INTRODUCTION

Advances in behavior control techniques have provoked widespread debate on the ethics and legality of the alteration of human behavior. Much attention has been directed to the application of these techniques on captive populations—prisoners and mental patients. Traditionally, both the courts and society at large ignored the content of treatment provided to these two groups during their period of institutionalization. Decisions on particular modes of therapy were thought to be exclusively within the discretion of administrators. But in the recent past, public and judicial concern for the rights of prisoners and mental patients has dramatically increased and focused on all aspects of institutional treatment. Particular attention has been

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1 Beyond Freedom and Dignity, 206 (1971).
2 Paradise Lost, Book I, lines 254-255.
3 See Peek v. Ciccone, 288 F. Supp. 329 (W.D.Mo. 1968), where court found that forcible injection of an inmate with thorazine and permatil was not cruel and unusual punishment, stating that only "unusual and exceptional circumstances" justify review of administrative decisions concerning inmate treatment.
paid to the emerging right to treatment and its opposite—the right to refuse treatment.  

It is this purported right to refuse treatment—or more precisely, the nature and extent of limitations upon the state’s power to force treatment upon unwilling prisoners—that will be the major subject of this discussion. The right of inmates to refuse treatment by the most coercive and intrusive behavior control therapies (e.g., psychosurgery, mind-altering drugs) has been extensively discussed and successfully litigated. This inquiry will focus instead on possible legal limitations on learning theory behavior modification techniques in corrections—specifically, token economies and tier advancement systems. Although most public indignation has been directed at the more coercive and dramatic forms of behavior control, the procedures involved in these two treatment methods raise similar ethical and legal questions.

I. Tokens and Tiers in Corrections

A. Definition

Token economies and tier advancement systems are clinical applications of the learning theory principles of Skinnerian operant conditioning. Operant conditioning is based on the principle that behavior is strengthened or weakened by its consequences. The frequency of a behavior, it is theorized, will increase if it is followed by positive consequences. On the other hand, if a behavior is persistently followed by unrewarding, or aversive consequences, that behavior will decrease in the future.

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7 COSTELLO, BEHAVIOR MODIFICATION AND CORRECTIONS: CURRENT STATUS AND FUTURE POTENTIAL 2 (1972).
Token economies are a special application of operant conditioning. Appropriate behavior patterns—target behaviors—are reinforced by rewards of chips or tokens. These chips or tokens can be converted, pursuant to an economic schedule, for “primary reinforcers”—e.g., food, privileges. It has been suggested that token systems have a variety of advantages over simpler learning theory models. Token systems provide the same reinforcement for individuals who have different preferences in backup reinforcers; they bridge the delay between the target response or behavior and the backup reinforcement. Programs using token reward also reflect the society from which the subject comes. Economic incentives and delayed gratification are learned as a result of program participation.

Tier advancement systems are also based on operant conditioning theory. They differ from token systems in that the target behavior to be reinforced is rewarded by the entire environment. In a typical tier arrangement, there is a base level environment with very limited necessities—e.g., food, clothing, and shelter—and restricted privileges—e.g., access to recreation, visitation. As a person exhibits a desired target behavior, he is rewarded with tokens or some other form of positive “points”. After a specified number of tokens or points have been earned, the individual is promoted to a new living environment with more privileges—e.g., greater freedom of movement—and enhanced necessities—e.g., better food, a cell or room with greater privacy. The individual progresses through a number of these tiers as he exhibits appropriate target behavior or behaviors. Tier advancement systems, although more static than token economies, operate on the same basic principle of tying a target behavior with a positive reward.

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8 Id. at 6.
10 MARTIN, LEGAL CHALLENGES TO BEHAVIOR MODIFICATION: TRENDS IN SCHOOLS, CORRECTIONS, AND MENTAL HEALTH 82 (1975).
11 Id. at 82, 83.
Experiments with these two behavior modification techniques have been carried out in a variety of correctional settings and with diverse groups of offenders. Token and tier systems, or combinations of the two, have been used to alter the behavior of juvenile offenders in both institutions and community corrections programs. Young adult offenders, inmates with a history of discipline problems, and “defective delinquents”, have been enrolled in token and tier programs attempting to modify behavior through management of reinforcement contingencies. The effectiveness of these various attempts at applying learning theory in the institutional context has been questioned by a number of critics. These programs have also raised a number of legal questions that have not yet been addressed by the courts or legislatures.

B Rights and Responsibilities — A Typology of Legal Issues

Token economies and tier advancement systems pose legal problems in both their designation of target behaviors and their choice of reinforcers. These two distinct processes will be analyzed separately. Programs involving either or both of these models of learning theory have also incorporated features of “negative reinforcement” — associating an undesired behavior

12 See the discussion of Case II (National Training School for Boys, Washington, D.C.), Kennedy Youth Center (Morgantown, W Va.), and Achievement Place in COSTELLO, supra note 7 at 20, 31, 55.


14 See description of tier/token economy program Project S.T.A.R.T. (Special Treatment and Rehabilitation Training) conducted by the Federal Bureau of Prisons in U.S. GOVERNMENT ACCOUNTING OFFICE, BEHAVIOR MODIFICATION PROGRAMS: THE BUREAU OF PRISONS ALTERNATIVE TO LONG TERM SEGREGATION, 9, 10 (1975).

15 “Defective delinquents,” repeated offenders who are judicially determined to be defective emotionally or intellectually and physically dangerous to society, are placed in a tier system at Maryland’s Patuxent Institution. Kennedy, Behavior Modification in Prisons. A “Clockwork Orange” or Radical Reform?, 4 (unpublished paper to appear in CRAIGHED, KAZDIN AND MAHONEY, BEHAVIOR MODIFICATION PRINCIPLES, ISSUES AND APPLICATIONS (1976).

16 See, e.g., Kennedy, id. at 17.
with undesirable consequences such as demotion in a tier system or loss of tokens. The possible legal limitations on this practice will be explored. Finally, the applicability of the doctrine of informed consent to these therapies will be examined.

To aid this analysis, a classification of program goals will be offered, with several specific examples. Reinforcers will also be categorized according to the degree that they intrude upon inmate privileges and rights. Practices involving elements of "negative reinforcement" will also be identified to assist the analysis of problems with procedural due process that appear in certain types of token and tier systems.

