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# Applying the Controlled Experiment to Penal Reform

Benjamin H. Green

# NOTE

## APPLYING THE CONTROLLED EXPERIMENT TO PENAL REFORM

The penal treatment of convicted criminals may be designed to serve various goals: deterrence, rehabilitation, retribution, and preventive detention. Legislatures, however, do not generally articulate which of these goals are to be served.[1] Yet the vast discretion bestowed by the legislatures upon judges and administrative agencies indicates an underlying goal of individual treatment directed towards rehabilitation.[2] This unspoken policy rests on the fundamental assumption that those vested with discretion know how to reform the offender. In fact, this assumption is unwarranted; the process of sentencing and correction takes place in a virtual informational vacuum. As one commentator notes, the treatment of criminal offenders today may have no more support "than the incantations of medicine men and potions of witches."[3] Therefore, without some form of research, the implementation of programs to further any of the possible goals of a penal system remains largely a matter of happenstance.[4]

Because our society values both liberty and rehabilitation, it is important to develop a mix of correctional tools that will advance these two policies. When and for how long should a person

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[1] *See* Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

[2] Judge Frankel states:

> The basic premise of the indeterminate sentence is the modern conception that rehabilitation is the paramount goal in sentencing. The idea is to avoid the Procrustean mold of uniform sentences to fit crimes in the abstract and to focus upon the progress over time of the unique individual in order to determine when it may be safe for society and good for him to set him free, at least within the limits of parole supervision.

*Id.* at 29. In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court upheld the validity of broad judicial discretion in sentencing and individualization of punishment.

[3] L. WILKINS, EVALUATION OF PENAL MEASURES 9 (1969).

[4] *See* Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421 (1969). Dean Cramton writes:

> The special task of the behavioral scientist is to analyze alternative legal arrangements from various points of view and to provide as accurate a statement as possible concerning the actual or expected benefits and costs of existing and proposed arrangements. With this information (or its best practicable approximation) policymakers may make an informed and rational choice of various modes and levels of social control.

*Id.* at 422.

be sent to prison? What treatment should he receive while in prison? And when should he be diverted from the criminal justice system entirely? These are questions that deserve attention. Moreover, due to limited prison resources it is especially important to efficiently and accurately assess new efforts at reform. This Note will examine one research tool, the controlled social experiment, in two contexts: post-conviction treatment of offenders and, to a lesser extent, pretrial diversion. In addition, this Note will explore whether such experiments are permissible in light of present social values and the limitations placed on state action by the Constitution.

## I

## THE CONTROLLED EXPERIMENT

The controlled experiment in penal reform is a legislatively sanctioned test of theories, programs, and methods of treatment aimed at furthering legitimate correctional goals. A class of similarly situated offenders is randomly divided into two groups. One group is exposed to the new treatment (experimentals), while the other is treated as if no experiment were taking place (controls). The two groups are then studied and compared to determine what effect, if any, the new treatment has had and whether that effect has proven beneficial in terms of the goal set (*e.g.*, rehabilitation, deterrence, preventive detention).

For example, in order to test the success of a pretrial diversion program, half of those eligible would be treated in the program, while the other half would be processed through the criminal justice system. A program designed to test the value of certain modes of incarceration might send one group of randomly selected offenders to an experimental prison, while distributing a control group throughout the regular prison system. On a more extreme level, a program might be designed to test the very assumptions upon which certain offenders are incarcerated. Using probation or parole, such a program would release a randomly selected group of offenders into the community, while a similar group would be left to complete their sentences. Follow-up studies would then be carried out to determine what goals were served by choosing one form of treatment over another.

Although this Note focuses on the use of controlled experiments for rehabilitative purposes, this research technique is adaptable to any of the substantive goals of a penal system, with the

possible exception of retribution. Judgments regarding punishment for punishment's sake tend to be made on a purely emotional level. But where the technique is used to shape public behavior and not merely to wreak retributive justice upon the individual offender, it is fully applicable. For example, it has been suggested that controlled experiments be conducted to discover methods of deterring as well as treating drunken drivers.[5]

The design of the controlled experiment will to some extent be dictated by the program being tested and the nature of the institution involved. For example, where a new policy's effect on the public is being tested, regions rather than individuals will comprise the control and experimental groups.[6] If the policy is to have an effect only upon a certain class of individuals, that class will comprise the universe from which the control and experimental groups are selected. Nevertheless, two characteristics are necessary for a scientifically valid experiment. The groups must be virtually identical with respect to the fact being tested, and they must be randomly selected—assignment to either group must rest on nothing more than mere chance.[7]

There are, of course, other less desirable research methods available to social scientists.[8] "Before and after" studies are one common alternative. This technique investigates changes brought about by a new program by comparing the situation prior to the program's introduction with the situation afterwards. Unfortunately, such comparisons are extremely inefficient and inaccurate because evaluation takes place only after the program has been fully implemented. "Matching exercises" are another alternative. Here the researcher attempts to locate individuals who are virtually identical to those in the experimental program and then compares the two groups. The results, however, are generally unreliable, due to the difficulty of achieving an accurate "match-up."[9]

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[5] *Id.* at 452.

