guilty except for the death penalty provision . . . , this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act. . . .

Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case. . . . Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.

. . . We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty. . . .<sup>298</sup>

The *Brady* court adopted as its standard of voluntariness the rule that a guilty plea "must stand unless induced by threats . . . , misrepresentation . . . , or perhaps by promises that are by their nature improper," such as bribes.<sup>299</sup> Under this standard, the Court held that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."<sup>300</sup>

If avoidance of the possibility of a death sentence is not so inherently coercive as to invalidate a guilty plea, then it is difficult to see how the possibility or promise of early release could be considered so inherently coercive as to invalidate an offender's choice of therapy. Of course, there may be cases in which the forces of institutionalization render a particular prisoner incapable of making such voluntary choices or in which threats or promises are so potent that the particular offender's

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296. 397 U.S. 742 (1970).

297. *Id.* at 749.

298. *Id.* at 750-51.

299. *Id.* at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

300. 397 U.S. at 755.

consent is virtually assured. Nevertheless, this does not mean that institutionalization or the opportunity of early release or of avoidance of confinement renders consent impossible.

Virtually no choice is totally free of coercion.<sup>301</sup> Psychologist Israel Goldiamond has performed a useful behavioral analysis of voluntariness and coercion, defining situations of coercion and noncoercion through the use of a contingency analysis.<sup>302</sup> In this model, coercion is most severe when there are no genuine choices and the consequences contingent on behavior are critical.<sup>303</sup> Certainly plea bargaining is coercive in this model,<sup>304</sup> sometimes extremely so. Nevertheless, courts have accepted the basic legitimacy of plea bargaining, deeming this degree of coercion constitutionally tolerable.<sup>305</sup>

One court has even held that informed consent may be valid where the conditions of confinement thereby avoided are themselves unconstitutional. In *Bailey v. Lally*,<sup>306</sup> inmates at the Maryland House of Corrections challenged the constitutionality of a state-sponsored program of medical experimentation in which they had participated. General conditions at the prison were concededly bad; in fact, similar conditions had been declared unconstitutional in prior cases. The medical research program in question offered at least a partial escape from those conditions into a live-in medical unit that provided a clean, less restrictive environment with air conditioning, adequate heating, hot water, color television, and separate bathroom facilities. Volunteers had the opportunity to earn extra money, and could hope that parole authorities would take their participation into consideration, although the inmates were not

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301. See Goldiamond, *Protection of Human Subjects and Patients: A Social Contingency Analysis of Distinctions Between Research and Practice, and its Implications*, 4 BEHAVIORISM 1, 27 (1976) ("coercion is not absolute; there are degrees of coercion as well as of freedom"); Jaffee, *supra* note 70, at 216. For an extensive philosophical analysis of the concept of coercion, see *Coercion* [1972] YEARBOOK OF THE AM. SOC'Y FOR POLITICAL & LEGAL PHILOSOPHY 1-328 (J. Pennock & J. Chapman eds. 1972).

302. Goldiamond, *supra* note 301, at 20-34; Goldiamond, *Singling Out Behavior Modifications for Legal Regulation: Some Effects on Patient Care, Psychotherapy and Research in General*, 17 ARIZ. L. REV. 105, 121-25 (1975).

303. Goldiamond, *supra* note 301, at 23.

304. See Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978); Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 675-78 (1980).

305. See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212, 222-23 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). The Supreme Court has even suggested that plea bargaining, properly conducted, is worthy of encouragement. See *Santabell v. New York*, 404 U.S. 257, 260 (1971).

306. 481 F. Supp. 203 (D. Md. 1979).

advised that their participation would affect parole. Nevertheless, the district court held that this was not legally impermissible coercion. While acknowledging that the prison conditions may have made participation "very attractive," the court noted that many inmates declined to participate in the program.<sup>307</sup> Moreover, prisoners who did participate were not directly pressured to do so and were not subjected to the unconstitutional conditions as a means of inducing their consent. Rather, the court found that the prisoners "had a viable choice" as well as "the option to withdraw" from the experimental program.<sup>308</sup> Approving the procedures used for obtaining informed consent, the court noted that the doctors involved made "diligent, continuing efforts" to inform the subjects concerning the various studies.<sup>309</sup> By providing information orally rather than merely relying on a written consent form, and by emphasizing the right of subjects to withdraw from the program at any time, the doctors "took the necessary measures to assure that the prisoners were exercising their free choice."<sup>310</sup> The court thus declined to deem the prisoners' consent involuntary.

In *Knecht v. Gillman*,<sup>311</sup> the Court of Appeals for the Eighth Circuit found that the involuntary use of apomorphine in a behavior modification program constituted cruel and unusual punishment. The court indicated, however, that use of this technique on inmates "who knowingly and intelligently consent"<sup>312</sup> would be permitted if an adequate system was instituted that would assure that informed consent was obtained. The inmates affected in *Knecht* were certainly subject to the inherent coercion of institutionalization and to the inducement of potentially early release if they participated; yet the court considered them legally capable to give consent.

These cases suggest that most offenders will be deemed, in principle, capable of consenting to even the most intrusive of treatment programs—programs that they otherwise appear to have a constitutional right to refuse. Because the inherent psychological pressures faced by offenders choosing rehabilitative alternatives are simply not avoidable, courts seek only to pro-

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307. *Id.* at 220.

308. *Id.*

309. *Id.* at 219.

310. *Id.* at 220.

311. 488 F.2d 1136 (8th Cir. 1973).

312. *Id.* at 1138.

tect against additional or related pressures that are unfair.<sup>313</sup> An analogy to plea bargaining is useful. The inherent coerciveness of plea bargaining is mitigated by the presence and advice of counsel during the plea bargaining process,<sup>314</sup> and by the practice of giving pleas in open court where the judge is required to conduct a review of the extent of the defendant's knowledge of his or her rights and the voluntariness of their waiver.<sup>315</sup> Similar protections could easily be fashioned in the context of consent to the most intrusive of treatments. Indeed, some type of pretreatment hearing and independent review may be required by the guarantee of procedural due process.<sup>316</sup> With these procedural qualifications, it seems likely that courts would uphold the validity of consent given by offenders in connection with correctional therapies.

## V. PROCEDURAL DUE PROCESS AND CORRECTIONAL THERAPIES

If a particular therapy is deemed so intrusive upon fundamental interests that prisoners have a constitutional right to refuse it, procedural due process issues will not arise—the potential subject has, by definition, an absolute veto power over whether to participate. Procedural due process guarantees may, however, affect the adequacy of informed consent practices and the validity of involuntarily administered therapies that are somewhat intrusive but that offenders have no right to refuse.

### A. LIBERTY AND PROPERTY INTERESTS

Procedural due process guarantees derive from the fifth and fourteenth amendments, which together prohibit the federal and state governments from depriving any person of life, liberty, or property without due process of law. Not every grievous loss inflicted upon a person by the government is sufficient to invoke the procedural protections;<sup>317</sup> the threshold in-

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313. Murphy, *supra* note 295, at 38; Wexler, *Reflections on the Regulation of Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 132, 133 (1975).

314. See Brady v. United States, 397 U.S. 742, 758 (1970). Compare Tollett v. Henderson, 411 U.S. 258, 265 (1973) and McMann v. Richardson, 397 U.S. 759, 771 (1970) with Fontaine v. United States, 411 U.S. 213, 215 (1973).

315. See Brady v. United States, 397 U.S. 742, 758 (1970); Boykin v. Alabama, 395 U.S. 238, 241-44 (1969); McCarthy v. United States, 394 U.S. 459, 467 (1969); FED. R. CRIM. P. 11.

316. See notes 356-74 *infra* and accompanying text.

317. See, e.g., Meachum v. Fano, 427 U.S. 215, 225 (1976) (transfer from me-

quiry is whether the interest infringed upon may be classified as a "liberty" or "property" interest.<sup>318</sup>

"Liberty" within the meaning of the due process clause "denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."<sup>319</sup> Even if not expressly protected by the constitution, liberty interests may arise from state law, such as when a state affords prisoners a statutory right to good time credit that may be forfeited only for serious misbehavior.<sup>320</sup> "Property" interests, for due process purposes, typically are not created by the constitution, but rather arise from an independent source such as state law.<sup>321</sup> Thus, tangible and intangible interests, as well as legitimate claims of entitlement to a benefit or status protected by state law for those meeting or maintaining specified qualifications, have been considered protected by due process.<sup>322</sup> When a government action is found to deprive a person of either a liberty or property interest, courts usually require that notice and some kind of hearing be provided prior to interference with the protected interest.<sup>323</sup>

Although procedural due process protections do apply to prisoners,<sup>324</sup> the Supreme Court has recognized that a valid

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dium security to maximum security prison with less desirable living conditions does not infringe a liberty interest within due process clause).

318. See, e.g., *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979); *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

319. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The *Meyer* definition of "liberty" has been cited frequently. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The Court has indicated that "[i]n a constitution for free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. at 572.

320. For example, a prisoner may acquire a liberty interest under a statute that guarantees time off for good behavior. See *Wolff v. McDonnell*, 410 U.S. 539, 557-58 (1974). Accord, *Vitek v. Jones*, 445 U.S. 480, 488-91 (1980) (state law afforded prisoner liberty interest in avoiding transfer to mental hospital absent fulfillment of specified standards); *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972) (state law granted prisoner conditional liberty interest in parole); *Enomoto v. Wright*, 462 F. Supp. 397, 402-03 (N.D. Cal. 1976) (state law granted prisoner liberty interest when transferred to solitary confinement for disciplinary or administrative reasons), *aff'd*, 434 U.S. 1052 (1978).

321. See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See generally Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. REV. 269, 275-83 (1975); Note, *Statutory Entitlement and the Concept of Property*, 86 YALE L.J. 695 (1977); Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89.

322. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (public school attendance); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (welfare benefits).

323. See generally L. TRIBE, *supra* note 110, at 501-63.

324. See generally *Hughes v. Rowe*, 49 U.S.L.W. 3346 (U.S. Nov. 15, 1980)

conviction extinguishes many of the liberties otherwise protected by the Constitution. In *Meachum v. Fano*,<sup>325</sup> for example, the Supreme Court held that no notice or hearing was required upon the discretionary transfer of state prisoners to a less agreeable prison, even though the transfer resulted in a substantially adverse change in prison conditions. Finding that state law conferred no right to be placed in any particular prison or to remain in a prison to which the prisoner was initially assigned, the Court held that "conviction had sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons. . . . Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."<sup>326</sup>

*Meachum* has been distinguished, however, where the transfer is not to another prison, but to a state mental hospital. In *Vitek v. Jones*,<sup>327</sup> the Court found a liberty interest grounded in an "objective expectation, firmly fixed in state law and official Penal Complex practice," that such a transfer would not occur unless the prisoner suffered from a mental disease or defect that could not be adequately treated in the prison.<sup>328</sup> Moreover, the Court found that even absent a liberty interest created by state law, the proposed transfer infringed upon a constitutionally protected liberty interest in view of the stigma accompanying placement in a mental hospital and the requirement that prisoners participate in behavior modification pro-

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(prior hearing required for segregation of prisoner absent emergency conditions); *Vitek v. Jones*, 445 U.S. 480 (1980) (hearing required prior to transfer of a prisoner to a mental hospital); *Enomoto v. Wright*, 434 U.S. 1052 (1978) (hearing required prior to imposition of solitary confinement); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (hearing required prior to forfeiture of accumulated good-time credit as sanction in prison disciplinary proceedings).

325. 427 U.S. 215 (1976). The Court reached the same result in the companion case of *Montayne v. Haymes*, 427 U.S. 236 (1976), involving a prison transfer for disciplinary purposes.

326. 427 U.S. at 224-25. The Court applied the same approach in *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979), when it held that, absent state law giving rise to a legitimate expectancy of release on parole, the decision of a parole board did not implicate a constitutionally protected liberty interest. The Court could find "no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." *Id.* (quoting *Meachum v. Fano*, 427 U.S. at 224).

327. 445 U.S. 480 (1980).

328. *Id.* at 489 (quoting *Miller v. Vitek*, 437 F. Supp. 569, 572-73 (D. Neb. 1977)).

grams.<sup>329</sup> Finding these consequences “qualitatively different from the punishment characteristically suffered by a person convicted of crime,”<sup>330</sup> the Court noted that although conviction and sentence extinguish the prisoner’s right to freedom from confinement for the term of the sentence, “they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protection.”<sup>331</sup>

Thus, at least when state law does not give rise to a property or liberty interest in resisting treatment, the question of whether due process applies to coercive rehabilitation will turn on whether the treatment infringes a liberty interest protected by the Constitution, and whether it “is within the normal limits or range of custody which the conviction has authorized the State to impose.”<sup>332</sup> Prior Supreme Court decisions indicate that mental hospitalization exceeds these limits, but transfer to another correctional facility does not.<sup>333</sup> The “normal range of custody” approach suggests that the imposition of traditional correctional treatments, either within or outside the prison (so long as they are not at mental hospitals or similarly stigmatizing facilities), will not be found to invade a constitutionally protected liberty interest. Counseling therapy as well as vocational, educational, and other verbal programs in which offenders may be ordered to participate, are not, standing alone, seriously stigmatizing. Moreover, these programs would seem to be “within the normal limits or range of custody which the conviction has authorized the State to impose.”<sup>334</sup>

Indeed, the Supreme Court recently implied as much when it refused to require due process hearings before the issuance of a parole violator warrant, even though such a warrant could adversely affect a prisoner’s classification and eligibility for institutional programs.<sup>335</sup> Reiterating that due process did not apply to prison transfers, the Court noted: “The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U.S.C. § 4081, and petitioner has no legitimate statutory or

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329. *Id.* at 491-94.

330. *Id.* at 493.

331. *Id.* at 494.

332. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

333. See text accompanying notes 324-26 *supra*.

334. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

335. *Moody v. Dagget*, 429 U.S. 78, 85-89 (1976).

constitutional entitlement sufficient to invoke due process."<sup>336</sup> The statutory scheme cited by the Court has been held to authorize the Attorney General to "establish and conduct all industries and other activities, classify the inmates, and provide for their proper government, discipline, treatment, care, rehabilitation and reformation."<sup>337</sup> A similar provision authorizes the United States Parole Commission to impose as a condition of parole that "a parolee . . . reside in or participate in the program of a residential community treatment center, or both."<sup>338</sup> On the federal level, these statutes would certainly seem to define the "normal limits or range of custody" to which convicted defendants may be subjected without additional due process protections. Similarly, when state law contemplates rehabilitation as a goal of incarceration or alternative sentence, or provides that community treatment may be made a condition of parole, imposition of traditional correctional therapies that are not themselves seriously stigmatizing will probably be deemed within the normal range of custody and hence, beyond the reach of the due process clause.

The Supreme Court is generally disinclined to impose due process requirements on state correctional decisionmaking. In refusing to require a hearing for all parole release decisions, for example, the Court noted the similarities among parole release, probation release, and correctional rehabilitation. In each area, "few certainties exist" and in each

the decision differs from the traditional mold of judicial decision-making in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.<sup>339</sup>

In language that seems equally applicable to traditional verbal rehabilitative approaches, the Court emphasized the discretionary and subjective judgments involved in parole release:

[T]here is no set of facts which, if shown, mandate a decision favorable to the individual. The parole determination, like a prisoner-transfer decision, may be made "for a variety of reasons and often involve[s] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate."<sup>340</sup>

Stating that the function of due process is largely "to minimize

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336. *Id.* at 88 n.9.

337. *Thogmartin v. Moseley*, 313 F. Supp. 158, 159 (D. Kan. 1969), *aff'd*, 430 F.2d 1178 (10th Cir.), *cert. denied*, 400 U.S. 910 (1970).

338. 18 U.S.C. § 4209(c)(1) (1976).

339. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 8 (1980).

340. *Id.* at 10 (quoting *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

the risk of erroneous decisions,"<sup>341</sup> the Court found this concern inapplicable to the essentially subjective and predictive decisions made by parole boards. Recognizing the experimental character of parole release decisionmaking, the Court praised such experimentation, which it feared might be abandoned or curtailed "[i]f parole determinations are encumbered by procedures that states regard as burdensome and unwarranted."<sup>342</sup>

The Court's reluctance to burden rehabilitation with formal proceedings will likely be overcome, however, when techniques more intrusive than the verbal approaches are imposed. Both the organic approach and many of the behavioral approaches do not seem "within the normal limits or range of custody which the conviction has authorized the State to impose."<sup>343</sup> Indeed, in *Vitek v. Jones*,<sup>344</sup> the Supreme Court mentioned "mandatory behavior modification programs" and "involuntary psychiatric treatment" as factors bearing on its finding that transfer to a mental hospital invades constitutionally protected liberty.<sup>345</sup> This strongly suggests that imposition of the more intrusive techniques, even in nonhospital settings, would be held to infringe protected liberty interests.

In *Vitek*, the Court also relied in part on *Ingraham v. Wright*,<sup>346</sup> which had recognized that protected liberties include "a right to be free from and to obtain judicial relief for, unjustified intrusions on personal security."<sup>347</sup> In *Ingraham*, the Supreme Court upheld the constitutionality of corporal punishment for public school students, but nonetheless found that such punishment invades a liberty interest protected by the Constitution and therefore was within the cognizance of due process. Although conceding "a de minimis level of im-

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341. 442 U.S. at 13.

342. *Id.*

343. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

344. 445 U.S. 480 (1980).

345. *Id.* at 492.

346. 430 U.S. 651 (1977).

347. *Id.* at 673. A recent district court opinion found that perhaps the oldest liberty recognized by the common law is "a person's right to be free from unwanted personal contact." *Davis v. Hubbard*, No. C73-205 (N.D. Ohio Sept. 16, 1980), summarized at 49 U.S.L.W. 2215 (1980). The court traced this "interest in the physical security of one's body" to the Magna Carta, and cited Blackstone's identification of "the right of personal security" as one of the "three elements of 'liberty' guaranteed to all Englishmen." *Id.* See also Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 433 (1977) (interference with an individual's bodily integrity, as well as with his "psychic integrity—his personality," implicates constitutional liberty).

sition with which the Constitution is not concerned," the *Ingraham* Court held that when school authorities restrain a student and inflict "appreciable physical pain," fourteenth amendment liberty interests are implicated.<sup>348</sup> Similarly, correctional therapies that involve "intrusions on personal security" of more than a de minimis nature would seem subject to the requirements of due process.<sup>349</sup> The organic techniques, which by definition involve bodily intrusions, and aversive conditioning techniques that involve physically intrusive stimuli or severe deprivations, certainly are more than de minimis.<sup>350</sup> Imposition of these more intrusive therapies may also stigmatize their offender-recipients,<sup>351</sup> resulting in adverse social consequences such as those found to accompany mental hospitalization in *Vitek*.<sup>352</sup> Moreover, protected liberty interests have traditionally been defined to include a person's "right to be free in the enjoyment of all his faculties."<sup>353</sup> Accordingly, to the extent that intrusive therapies interfere with mental integrity in a way incapable of being resisted, these therapies may invade constitutional liberty even if they do not involve bodily intrusions.

For all of these reasons, the more intrusive therapies clearly appear to infringe that "residuum of liberty" retained by offenders,<sup>354</sup> and may be imposed, if at all, only after affording additional due process protection to those affected.<sup>355</sup>

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348. 430 U.S. at 674.