1. Designation of Target Behaviors

Correctional token economies and tier advancement systems have been designed to encourage diverse target responses. Educational behaviors have been chosen by a large number of programs for reinforcement. For example, the Kennedy Youth Center in Morgantown, West Virginia, was designed by the Federal Bureau of Prisons to increase the academic achievement level of incarcerated delinquents through programmed instruction. The token economy system at Draper Correctional Institution in Elmore, Alabama, included among its target behaviors the goal of achieving increases in academic performance among its youthful offender subjects. Other programs have attempted to influence educational attainments through token economies and tier advancement systems.

Maintenance and convenience behaviors—e.g., improving personal appearance, bedmaking, cleaning living areas—have also been a major target of correctional experiments with operant conditioning. The Atascadero State Hospital in California initiated a program which awarded this type of behavior in its clientele of sex offenders and mentally ill criminal offenders. Changes in attitudes and feelings have been another goal for

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17 Costello, supra note 7, at 31.
18 Rehabilitation Research Foundation, supra note 13, at 10.
19 Costello, supra note 7, at 89.
change through token economies and tier advancement systems. The Southwest Indian Youth Center, located in Tucson, Arizona, operated a program for fifteen to eighteen year-old chronic offenders from reservations. Among its target behaviors was the objective of changing basic attitudes and feelings. The Southwest Indian Youth Center, located in Tucson, Arizona, operated a program for fifteen to eighteen year-old offenders from reservations. Among its target behaviors was the objective of changing basic attitudes and feelings.\textsuperscript{20} Achievement Place, a community based series of programs for juvenile offenders, similarly attempted to change social attitudes and feelings. Social cooperation was rewarded through the program design, while arguing and bragging were punished through a system of fines.\textsuperscript{21}

In order to analyze possible legal limitations on the target behaviors of token economies and tier advancement systems, it is convenient to classify program goals into the three categories just outlined — education, convenience and maintenance behaviors, and changes in attitudes and feelings. This is a simple categorization, and a number of operant conditioning programs have elements of all three. The utility of this classification will be explored later.

2. Choice of Reinforcers

The encouragement of target behaviors requires the choice of rewards or reinforcers that effectively strengthen the desired response. It has been suggested that the key to the legal problems associated with reinforcers is that in order to use items and events as rewards, it is necessary to begin with a state of "deprivation."\textsuperscript{22} This state of "deprivation" may involve denial of basic inmate rights — e.g., the right to send and receive correspondence\textsuperscript{23} and restrictions on privileges that could lead to legal difficulties. The legal problems inherent in a "deprivation" situation may be avoided by the use of idiosyncratic reinforcers — privileges not generally available to inmates.\textsuperscript{24} Rein-

\textsuperscript{20} Id. at 45.
\textsuperscript{21} Id. at 59.
\textsuperscript{24} Wexler, \textit{supra} note 6, at 103.
forcers can thus be divided into two basic categories for the purpose of legal inspection—idiosyncratic and "baseline" or basic reinforcers. These distinct types of reinforcers, it will be argued, should be subject to different standards of judicial review.

Tier advancement systems are often structured to begin with a "deprivation" situation. The four-level graded tier system for "defective delinquents" in Patuxent Institution has a base level with few amenities in the environment. At the first level, the prisoner has an ordinary cell, exercises in a bleak recreation yard, works on a sanitation crew, and has little access to the "luxuries" of prison life—television, commissary privileges, freedom of movement within the institution. Project START, the Federal Bureau of Prisons Program, had a similar entry level. During the orientation period, the new program participant was allowed only basic personal articles, little time out of his cell and limited exercise.

Several token economy and tier advancement programs have placed an emphasis on idiosyncratic reinforcers. The previously mentioned Achievement Place Program offered a variety of reinforcers that are generally not available to institutionalized juveniles—home visits, town visits, an allowance. The Southwest Indian Youth Center had an even stronger idiosyncratic reinforcer—the opportunity to earn an early release from the institution. It has been suggested that the use of idiosyncratic reinforcers may be clinically superior to reliance on "deprivation" and baseline reinforcers.

3. Fines in Token Economies and Demotions in Tier Systems

Quite a few of the experiments in operant conditioning in corrections have incorporated elements of "negative reinforce-

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27 Costello, supra note 7, at 55.
28 Id. at 49.
29 Wexler, supra note 6, at 103.
ment” to supplement rewards for positive behavior. This practice raises unique problems in the area of procedural due process, which will be explored in a subsequent section of this analysis. Several program examples are now offered to indicate the types of negative reinforcement that have been utilized.

The Valley View School for Boys, a reformatory located in St. Charles, Illinois, operates a token economy that is designed to strengthen academic behaviors. Tokens are awarded for positive behavior and attitudes in the classroom, the tokens can be exchanged for furloughs, commissary privileges, furnishings, certain counseling services and recreation. Program participants are also negatively reinforced through “write ups.” These “write ups” are fines, which result in a subtraction of tokens from the participant’s account or “point write ups” for serious offenses. Three “point write ups” in a week are followed by a serious change in the juvenile’s status. He loses his right to work for tokens, must wear state clothes, has earlier hours and experiences a complete loss of privileges. Several of the other juvenile token economies, the Southwest Indian Youth Center and the Achievement Place Programs, included fine systems as a feature in their program design.

Tier advancement systems have also used negative reinforcers. Some have utilized demotion in the tier system as a sanction for undesired behavior. Project START, a Federal Bureau of Prisons experiment with operant conditioning, allowed demotion to a lower level for flagrant violations of tier level rules. This could result in a drastic change in the inmate’s living environment and privileges. For example, START inmates in advanced levels were able to earn good time while those in the orientation level were ineligible for this opportunity. Since tier systems use better grades of environment as basic motivation, a demotion within a system may result in a very serious individual loss to an inmate.

