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Constitutional Law - Eighth Amendment - Aversion Therapy as Cruel and Unusual Punishment

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community. If alternative secular means exist, however, governmental units must use those means. The government may permit the expression of religious ideas at public rituals which are a part of local tradition[47] and which fall within the limits of "accommodation neutrality."

John C. Bates

CONSTITUTIONAL LAW—EIGHTH AMENDMENT—AVERSION THERAPY AS CRUEL AND UNUSUAL PUNISHMENT—The Court of Appeals for the Eighth Circuit has held that injection of the drug apomorphine as an agent of aversion therapy constitutes cruel and unusual punishment violative of the eighth amendment when administered to nonconsenting inmates of the Iowa Security Medical Facility.

Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973).

Mr. Knecht, plaintiff and inmate of the Iowa Security Medical Facility [ISMF], sought an injunction to prohibit defendants, institution officials, from further use of apomorphine[1] as an agent in aversion therapy.[2] Alleging officials had administered the drug

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47. In Mt. Lebanon School District, for example, pronouncement of an invocation and benediction was a sixty-year-old tradition. Brief for Appellants at 3a, Wiest v. Mt. Lebanon School Dist., 457 Pa. 166, 320 A.2d 362 (1974).

1. Apomorphine is obtained by treating the morphine molecule with strong mineral acids. Its analgesic properties are diminished, but it retains the capacity to stimulate the medullary chemoreceptor trigger zone and to produce a combination of central nervous system excitation and depression. Its primary therapeutic use is in the production of emesis, particularly in cases of poisoning by orally ingested substances. The usual dose is 0.1 mg/kg, given subcutaneously; vomiting ordinarily occurs within a few minutes and is preceded by nausea and salivation. . . . Since the drug can also produce respiratory depression, it must be used with caution when there is a central nervous system depression from whatever cause.

L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 251 (4th ed. 1970).

2. Aversion therapy employs punishment, most commonly electric shock or induced nausea, as its conditioning agent. Joining the punishment with an act which the person must learn to avoid, the therapist seeks to change undesirable behavior. Theoretically, after a few pairings, inappropriate behavior patterns will evoke repulsive reactions similar to those produced by the noxious stimulus. If the therapist makes the patient vomit every time the patient does something he should not, the patient, in theory, will avoid the inappropriate behavior because it will produce the same feared response in him as vomiting does. Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 423-35 (1970).

without his consent, plaintiff charged continued injection of apomorphine violated his constitutional right of freedom from cruel and unusual punishment under the eighth amendment.[3] After the trial court dismissed his complaint, plaintiff appealed.[4]

ISMF helps to diagnose and treat people who, because of psychological disorders, seem to need confinement in a security setting.[5] Patients come to ISMF from other social service institutions, as court referrals, and from city and county jails.[6] For some time before this lawsuit, ISMF authorities used apomorphine in the aversion therapy given inmates with behavior problems, ordering the administration of apomorphine injections whenever an inmate violated the behavior protocol established for him by the professional staff. By using aversion therapy, hospital officials sought to change or modify undesirable behavior patterns in a selected group of inmates. An ISMF physician testified at trial that inmates received the apomorphine injections for a variety of behavioral infractions including giving cigarettes against orders, talking, swearing, or lying. To administer the drug, a staff member escorted the inmate to a bathroom near the nurses station where a nurse gave the injection intramuscularly. The inmate then was exercised and within approximately fifteen minutes began vomiting for periods lasting from fifteen minutes to an hour. Frequently, no nurse or doctor personally witnessed the offending behavior but ordered the apomorphine injections solely on the report of other inmates or inmate aides.

3. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

4. Plaintiff brought the action under provisions of The Civil Rights Act, 42 U.S.C. § 1983 (1970) which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The district court assigned the case to a magistrate as master pursuant to FED. R. CIV. P. 53(a). After hearing the evidence, the magistrate recommended dismissal, suggesting certain precautionary measures for ISMF's future use of apomorphine in aversion therapy. The trial court dismissed the complaint and refused to adopt the magistrate's recommendations. Knecht v. Gillman, 488 F.2d 1136, 1136-37 (8th Cir. 1973).

5. IOWA CODE ANN. § 223.1 (1973) reads:

> There is hereby established an institution for persons displaying evidence of mental illness or psycho-social disorders and requiring diagnostic services and treatment in a security setting. The institution shall be under the jurisdiction of the department of social services and shall be known as the Iowa Security Medical Facility.