349. The Supreme Court's sanctioning of visual body cavity searches of pre-trial detainees in *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979), does not conflict with this analysis. Not only did *Wolfish* involve a fourth amendment search and seizure question rather than a fifth or fourteenth amendment due process issue, but the intrusions involved were visual inspections only, rather than invasions of physical security.

350. See notes 347-48 *supra* and accompanying text.

351. See HARVARD MEDICAL SCHOOL LABORATORY OF COMMUNITY PSYCHIATRY, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 63 (1973); Winick, *supra* note 181, at 807. See generally Burt, *Of Mad Dogs and Scientists: The Perils of the "Criminal-Insane,"* 123 U. PA. L. REV. 258 (1974).

352. 445 U.S. 480 (1980). In a number of prior cases involving government action imposing a stigma accompanied by denial of some more tangible interest such as employment or educational opportunities, the Court has found that procedural due process requires a hearing. Compare *Goss v. Lopez*, 419 U.S. 565, 574 (1975) and *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) and *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) with *Bishop v. Wood*, 426 U.S. 341, 348 (1976) and *Paul v. Davis*, 424 U.S. 693, 701-10 (1976).

353. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

354. *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

355. See also *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974) (due process hearing required before transfer to prison tier program involving severe deprivations); *Harmon v. McNutt*, 91 Wash. 2d 126, 587 P.2d 537 (1978) (due process hearing required for prisoners prior to transfer to mental health unit and use of dramatic or intrusive treatment). Cf. *Rogers v. Okin*, 28 CRIM. L.

## B. THE NATURE OF THE HEARING REQUIRED

When liberty or property interests are found implicated by a proposed therapy program, some form of hearing will be required, but it might not follow the formal, adversarial judicial model for fact finding.<sup>356</sup> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation;"<sup>357</sup> due process instead "is flexible and calls for such procedural protections as the particular situation demands."<sup>358</sup> In determining what process is due in a particular situation, the Supreme Court has engaged in a broad balancing approach, considering three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>359</sup>

In balancing these factors, the Court has displayed an increased willingness to permit informal procedures that depart substantially from the trial-type hearing traditionally associated with due process.<sup>360</sup> The degree of procedural formality

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RPTR. 2397 (1st Cir. 1980) (procedural due process implicated by involuntary administration of psychotropic medication to state mental hospital patients); *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976) (same); *Winters v. Miller*, 446 F.2d 65 (2d Cir.), cert. denied, 404 U.S. 985 (1971) (same); *Rennie v. Klein*, 476 F. Supp. 1294 (D.N.J. 1979) (same), appeal docketed, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980); *Morales v. Turman*, 383 F. Supp. 53, 83 (E.D. Tex. 1974), rev'd on other grounds, 535 F.2d 864 (5th Cir. 1976), rev'd, 430 U.S. 322 (1977) (same).

356. See *Parham v. J.R.*, 442 U.S. 584, 606-13 (1979).

357. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

358. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

359. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Accord, *Parham v. J.R.*, 442 U.S. 584, 604-08 (1979); *Ingraham v. Wright*, 430 U.S. 651, 675 (1977). See *Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976).

360. See L. TRIBE, *supra* note 110, at 539-54; Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 739-42 (1976). Illustrative are four recent Supreme Court cases. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court, holding that a student's ten-day suspension from public school without a hearing violated due process, indicated that an informal hearing would be sufficient. *Id.* at 574-84. In *Ingraham v. Wright*, 430 U.S. 651 (1977), because of the existence of a tort remedy under state law for excessive corporal punishment, the Court refused to impose any hearing requirement in excess of the existing process, which required a decision to be made by teacher and principal as to whether corporal punishment was reasonably necessary under the circumstances. *Id.* at 672-82. In *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the Court found that dismissals for academic cause do not necessitate a hearing before the school's decisionmaking body. *Id.* at 84-91. In *Parham v. J.R.*, 442 U.S. 584 (1979), the Court considered whether due process required an adver-

will depend upon the Court's assessment of the risk and cost of error and the extent to which various procedural safeguards would minimize the risk, and the costs of such procedures. The broad range of rehabilitation techniques in use present differing intrusions on constitutional liberties as well as differing risks of erroneous deprivations, such that the balance may be struck differently for particular techniques. The proposed continuum of intrusiveness can be used to analyze how the balance will be determined in each case.

In view of the Supreme Court's reluctance to extend due process protections in a manner that would "subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts,"<sup>361</sup> it is likely that courts will find that informal and flexible procedures, rather than adversarial trial-like hearings, are generally sufficient for the less intrusive therapies.<sup>362</sup> This is particularly true in view of the predictive, subjective, and clinical nature of the judgments involved in assigning offenders to these therapeutic programs.<sup>363</sup>

The more controversial and intrusive the technique, however, the more likely that courts will insist on more formal, adversarial procedures. More intrusive therapies impose increasingly greater deprivations on the individuals affected, thus increasing the risk of harm from erroneous deprivations. In view of the grave intrusions on fundamental rights presented by psychosurgery, for example, and the irreversible nature of the procedure, it is likely that courts will insist upon a highly formal evidentiary hearing, perhaps by a court, in order to authorize involuntary psychosurgery—assuming a prisoner in a particular context does not have an absolute right to refuse the treatment.<sup>364</sup> For interventions like psychotropic

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sary hearing when a parent or guardian seeks to commit a minor child to a state mental hospital. Finding the child to have "a substantial liberty interest in not being confined unnecessarily for medical treatment," *id.* at 600, the Court nevertheless found sufficient the statutory procedure under which a hospital admitting physician was required to review the child's condition to determine whether the statutory requirements for hospitalization were satisfied. *Id.* at 616-17.

361. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

362. *Cf. Rennie v. Klein*, 476 F. Supp. 1294, 1307-10 (D.N.J. 1979), *appeal docketed*, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980) (mandating informal review by an independent psychiatrist before state mental hospital may forcibly administer psychotropic drugs to involuntarily committed patients).

363. *Parham v. J.R.*, 442 U.S. 584, 606-07 (1979).

364. *See, e.g., Price v. Sheppard*, 307 Minn. 250, 257, 239 N.W.2d 905, 910 (1976).

drugs, which may invade fundamental constitutional rights but usually lack permanent effect, a less formal procedure may be required than that required for imposing psychosurgery.<sup>365</sup> The balance struck for most behavioral techniques will likely require even less in the way of formality.

The Supreme Court's recent decision in *Vitek v. Jones*,<sup>366</sup> reveals some procedural safeguards that might be followed for moderately to highly intrusive programs. In *Vitek*, the Court upheld a district court decision which required that, before a prisoner could be sent to a mental hospital, written notice that such a transfer was being considered must be provided and an administrative hearing before an independent decisionmaker must be held.<sup>367</sup> A sufficient period of time must be allowed between the notice and hearing to permit the prisoner to prepare adequately.<sup>368</sup> At the hearing, evidence relied upon to support the transfer must be disclosed to the prisoner, and he or she must be afforded an opportunity to confront and cross-examine state witnesses and to present documentary evidence and testimony by witnesses (unless good cause is shown to prohibit such presentation, confrontation, or cross-examination).<sup>369</sup> Assistance by a qualified and independent advisor—a licensed psychiatrist or other mental health professional—must also be provided.<sup>370</sup> Finally, the independent decisionmaker must prepare a written statement of the evidence relied upon and of the reasons for the transfer.<sup>371</sup>

Although less formality may be required when the therapeutic intervention involves psychotropic drugs or behavioral techniques administered in a setting less stigmatizing than the mental hospital in *Vitek*, it is clear that an informal administrative determination by an independent decisionmaker is a mini-

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365. See, e.g., *Rogers v. Okin*, 28 CRIM. L. RPTR. 2397 (1st Cir. 1980); *Davis v. Hubbard*, No. C73-205 (N.D. Ohio Sept. 16, 1980), summarized at 49 U.S.L.W. 2215 (1980); *Rennie v. Klein*, 476 F. Supp. 1294 (D.N.J. 1979), appeal docketed, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980).

366. 445 U.S. 480 (1980).

367. *Id.* at 494-96.

368. *Id.* at 494.

369. *Id.* at 494-95.

370. Although four of the justices thought an attorney was required, *id.* at 497, Mr. Justice Powell, the swing vote in the Court's 5-4 decision, rejected this view, finding that due process was satisfied by the provision of qualified and independent assistance by a mental health professional. *Id.* at 497-500 (Powell, J., concurring). His concurring opinion became the Court's opinion in the case. *Id.* at 497. The four dissenters would have found the case moot. *Id.* at 501, 505 (Stewart, J. & Blackmun, J., dissenting).

371. *Id.* at 494-95.

mal requirement before such techniques may be imposed. For techniques falling on the lower end of the continuum of intrusiveness but still triggering due process protection, the courts will probably be willing to accept managerial models in which correctional decisions are subjected to administrative or clinical review either by a higher level correctional official or by a neutral and independent evaluator.<sup>372</sup> Administrative review provided by the typical institutional review board, frequently involving participation by prisoners and noninstitutional personnel, would seem to meet the due process requirements for these less intrusive techniques.

It can be concluded that a hearing is not likely to be required before the imposition of traditional verbal rehabilitative approaches, but that some kind of hearing will be required for the less conventional and more intrusive techniques. When the offender objects to these more intrusive therapies, the hearing should consider the efficacy of the proposed approach; for those therapies intruding on fundamental constitutional rights, the hearing should address whether there are less drastic alternatives that would accomplish the government's interest.<sup>373</sup> For offenders who consent to therapy, probably no due process hearing will be required, except when highly intrusive techniques are used which result in substantial deprivations of fundamental rights; in the latter situation, courts may insist on a hearing to ensure the adequacy and voluntariness of consent.<sup>374</sup> The nature of the hearing required in each case will vary substantially, depending upon the extent of intrusion upon protected constitutional rights and the court's evaluation of the usefulness and costs of particular procedural safeguards. Moreover, the amount of procedure will likely change over time as professional and community attitudes toward the various therapeutic interventions themselves change, and as the risks and benefits of each become better understood.