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31 Costello, supra note 7, at 42, 55.
II. LIMITS ON GOALS IN TOKEN ECONOMIES AND TIER SYSTEMS —
THE SELECTION OF TARGET BEHAVIORS

One of the most complex problems posed by the new science of behavior modification is the development of limitations on the selection of value and behavior patterns to be altered. It has been suggested that uncontrolled behavior modifiers can manipulate reinforcers to involuntarily adapt subjects to institutional and societal values. Such manipulation poses serious threats to traditional concepts of individuality, privacy, and personal autonomy.

The following discussion will discuss limitations on the choice of goals in correctional token economies and tier systems. Traditional First Amendment restrictions on that state’s power to interfere with individual behavior will be considered. The implications of the right to physical and mental privacy and autonomy, a right that has emerged largely from litigation on behavior modification techniques, will be analyzed. Finally, the interests of the state in using these therapies to promote a compelling state purpose will be discussed.

A. Religious, Political and Social Beliefs as a Target Behavior

It is unlikely that the state could ever use forms of operant conditioning to alter or eradicate inmate religious, political, or social beliefs. Unorthodox and unpopular beliefs and practices have received repeated protection in the prison context. Restraints on these First Amendment rights of prisoners in these areas have been allowed only when the state has proved a compelling state interest.

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33 Holland, Behavior Modification for Prisoners, Patients, and Other People as a Prescription for the Planned Society, 3 (unpublished paper delivered at meeting of Eastern Psychological Association in Philadelphia, Pa., 1974).
34 See, e.g., Brown v. Peyton, 437 F. 2d 1228 (4th Cir. 1971), where court held that even though prison authorities have a legitimate interest in rehabilitating prisoners and may limit freedom to promote rehabilitation, a compelling state interest must be shown to suppress religious practices and communications.
A basic distinction must be drawn in the area of religion. While an inmate has an absolute right to believe in a religion of his choice, the government has a right to limit the practice of the tenets of the religion when a compelling state interest is shown. The implications of this doctrine for operant conditioning programs are clear. The token economy or tier system could not include changes in religious beliefs as a goal of program design. Behaviors resulting from the exercise of that religious belief—e.g., violent or disruptive preaching—might be subject to operant conditioning if the government could prove a compelling state interest.

Unpopular and unusual political beliefs have also been protected in the correctional context. In In re Mannuo, a California appellate court struck down a parole condition forbidding an anti-war activist from joining any organization which advocated social change. The court found that there was no showing that there was a rational relationship between the limitation infringing freedom of association and the advancement of a legitimate government purpose. A similar decision invalidated the refusal of the U.S. Board of Parole to allow a paroled atomic spy to participate in peace demonstrations and to address meetings of an alleged communist organization. The Federal District Court for the Southern District of New York declared these restrictions overly broad, only a compelling state interest could justify limitations on First Amendment political freedoms, and the advancement of a compelling state interest—e.g., re-

35 See Remmers v. Brewer, 361 F. Supp. 537 (N.D. Iowa 1973), aff'd, 494 F. 2d 1277 (8th Cir. 1974), cert. denied, 43 U.S.L.W 3281 (Nov. 12, 1974) (Church of the New Song religion within the ambit of the first amendment; members can exercise their beliefs on an equal basis with other religions, absent a showing that beliefs are not sincerely felt), LaReau v. McDougall, 473 F. 2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878 (a Catholic inmate may be denied the right to attend Mass while in disciplinary segregation, inmate's history of disrupting prison order sufficient justification for restriction).
habilitation—in this protected area must be related to specific dangers of misconduct.

Similar results have been reached in decisions on abridgements of inmate rights to hold unpopular political beliefs. Among the rights not taken away from a prisoner is freedom from discriminatory punishment because of unpopular secular beliefs. A token economy which was specifically geared toward changing political beliefs would undoubtedly be unconstitutional. As in religion, though, specific behaviors resulting from the exercise of a political belief might be subject to operant conditioning techniques if justified by a compelling state interest.

None of the experiments in operant conditioning that have been conducted to date have attempted to overtly change religious, social or political beliefs. It has been charged, however, that programs have been designed to silence dissatisfaction with prison institutional settings. Critics of token and tier systems note that they can be used to stifle dissent within prisons by selecting those inmates who maintain individuality, leadership, and self-interest for behavior modification. Behavior modification techniques which reward target behaviors such as passivity and acceptance of institutional rules, it is alleged, are a veiled attack on First Amendment political freedoms.

Operant conditioning programs which reward target behaviors associated with adjustment to the peculiar world of prisons might be illegitimate if they employ selection criteria with the end of stifling dissent. In *Carothers v Follette*, a prisoner alleged that he had been placed in solitary confinement due to a letter he had written to the commissioner of corrections complaining about the prison administration. The Federal District Court for the Southern District of New York, ruled that punishment of this type, if proven to be true, would have a chilling effect on the First Amendment right to voice dissatisfaction. Any

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38 Sostre v. McGinnis, 442 F. 2d 178 (2d Cir. 1971).
39 See the criticism of START in Holland, supra note 33, at 6.
40 *Id.*
operant conditioning program which attempted to modify the behavior of inmates solely because they legitimately exercise protected First Amendment rights would be unconstitutional.

The question becomes more complex, however, when the exercise of the right to dissent is accomplished by acts that contravene institutional interests that might be considered compelling. For example, an inmate has the right to hold black militant social and political beliefs. The prolonged isolation of an inmate of this type with proven leadership abilities has been declared unconstitutional in the absence of overt disruptive conduct. When belief is translated into action, as when a politically motivated inmate incites other prisoners to riot, action might be taken because of the demonstrable compelling state interest in institutional security.

The analysis of the selection of goals in operant conditioning is extremely complex. Goals that potentially infringe upon established First Amendment freedoms—the right to hold unpopular political and social beliefs, religious freedom, and the right to dissent—might be categorized by the level of their intrusiveness. Token economies and operant conditioning programs are clearly prohibited from attempting to alter the basic attitudes and beliefs themselves. Manifestations of these attitudes and beliefs—overt behavior—can be subjected to behavior modification only when the government demonstrates a compelling state interest. Behavior which expresses these beliefs and attitudes, through legitimate channels—e.g., expressing dissent to government officials or the courts—cannot be used as a justification for operant conditioning.