6. 488 F.2d at 1138.

Often, the drug was administered without specific authorization of a physician, although apomorphine induces temporary cardiovascular changes.[7]

Plaintiff's appeal asked the court to decide whether officially sanctioned injections of an emetic drug to nonconsenting inmates[8] violated eighth amendment constitutional guarantees against cruel and unusual punishment. The court recognized that in order to treat and rehabilitate a mental patient, some compromise of procedural rights may be necessary.[9] The *Knecht* court found the administration of drugs, including apomorphine, "treatment" because logically it could not be "examination" or "diagnosis," the two other acknowledged objectives of institutionalization.[10]

Probing beneath treatment, and scrutinizing the realities of psychiatric hospitalization, the *Knecht* court said an administrative practice must undergo constitutional review on the basis of its true nature not its labels.[11] Neither its label of treatment nor the absence of criminal incarceration deterred the court from applying eighth amendment standards to the disputed practice. Having established the reviewability of the therapy, the *Knecht* court examined the ISMF aversion therapy according to its particular factual context.

In the court's view, whether labelled therapy or punishment, forcing someone to vomit for fifteen minutes or more for a minor disciplinary infraction must constitute cruel and unusual punishment unless the person knowingly and intelligently consented to this treatment.[12] The *Knecht* court held that the involuntary use of apo-

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7. *Id.* at 1137.

8. Noting the failure of the record to demonstrate that ISMF officials always obtained an inmate's prior consent before subjecting him to aversion therapy, the *Knecht* court said evidence supported the plaintiff's contention that on a few instances at least, nonconsenting inmates had received the drug. While at the time of trial ISMF therapists did not inject apomorphine unless an inmate had signed a written consent form, the court stated the record did not indicate whether authorities permitted an inmate to withdraw his consent. *Id.* at 1137-38.

9. *Id.* at 1138, *citing* McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (jury trial not required in delinquency proceedings); *and* Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964) (defective delinquent statute upheld).

10. 488 F.2d at 1138. For the statute establishing the Iowa Security Medical Facility as an institution for diagnosis and treatment of the mentally ill see note 5 *supra*.

11. 488 F.2d at 1139, *citing* Trop v. Dulles, 356 U.S. 86, 95 (1958); *and* Vann v. Scott, 467 F.2d 1235, 1240 (7th Cir. 1972).

12. 488 F.2d at 1140. For other cases establishing a requirement of informed consent before permitting medical experimentation or treatment see Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) (physician has a duty to disclose material risks of medical treatment); Kaimowitz v. Department of Mental Health, Civil Action No. 73-19434-AW (Cir. Ct. for

morphine in aversion therapy violated the eighth amendment's proscription against cruel and unusual punishment.[13]

The *Knecht* court directed the lower court to enjoin the defendants from further use of apomorphine in aversion therapy except under specified guidelines. Authorities must obtain written consent from each participant in the aversion therapy program. This consent must contain a written description of risks involved and effects of treatment[14] as well as advise the inmate of his right to terminate his consent at any time.[15] A physician must certify that the patient has read and fully understands the terms and conditions of consent. In addition, the physician must attest to the inmate's mental competency to knowingly and intelligently give his informed consent to the procedure.

ISMF officials now must allow the inmate to revoke his consent at any time. If a participating inmate orally expresses a wish to withdraw his consent, authorities immediately must furnish him with a revocation form for this purpose. Any apomorphine injection requires the express authorization of an ISMF physician. Only a doctor or nurse may give an injection, and then only if a member of the professional staff personally has witnessed the offending behavior. Information from other inmates or inmate aides about protocol violations shall not suffice, of itself, to warrant apomorphine.[16]

Wayne County, Mich. 1974) (psychosurgery on mental patients); New York City Health & Hosp. Corp. v. Stein, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (Sup. Ct. 1972) (mental patient's refusal to consent to electroshock therapy determinative because knowingly made).

13. 488 F.2d at 1140.

14. For an example of a medical code which requires informed consent from a patient before the administration of medical treatment see AMERICAN HOSPITAL ASSOCIATION, A PATIENT'S BILL OF RIGHTS (1972). Article 3 reads:

> The patient has the right to receive from his physician information necessary to give informed consent prior to the start of any procedure and/or treatment. Except in emergencies, such information for informed consent should include but not necessarily be limited to the specific procedure and/or treatment, the medically significant risks involved, and the probable duration of incapacitation. Where medically significant alternatives for care of treatment exist, or when the patient requests information concerning medical alternatives, the patient has the right to such information. The patient also has the right to know the name of the person responsible for the procedure and/or treatment.