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372. Cf. *Parham v. J.R.*, 442 U.S. 584, 616-17 (1979) (holding that staff physician review of a hospital admission decision for a juvenile was sufficient).

373. See *Rogers v. Okin*, 28 CRIM. L. RPTR. 2397 (1st Cir. 1980); *Rennie v. Klein*, 462 F. Supp. 1131, 1148 (D.N.J. 1978), *appeal docketed*, Nos. 79-2576, 79-2577 (3d Cir. Jan. 30, 1980).

374. See, e.g., *Knecht v. Gillman*, 482 F.2d 1136 (8th Cir. 1973) (intrusive aversive therapy).

## VI. CONSTITUTIONAL LIMITS ON CORRECTIONAL RESEARCH

## A. SUBSTANTIVE CONSTITUTIONAL OBJECTIONS

Although much correctional research has been performed, our knowledge remains primitive<sup>375</sup> concerning the causes and correlates of criminality<sup>376</sup> and the effectiveness of correctional therapy.<sup>377</sup> Continued research and experimentation concerning these issues, therefore, seems essential.<sup>378</sup> Unfortunately, volunteer subjects are sometimes not available, and when available their consent and full knowledge could bias the sample or methodology, precluding scientifically adequate conclusions. If such research is to be performed at all, it must frequently be conducted on an involuntary basis or with less than the full disclosure generally thought necessary for informed consent.<sup>379</sup> Yet the very words "experimentation" and "research" applied in correctional contexts, particularly on an involuntary basis, evoke considerable controversy and the spectre of Nuremburg.<sup>380</sup> Indeed, recent cases have had a chilling effect on correctional research—almost no research is presently being conducted in correctional settings in this country.<sup>381</sup> Although concern with prison experimentation is certainly legitimate, the categorical response it has evoked in some discussions and proposals,<sup>382</sup> as well as in some statutory

375. See PANEL ON RESEARCH ON REHABILITATION, NATIONAL RESEARCH COUNCIL, THE REHABILITATION OF CRIMINAL OFFENDERS 5-7, 27-34 (L. Schrest, S. White, E. Brown eds. 1979); Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 646 (1966).

376. See generally BIOSOCIAL BASES OF CRIMINAL BEHAVIOR, *supra* note 40; S. MEDNICK & S. SHOHAM, NEW PATHS IN CRIMINOLOGY—INTERDISCIPLINARY AND INTERCULTURE EXPLORATIONS (1979); R. MONROE, BRAIN DYSFUNCTION IN AGGRESSIVE CRIMINALS (1978).

377. See generally E. LIPTON, R. MARTINSON & J. WILKES, *supra* note 2.

378. See REHABILITATIVE TECHNIQUES, *supra* note 2, at 10; Morris, *supra* note 375, at 638, 646 ("Few will . . . deny the need to establish empirically valid foundations for the methods we use in preventing and treating crime . . . . [T]here is widespread verbal agreement (if not action) that we must critically test our developing armamentarium of prevention and treatment methods, and that to do so requires testing by means of controlled clinical trials.").

379. See Riecken, *supra* note 41, at 2-7; Soble, *Deception in Social Science Research: Is Informed Consent Possible?*, 8 HASTINGS CENTER REP. 40, 40 (Oct. 1978); Zeisel, *Reducing the Hazards of Human Experiments Through Modification of Research Design*, 169 ANNALS N.Y. ACAD. SCI. 475, 475-476 (1970); Note, *Applying the Controlled Experiment to Penal Reform*, 62 CORNELL L. REV. 158, 162 (1976).

380. See generally J. KATZ, *supra* note 55, at 1013-1052; PRISONER RESEARCH, *supra* note 18.

381. Halleck, *supra* note 10, at 30-31.

382. E.g., ABA, *Tentative Draft of Standards Relating to the Legal Status of*

treatments<sup>383</sup> and administrative policies,<sup>384</sup> seems inappropriate. Rather than treating all types of research alike, or for that matter attaching blanket legal sanctions to particular categories of research, analysis in this area should focus on the effects of the specific research in question.

The analysis proposed here parallels the discussion of an offender's constitutional right to resist correctional therapy. A continuum of intrusiveness similar to the one constructed for the various rehabilitative techniques may be useful for the classification of different types of correctional research. As with the discussion of therapy, the focus should be upon the extent of any physical or mental intrusion accompanying the proposed research; the nature, extent and duration of its effects; and the extent to which these effects may be avoided or resisted by unwilling subjects.<sup>385</sup> Research that seriously invades bodily privacy would implicate the fundamental constitutional right of privacy. Research that interferes with mental processes would similarly implicate the first amendment. In both cases strict judicial scrutiny of the governmental interests furthered by such research as well as of the means used to accomplish these interests would be appropriate. Conversely, experimentation involving neither physical intrusions nor interference with mental processes—survey research, for example—would not invade fundamental constitutional rights.

Under this analysis, some research that involves nonconsenting offenders may be constitutionally permissible. Research in the higher range of the continuum of intrusiveness, however, may so intrude on constitutional rights that it could be performed, if at all, only upon consenting subjects. Again, the constitutional inquiry must address whether the government's interest in performing the research is sufficiently compelling to outweigh the subjects' individual liberty interests, and whether the government's purpose could be accomplished through less drastic means.<sup>386</sup>

Whether the government interest in correctional research can be classified as "compelling" is an open question. In a number of contexts the Supreme Court has displayed sensitiv-

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*Prisoners*, 14 AM. CRIM. L. REV. 375 (1977); American Correctional Ass'n, *supra* note 281.

383. *E.g.*, CAL. PENAL CODE §§ 3500-3524 (West Supp. 1970-1979); OR. REV. STAT. § 421.085 (1973).

384. See text accompanying notes 47-54 *supra*.

385. See text accompanying note 110 *supra*.

386. See text accompanying notes 219-23, 238-46 *supra*.

ity to the societal need for research and experimentation in the formulation of social policy.<sup>387</sup> Because the government interest in protecting community safety is a compelling interest at the core of the police power<sup>388</sup> and because the government interest in offender rehabilitation would probably be deemed compelling, research into the causes of criminality, into new correctional treatment methods, and into the efficacy of existing methods, could similarly be seen as compelling.<sup>389</sup> Courts have upheld intrusions on bodily privacy in other contexts, but usually when there has been no less intrusive alternative. In *Jacobson v. Massachusetts*,<sup>390</sup> the Supreme Court deemed the governmental interest in preventing the spread of an epidemic sufficient to outweigh an individual's objections to forced inoculation. Similarly, the government's police power interest in gathering evidence of crime has been found sufficient to authorize forced blood tests of motor vehicle drivers to determine whether they have been driving while intoxicated<sup>391</sup> and to justify surgical removal of bullets from suspects in a

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387. See *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), in which Justice Brandeis stated:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

*Id.* at 311 (Brandeis, J., dissenting) (footnotes omitted). For a more recent case applying these precepts, see *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (noting that "states have broad latitude in experimenting with possible solutions to problems of vital local concern").

388. See notes 228-35 *supra* and accompanying text.

389. Indeed the government interest in therapeutic research should be considered more significant than the government interest in imposing treatments on offenders. Such research would further not only the societal interest in limiting recidivism, but also the interests of those offenders who desire effective rehabilitation. The societal interest may be met by incarceration alone, see note 264 *supra* and accompanying text, but the interests of offenders in having a choice of effective rehabilitative programs, and in exercising such a choice in an informed manner, could not be served in the absence of therapeutic research.

390. 197 U.S. 11 (1905).

391. See *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *Breithaupt v. Abram*, 352 U.S. 432, 439-40 (1957).

criminal case.<sup>392</sup> Yet in these situations the bodily intrusions were strictly necessary to serve the compelling interest in halting an epidemic or in obtaining evidence. With much correctional research, however, the governmental interest can be fully accomplished with volunteer subjects, making involuntary participation an unnecessarily drastic intrusion. Even if the government's interest in research is deemed compelling in the abstract, application of the "least restrictive alternative" principle<sup>393</sup> would restrict research methodologies that involve extremely intrusive techniques. If the research can be performed by utilizing noncorrectional populations or volunteer offenders, then research invading fundamental rights will not be permitted with nonconsenting offenders. Moreover, if the goal of a particular research project can be accomplished through means which intrude less on protected liberties than the means proposed by correctional authorities, courts will uphold the offender's refusal to participate. Additionally, in considering challenges to involuntary participation in research, courts may insist on proof of the experiment's scientific validity.<sup>394</sup>

One other factor might be weighed into the balance between prisoner liberties and governmental interests. When a governmental agency purports to have authority to infringe upon fundamental rights, courts have sometimes insisted on an explicit legislative expression of that authority.<sup>395</sup> In *Kent v. Dulles*,<sup>396</sup> the Supreme Court held that the Passport Act of 1926, which granted the Secretary of State the authority to "grant and issue passports . . . under such rules as the President shall designate and prescribe,"<sup>397</sup> was insufficient authority for a regulation prohibiting issuance of passports to members of the Communist Party. Finding that the regulation impinged upon the constitutionally protected right to travel, the Court held that "[w]here activities or enjoyment, natural

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392. See *United States v. Crowder*, 543 F.2d 312, 316-17 (D.C. Cir. 1976) (en banc), cert. denied, 97 S. Ct. 788 (1977).