B The Emerging Right to Physical and Mental Privacy and Autonomy

It has been suggested that the right to privacy and the First Amendment’s protection of free speech together prevent coercive governmental intrusion upon the mind and behavior of an un-

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42 In re Hutchinson, 23 Cal. App. 3d 337 (1972).
willing subject. In two cases, *Kaimowitz v. Michigan Department of Mental Health* and *Mackey v. Procunier*, lower courts have recognized the existence of this right and suggested that it can be applied to prevent the use of coercive behavior modification techniques—psychosurgery and aversive drug conditioning specifically—in prison settings. If this emerging right is recognized universally, it might be used as the basis to refuse all unwanted treatment, including forms of operant conditioning.

There are two distinct sources of this emerging right to refuse treatment. The first is the right to privacy. The *Mackey* case, which was decided by the Court of Appeals for the Ninth Circuit, was based on several Supreme Court precedents on privacy rights—the right to possess pornography in the privacy of one’s home, the abortion decisions, and the right to privacy in the marital bed. The state prisoner’s complaint that he was treated with a “fright drug” without his consent, it was concluded, raised serious constitutional questions concerning “impermissible tinkering with the mental processes.” The *Kaimowitz* court also found “[t]here is no privacy more deserving than that of one’s mind.” Only a compelling state interest could justify the violation of this right to privacy through experimental psychosurgery, and none was shown in this case.

The other source of the right to refuse treatment is the right to mental autonomy, which has been conceptualized as a derivative of the First Amendment’s protection of free speech. If the First Amendment protects communication of ideas, it must necessarily protect as an incident of this right the power to generate

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43 See Friedman, *Legal Regulation of Applied Behavior in Mental Institutions and Prisons*, 17 Ariz. L. Rev. 39, 58 (1975), Shapiro, supra note 5, at 273.
45 477 F. 2d 877 (9th Cir. 1973).
46 For a full discussion of the privacy argument in behavior control, see Friedman, supra note 43, at 57, 58, 59.
47 Mackey v. Procunier, 477 F. 2d at 888.
thoughts, ideas, and mental activities.\textsuperscript{49} The \textit{Karmowitz} court accepted this concept, holding that to the extent that the First Amendment protects the dissemination of ideas and the expression of thought, it equally must protect the individual's right to generate ideas.\textsuperscript{50} The concept of mental autonomy, coupled with the right to mental privacy, may prove to be a serious obstacle to the implementation of behavior modification techniques in correctional institutions.

Are these concepts applicable to operant conditioning techniques, such as token economies and tier advancement systems? Even if the right to mental privacy and autonomy was accepted universally by the courts, its application might be limited by the concept of intrusiveness. Simply walking past a person effects a change in his mental sensorium; but this influence on a person's mentation cannot be considered an intrusion upon a mental right to privacy or autonomy.\textsuperscript{51} Not every effort to change behavior by changing mentation, attitudes, or emotion raises a threshold argument for violation of the First Amendment or the right to privacy.

The limiting principles needed to determine whether a given therapy raises a viable claim of infringement upon protected mentation may revolve around the concept of intrusiveness. Even the \textit{Karmowitz} court accepted this concept; it held that the intrusive, irreversible procedures involved in experimental psychosurgery in non-life threatening situations require informed consent from the subject.\textsuperscript{52} Several variables might be used to measure the intrusiveness that a therapy imposes upon mentation—the extent to which the therapy's effect on mentation is reversible, the extent to which it produces a psychic state

\textsuperscript{49} See Shapiro, \textit{The Uses of Behavior Control Techniques: A Response}, 7 Issues in Criminology 55, 68 (1972).

\textsuperscript{50} \textit{Karmowitz} v. Michigan Dept. of Mental Health, 2 Prison L. Reptr. at 477.

\textsuperscript{51} See Shapiro for an analysis of the concept of intrusiveness upon mentation and privacy, supra note 5, at 258-260.

\textsuperscript{52} \textit{Karmowitz} v. Michigan Dept. of Mental Health, 2 Prison L. Reptr. at 474.
that is "unnatural" to the subject, the duration of the change.\textsuperscript{53} It could be argued that token economies and tier systems do not intrude seriously enough upon mentation to raise constitutional problems. These therapies cannot be compared to psychosurgery or aversive drugs in terms of irreversible effects or producing unnatural psychic states, the duration of their effects upon behavior is uncertain.\textsuperscript{54}

Skinnerian behaviorists would agree that that right to mental privacy and autonomy should be restricted to the intrusive organic behavior modification therapies. They would argue that behavior is the product not of the mind, personality, or mental processes but rather of the environment. Thus to manipulate the environment to achieve certain goals through operant conditioning neither invades the personality nor tinkers with the mental processes.\textsuperscript{55}

The debate over the intrusiveness of operant conditioning upon the mental processes will undoubtedly continue, and may require litigation to resolve it. The answer to the question may involve a re-assessment of such basic concepts as "freedom", "dignity", "privacy", and "mental autonomy". To the behavioral psychologist, these concepts are irrelevant since behavior is determined by the environment.\textsuperscript{56}

Operating on existing legal principles, however, a framework can be offered for examining existing goals of behavior change according to their level of intrusiveness. As was suggested previously, correctional token economy and tier advancement goals can be categorized into three areas—maintenance and convenience behaviors, educational goals, and changes in basic atti-

\textsuperscript{53} Shapiro proposes a classification of this type of effects of therapy upon mentation, \textit{supra} note 5, at 62.

\textsuperscript{54} See Costello, \textit{supra} note 7, at 96. The reported research results of token economy and tier systems often lack follow-up data on the transference of acquired behaviors to non-institutional environments. It has been suggested that these therapies are ineffective in terms of effecting changes that will be reflected outside the institution.

\textsuperscript{55} \textit{Martin}, \textit{supra} note 10, at 156.

\textsuperscript{56} See Skinner, Beyond Freedom and Dignity (1971).
tudes and feelings. It might be suggested that the first of these — maintenance and convenience behaviors — are completely exempt from a claim of mental autonomy and privacy. The establishment of personal hygiene and self-care behaviors require a minimal intrusion upon the mental processes. Educational goals do require a higher degree of intrusion, but also may not raise a threshold argument for an invasion of mental privacy or autonomy — particularly when they teach basic learning skills, such as reading and mathematics, rather than promoting ideals and values. Programs aiming at changing basic attitudes and feelings may be the most suspect, if highly intrusive, they may be subject to legal restriction.