[6] *See, e.g.*, Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (experimental group consisted of approximately 25 percent of all welfare recipients in New York State).

[7] *See* D. GLASER, ROUTINIZING EVALUATION: GETTING FEEDBACK ON EFFECTIVENESS OF CRIME AND DELINQUENCY PROGRAMS 55-83 (1973).

[8] For a general discussion of research methods, see *id.* at 66-82.

[9] *See* Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 226 (1974):

> The matching strategy thus attempts to duplicate the similarity of groups created by random assignment by finding similar persons in similar positions. . . . [M]atching exercises can be constructed from historical records after a treatment group

Thus, there is a consensus among social scientists that controlled experimentation is by far the most accurate and efficient research tool available,[10] and one quite necessary in the development of a rational system of sentencing: "The step from our present too broad analysis of competing treatment methods toward the gradual development of a treatment nosology demands much more refined and narrow controlled experimentation, and is an inevitable precursor of rational penal reform."[11] But even if such experiments are deemed the most efficient means of achieving penal reform, human experimentation raises serious ethical and legal problems.[12] In view of the limits placed upon government by the Constitution, these problems are particularly acute where such experimentation is conducted within the criminal justice system.[13]

## II

## THE DILEMMA OF SOCIAL EXPERIMENTATION IN THE CORRECTIONS CONTEXT

Any technique of human experimentation rests on the concept of using the individual for the benefit of society as a whole. In essence, society may permissibly harm the individual in its effort to gain knowledge. However, the concept of the "human guinea pig" is not well-received in our society. In the bio-medical field, the problem is lessened by requiring informed consent.[14] In

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has been selected and processed. . . . Such after-the-fact matching is quicker, cheaper, and vastly more dangerous than controlled experimentation.

[10] *See* H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURTS 241 (1959):

> The popular notion of an "experiment," in the sense of an innovation, tentatively introduced on a limited scale, is already quite familiar to the field of judicial administration. The trouble is that these tryouts are as a rule not accompanied by control procedures that permit us to learn exactly what was and what was not achieved. *Only a scientifically controlled experiment can do this.*

(Emphasis added.) *See also* Garabedian, *Research and Practice in Planning Correctional Change*, 17 CRIME & DELINQUENCY 41, 46 (1971); Geis, *Ethical and Legal Issues in Experimentation with Offender Populations*, *in* JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, RESEARCH IN CORRECTIONAL REHABILITATION 34 (1967); Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 646 (1966); Zimring, *supra* note 9, at 225.

[11] Morris, *supra* note 10, at 645 n.28.

[12] For an excellent discussion of the ethical dilemmas involved in bio-medical human experimentation, see Freund et al., *Ethical Aspects of Experimentation with Human Subjects*, 98 DAEDALUS 219-594 (1969).

[13] *See* notes 37-77 and accompanying text *infra*.

[14] A great deal of controversy surrounds the question whether fully informed voluntary consent can be achieved. *See* Jaffe, *Law as a System of Control*, 98 DAEDALUS 406 (1969); Lasagna, *Special Subjects in Human Experimentation*, 98 DAEDALUS 449 (1969).

the correctional context, on the other hand, consent may not be a useful, or indeed relevant consideration. For example, if one is testing the efficacy of different parole or sentencing decisions (a form of governmental action traditionally imposed upon unwilling individuals), the addition of consent to the research design must necessarily reduce the accuracy of results. As a practical consideration, consent may create self-consciousness among the participants and stimulate expectations that bias the experiment.[15] Indeed, mere disclosure to a prisoner of his participation in an experiment may increase the cynicism already felt by most convicts and foster a negative "guinea pig" mentality.[16]

In view of the inapplicability of consent to correctional experimentation, it is fair to say that such "social experimentation epitomizes the central dilemma posed by all experimentation involving human beings: when, in a society that values both knowledge and human dignity and equality, may some people be used as means to serve the ends of the group?"[17] Such a sacrifice of the individual is superficially antithetical to our criminal justice system which itself sacrifices much in the way of efficiency and truth in order to restrict the power of the group and protect the individual. Thus, the question of experimentation in treating offenders requires a profound value judgment: "Is it justifiable to impose a criminal sanction guided by the necessities of research and not the felt necessities of the case?"[18]