393. See notes 238-46 *supra* and accompanying text.

394. See Capron, *Social Experimentation and the Law*, in *ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION* 127, 152 (A. Rivlen & P. Timpane eds. 1975); Rutstein, *The Ethical Design of Human Experiments*, in *EXPERIMENTATION WITH HUMAN SUBJECTS* 383-401 (P. Freund ed. 1969).

395. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308-309 (1978) (opinion of Powell, J.); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105-14 (1976); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); J.FREEDMAN, *CRISIS AND LEGITIMACY* 83-85 (1978); B. SCHWARTZ, *ADMINISTRATIVE LAW* 47-48 (1976).

396. 357 U.S. 116 (1958).

397. Act of July 3, 1926, ch. 772, § 1, 44 Stat., pt. 2, 887, quoted in *Kent v. Dulles*, 357 U.S. 116, 123 (1958).

and often necessary to the well-being of an American citizen . . . are involved, we will construe narrowly all delegated powers that curtail or dilute them.”<sup>398</sup> Referring to the Passport Act, the Court could not “find in this broad generalized power an authority to trench so heavily on the rights of the citizen.”<sup>399</sup> Thus, particularly when faced with correctional research that would seriously invade constitutional rights, courts may well hold that a general legislative delegation<sup>400</sup> is insufficient to support the agency’s assertion of authority to conduct such research. This approach allows courts to avoid deciding the constitutional issue and in effect, remands the underlying policy question to the legislature for decision with an awareness that its choice will implicate fundamental values and will be subjected to searching constitutional scrutiny.<sup>401</sup>

This framework for analyzing challenges to involuntary participation in correctional research is virtually identical to that developed for consideration of similar objections to involuntary therapy. Certain types of research, however, present issues that might not arise with most correctional therapies. Research involving mere observation of offenders, or the collection of information concerning them—including physical, psychiatric, psychological, neurological, electroencephalographic, and other physiological testing and measurement—does not have a parallel in correctional therapy. These invasions of essentially informational privacy present a different constitutional issue.

In a number of contexts, the courts have recognized that “the privacy of one’s personal affairs is protected by the Constitution.”<sup>402</sup> In *Union Pacific Railway Co. v. Botsford*,<sup>403</sup> for example, the Supreme Court held that plaintiffs in civil injury suits may not be forced to submit to surgical examinations concerning the extent of injuries. The Court stressed the right to personal privacy: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every

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398. 357 U.S. at 129.

399. *Id.*

400. See, e.g., 18 U.S.C. § 4042(1) (1976) (delegation to bureau of prisons to “have charge of the management and regulation of all Federal [prisons]”).

401. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962); J. FREEDMAN, *supra* note 395, at 83; Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433, 442-43 (1977).

402. *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

403. 141 U.S. 250 (1891).

individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."<sup>404</sup> The *Botsford* Court did recognize, however, that a strong public interest could override the privacy right.<sup>405</sup>

More recently in *Whalen v. Roe*,<sup>406</sup> the Supreme Court acknowledged that constitutional privacy protects "the individual interest in avoiding disclosure of personal matters,"<sup>407</sup> but nonetheless upheld a statutory scheme for maintaining computerized records of prescriptions for certain dangerous drugs.<sup>408</sup> The record-keeping requirements included mandatory recording of patient names and addresses—a procedure that was challenged by both physicians and patients. The Court found that the patients' constitutional privacy was infringed by the statutory requirement, but stressed the strong state interest in minimizing the misuse of dangerous drugs and the detailed statutory safeguards to prevent unauthorized use of the records. In language that would seem applicable to correctional research as well, the Court found that important public purposes under the police power can justify collection and use of personal data, at least pursuant to a system containing safeguards against unwarranted disclosure.<sup>409</sup> Similarly in *Planned Parenthood v. Danforth*,<sup>410</sup> the Supreme Court upheld

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404. *Id.* at 251.

405. The Court cited the common law writ de ventre inspeciendo as an example. This writ authorized physical examinations of women convicted of capital crimes to determine whether they were pregnant in order to prevent the death of an unborn child. *See id.* at 253.

406. 429 U.S. 589 (1977).

407. *Id.* at 599.

408. *Id.* at 600.

409. *Id.* at 605.

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy.

*Id.* (footnote omitted).

410. 428 U.S. 52 (1976). *See also* *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 452-54 (1976) (public interest in preserving presidential documents outweighed President Nixon's privacy interests).

abortion record-keeping and reporting requirements, holding that the state interest in the preservation of maternal health was sufficient to override the patient's privacy claim, at least where confidentiality was respected.<sup>411</sup> A more extreme invasion of privacy was recently sanctioned in *Bell v. Wolfish*,<sup>412</sup> where the Supreme Court held that pretrial detainees could be required to expose their body cavities for visual inspection as part of a strip search following every contact visit with a person from outside the institution. Although the inmates were not touched by security personnel during the procedure, the inmates were subject to very close visual inspection.<sup>413</sup> Noting that it did not "underestimate the degree to which these searches may invade the privacy of inmates,"<sup>414</sup> the Court nevertheless upheld the searches on less than probable cause, finding that the governmental interest in security outweighed the individual interest in privacy.<sup>415</sup>

In these and a number of lower court cases following a similar approach,<sup>416</sup> courts have applied neither strict nor minimal scrutiny to interference with informational privacy. The courts instead adopt an intermediate level of scrutiny that balances specific governmental and individual interests and requires reasonable safeguards against unnecessary invasions of privacy.<sup>417</sup> Judged by this standard, correctional research concerning the causes of criminality or the efficacy of various

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411. 428 U.S. at 79-81.

412. 441 U.S. 520 (1979).

413. Male inmates were required to lift their genitals and bend over to spread their buttocks for visual inspection; female inmates were subjected to visual inspection of vaginal and anal cavities. *Id.* at 558 & n.39.

414. *Id.* at 560.

415. *Id.* at 559-60. *Accord*, Daugherty v. Harris, 476 F.2d 292, 294-95 (10th Cir.) (upholding rectal searches of prisoners conducted by trained para-professional medical assistants), *cert. denied*, 414 U.S. 872 (1973).

416. *See generally* Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978) (upholding a state financial disclosure law for elected officials against a claim of undue interference with informational privacy), *cert. denied*, 439 U.S. 1129 (1979); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028 (D. Hawaii 1979) (granting preliminary injunction against enforcement of state anti-medicaid fraud statute permitting prosecutors to inspect confidential files of psychotherapists, finding the state interest insufficient to outweigh the individual privacy interest in preventing disclosure of such highly personal information); McKenna v. Fargo, 451 F. Supp. 1355 (D.N.J. 1978) (finding that a city's interest in screening firefighters is sufficient to justify psychiatric testing of applicants), *aff'd*, 601 F.2d 375 (3d Cir. 1979); Kochman v. Keansburg Bd. of Educ., 124 N.J. Super. 203, 305 A.2d 807 (1973) (finding the state interest in protecting children sufficient to justify the infringement on privacy resulting from a requirement that teachers undergo psychiatric examination).

417. Plante v. Gonzalez, 575 F.2d 1119, 1132-34 (5th Cir. 1978); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1039-45 (D. Hawaii 1979).

correctional therapies will probably be considered sufficiently important to justify reasonable intrusions on informational privacy of offenders. This is particularly likely in the case of incarcerated offenders who are customarily subjected to official surveillance and enjoy a vastly reduced expectation of privacy.<sup>418</sup> Furthermore, the fact that collection and publication of this information in scientific studies will probably not involve disclosure of information identifying particular offenders reduces the extent of intrusion.<sup>419</sup>

Even the collection of data that involves minimal touching or invasion of bodily privacy and is not seriously intrusive, such as physical, neurological, and physiological examinations and measurements, will probably be upheld. Other involuntary invasions of bodily privacy—vaccinations, blood tests, rectal searches, surgical removal of a bullet—have been upheld on a showing of clear necessity, procedural regularity, and minimal pain.<sup>420</sup> Thus it seems likely that research involving some bodily invasions will be allowed when the research program is deemed sufficiently important, when the data may not easily be obtained elsewhere or on a voluntary basis, and when minimally intrusive procedures are used. When research passes a sufficient threshold of intrusiveness, however, courts will apply strict scrutiny—requiring both a compelling governmental interest and use of the least drastic means. Of course, as with intrusive therapy, offenders may give informed consent and waive their constitutional right to refuse to participate.<sup>421</sup> Neither the fact of incarceration per se nor the prospect or

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418. See *Lanza v. New York*, 370 U.S. 139, 142-45 (1972) (discussing whether fourth amendment would be violated by interception of conversation in jail visiting room); *Travers v. Paton*, 261 F. Supp. 110, 114-16 (D. Conn. 1966) (secret filming of prisoner in parole hearing did not invade privacy).

419. When information about individual offenders is essential, however, the courts will probably allow disclosure. In *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E.2d 610, *cert. denied*, 398 U.S. 960 (1969) the Supreme Court of Massachusetts enjoined the showing to the general public of a film depicting life at a state mental hospital, which included scenes of identifiable patients as well as some patient nudity. However, the court permitted the showing of the film to specialized audiences:

It is a film which would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity. The public interest in having such persons informed about Bridgewater, in our opinion, outweighs any countervailing interests of the inmates and of the Commonwealth (as *parens patriae*) in anonymity and privacy.

*Id.* at 262, 249 N.E.2d at 618.