C Rationale for Intrusion Upon Constitutionally Protected Rights — A Compelling State Interest

From previous discussion it is apparent that the utilization of operant conditioning techniques in corrections may raise a question of an infringement of basic constitutional rights. Assuming that a program intrudes upon either traditionally protected areas, such as religion or political beliefs, or upon a new right to mental privacy and autonomy, it might be asked what interests can justify unwanted treatment? In order to invade constitutionally protected areas, the government must prove that the invasion is necessary to promote a compelling state purpose and no more restrictive than necessary to promote that purpose. Several government purposes might be offered to support involuntary placement of inmates in operant conditioning programs.

The first interest or purpose that the government might offer to justify unwanted treatment is rehabilitation. The Supreme Court has recognized that rehabilitation is an important government interest in prisons, at a level with security and order. It can be used to justify the censorship of prison mails, if its

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limitation on First Amendment rights is no greater than necessary. This recognition of rehabilitation as a legitimate government interest, however, might not be expanded to the status of a compelling state interest.

Other interests might be advanced to justify the use of operant conditioning techniques. Institutional security and order might be construed as compelling state purposes in cases when a particular behavior, even if politically or religiously motivated, is highly disruptive (e.g., inciting to riot). Education also might be considered as a compelling state interest, particularly in the case of juveniles.⁶⁹

Support for asserting education as a compelling state interest can be found in a recent case involving an illiterate inmate in the Arkansas Department of Corrections.⁷⁰ Claiming the right to be ignorant, he protested compulsory school attendance. The federal district court in Arkansas denied his claim on the grounds that a state may clearly undertake to rehabilitate its inmates, at least in case of illiteracy. The court also indicated that this right might be limited if adverse consequences to the inmate were involved, such as danger to life or health.

Any use of a compelling state interest argument, however, would be limited by the least restrictive means test. Even if a government purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved.⁶¹ An unwilling inmate might argue that there are less intrusive means than a token economy or tier advancement system—e.g., psychotherapy—to achieve the government purpose. This argument may be most effective with the forms of operant conditioning that involve “deprivation situations” and severe constraints on inmate privileges. A less severe form of operant

⁶⁹ In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court stated: “Acting to guard the general interest in youth’s well-being, the state as parens patriae may restrict the parent’s control by requiring school attendance.”


conditioning—e.g., through idiosyncratic reinforcers—might then be required if the restricted right is deemed fundamental.

III. LIMITS ON MEANS IN CORRECTIONAL OPERANT CONDITIONING PROGRAMS—CHOICE OF REINFORCERS

Token economies and tier advancement systems rely on the use of reinforcers, negative and positive, to create optimal learning environments. The positive reinforcers, as suggested before, can be divided into two categories—idiosyncratic and "baseline" or basic reinforcers. Possible legal limitations on these different forms of reward therapy will be investigated in the following discussion. Negative reinforcement techniques, as applied in correctional operant conditioning programs, raise a separate but related set of legal problems. These will also be analyzed.

A. Cruel and Unusual Punishment—Establishment of a Minimally Acceptable Environment for Operant Conditioning

The Eighth Amendment's ban on cruel and unusual punishments has traditionally not been applied to forms of correctional treatment. In a number of cases, courts have refused to interfere with administrative choices of correctional treatment. Only recently have courts looked beyond the label of "treatment" in Eighth Amendment inquiries.

In *Knecht v. Gillman*, the Court of Appeals for the Eighth Circuit enjoined the use of apomorphine, a vomit-inducing drug, on nonconsenting inmates in a behavior modification program. The court held that the mere characterization of the act of administering the drug to inmates as "treatment" did not insulate

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62 See, e.g., Haynes v. Harris, 344 F. 2d 463 (8th Cir. 1965) (unwanted medical treatment is not cruel and unusual punishment), Smith v. Baker, 326 F. Supp. 787 (W.D. Mo. 1970) (forcible injection of inmate with promazine not cruel and unusual punishment, unless "exceptional circumstance" proved).

63 488 F. 2d 1136 (8th Cir. 1973).
the act from Eighth Amendment scrutiny. Similar results were reached in *Nelson v. Heyne*, a case in which the administration of tranquilizing drugs (thorazine and sparine) to juveniles in correctional institutions was prohibited on Eighth Amendment grounds. The “treatment”—“punishment” distinction offered by the state was rejected.

As was noted previously, token economies and tier advancement systems are often initiated by “deprivation” situations for treatment purposes. “Treatment”, even for rehabilitative purposes, is now undoubtedly subject to scrutiny for Eighth Amendment purposes. The critical question for the law in this area is the definition of a baseline below which deprivation for contingency purposes becomes cruel and unusual punishment.

A similar question has been faced by the courts in decisions on the conditions in solitary confinement. In cases such as *Finney v. Arkansas Board* and *Berch v. Stahl*, federal courts have established that inmates may not be deprived of certain basic necessities of life—light, heat, ventilation, sanitation, clothing, and a proper diet—for the purposes of punitive isolation. A similar standard has been established for mental patients who are subjected to various forms of treatment, including behavior modification. In *Wyatt v. Stickney*, the Federal District Court for the Middle District of Alabama ruled that certain physical and psychological needs—e.g., a bed, a nutritionally adequate diet, privacy—may not be made subject to successful performance in treatment programs. Arguably, token economies and tier systems which attempt to use basic physical needs as reinforcers will be characterized as cruel and unusual punishment.

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64 *Id.* at 1139.
65 491 F. 2d 352 (7th Cir. 1974).
66 505 F. 2d 194 (8th Cir. 1974).
This question has already been faced by courts dealing with token economy systems for juveniles. In *Inmates of Boys' Training School v. Affleck*, the Federal District Court for Rhode Island ruled that institutionalized juveniles have a right to treatment. In its examination of the training school's treatment programs, the court found an attempt at behavior modification, which it characterized as a "carrot and stick program." The court held that there was a minimum level of physical needs which could not be made subject to reinforcement in a treatment program. Daily showers, bedding, clothing changes, and other physical necessities could not be considered "privileges" to be bought with acceptable behavior. This particular program, it was ruled, could not use baseline reinforcers as incentives without running afoul of the Eighth Amendment.