Aside from these ethical constraints, the due process and equal protection clauses of the Constitution and to a lesser extent the eighth amendment stand as obvious stumbling blocks to controlled correctional experiments. By its very nature a valid experiment must discriminate between similarly situated people and do so on the basis of pure chance.[19]

Despite these ethical problems and constitutional objections, a model of controlled experimentation, sanctioned by the legisla-

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[15] *See* Geis, *supra* note 10, at 37; Zeisel, *Reducing the Hazards of Human Experiments Through Modifications in Research Design*, 169 ANNALS N.Y. ACAD. SCI. 475, 475 (1970).

[16] *See* Geis, *supra* note 10, at 37.

[17] Capron, *Social Experimentation and the Law*, *in* ETHICAL AND LEGAL ISSUES OF SOCIAL EXPERIMENTATION 127 (A. Rivlin & P. Timpane eds. 1975).

[18] Morris, *supra* note 10, at 647.

[19] *See* H. ZEISEL ET AL., *supra* note 10, at 242. Dean Cramton also points out this fundamental dilemma: "Experiments on human subjects involving legal requirements threaten a fundamental principle of the legal order: that equals will be treated equally. If controlled experiments were conducted, a deliberate inequality would be imposed by the legal system contrary to this fundamental principle." Cramton, *supra* note 4, at 451.

ture, can be designed and implemented. The model suggested here consists of three basic guidelines: (*1*) that the experiment be imposed only after the offender has passed through judicial proceedings and into the correctional system (hereinafter referred to as administrative experimentation); (*2*) that the experimental treatment be less severe than the treatment traditionally given[20] (hereinafter referred to as lessened severity); and (*3*) that the overall differences in treatment between the control and experimental groups not be excessive[21] (hereinafter referred to as nonexcessive differences in treatment). The first two guidelines were suggested by Dean Norval Morris.[22] Such a design minimizes the ethical problems inherent in such experimentation and would probably withstand constitutional attack.

The first and third guidelines are straightforward in application. Administrative experimentation requires that the judge treat each offender normally and that any experiment be conducted through administrative agencies, which are better equipped in terms of resources and expertise to undertake serious research.[23] This guideline appears best suited to a penal system with flexible administrative sentencing procedures. However, even in those systems with judge-imposed sentencing, the flexibility available to correctional administrators provides wide scope for experimentation. With respect to the third guideline, achieving nonexcessive differences in treatment requires only that unconscionable variations between the control and experimental groups be avoided.

The requirement of lessened severity may be more difficult to establish. In many instances, the relative differences in severity resulting from the new measure will be difficult to determine. Indeed, a measure designed to be less severe may be perceived by the experimental group as more severe. For example, the pretrial diversion program in New York City seemingly offers an attractive alternative to the accused. An eligible defendant may participate in a supervised employment program rather than take his chances with the criminal justice system. Surprisingly, many eligible defendants have rejected the program.[24] The explanation for this

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[20] It should be noted that this requirement would reduce the usefulness of the model where the goal sought to be advanced is one of increased deterrence.

[21] A caveat must be noted here. To the extent that the scope of experimentation is restricted by these guidelines, some accuracy may be sacrificed.

[22] Morris, *supra* note 10, at 645-56.

[23] *See id.* at 648.

[24] *See* Zimring, *supra* note 9, at 237.

development is that even if convicted, most offenders face only light sentences. Therefore, conviction often leads to less state control of the individual than does the work program.[25]

It is, of course, impossible to design an experiment that will cater to each offender's subjective preferences. Nevertheless, each proposed experiment should be carefully examined to ensure that the new measure does not involve increased severity. The suggested test is an objective one well recognized by the courts: reasonableness. If the experimental treatment is reasonably less severe, then it will be acceptable. Such an objective standard would minimize resistance among the subjects and encourage public acceptance of the program.

## III

## DEFENDING THE OFFICIAL CONTROLLED EXPERIMENT IN THE CONTEXT OF PENAL REFORM

### A. *Non-Constitutional Issues*

At the outset, one must confront the objection that the controlled penal experiment introduces an unacceptable element of unfairness into the criminal justice system. This objection derives from two characteristics of the controlled experiment: first, to some degree such an experiment modifies the treatment of prisoners not according to the deserts or needs of the individual, but rather according to the requisites of the experiment; and second, it randomly imposes different treatment on similarly situated individuals. Under close scrutiny, however, it becomes apparent that these two characteristics already permeate our criminal justice system.