420. L. TRIBE, *supra* note 110, at 194-95; see Jaffe, *supra* note 70, at 212.

421. See notes 269-316 *supra* and accompanying text.

promise of release or avoidance of incarceration in exchange for participation will necessarily render informed consent impossible.<sup>422</sup>

## B. PROCEDURAL DUE PROCESS REQUIREMENTS

Procedural due process may require notice and a hearing before use of correctional research, even for those types of research found to be constitutionally permissible without informed consent. The general framework developed earlier for applying procedural due process to correctional therapy<sup>423</sup> will apply as well to correctional research. Thus, research involving physical bodily intrusions of more than a de minimus nature would be subject to the requirements of procedural due process. It is an open question, however, whether forced participation in research involving lesser intrusions will be deemed to so infringe liberty interests as to trigger due process protection. Under *Meachum v. Fano*,<sup>424</sup> traditional rehabilitative therapy may be imposed without a hearing<sup>425</sup> because such therapy falls "within the normal limits or range of custody which the conviction has authorized the State to impose."<sup>426</sup> The "normal range of custody," however, does not clearly include forced participation in research, even if only minimally intrusive. The "normal limits or range of custody" to which convicted defendants may be subject under *Meachum* without additional due process seem to be defined in large part by relevant statutory and regulatory law. The typical statutory delegation of authority to correctional agencies, although authorizing correctional treatment either expressly or by implication, does not empower the agencies to perform nonconsensual research or experimentation. Thus, even given *Meachum's* restrictive view of the liberty enjoyed by prisoners, many forms of involuntary correctional research could be held to invade constitutional liberty. Of course, there is a "de minimus level of imposition with which the Constitution is not concerned,"<sup>427</sup> which could encompass research involving mere observation of offenders, accumulation of information concerning them or concerning

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422. See notes 301-16 *supra* and accompanying text; Singer, *supra* note 295. See also *Bailey v. Lally*, 481 F. Supp. 203, 218-21 (D. Md. 1979).

423. See notes 317-72 *supra* and accompanying text.

424. 427 U.S. 215 (1976).

425. See notes 325-26 *supra* and accompanying text.

426. 427 U.S. at 225.

427. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

correctional therapy programs, and even the performance of in-offensive physical and physiological measurement and testing.

When due process is held to apply, courts will likely permit informal procedures to be used—at least for research that is not highly intrusive.<sup>428</sup> Rather than formal trial-type hearings, the courts will probably be willing to accept procedures involving administrative or clinical review of the research protocol and of the selection process for subjects. The review provided by the typical institutional review board<sup>429</sup> would seem generally sufficient for all but highly intrusive research. For intrusive research, assuming it to be substantively permissible, the hearing would be more formal and would strictly scrutinize the research by questioning whether it is scientifically valid, whether there are less drastic means of conducting the proposed research, and whether noncorrectional populations or consenting offenders could be used instead.

### C. THE CONSTITUTION AND RESEARCH METHODOLOGY

To be scientifically valid, correctional research must be performed by means of controlled experimentation which requires, among other things, the random assignment of subjects to the experimental group and to the control group.<sup>430</sup> Yet random assignment often appears discriminatory—"some people receive the experimental treatment while others are excluded from it, and either treatment or its withholding may involve risk of harm"<sup>431</sup>—a common perception that may raise constitu-

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428. See notes 360-72 *supra* and accompanying text.

429. See, e.g., 45 C.F.R. § 46 (1979); notes 47-48 *supra* and accompanying text.

430. REHABILITATIVE TECHNIQUES, *supra* note 2, at 6-7, 16-17, 60-61, 66; Farrington, *supra* note 40, at 312-13; Morris, *supra* note 375, at 646-47; Rezmovic, *Methodological Considerations in Evaluating Correctional Effectiveness: Issues and Chronic Problems*, in REHABILITATIVE TECHNIQUES, *supra* note 2, at 163, 164-66; Zeisel, *supra* note 379, at 476-77; Zimring, *Measuring the Impact of Pre-trial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 235, 238-39 (1974); Note, *supra* note 379, at 160-61. Examples of social experiments using random selection are numerous. See, e.g., Breger, *Legal Issues Raised by Randomized Social Experiments*, in PROCEEDINGS AND BACKGROUND PAPERS: CONFERENCE ON ETHICAL AND LEGAL PROBLEMS IN APPLIED SOCIAL RESEARCH, 9-1, 9-7 (R. Boruch, J. Ross & J. Cecil eds. 1979). Such random experimentation has been conducted in the legal system. See, e.g., Shapard, *Ethical Issues in Experimentation in the Law: Structural Concerns* (unpublished discussion draft prepared for the Federal Judicial Center Advisory Commission on Experimentation in the Law, 1979); Woods, *Random Assignment to Treatment Groups: A Strategy for Judicial Research*, 17 CRIMINOLOGY 230 (1979).

431. Zeisel, *supra* note 379, at 475. See also Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 451-52 (1969) (controlled experiment threatens principle that equals be treated equally).

tional problems under the fourteenth amendment guarantee of equal protection.<sup>432</sup> Nevertheless, when the research process is fully examined against the mandate of the equal protection clause, random assignment of research subjects, with limited exceptions, appears readily permissible.

The equal protection clause does not require that government treat all persons similarly situated alike;<sup>433</sup> it imposes a burden on government to justify differential treatment as related to a legitimate governmental purpose. The degree of justification required will depend upon the nature of the individual interest affected and whether the government action operates to the peculiar disadvantage of a "suspect" class.<sup>434</sup> Most classifications challenged on equal protection grounds will be subjected to minimal scrutiny, requiring only that the classification bear a reasonable relation to a legitimate governmental purpose.<sup>435</sup> In cases involving "suspect classifications"—such as race,<sup>436</sup> alienage,<sup>437</sup> and national origin<sup>438</sup>—or

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432. See REHABILITATIVE TECHNIQUES, *supra* note 2, at 9, 100; Baunach, *Random Assignment in Criminal Justice Research: Some Ethical and Legal Issues*, 17 CRIMINOLOGY 435, 440 (1980) (LEAA staff conclusion that equal protection places legal restrictions on random assignment of selection techniques); Bregger, *supra* note 430, at 9-6; Riecken, *supra* note 41, at 2-7; Teitelbaum, *Spurious, Tractable, and Intractable Legal Problems: A Positivist Approach to Law and Social Science Research*, in PROCEEDINGS AND BACKGROUND PAPERS: CONFERENCE ON ETHICAL AND LEGAL PROBLEMS IN APPLIED SOCIAL RESEARCH, 12-20 (R. Boruch, J. Ross & J. Cecil eds. 1979); Note, *supra* note 379, at 162.

433. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

434. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (defining a suspect class as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

435. See L. TRIBE, *supra* note 110, at 994-96; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969). See generally *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961). So narrow is judicial review under the rational basis test that "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979). The classification will be upheld unless "the varying treatment of different groups or persons is so unrelated to that achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Id.* at 97. "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ." *New Orleans v. Dukes*, 427 U.S. at 303.

436. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964).

437. See, e.g., *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

438. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

affecting "fundamental rights"—such as voting,<sup>439</sup> interstate travel,<sup>440</sup> or procreation<sup>441</sup>—courts will require that the challenged classification be shown to be necessary to achieve a compelling state interest.<sup>442</sup> Recently, the Supreme Court has applied a form of intermediate scrutiny to classifications that affect important but not necessarily "fundamental" interests or that are based on sensitive but not necessarily "suspect" criteria.<sup>443</sup> Under intermediate scrutiny, the challenged classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>444</sup>

In the correctional context, courts have held that differential treatment based on race<sup>445</sup> or sex,<sup>446</sup> including discrimination in prison job assignments<sup>447</sup> or in access to vocational education programs,<sup>448</sup> violates equal protection. Random selection in correctional research, however, is not based on a prisoner's membership in a class, suspect or otherwise. Hence, such selection generally would be subjected to minimum scrutiny requiring only a reasonable relation to a legitimate governmental purpose—at least for research that does not invade fundamental constitutional rights. Because the goal of correctional research is surely a legitimate and probably even a compelling governmental interest,<sup>449</sup> and because "[t]he controlled experiment is an indispensable instrument in our search for knowledge,"<sup>450</sup> the rational basis test should be easily met.<sup>451</sup>

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439. See, e.g., *Bullock v. Carter*, 405 U.S. 134 (1972).

440. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

441. See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

442. See *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); Note, *supra* note 435, at 1088, 1101-1103, 1121-22.

443. L. TRIBE, *supra* note 110, at 1082-92; Note, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 177 (1977). The Court, for example, has applied intermediate scrutiny in cases involving illegitimacy, see *Trimble v. Gordon*, 430 U.S. 762, 767-76 (1977), and gender. See *Craig v. Boren*, 429 U.S. 190, 199-204 (1976).

444. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Supreme Court has not specified whether the quoted standard, enunciated in a case involving classifications based on sex, is applicable to classifications based on illegitimacy. Note, *supra* note 443, at 180.

445. See, e.g., *Lee v. Washington*, 390 U.S. 333 (1960).

446. See, e.g., *Molar v. Gates*, 98 Cal. App. 3d 1, 159 Cal. Rptr. 239 (1979).

447. See, e.g., *Saunders v. Sumner*, 366 F. Supp. 217 (W.D. Va. 1973); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973); *Motley v. Rundle*, 340 F. Supp. 807 (E.D. Pa. 1972).

448. See, e.g., *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974).

449. See *Teitelbaum*, *supra* note 432, at 12-22; note 436 *supra* and accompanying text.

450. *Zeisel*, *supra* note 379, at 475.