Adult tier advancement systems have been challenged on similar grounds. A three level tier advancement system for inmates considered to be troublesome and dangerous to prison security was established by state correctional officials in Joliet, Illinois. Inmates placed in this Special Program Unit asserted that the conditions of confinement in it amounted to cruel and unusual punishment. Among the deficiencies listed in the complaint were a lack of adequate exercise, insufficiency of soap, hot water, and cleaning utensils, small cells and inadequate lighting. The Federal District Court for the Northern District of Illinois held that confinement in this "deprivation situation" did not constitute cruel and unusual punishment because conditions were not sufficiently bad to support such a holding. The Federal District Court in Vermont rejected a similar com-

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70 For a history of the conception and establishment of this program, see Goldberger, *Court Challenges to Prison Modification Programs. A Case Study*, 13 Am. Cr. L. Rev. 37 (1975).
71 Id. at 46, 47.
plaint from inmates in Vermont State Prison. These inmates were enrolled in a program which provided for a graduated extension of privileges based on improvement of attitudes and behavior. The "deprivation situation" in this program did not amount to an Eighth Amendment violation because the court specifically found that inmates were not denied basic items—food, clothing, sanitation, and medical care. These cases together suggest that the use of baseline reinforcers in adult operant conditioning programs will be barred as cruel and unusual punishment when basic needs are made subject to reward.

This analysis of the cruel and unusual punishment clause leads to several conclusions. Reinforcers with institutionalized juveniles will always be subject to strict judicial scrutiny, and prohibited when restrictions are severe. Adults may be subjected to more serious deprivations, but there is a line beyond which basic needs cannot be denied. Programs which use idiosyncratic reinforcers are free from allegations of eighth amendment violations, the contingent availability of these rewards does not conflict with the legally emerging absolute rights of inmates.

There is one case which suggests that the use of either baseline or idiosyncratic reinforcers can be enjoined when they are used upon juveniles by untrained and unsupervised staff. In Morales v. Turman, the Federal District Court for the Eastern District of Texas extended the right to treatment to institutionalized juveniles. In its elaboration of the requirements of the right to treatment, the court examined the token economy:

Nor do the Texas Youth Centers' sporadic attempts at 'behavior modification' through the use of point systems rise to the dignity of professional treatment programs geared to individual juveniles.

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74 Id. at 1344.
76 Id.
Treatment, it was concluded, requires adequately trained and supervised staff. The court suggested that the placement of juveniles in unsupervised hands of unsuitable staff may be cruel and unusual punishment. Institutionalized juveniles, if the right to treatment is accepted universally, may thus require a staff carefully trained in the theory and techniques of learning theory to keep a program free of allegations of Eighth Amendment violations.

B Procedural Due Process Analysis of the “Grievous Loss” Standard to Operant Conditioning Techniques in Corrections

1. The Right to Hearing Prior to Program Induction

   The Due Process Clause of the Fourteenth Amendment has been applied with increasing frequency to restrict administrative discretion in correctional decisions which affect inmate rights and privileges. The Supreme Court in Wolff v. McDonnell77 ruled that inmates who lose good time credits for disciplinary infractions are being subjected to a “grievous loss” of liberty. As a result, the Court required a limited due process hearing for inmates who faced this loss. Similar due process hearings have been required by the lower courts in a variety of situations where inmates are being subjected to losses of either “liberty” or “property,” including induction into behavior modification programs.

   Inmates who are unwilling to participate in either a token economy or tier advancement system might allege that they are entitled to a due process hearing before placement in such a program. This type of challenge was successfully litigated in Clonce v Richardson.78 The challenged program, Special Treatment and Rehabilitation Training (START), was developed at the Medical Center for Federal Prisoners in Springfield, Mis-

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START had ingredients of both token and tier systems—a “deprivation state”, a reinforcement arrangement, and a graded progression of inmates through tiers with better living environments. Prisoners who participated in the program were selected from segregation units throughout the federal prison system.

The Federal District Court for the Western District of Missouri, focused its attention on the “deprivation state” imposed on START participants in its analysis. When START prisoners were placed in the Orientation Level, they were permitted to have only a Bible and a hometown paper. Reading materials of a political and educational nature are available to prisoners in regular segregation on a circulating basis throughout the federal prison system. Among the other privileges generally available to prisoners in segregation that were denied in START were the following: religious services, freedom from continuous monitoring of activities and speech, and the prospect of having the privileges available to inmates in open population restored without affirmatively participating in a rehabilitation program. It was concluded that these deprivations constituted a “major change in the conditions of confinement,” requiring at a minimum the type of hearing required by the Supreme Court in Wolff v. McDonnell.

Several other courts have reached similar conclusions in their analysis of the due process rights of prisoners placed in token economies or tier systems. While the conditions in the previously mentioned Illinois Special Program Unit in Joliet were not shocking enough to constitute cruel and unusual punishment, they did entail “significant deprivations of liberty” serious

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70 Id. at 349.
80 Id. at 348, Wolff required the following minimum due process safeguards: written notice of charges twenty-four hours prior to a hearing; a written notice of the factfinders’ decision concerning the violation, with reasons and a statement of the evidence relied upon; the opportunity to call witnesses and to present documentary evidence, when these practices are not hazardous or contrary to correctional goals; and a right to counsel substitute; supra note 77, at 564.
enough to invoke the fourteenth amendment. The Seventh Circuit Court of Appeals ruled that there was a sufficient contrast between the privileges associated with membership in the general population and those available in the program to require a due process hearing prior to transfer. Due process safeguards were also imposed on the Vermont State Prison experiment with operant conditioning theory. The Federal District Court for Vermont imposed these safeguards because the program curtailed substantial privileges afforded to inmates in the general population, thus subjecting the participant to a “grievous loss.” These pre-Wolff cases are further authority for the proposition that a limited due process hearing is required prior to placement of an inmate in an operant conditioning program with an environment lacking the privileges available to the general inmate population.