First, the concept of general deterrence is an accepted element of modern penal philosophy[26]—society imposes individual sanctions in order to deter others from committing similar offenses. In penal philosophy, as in experimental theory, a tension exists between the ideal of individual treatment and the necessity of uniform punishment. This aspect of general deterrence has not gone unrecognized:

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[25] *See id.*

[26] *See* Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 953 (1966): "[G]eneral prevention has occupied and still occupies a central position in the philosophy of criminal law, in penal legislation and in the sentencing policies of the courts . . . ." *See also* F. ZIMRING & G. HAWKINS, DETERRENCE 18 (1973); Frankel, *supra* note 1, at 43-44.

> When objections are made to this definition of general deterrence as the effect of punishment *on others*, it is not only because the definition is found to be analytically misleading, but also because it tends to engender a feeling that somebody is being sacrificed for the purpose of instilling fear in others; that the use of the deterrence mechanism is, therefore, in some way unjust or improper.[27]

General deterrence is an accepted and, in some cases, the overriding principle used in sentencing offenders. Judge Frankel, for example, advocates legislative articulation of the substantive goals to be served by imposing sentence for a particular crime. He suggests that if the goal of general deterrence is to be achieved, mandatory terms must be set by the legislature.[28] The New Jersey Supreme Court has also recognized that, absent a legislatively articulated policy, a court may in its discretion sentence with general deterrence as the primary goal.[29]

The second element supporting penal experimentation is the present lack of consistency in treating offenders—a situation producing the very randomness sought in a controlled experiment. As Judge Frankel notes: "[N]obody doubts that essentially similar people in large numbers receive widely divergent sentences for essentially similar or identical crimes."[30] Moreover, the system confers almost unbridled discretionary power upon judges and administrators.[31] Not infrequently, the treatment an offender receives is as much a function of which judge passes sentence and where the crime was committed, as the record and characteristics of the individual.[32] Given the wide disparities of the present sys-

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[27] Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338, 343 (1975) (emphasis in original).

[28] Frankel, *supra* note 1, at 41-42.

[29] In State v. Ivan, 33 N.J. 197, 202, 162 A.2d 851, 853 (1960), the court stated:

> If the offense has strong emotional roots or is an isolated event unassociated with a pressing public problem, there is room for greater emphasis upon the circumstances of the individual offender. On the other hand, if the crime is a calculated one and part of a widespread criminal skein, the needs of society may dictate that the punishment more nearly fit the offense than the offender. There the sentencing judge may conclude he should give priority to punishment as a deterrence to others and as an aid to law enforcement.

[30] Frankel, *supra* note 1, at 7.

[31] *See id.* at 1.

[32] *See* Morris, *Juvenile Offenders Before the Courts*, 66 YALE L.J. 962, 967 (1957). *See also* Circuit Conference of the Ninth Judicial Circuit, Sentencing Institute, 27 F.R.D. 293, 383-88 (1960), where the results of a sentencing test given to a group of federal judges are reported. In that test a hypothetical case was submitted to 27 judges. Seventeen of the judges

tem, the introduction of a limited, randomized disparity for legitimate research purposes does not appear objectionable.

The model guidelines of administrative experimentation, lessened severity, and nonexcessive differences in treatment also minimize the ethical problems raised by human experimentation. First, the level of individual sacrifice is mitigated by administrative supervision of the experiment. Under this guideline, each convicted offender is initially sentenced to a just and appropriate term by a judge. The correctional administrator is thus given a fixed limit within which to conduct the experiment, and the offender is assured of treatment no worse than he would have received in the absence of the experiment. The result is that although the offender may be denied the new treatment, he will not be denied the benefit of a judicial judgment as to his appropriate sentence.[33]

Second, the requirement of lessened severity minimizes the sacrifice required of any individual within the experimental group. On the other hand, if this guideline is adhered to, a benefit or treatment made available to the experimental group will clearly be denied to the control group. To the extent that such variation involves no significant difference in the *severity* of treatment, as required by the third guideline, the issue of inequality will be minimized and, by definition, incapable of resolution until the results of the experiment are determined.[34] However, to the extent that obvious benefits are conferred (such as parole, release to a community facility, or transfer to a minimum security prison), the issue of inequality will remain. The best answer to this objection is that, if successful, the experimental program will presumably be expanded throughout the penal system. Thus, the goals sought to be achieved may well justify the means.[35]

Third, the requirement of nonexcessive differences in treatment serves several distinct goals. By limiting the variation permitted in treatment, the absolute amount of inequality can be reduced, and sufficient deterrent effect and moral opprobrium will be retained. Furthermore, if serious offenders are included in an experiment, this requirement will prevent both the "release to the

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suggested terms of imprisonment ranging from 6 months to 15 years. The other 10 judges suggested probation.