15. In contrast to ISMF inmates and other mental patients, inmates of Iowa prisons who volunteer for medical research have been given, by statute, the right to revoke their consent at any time. IOWA CODE ANN. § 246.47 (Supp. 1973) reads:

> The state director may send to the hospital of the medical college of the state university inmates of the Iowa state penitentiary and the men's reformatory for medical research at the hospital. Before any inmate is sent to the medical college, he must volunteer his services in writing. An inmate may withdraw his consent at any time.

In *Knecht v. Gillman*, a federal court of appeals pierced the gloss of labels and took a critical judicial look at the treatment given patients in mental institutions. In doing so, however, the court failed to elucidate three major issues: whether confined mental patients are capable of informed consent; whether the experimental nature of the treatment makes *informed* consent impossible; whether sufficient safeguards exist to prevent administrative overreaching on the part of the institution.

One cannot help but regard as unsatisfactory the *Knecht* court's analysis of consent. Although dictating guidelines for obtaining and revoking consent, as well as for certification of mental capacity to give informed consent, the court at no time discussed the crucial question of whether a mental patient, or any confined individual for that matter, can consent knowledgeably and freely to his treatment.[17] Before an individual can consent to any treatment, he must possess the capacity to understand the nature and effects of his action.[18] The very impairment which causes his commitment, however, renders the mental patient's consent functionally suspect.[19] Yet from reading *Knecht*, one can conclude only that the court rather naively assumed all inmates chosen as subjects for one of the sundry therapies currently in vogue *could* have agreed to their treatment if they desired. This is so even though the effects of the treatment may not be known totally because of the degree of experimentation involved.

As a prerequisite to giving willing and voluntary consent, the patient must have sufficient information with which to make an intelligent decision. The *Knecht* court did order ISMF officials to advise patient subjects of risks and effects of treatment.[20] But how enlightening such information may prove in situations where, as here, the experimental nature of treatment makes risks speculative,

16. 488 F.2d at 1141.

17. *See* Note, *Conditioning and Other Technologies Used to "Treat?" " Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972) [hereinafter cited as *Prisoners and Mental Patients*].

18. Thorn v. Superior Court, 1 Cal. 3d 666, 683, 464 P.2d 56, 61, 83 Cal. Rptr. 600, 605-06 (1970) (involuntary commitment proceedings); cases cited note 12 *supra*.

19. Thorn v. Superior Court, 1 Cal. 3d 666, 683, 464 P.2d 56, 61, 83 Cal. Rptr. 600, 605-06 (1970); Kaimowitz v. Department of Mental Health, Civil Action No. 73-19434-AW (Cir. Ct. for Wayne County, Mich. 1974); New York City Health & Hosp. Corp. v. Stein, 70 Misc. 2d 944, 945-46, 335 N.Y.S.2d 461, 464-65 (Sup. Ct. 1972).

20. 488 F.2d at 1140.

remains an unanswered question. In outlawing aversion therapy except to consenting inmates, the *Knecht* court may have sensed a problem inherent in medical experimentation on captive population subjects.[21] Expressly, however, it announced no views on the issue.

For a person to give operative consent he must do so freely and willingly.[22] The *Knecht* court seemingly ignored the more subtle means of inducement officialdom uses to procure cooperation from captive persons.[23] Even writers sympathetic to medical research and human experimentation have attributed to volunteers from captive populations motives far removed from conventional therapeutic objectives.[24] Prisoners, for instance, have volunteered for medical experiments to relieve boredom, to obtain monetary benefits, to procure added privileges, to secure escape opportunities, or to enhance their parole possibilities. Only occasionally do altruism and a desire to aid medical science kindle the volunteer spirit.[25] One can assume the same considerations spur cooperation from mental patients who are experimental subjects. Indeed, the authoritarian position of the therapist alone, without additional blandishments, may suffice to compel acquiescence to treatment.[26]

Coupled with the question of the nature of inmate consent to treatment is the issue of the detachment of that administrative authority which not only applies the therapy but also serves as the determiner of the quality of consent.[27] Can the same therapist who seeks to obtain consent to a treatment, the efficacy of which if

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21. *See* text accompanying notes 23-26 *infra*.