The logic of these decisions, however, has been called into question by several 1976 Supreme Court decisions limiting inmate rights. In Meachum v. Fano, the Supreme Court ruled that, absent a state law or practice conditioning the transfer of inmates between institutions, the Fourteenth Amendment Due Process Clause in and of itself does not require an inmate to a factfinding hearing prior to his transfer even if the conditions of the receiving institution are substantially less favorable to him than those existing in the institution from which he was transferred. In its analysis of the “liberty” interest of inmates facing transfer to less favorable institutions, the Court rejected the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. The Court ruled that not every change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to trigger a due

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81 United States ex rel Miller v. Twomney, supra note 72, at 713.
82 Id. at 717.
83 Bowers v. Smith, supra note 73, at 1344.
84 96 S.Ct. 2532 (1976).
process hearing. In another case on inmate transfers,85 the Supreme Court ruled that a due process hearing is not required prior to a transfer, even if the purpose of the transfer is disciplinary.

The impact of these decisions on prison token economy or tier advancement systems is unclear. It can be argued that these decisions apply only to the narrow area of inmate transfers, and are thus inapplicable to other situations where inmates are confronted with a loss of "liberty" or "property." This interpretation of these cases would leave the holding in *Clonce v. Richardson* and the other behavior modification cases undisturbed.

The Court's constitutional analysis, however, draws into question many earlier lower court rulings which required due process hearings prior to various deprivations of inmate liberty. Prisoners might be inducted into token economy or tier advancement programs without a due process hearing, even if the program involved serious deprivations of privileges available to the general inmate population. Litigation may be required to resolve this issue.86 However this question is resolved, it is clear that programs using totally "idiosyncratic" reinforcers are exempt from due process requirements. Since these reinforcers are exempt from due process requirements. Since these reinforcers involve items and privileges not generally available to the inmate population, involuntary placement in a program utilizing them does not subject the participant to deleterious consequences or a "grievous loss" of liberty or property. A due

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86 The Supreme Court during its 1975-76 term reserved the issue of whether minimum due process is necessary when inmates are deprived of privileges available to the general prison population. In *Baxter v. Palmigiano*, 96 S.Ct. 1551 (1976), a Ninth Circuit Court of Appeals decision that had afforded minimum due process to prisoners who were denied privileges was reversed. The Supreme Court held that this ruling was premature because the inmates in question were brought before prison disciplinary boards for allegations of "serious misconduct" that required the procedures outlined in *Wolff*. There was not enough evidence in the records of these hearings to establish the degree of "liberty" at stake in loss of privileges and thus whether some sort of procedural safeguards are due when such "lesser penalties" are at stake.
process hearing prior to entry cannot be mandated by constitutional principles.

2. Negative Reinforcement Techniques—Due Process Issues

The use of negative reinforcement techniques to supplement positive reinforcers—both baseline and idiosyncratic—raises distinct problems in the area of procedural due process. Fining practices or demotion in tier systems raise the prospect of a “grievous loss” that was discussed in the previous section on due process. These practices are analyzed separately.

Token economies in corrections have utilized fines as a means of discouraging unwanted target behaviors. An inmate who faces the prospect of a substantial fine of tokens for engaging in unwanted behavior could argue that he is faced with a “grievous” loss of property. Since this challenge could not be answered by the argument that the receipt of tokens was a privilege rather than a right, their loss could be considered grievous enough to require a due process hearing prior to revocation. Such an argument might prove weak if the loss were minimal. If the loss were substantial, however, and resulted in a denial of a large number of basic privileges, such as recreation and access to religious services, it might prove effective.

A potentially more effective argument could be leveled against tier systems which use demotion as a negative reinforcer. Demotion in a tier system can result in major environmental changes and entail a serious loss of privileges. Losses of this type—e.g., the privilege of earning good time—could be construed as a “major change in the conditions of confinement” that requires a Wolff due process hearing. An argument of this type, however, would have to come to terms with the implications of the Supreme Court transfer cases.

A remedy requiring fewer procedural protections than Wolff might be suggested as the solution to this conflict between lower

IV. INFORMED CONSENT

A. Definition

The doctrine of informed consent to medical treatment and therapy has several bases—it can be derived from statutory law, common law, and constitutional principles.\(^8^9\) Its basic premise is that knowing, voluntary, and competent consent is an essential prerequisite to the application of intrusive medical techniques or therapies upon the body.\(^9^0\) The applicability of informed consent to operant conditioning techniques will now be explored.

B. Informed Consent and Operant Conditioning Techniques

1. Statutory Duties

A number of jurisdictions have passed statutes requiring the informed consent of prisoners or mental patients as a prerequisite to certain treatment procedures. Psychosurgery, surgery, and electroconvulsive therapy are the most frequently regulated procedures.\(^9^1\) However, some statutes require informed con-

\(^8^9\) See, Friedman, supra note 43, at 50.
\(^9^0\) Kaumowitz v. Michigan Dept. of Mental Health, 2 Prison L. Rptr. at 477.
\(^9^1\) Friedman, supra note 43, at 50.
sent prior to the administration of experimental procedures. Although none of the state statutes specifically require informed consent for operant conditioning techniques, some of the techniques can be considered "experimental" and therefore might be considered to require statutory informed consent. Specific token economy and tier system techniques are experimental if they deviate from the broad range of approaches followed by a majority of reasonable practitioners in this field. This is the standard that is followed with medical treatment; deviation from established medical procedure is experimentation. Determination of this question revolves around expert testimony on the acceptance of a specific technique by the majority of practitioners.

2. Common Law Basis for Informed Consent

The common law protects the integrity of the body from unwanted intrusions. In tort law, informed consent is the device by which a client authorizes a therapist to invade his body for the purpose of treatment. Intrusions without informed consent are unauthorized touchings making the therapist liable for assault and battery of his client.