[33] *See* Morris, *supra* note 10, at 638.

[34] *See* H. ZEISEL ET AL., *supra* note 10, at 246.

[35] *See id.*

streets of great numbers of dangerous criminals"[36] and drastic reductions in criminal sentences.

Thus, combining the proposed guidelines with the randomness required by the experimental model will produce a situation not very different from that existing at present—with the added benefit of a rational experimental goal. Moreover, minimizing the ethical dilemmas involved in controlled penal experimentation is only one consideration. Empirical knowledge is necessary for penal reform, and the controlled experiment is clearly a viable method of obtaining such knowledge. Whether the Constitution permits such experimentation, however, is another question.

### B. *Constitutional Issues*

#### 1. *Experimentation as Appropriate State Action*

Controlled penal experiments have obvious constitutional limits. These limits are particularly important at the policy formulation stage and in the actual design and administration of a particular experiment.[37] For example, enabling legislation must limit experimentation to programs that are constitutional per se and as applied. An experiment designed to test the utility of providing counsel to defendants accused of felonies would be clearly impermissible, for it would necessitate denying counsel to one group, thereby violating the sixth amendment. A constitutional right guaranteed under all circumstances cannot be withdrawn for purposes of experiment.[38]

Nevertheless, it must be determined whether controlled penal experimentation is a legitimate state function under the fifth and fourteenth amendments. The function of social experimentation in general has been recognized by the Supreme Court. As Justice Brandeis wrote:

> The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight

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[36] F. ZIMRING & G. HAWKINS, *supra* note 26, at 362.

[37] *See* J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS 2-3 (1972). Professor Katz divides the controlled experiment into three functional parts: formulation, administration, and review.

[38] *See* Pointer v. Texas, 380 U.S. 400, 413 (1965) (concurring opinion, Goldberg, J.); H. ZEISEL ET AL., *supra* note 10, at 242.

> is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science . . . . There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.[39]

There is, however, a basic distinction between the social experiment as Brandeis understood it and more modern concepts. Justice Brandeis understood experimentation to encompass the common notion of trial and error. Indeed, the Supreme Court has often supported experimental state legislative efforts.[40] But in those instances, the entire state became the laboratory for the rest of the country, and the new legislative program did not discriminate among the state's own citizens.[41] Yet, the Court's reference to experimentation indicates at least an acceptance of and deference to state judgments respecting experimental legislative programs.

2. *Equal Protection and the Controlled Experiment*

To date, only the Second Circuit has considered the constitutionality of controlled social experimentation. In *Aguayo v. Richardson*,[42] in an opinion by Judge Friendly, the court held controlled experimentation to be constitutional in the context of welfare reform. In *Aguayo*, New York had imposed increased qualification requirements on about twenty-five percent of the individuals eligible for welfare payments. To simplify greatly, welfare recipients in the experimental districts were required to register for and accept employment if offered in order to remain eligible.[43] The purpose of the experiment was to develop new programs to shrink the state welfare rolls. Upholding this state action against the equal protection attacks of welfare rights organizations, the court stated:

> A purpose to determine whether and how improvements can be made in the welfare system is as "legitimate" or "appropriate" as anything can be. This purpose is "suitably furthered"

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[39] New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (dissenting opinion, Brandeis, J.). *Accord*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 50 (1973); Johnson v. Louisiana, 406 U.S. 356, 376 (1972) (concurring opinion, Powell, J.).

[40] *E.g.*, Johnson v. Louisiana, 406 U.S. 356 (1972); Apodoca v. Oregon, 406 U.S. 404 (1972) (both upheld nonunanimous criminal jury verdicts).

[41] *See* Capron, *supra* note 17, at 156-57.

[42] 473 F.2d 1090 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

[43] *Id.* at 1094.

> by controlled experiment, a method long used in medical science which has its application in the social sciences as well.[44]

The court further indicated that economic considerations may be taken into account by the states. "The Equal Protection clause," it stated, "does not place a state in a vise where its only choices . . . are to do nothing or plunge into statewide action."[45] Finally, the court observed that random classification is not arbitrary per se in a constitutional sense. The randomness at issue was considered rationally related to the purpose of the classification—determining whether the experimental program should be made applicable to all state welfare programs.[46]

If a fundamental right or suspect class is involved, the equal protection clause requires the showing of both a compelling state interest and that a "less drastic means" of furthering that interest has been chosen.[47] If no fundamental right or suspect class is involved, a state need only show that the classification bears a rational relation to a legitimate state purpose[48] and that the classification itself is reasonable and not arbitrary.[49]

*Aguayo* dealt with welfare, an important but not a fundamental interest.[50] As such, the lesser standard applied, and the court found that the test had been more than satisfied.[51] If *Aguayo* stands for the proposition that controlled welfare experimentation is acceptable under the equal protection clause where the purpose is legitimate and no unreasonable classification is made, then controlled experimentation in the treatment of convicted offenders may also be constitutionally acceptable.