22. Cases cited note 12 *supra*.

23. Authorities who have discussed the problem of coercive influences, both physical and psychological, which have induced consent to medical experimentation from captive population volunteers include Mulford, *Experimentation on Human Beings*, 20 STAN. L. REV. 99, 106 (1967) [hereinafter cited as Mulford]; Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1199-1200 (1965) [hereinafter cited as Ruebhausen]; *Prisoners and Mental Patients*, *supra* note 17, at 670-73.

24. Hodges & Bean, *The Use of Prisoners for Medical Research*, 202 J.A.M.A. 513 (1967); McDonald, *Why Prisoners Volunteer to Be Experimental Subjects*, 202 J.A.M.A. 511, 512 (1967).

25. Coercive influences on captive populations render the motives of prisoners and inmates who volunteer for medical experimentation inherently suspect. *See* authorities cited note 23 *supra*.

26. Ruebhausen, *supra* note 23, at 1200.

27. The court in Thorn v. Superior Court, 1 Cal. 3d 666, 683, 464 P.2d 56, 61, 83 Cal. Rptr. 600, 605-06 (1970), recognized a conflict of interest which may occur by the agency seeking commitment regarding the certification of the incapacity of mental patients to give voluntary consent to their commitment. The court required independent counsel to represent the mentally incapacitated at commitment proceedings.

experimentally demonstrated may enhance his career, objectively and disinterestedly decide whether a potential subject has or has not the capacity to give informed consent?[28] Does not a conflict of interest arise from entrusting to the same authority which undertakes the therapeutic role the function of explaining what a particular treatment entails and of determining that a patient has given informed consent?[29]

Inmates of The Boys Training School v. Affleck,[30] a plea for injunctive relief stemming from deplorable and substandard conditions of confinement and a case the *Knecht* court cited for the proposition that a federal court may entertain eighth amendment claims absent criminal incarceration,[31] specifically recognized the issue of the constitutionality of administrative decisions. In effect the *Inmates* court limited the school officials' discretion to employ any means they deemed advisable to punish, rehabilitate, or treat their juvenile charges.[32] Seeking to curb administrative abuse, the *Inmates* court measured official conduct by strict constitutional standards.[33]

While both *Knecht* and *Inmates* dealt with confinement realities, *Inmates* better handled the effect of administrative overreaching on

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28. *See* Mulford, *supra* note 23, at 106, 108. The author notes that career interests may influence a therapist's choice of treatments.

29. *See* Thorn v. Superior Court, 1 Cal. 3d 666, 683, 464 P.2d 56, 61, 83 Cal. Rptr. 600, 605-06 (1970) (discussion of these issues in the context of the adjudication of the constitutionality of state involuntary commitment proceedings).

30. 346 F. Supp. 1354 (D.R.I. 1972).

31. *See also* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (mental patient's right to treatment); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) (minimally adequate treatment mandated for committed retardates); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971) (confinement of criminal defendants as mentally incompetent); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969) (confinement of criminal defendants as mentally incompetent).

32. The *Inmates* court enjoined the defendants from the use of an antiquated and rundown annex, prohibited the transfer of problem inmates to the Adult Correctional Institution, and established due process procedures for disciplinary transfers of inmates. It also ordered the creation of recreational and education programs for all inmates of the school. 346 F. Supp. at 1365-72.

33. The *Inmates* court found the purpose of confinement at the Boys' Training School to be rehabilitative and not punitive. The court held, however, that since some conditions of confinement exceeded the rehabilitative purpose of the school, they violated the eighth amendment. *Id.*

Regarding the school's behavior modification program, the court said minimal decent conditions of confinement were not "privileges" to be given or taken away at the sole discretion of school authorities. Rather, decent living conditions were matters of right which the state, as the legal custodian of the confined juveniles, had a duty to provide. *Id.* at 1373.

the constitutional rights of captive populations. Had *Knecht*, as *Inmates*, concentrated on unbridled administrative discretion in choosing treatment, perhaps the court could have defined more concretely the objectionable elements of aversion therapy as practiced at ISMF. Rather than addressing itself to the issue of possible administrative overreaching, the *Knecht* court merely announced prospective guidelines for the future use of aversion therapy at ISMF.