451. See *Breger*, *supra* note 430, at 9-11; *Capron*, *Social Experimentation*

Use of random and nonrandom selection criteria in various experimental settings has been challenged on equal protection grounds. In *Marshall v. United States*,<sup>452</sup> drug addicts with two or more prior felony convictions challenged Title II of the Narcotic Addict Rehabilitation Act of 1966,<sup>453</sup> a statute which offered discretionary rehabilitative commitment in lieu of penal incarceration to first offender addicts. Although this "correctional experiment" did not employ random assignment, the Court's approach is illuminating. In upholding the statutory scheme, the Court applied the rational basis test, noting that convicted defendants have no fundamental right to rehabilitation from addiction at public expense, and that no suspect classification was used by the statutory scheme.<sup>454</sup> Recognizing that the program was "fundamentally experimental in nature"<sup>455</sup> the Court noted that "in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation."<sup>456</sup> The Court stressed that the classification selected was not "directed 'against' any individual or category of persons, but rather it represented a policy choice in an experimental program made by that branch of Government vested with the power to make such choices."<sup>457</sup>

Two state courts have relied on *Marshall* to uphold, against equal protection attack, experimental projects under which drunken drivers were punished differently because prosecuted in different districts.<sup>458</sup> These cases support the principle that, if selection criteria are rational, government experimentation offering a possible benefit to some, but not all who are similarly situated will not offend equal protection—at least where the benefit is one to which there is no constitutional entitlement. Geographic sampling has been held a rational criteria. Random assignment, which also is the preferred method of determining the effectiveness of a program or testing social science research

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and the Law, in *ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION* 155-63 (A. Rivlin & T. Timpane eds. 1975).

452. 414 U.S. 417 (1974).

453. 18 U.S.C. §§ 4251-4255 (1976).

454. 414 U.S. at 421.

455. *Id.* at 426.

456. *Id.* at 427.

457. *Id.* at 428.

458. See generally *McGlothen v. Department of Motor Vehicles*, 71 Cal. App. 3d 1005, 140 Cal. Rptr. 168 (1977); *Healy v. Bristol*, 367 Mass. 909, 327 N.E.2d 894 (1975). See also *Commonwealth v. Kindness*, 247 Pa. Super. Ct. 99, 371 A.2d 1346 (1977) (equal protection not violated by excluding from pretrial diversion program defendants charged with driving while intoxicated).

hypotheses,<sup>459</sup> should also meet this test.

In nonexperimental contexts involving allocation of scarce resources or government benefits, random allocation—as by lot—has been suggested as the least objectionable method of allocation.<sup>460</sup> When individual differences seem irrelevant to the making of such choices, as in deciding which of many patients in need receives limited kidney dialysis treatment, randomization has been urged as the most ethical method of selection.<sup>461</sup> One empirical study of candidates for an innovative educational program revealed that random assignment was perceived by the candidates as the fairest method of selection.<sup>462</sup> Indeed, courts have suggested that “in cases where many candidates are equally qualified . . . further selections be made in some reasonable manner such as ‘by lot.’”<sup>463</sup>

Even in cases, both experimental and nonexperimental, involving governmental imposition of burdens rather than benefits, random selection has been upheld. In *Aguayo v. Richardson*,<sup>464</sup> the Court of Appeals for the Second Circuit upheld against equal protection challenge an experimental project in which welfare recipients in selected districts were required to register for training and employment. In an opinion strongly endorsing controlled experimentation, Judge Friendly, applying the rational basis test, rejected the argument that unequal application of the work requirement violated equal protection.<sup>465</sup>

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459. See SOCIAL EXPERIMENTATION 4-9, 53-55 (H. Riecken & R. Boruch eds. 1974); Campbell, *Reforms as Experiments*, 24 AM. PSYCH. 409, 426 (1969); Wortman & Rabinowitz, *Random Assignment: The Fairest of Them All*, in PROCEEDINGS AND BACKGROUND PAPERS: CONFERENCE ON ETHICAL AND LEGAL PROBLEMS IN APPLIED SOCIAL RESEARCH 15-1—15-10 (R. Boruch, J. Ross & J. Cecil eds. 1979).

460. See Greely, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113 (1977).

461. See P. RAMSEY, *THE PATIENT TO PERSON: EXPLORATIONS IN MEDICAL ETHICS* 247 (1970); Freund, *Introduction to EXPERIMENTATION WITH HUMAN SUBJECTS* at xvii (1970). But see E. CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 71 (1955).

462. Wortman & Rabinowitz, *supra* note 459.

463. *Holmes v. New York Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) (allocation of low-rent public housing) (quoting *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964) (involving the allocation of liquor licenses)). See also *Star Television, Inc. v. Federal Communications Comm'n*, 416 F.2d 1086, 1095 (D.C. Cir.) (Leventhal, J., dissenting) (discussing random allocation of broadcasting licenses), *cert. denied*, 396 U.S. 888 (1969).

464. 473 F.2d 1090 (2d Cir. 1973), *cert. denied sub nom. Aguayo v. Weinberger*, 414 U.S. 1146 (1974).

465. [The] Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a state-wide basis. The objections to allowing officials “to pick and choose only a few to whom they

Determining that the government interest in improving the welfare system was "as 'legitimate' or 'appropriate' as anything can be," the court found that this interest would be "'suitably furthered' by controlled experiment, a method long used in medical science which has its application in the social sciences as well."<sup>466</sup> In nonexperimental contexts involving government imposition of burdens by lot, at least where alternative methods seem unavailable or more objectionable, equal protection challenges have been similarly denied.<sup>467</sup>

When the burden infringes a fundamental constitutional right, however, random imposition of the burden is more dubious. Random police stops of motor vehicles to check the license of the operator and the registration of the car, for example, were recently held to violate privacy interests protected by the fourth amendment prohibition against unreasonable search and seizure.<sup>468</sup> The Supreme Court suggested that spot check decisions based on observed violations or more individualized factors giving rise to articulable suspicion would be appropriate, as would other methods "that involve less intrusion or that do not involve the unconstrained exercise of discretion."<sup>469</sup> Analogously, death penalty laws that automatically impose capital punishment for certain crimes without considering individualized factors have been found to violate the eighth

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will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected," . . . are inapposite to the selection, on a random but rational basis, of certain areas of the state to try out a program for the very purpose of determining whether it, or some variation of it should be made applicable to all. The Equal Protection clause does not place a state in a vise where its only choices in dealing with the problems . . . are to do nothing or plunge into statewide action.

473 F.2d at 1109-10. The right to welfare, involved in *Aguiayo*, had previously been held by the Supreme Court to be a fundamental right. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

466. 473 F.2d at 1109. See also *Britt v. McKenney*, 529 F.2d 44, 45 n.1 (1st Cir. 1976).

467. The draft lottery, for example, under which persons available for induction into the armed services or chosen in order of birthdates selected by lottery, was upheld against equal protection challenge. See, e.g., *United States v. Johnson*, 473 F.2d 677 (9th Cir. 1972). Grand and petit jury pools are chosen through random selection, 18 U.S.C. §§ 1862-1863 (1976), which is thought to avoid the arbitrary exclusion from the jury of any particular class of persons. See, e.g., *United States v. Davis*, 518 F.2d 81 (10th Cir.), cert. denied, 423 U.S. 997 (1977). Selection by lot has also long been appropriate in the desperate situation when shipwrecked lifeboat occupants have run out of food. See *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C.E.D. P.A. 1842).

468. *Delaware v. Prouse*, 440 U.S. 648, 655-57, 663 (1979).

469. *Id.* at 663.

amendment,<sup>470</sup> as have such laws that leave the life or death decision to the total discretion of the jury, allowing arbitrariness and discrimination in the application of the penalty.<sup>471</sup> These cases, invalidating imposition of substantial burdens where more reasonable or equitable methods than randomization are available, may be distinguished from those involving allocation of benefits, such as the rehabilitative alternatives to prison or license suspension involved in *Marshall* and the state cases dealing with driving while intoxicated.<sup>472</sup>

The death penalty cases and the case invalidating random motor vehicle stops indicate that there are some constitutional limitations on the use of randomization in correctional research that burdens fundamental rights. In the case of sentencing decisions affecting liberty—one of the most fundamental values—randomization would seem constitutionally offensive if its use produces more severe intervention than would normally occur.<sup>473</sup> In any event, correctional research that invades funda-

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470. See *Roberts v. Louisiana*, 431 U.S. 633, 636-38 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976). See also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (invalidating a death penalty statute that strictly limited the range of mitigating circumstances a trial judge could consider on the basis that the eighth amendment requires individualized consideration of such factors for each defendant).

471. See *Furman v. Georgia*, 408 U.S. 238 (1972). The Court has upheld death penalty laws, however, which contained criteria channelling the exercise of jury discretion. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

472. See notes 452-58 *supra* and accompanying text. The distinction recalls *Norvall Morris'* suggestion that correctional research may be permissible if performed in accordance with what he calls the principle of "less severity":

[T]he new treatment being studied should not be one that is regarded in the mind of the criminal subjected to it, or of the people imposing the new punishment, or of the community at large, as more severe than the traditional treatment against which it is being compared. To take a group of criminals who otherwise would be put on probation and to select some at random from a group who would otherwise be incarcerated and to treat them on probation or in a probation hostel would seem to be no abuse of human rights.

*Morris*, *supra* note 375, at 648-49.

473. Surely this is true in the case of the death penalty, for in (but perhaps only in) that context the eighth amendment demands that punishment be based on individualized consideration. *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976); see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (noting the "degree of respect due the uniqueness of the individual"). The essence of the prohibition of "cruel and unusual punishments," Mr. Justice Brennan has suggested, is "condemnation of the arbitrary infliction of severe punishments." *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring). The ban on arbitrary infliction of severe punishments, which could be considered to apply to randomized sentencing alternatives, lies, in Mr. Justice Brennan's view, in the "notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." *Id.* Treating identical offenders differently, at least in respect to

mental constitutional rights, whether or not it involves sentencing, will be strictly scrutinized. If such research is otherwise constitutionally permissible, the government's interest in conducting it will necessarily be sufficiently compelling to outweigh the individual's fundamental right to refuse it. The constitutionality of random assignment in correctional research that burdens fundamental rights will therefore turn on the necessity of controlled experimentation, as opposed to alternative research strategies where random assignment can be avoided or minimized.<sup>474</sup> Although in other contexts randomness may be the quintessence of arbitrariness, in the context of a controlled experiment it is often essential and almost per se reasonable.<sup>475</sup> In research, "randomness has the advantage of

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imposition of severe punishments, without some justification grounded in individualized differences between them, may thus be deemed unconstitutional. The opinions of two other Justices in *Furman* lend support to this view. Mr. Justice White found the death penalty, as administered pursuant to statutes vesting capital juries with unlimited discretion, unconstitutional since "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). And Mr. Justice Stewart found death sentences so imposed to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Id.* at 309-10 (Stewart, J., concurring). Whether and to what extent these notions will apply outside the context of the death penalty is an open question. Although Mr. Justice Brennan's language in *Furman* applies to "severe punishments" without limitation, the Supreme Court has recognized that "the penalty of death is different in kind from any of the punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Compare *United States v. Jackson*, 390 U.S. 570 (1968) with *Corbitt v. New Jersey*, 99 S. Ct. 492 (1978); compare *Furman v. Georgia*, 408 U.S. 238 (1972) with *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980).