### 3. *The Constitutional Rights of Convicted Offenders*

Whatever the case in the past, it is clear today that the convicted offender is afforded some of the constitutional protections

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[44] *Id.* at 1109.

[45] *Id.* at 1109-10.

[46] *Id.*

[47] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[48] *Id.* at 40.

[49] McGinnis v. Royster, 410 U.S. 263, 270 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).

[50] Dandridge v. Williams, 397 U.S. 471, 485 (1970). The Supreme Court has held, however, that due process must be afforded the welfare claimant whose benefits are terminated. Goldberg v. Kelly, 397 U.S. 254 (1970).

[51] 473 F.2d at 1109. Judge Friendly suggested that the Supreme Court might be developing a new middle-level equal protection standard, falling in between the two tiers of the old test. Without deciding whether such a new standard would be applicable in the instant case, he indicated that both of the lesser standards had been met. *Id.*

guaranteed by the due process and equal protection clauses. For example, although at the time of sentencing a convicted offender does not enjoy all of the procedural protections available prior to his conviction,[52] he does retain a legal interest in having his sentence set lower than the maximum allowed by law. Hence, he is entitled to safeguards against sentences based upon untrue or misleading information[53] and sentences imposed for impermissible reasons such as vindictiveness,[54] wealth,[55] or race.[56] A defendant's probation or parole, once granted, also give rise to an interest held to be "valuable and . . . within the protection of the Fourteenth Amendment."[57] Furthermore, even while imprisoned the individual possesses certain state-created "liberty" interests, such as "good-time" credit[58] and the expectation of consideration for parole.[59] As the Supreme Court has stated:

> [T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.[60]

Although the interests of a convicted individual in his sentence and treatment have been held cognizable by the courts, these interests are of a less than fundamental nature. The Supreme Court has refused to give retroactive effect to its sentencing de-

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[52] *See, e.g.*, Williams v. New York, 337 U.S. 241 (1949) (denied right to confront witnesses at sentencing hearing); United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (wiretap evidence excluded at trial held admissible at sentencing hearing).

[53] Townsend v. Burke, 334 U.S. 736 (1948).

[54] North Carolina v. Pearce, 395 U.S. 711 (1969).

[55] Tate v. Short, 401 U.S. 395 (1971).

[56] Many of the objections raised against capital punishment centered on the fact that it had been imposed more frequently upon black defendants. *See* Furman v. Georgia, 408 U.S. 238, 250-51 (1972) (concurring opinion, Douglas, J.). *But cf.* Gregg v. Georgia, 96 S. Ct. 2909 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Roberts v. Louisiana, 96 S. Ct. 3001 (1976) (all holding death penalty not unconstitutional per se).

[57] Morrissey v. Brewer, 408 U.S. 471, 482 (1972). *Accord*, Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[58] Wolff v. McDonnell, 418 U.S. 539 (1974).

[59] Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). *Contra*, Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.), *vacated as moot*, 414 U.S. 809 (1973).

[60] Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

cisions in noncapital cases.[61] It has deferred to legislative judgments concerning differentiation of treatment among offenders based on the interests thus served.[62] Most significantly, in noncapital cases the Court has required only a lesser "rational basis"[63] standard—"some relevance to the purpose for which the classification is made"[64]—to sustain legislative classification of offenders for treatment purposes. Hence, the rationale of *Aguayo* may be generally applicable as long as no suspect class, such as race, is involved.

4. *Due Process and the Controlled Experiment*

Two comments are necessary before presenting a due process analysis of the experimental model. First, the requirement of administrative experimentation removes the model from the sentencing process completely. Hence, the due process requirements inhering in the sentencing context should already be satisfied before any experiment is commenced. Second, the requirement of lessened severity eliminates the need to examine the experimental group's position. No individual offender is deprived of any interest he had prior to the experiment merely for the purposes of the experiment. Therefore, our inquiry must center on whether the denial of the experimental benefit to the control group violates due process.