It can be argued that the traditional concept of informed consent is inapplicable to learning theory programs because they do not involve an intrusion into the body. The notion of informed consent may be appropriate to medical forms of treatment, which involve intrusions, but is not relevant to a learning theory model of behavior change. The more appropriate model, it can be argued, is a contractual model in which both client and

92 See N.Y. Mental Hygiene Law § 15.03(b)(4) (McKinney Supp. 1974-75) (consent required for experimental drugs or procedures), N.C. Gen. Stat. § 122.55.6 (1974) (treatment involving experimental drugs or procedures shall not be given without informed consent).
93 See Martin, supra note 10, at 36.
94 See Carpenter v. Blake, 60 Barb. 488 (N.Y. 1871), rev'd on other grounds 50 N.Y. 696 (1871).
therapist agree upon specific goals and the means by which to achieve them. This question about the applicability of informed consent to operant conditioning techniques is basic, courts have yet to resolve the issue.

There are remedies, however, in traditional tort theory which could be used to impose liability upon learning theory therapists. Torts such as invasion of privacy and intentional infliction of emotional stress could be used to provide grounds for a suit for damages in this area. An approach of this type would clearly avoid the bodily intrusion question in cases of harm to clients.

3. Constitutional Principles Requiring Informed Consent

Constitutional principles can be invoked to require an informed consent to therapy. The Court of Appeals for the Eighth Circuit used informed consent as an equitable remedy to prevent the use of an aversive drug on unwilling inmates. Since the use of the drug for disciplinary infractions constituted cruel and unusual punishment, only a protective device such as informed consent would justify its use in a treatment program.

Informed consent could also be used as a means to allow experimental treatment which violates other constitutional rights — the proposed right to mental autonomy and privacy. Before informed consent could be imposed as a program requirement, however, there would have to be a clear violation of a constitutional right. It has been suggested that the concept of intrusiveness may limit the application of the right to mental autonomy and privacy to a small group of operant conditioning programs — those which attempt to alter basic social attitudes and feelings.

The token economy and tier advancement system programs which are most susceptible to a requirement of informed con-

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97 This proposal is offered by Friedman, supra note 48, at 55.
98 Knecht v. Gillman, 488 F. 2d at 1139.
sent are those involving a "deprivation situation." A drastic scheme of denying basic needs to create conditions for positive reinforcement might be properly deemed "aversive" for legal purposes and follow the emerging restrictions on "aversive" therapy. Knecht suggests that "aversive" conditioning is cruel and unusual punishment in the absence of informed consent. Experiments utilizing baseline reinforcers in corrections may thus be restricted to consenting prisoners.

The mandate of requiring informed consent prior to behavior modification experiments is unsettled. Courts could consider other remedies in situations where substantial constitutional rights might be abridged in the name of treatment — e.g., review of institutional treatment techniques by human rights committees. Token and tier systems using idiosyncratic reinforcers to reward target behaviors that do not infringe on constitutional rights might be completely free of the demands of informed consent. Voluntary participation in such programs, however, may be the key to successful therapy, in spite of the lack of a legal requirement of informed consent.

**Conclusion**

Experiments in behavior control have raised unprecedented questions for the law and our system of values. What is the mind? Is it the pure product of environmental inputs? What right can the state claim to remodel or restructure basic human values and behavior patterns while maintaining respect for human integrity and individual rights?

These questions can be considered moot. The mental processes are the product of environment rather than "free will" according to behaviorists. This very basic issue is the key to a true

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99 This idea is proposed and analyzed by Wexler, *supra* note 6, at 107, 108.
100 See Wyatt v. Stickney, 344 F Supp. at 376.
resolution of the conflict between operant conditioning and traditional concepts of due process and individual responsibility for behavior.

Parameters can be offered to guide the resolution of this issue. As was suggested earlier in this analysis, correctional systems pose problems in both their designation of target behaviors and their choice of reinforcers. Each of these processes involves distinct legal issues.

The process of selecting value or behavior patterns for alteration through operant conditioning can intrude upon traditional First Amendment rights. Programs cannot attempt to alter basic religious, political, or social beliefs and attitudes held by inmates without violating the First Amendment. Manifestations of these beliefs and attitudes in behavior, however, are subject to change through token economy and tier advancement systems when the government demonstrates a compelling state interest. Even when a compelling state interest is shown, programs are limited by the least restrictive means test required by the Constitution. This means, in practical terms, that the least intrusive means — e.g., a token economy based on idiosyncratic reinforcers — must be used when the object of behavioral change interferes with fundamental rights.

The rights to physical and mental privacy and autonomy have been recognized by lower courts in cases dealing with coercive forms of behavior control. The extent of judicial recognition of these rights is as yet unclear; their prospective application to token and tier systems is uncertain. It can be suggested that their application will be limited by the concept of intrusiveness. Only those programs with the object of changing basic inmate attitudes and feelings may produce a threshold argument for a violation of constitutional rights.

The choice of rewards in correctional operant conditioning programs can generate significant legal problems. Positive reinforcers can be divided into two groups — idiosyncratic and “baseline” or basic reinforcers. These differing approaches to
reward therapy should be subject to separate standards of judicial review.

The Eighth Amendment’s proscription of cruel and unusual punishments is now clearly applicable to correctional treatment therapies. Token economy or tier advancement systems utilizing “baseline” or basic reinforcers can violate the protections contained in the Eighth Amendment when they make basic necessities of life—e.g., light, heat, clothing, other physical necessities—the subject of contingent reinforcement. Idiosyncratic reinforcers do not raise the question of Eighth Amendment review, since the rewards associated with an appropriate behavioral response are benefits not generally available to inmates rather than physical necessities.

This suggested dichotomy in the standard of judicial review appears again in the application of the Due Process Clause of the Fourteenth Amendment to these different clinical approaches for achieving behavioral change.

The placement of an inmate into a program employing a “deprivation situation” as the first stage in behavioral change or an environment lacking privileges generally available to prisoners may require a limited due process hearing before program induction. Demotions in tier systems or loss of tokens in a token economy may similarly demand due process safeguards. The use of idiosyncratic reinforcers avoids this due process problem because no vested liberty or property interests are involved.

This intersection between the emerging science of operant conditioning and the law is new and uncharted. The application of Skinnerian learning theory in correctional rehabilitation holds promise, and this analysis has not attempted to discourage experimentation in this field. The goals of rehabilitation and scientific advancement implicit in these experiments must be tempered with a respect for the rights and dignity of inmates. Without a careful regard for traditional legal precepts protecting “mind”, “freedom”, and “dignity”, experimenters with the new science of operant conditioning cannot function under our system of law and justice.