474. See Baunach, *supra* note 432, at 440-42; Rezmovic, *supra* note 430, at 166-77; Zeisel, *supra* note 379, at 475-76. See generally *Symposium on Empirical Research in Administrative Law, Part I*, 31 AD. L. REV. 443 (1979). These alternative research strategies are sometimes equally feasible as random selection or only minimally less so.

475. See Breger, *supra* note 430, at 9-11; Capron, *supra* note 451, at 160-62; Riecken, *supra* note 41, at 2-7; Teitelbaum, *supra* note 432, at 12-23. Professor Capron has put it well:

Random selection is arbitrary only in the sense that it depends on the caprice of chance; its outcome is uncertain and unexplainable on rational grounds—indeed, that is what makes it valuable in experimentation. It is not arbitrary in the sense of being dependent on the pleasure of the person making the selection, and that is the arbitrariness that has earned a bad name in constitutional jurisprudence, for the obvious reason that persons with arbitrary powers may behave despotically and may use their discretion to impose burdens unfairly and on impermissible grounds (for example, race, ethnic group, or national origin). Furthermore, unlike other kinds of decisionmaking, which use the cloak of discretion to frustrate review, random selection in experimen-

being evenhanded and rationally related to the state's (and investigator's) interest in conducting a valid experiment."<sup>476</sup> In correctional research then, the use of random selection should therefore be constitutionally permissible when fundamental rights are not infringed, and perhaps even when they are infringed if other research designs would not be feasible.

## VII. CONCLUSION: ETHICAL AND PROFESSIONAL CONCERNS

This Article has presented a framework of legal limitations on correctional treatment and research and has outlined the direction in which the law appears to be moving with respect to these issues. Although the law obviously plays an important role in limiting the activities of those involved with offender rehabilitation and research, it acts against a backdrop of ethical and professional controls that frequently operate much more directly and effectively on the actors in the rehabilitation process.<sup>477</sup> Legal developments in this area will derive from legislative, regulatory, and judicial sources that necessarily lack the insight and expertise of those in the field. As a result, the law is likely to develop generalized approaches and to respond most sharply to exposed abuses in a manner that will make correctional rehabilitators and researchers feel misunderstood. Professional and ethical controls are always to be preferred. This preference, if not the threat of the legal controls that this Article describes, should prompt the various disciplines involved in correctional rehabilitation and research to implement reforms before they are imposed from without.

Although much work needs to be done by the relevant professional disciplines, some initial steps have been taken. Ethical and professional standards for the conduct of human experimentation in medical research have been adopted by some organizations.<sup>478</sup> Codes for the conduct of social and behavioral research have also been adopted<sup>479</sup> and a growing body of scholarly work is available that deals with the ethical

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tation can be reviewed; that is, a statistician can determine whether the method used did generate a random result.

Capron, *supra* note 451, at 161-62.

476. Capron, *supra* note 451, at 163.

477. See Jaffe, *supra* note 70, at 205.

478. See, e.g., Nuremberg Code, *supra* note 55; Helsinki Declaration, *supra* note 59; 45 C.F.R. § 46 (1979).

479. E.g., American Psychology Ass'n., *Code of Ethics*, in THE PSYCHOLOGY ALMANAC: A HANDBOOK FOR STUDENTS (H.E. Wilkening ed. 1973); American Psychiatry Ass'n Board of Social & Ethical Responsibility for Psychology, *Re-*

problems of medical, social, and behavioral experimentation involving human subjects.<sup>480</sup>

Ethical and professional standards, however, have not adequately addressed the involuntary imposition of correctional rehabilitation. For example, although leading behavior therapists<sup>481</sup> and professional organizations<sup>482</sup> consider a patient's informed consent an ethical prerequisite to treatment, the fairly routine violation of this principle in correctional settings has met with little in the way of professional condemnation or discussion. A body of scholarship concerning the ethical limitations on forced treatment has begun to emerge,<sup>483</sup> and consideration has been given to the ethical problem presented by the role of the correctional therapist as a "double agent" with loyalties both to patient and governmental employer.<sup>484</sup> Rigorous application of clear standards, however, has yet to emerge.

It is earnestly hoped that this Article will provoke further development of professional and ethical standards concerning correctional therapy and research. Although the law may not prohibit some types of involuntary correctional therapy and research, substantial ethical and policy questions remain. Widely

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*port of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCH. 1099 (1978).

480. See, e.g., G. BERMANT, H. KELMAN & D. WARWICK, *THE ETHICS OF SOCIAL INTERVENTION* (1978); *DEVIANCE AND DECENCY: THE ETHICS OF RESEARCH WITH HUMAN SUBJECTS* (C. Klockars & F. O'Connor eds. 1979); *ETHICAL AND LEGAL ISSUES*, *supra* note 62; C. FRIED, *supra* note 71; J. KATZ, *supra* note 55; P. RAMSEY, *supra* 461; *SOCIAL RESEARCH IN CONFLICT WITH LAW AND ETHICS* (P. Nejelski ed. 1976); Bloomberg & Wilkens, *Ethics of Research Involving Human Subjects in Criminal Justice*, 23 CRIME & DELINQUENCY 435 (1977). The various reports of the National Commission treat this subject in great detail. See *THE BELMONT REPORT*, *supra* note 273; *SPECIAL STUDY*, *supra* note 12; *RESEARCH INVOLVING CHILDREN* (1977); *RESEARCH INVOLVING THOSE INSTITUTIONALIZED AS MENTALLY INFIRM* (1978); *PRISONER RESEARCH*, *supra* note 18.

481. E.g., Bandura, *supra* note 175; Davison & Stuart, *Behavior Therapy and Civil Liberties*, 30 AM. PSYCH. 755 (1975).

482. E.g., Ass'n for Advancement of Behavior Therapy, *Ethical Issues for Human Services*, 8 BEHAVIOR THERAPY 763 (1977).

483. See, e.g., *LEGAL & ETHICAL ISSUES, IV TASK PANEL REPORTS SUBMITTED TO THE PRESIDENT'S COMM'N ON MENTAL HEALTH* 1359 (1978); Halleck, *supra* note 113; Robinson, *Harm, Offense and Nuisance: Some First Steps in the Establishment of an Ethics of Treatment*, 29 AM. PSYCH. 233 (1974); Shapiro, *supra* note 24.

484. See, e.g., *LEGAL & ETHICAL ISSUES, IV TASK PANEL REPORTS SUBMITTED TO THE PRESIDENT'S COMM'N ON MENTAL HEALTH* 1474-76 (1978); American Psychological Ass'n Board of Social & Ethical Responsibility for Psychology, *supra* note 479; *WHO IS THE CLIENT? THE ETHICS OF PSYCHOLOGICAL INTERVENTION IN THE CRIMINAL JUSTICE SYSTEM* (J. Monahan ed. 1980); *In the Service of the State: the Psychiatrist as Double Agent*, 8 HASTINGS CENTER REP. (Spec. Supp. Apr. 1978); Shestack, *Psychiatry and the Dilemmas of Dual Loyalties*, 60 A.B.A.J. 1521 (1974).

shared societal values, emphasizing the dignity and autonomy of the individual, place a strong ethical burden on those who would subject offenders to involuntary participation in treatment or research,<sup>485</sup> and should, at a minimum, remove decisionmaking in these areas from the sole discretion of rehabilitators and investigators. It is ironical that the constitutionality of coercive imposition of treatment turns to a large extent on the ability of the offender to avoid or resist unwanted effects. Although the law may permit their involuntary imposition, the rehabilitative techniques on the lower end of the continuum of intrusiveness will be ineffective absent the offender's voluntary cooperation and genuine desire for change.<sup>486</sup> Hence, efficacy and ethical principles combine to favor a voluntary rather than a coercive approach to these techniques.<sup>487</sup> Although it may be appropriate to impose a brief period of compulsory participation so that the offender's choice will be more informed, and perhaps even to attempt to persuade offenders that it is in their own best interests to participate, the choice should ultimately be a voluntary one for which the offender suffers no sanctions as a result of his or her decision.<sup>488</sup>

Ethical and professional concerns should be particularly heightened when the subjects of therapy or research are as vulnerable and isolated from public scrutiny as are offenders within prisons or those diverted to the new community alternatives. There should be no greater willingness to experiment with or coercively "rehabilitate" offenders than other citizens who might benefit from these techniques. If the professional community does not recognize these ethical principles and respond to the problems created by the more intrusive approaches, the law must and will.

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485. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 59 (1968); A. VON HIRSCH & K. HANRAHAN, *ABOLISH PAROLE?* 28 (1978); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 552 (1978).

486. See notes 112-16, 153-57, *supra* and accompanying text.

487. N. MORRIS, *supra* note 1, at 24.

488. See *id.* at 18-20. See generally A. VON HIRSCH & K. HANRAHAN, *supra* note 485.