Whether and to what extent due process requirements attach depends on two conditions. The individual must be faced with a "grievous loss,"[65] and the interest threatened must be within the concepts of life, liberty, or property under the fourteenth amendment.[66] To fall within these limits, the interest must be more than a "unilateral expectancy"; it must rise to the level of an entitlement.[67] The interest may be created by the state. If so, the interest is also defined by the state, and due process ensures that those having the entitlement are not capriciously deprived of it. As the Supreme Court stated in *Wolff v. McDonnell*, a case applying the due process clause in the corrections context:

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[61] *E.g.*, Michigan v. Payne, 412 U.S. 47 (1973); *cf.* Schick v. Reed, 419 U.S. 256 (1974) (condition on commutation of death sentence held not subject to retroactive review).

[62] *E.g.*, Williams v. New York, 337 U.S. 241 (1949).

[63] McGinnis v. Royster, 410 U.S. 263, 270 (1973).

[64] Marshall v. United States, 414 U.S. 417, 422 (1974) (quoting opinion below, Marshall v. Parker, 470 F.2d 34, 38 (9th Cir. 1972)).

[65] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[66] *Id.*

[67] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

> [T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.[68]

Since participation in the experiment is independent of the sentencing process and, as a state-created interest, is state defined, it can be argued that due process requires only that all eligible prisoners be considered for the experiment; if no member of the control group is denied a state-created interest that he is reasonably entitled to receive, then this first aspect of due process will be satisfied.[69]

On the other hand, the manner in which the experimental benefit is conferred is random and, to that extent, may appear arbitrary or capricious, suggesting a denial of due process. The randomness, however, is rational in light of the goal to be attained. Unlike the forms of arbitrariness struck down in the past,[70] purely random selection procedures can mask no impermissible hostility to particular individuals or groups.

Nevertheless, a court might adopt a more substantive constitutional analysis and attempt to judge the scientific validity of the experiment in order to test whether the state has a valid scientific purpose at all, or whether the experiment is reasonably designed to effect the asserted purpose.[71] The outcome of such a substantive analysis would depend, of course, upon the experiment in question. With respect to the state's purpose, this Note has argued that the controlled experiment may be used to test the efficacy of different forms of penal treatment under any legitimate

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[68] 418 U.S. 539, 557 (1974).

[69] *See* Arnett v. Kennedy, 416 U.S. 134, 136 (1974) (plurality opinion, Rehnquist, J.). Three members of the Court agreed that a statutory expectancy may include and be limited by the procedure by which the state can deny the expectancy. *Id.* at 152-53. *See also* Meachum v. Fano, 96 S. Ct. 2532, 2539 (1976).

[70] *E.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969) (requiring statement of reasons for increased sentence upon retrial to ensure that sentencing judge did not punish defendant for appealing earlier conviction); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 934 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974) (requiring statement of reasons for denial of parole). *See also* Capron, *supra* note 17, at 162.

[71] The *Aguayo* court rejected this approach and refused to review the experiment's methodology. 473 F.2d at 1110.

penal policy. Therefore, as long as the state truly seeks to discover effective methods to deter, rehabilitate, or detain offenders, it should have no difficulty in demonstrating a legitimate interest and purpose. With respect to whether a given controlled experiment is a reasonable means to achieve the asserted end, again, provided the experiment is reasonable on its face and has substantial scientific validity, the state should have little difficulty in defending the experiment against substantive attack. Moreover, by minimizing inequalities and intrusions into prisoners' rights, the model guidelines would do much to guarantee the reasonableness of penal experiments.

5. *Cruel and Unusual Punishment and the Controlled Experiment*

One final constitutional hurdle remains: the eighth amendment's prohibition of cruel and unusual punishment. As was suggested in *Furman v. Georgia*[72] and confirmed in *Gregg v. Georgia*,[73] the random manner in which the death penalty had been imposed under statutory schemes of broad and unguided discretion contributed to its cruel and unusual nature. As Justice Stewart wrote: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[74] It may be that the Court will find something abhorrent about randomness in any part of the criminal justice system, but the death penalty raises issues qualitatively different from any others involved in the treatment of offenders.[75] Moreover, the randomness in *Furman* evidenced a complete lack of rational purpose. In the experimental situation, randomness is both rational and purposeful. Finally, the randomness of the death penalty masked racial and social class overtones.[76] No such possibility exists where randomness not only describes the outcome but also the method of selection.

Another element in the eighth amendment prohibition is the idea of proportionality. This usually involves comparing the punishment set by the legislature with the seriousness of the crime.[77] However, if some criminals convicted of a certain offense are treated leniently, while others suffer the full measure of the

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[72] 408 U.S. 238, 245-52 (1972) (concurring opinion, Douglas, J.).

[73] 96 S. Ct. 2909, 2932 (1976) (opinion announcing the judgment of the court, per Stewart, Powell, Stevens, J.J.).

[74] 408 U.S. at 309 (concurring opinion).

[75] *See* 96 S. Ct. at 2932; Moore v. Illinois, 408 U.S. 786, 800 (1972) (*Furman* held retroactive).

[76] *See* note 56 *supra*.

[77] *E.g.*, Weems v. United States, 217 U.S. 349, 366-67 (1910).

statutory punishment, a question of proportionality will arise. Limiting the differences in treatment between the experimental and control groups avoids this possibility.

## IV

## APPLYING THE MODEL

In order to make the model more concrete, three hypothetical examples of its application are offered below.

### A. *Pretrial Diversion*

Pretrial diversion programs typically attempt to divert certain kinds of offenders, particularly first-time offenders accused of minor crimes, from the criminal justice system. These persons are offered employment or therapy in lieu of a criminal disposition.

Pretrial diversion is perhaps unique in that its purpose is constitutional, but it requires the waiver of constitutional protections. Before an individual is placed in a program, he must waive his right to the constitutional guarantees afforded a criminal defendant. Hence, a pretrial diversion experiment requires that the pool from which the control and experimental groups are drawn be comprised of only those who have consented to participate.

Once consent is required, the application of the model poses few problems. Because pretrial diversion deflects offenders from the judicial process, any such experiment will be purely administrative in nature. Furthermore, because it is a program offered only to nonserious offenders,[78] the differences in treatment will probably not be excessive. The guideline of lessened severity, however, may cause problems since the offenses committed by those eligible for such a program carry light sentences even at their harshest. Nevertheless, participation in an employment program is reasonably less severe than a criminal disposition. Moreover, the safeguard of lessened severity is in part replaced by an even stronger protection: consent of the subjects.

### B. *Experimental Prisons Within One System*

Variations in custodial programs within a prison system may be tested by the creation of an experimental prison. Indeed, facilities for such testing may soon exist in the federal system at the

[78] *See* Zimring, *supra* note 9, at 236-37.

experimental prison at Butner.[79] In running such a program, the experimental and control groups are randomly selected from the category of inmates sought to be treated, and the experimental group is then transferred to the special facility. Such a transfer would violate none of the prisoners' rights. Indeed, the Supreme Court recently held that a prisoner may be transferred to a more secure facility without any of the due process safeguards attaching.[80] Such a transfer, however, might violate the guideline of lessened severity. It has also been held that the mere presence of a special program in one facility of a system does not give rise to an equal protection violation because other facilities within the system do not have similar programs.[81]

C. *Early Parole*

The general validity of the parole process may be tested by the technique of controlled experimentation. This technique may also be helpful in developing a theory of in-community treatment for those completing their prison terms in a half-way house. In either case, prisoners eligible for parole comprise the subject group from which the experimentals and controls are chosen. The experimental group is paroled automatically (in the latter case to a half-way house). The control group, on the other hand, remains incarcerated, at least until the individual prisoners are paroled through normal channels. Thus, the control group is not denied its constitutionally protected expectation of parole consideration. The guideline of nonexcessive differences in treatment, however, imposes some limits. For example, prison authorities could not parole individuals serving twenty year sentences, while leaving similar inmates to languish in prison for the entire term. The damage that such a program would do to our basic notion of equality would far outweigh the value of the particular experiment.

## CONCLUSION

Although controlled experimentation is an effective and desirable tool for furthering penal reform, it is fraught with ethical and constitutional problems. Nevertheless, a model based upon the three guidelines of administrative experimentation, lessened

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[79] *See* Holden, *Butner: Experimental U.S. Prison Holds Promise, Stirs Trepidation*, 185 SCIENCE 423 (1974).

[80] Meachum v. Fano, 96 S. Ct. 2532 (1976).

[81] Polakoff v. Henderson, 370 F. Supp. 690 (N.D. Ga. 1973), *aff'd*, 488 F.2d 977 (5th Cir. 1974) (involving conjugal visitation program).

severity, and nonexcessive differences in treatment minimizes these problems and creates an acceptable research technique. Such experimentation, however, is only justifiable where there is a commitment to penal reform. Regardless of the model, human experimentation compromises the value of the individual and can only be justified where there is a commitment to improving prison conditions. Moreover, human experimentation in the corrections field is susceptible to extreme abuse. The means and ends of any experiment must be carefully scrutinized to avoid inflicting unnecessary punishment and to ensure that no impermissible motive lies behind the experiment. If all of the foregoing conditions are satisfied, the controlled penal experiment may yet serve a useful and enlightening function in our society.

*Benjamin H. Green*