Moreover, the practice under review might be abusive solely because of its experimental nature. Considered both drastic and experimental,[34] aversion therapy has doubtful psychiatric merit.[35] Under their broad administrative authority, ISMF officials conducted questionable medical experiments, often involuntary, on people whose capacity to consent freely and knowingly to treatment had never been determined impartially. In banning aversion therapy on nonconsenting inmates, and in establishing consent requirements for future use, the *Knecht* court at least mandated minimal constitutional safeguards. To clarify its position on the eighth amendment question, however, perhaps the *Knecht* court should have considered whether ISMF authorities could be permitted to employ experimental methods of treatment at all.

Herein lies the dilemma of any court adjudicating mental patients' rights. Can the patient think for himself or must he rely on others, frequently interested parties, to do so for him? If only his care-givers can consent for the patient, how can the court know these guardians act with disinterest and objectivity? At least at commitment proceedings, courts have required independent counsel to assist mental patients.[36] Attorneys might also be given authority to oversee some aspects of the treatment process itself.

To curb the unrestricted authority therapists currently enjoy,

34. *See Prisoners and Mental Patients*, *supra* note 17, at 667-74.

35. The record before the *Knecht* court contained inconclusive testimony regarding the medical benefits of aversion therapy. Dr. Steven Fox of the University of Iowa branded aversion therapy a "highly questionable technique" with only a 20% to 50% success rate. He called it a "punishment worse than a controlled beating" because the person administering the drug could not control its effects after injection.

On the other hand, Dr. Loeffelholz of the ISMF staff claimed a 50% to 60% success rate in modifying behavior of ISMF inmates. The court noted there was no evidence the drug was used at any inmate medical facility in any other state. 488 F.2d at 1138.

36. *E.g.*, *id.* The court in *Thorn* upheld the issuance of a writ of habeas corpus to test the validity of an involuntary commitment. It further stated habeas corpus writs would be proper whenever a patient did not have the independent assistance of a mental health counselor or an attorney at certification for commitment proceedings. *See* discussion note 27 *supra*.

courts might require all experimental treatments to undergo prior independent review before administration.[37] An independent advisory board comprised of therapists, physicians, attorneys, and interested citizens, all of whom are not connected formally with the institution involved, could determine the medical benefits of a treatment and its acceptability for a particular patient. On the advisory board would fall the responsibility of balancing the scientific merits of a therapy with the risks to a patient's health and wellbeing.[38]

Courts could require the presence of impartial witnesses at the time a mental patient receives an explanation of the experimental therapy and consents to its administration.[39] In addition the therapeutic team itself might include a disinterested individual who acts as a "patient representative."[40] The patient's spokesman would monitor the therapy and would halt experiments which threaten to harm a patient-volunteer. Courts might more readily entertain civil suits against therapists who violate their professional responsibilities by failing to obtain informed consent before subjecting mental patients to novel and/or risky treatments.[41] As an added safeguard, courts might require mental facilities to promulgate among inmates an official policy against granting special concessions or privileges to inmate volunteers.[42]

Although intuitively reaching a correct result regarding eighth amendment claims,[43] the *Knecht* opinion overlooked vital issues,

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37. Kaplan, *Experimentation—An Articulation of A New Myth*, 46 NEB. L. REV. 87, 107-09 (1967) [hereinafter cited as Kaplan]; Mulford, *supra* note 23, at 108-09. Both authorities strongly support the concept of prior independent review before any medical experiment involving risk to the human volunteer is undertaken.

38. Kaplan, *supra* note 37, at 107-09; Mulford, *supra* note 23, at 108-09.

39. Kaplan, *supra* note 37, at 107.

40. Mulford, *supra* note 23, at 108-09.

41. Kaplan, *supra* note 37, at 90-96; Mulford, *supra* note 23, at 111-13; Stason, *The Role of Law In Medical Progress*, 32 LAW & CONTEMP. PROB. 563, 586-87 (1967). Kaplan suggests that the legal standard for physician liability whenever nontherapeutic medical research is involved should be one of full disclosure of known risks. Mulford would not insulate the medical investigator from civil liability if the investigator negligently failed to secure prior group review before undertaking a risky experiment or failed to safeguard the subject's interest throughout the experimentation.

42. Kaplan, *supra* note 37, at 103.

43. Actually the results in *Knecht* have strong precedential support. In his concurring opinion in the Supreme Court's latest eighth amendment decision, Furman v. Georgia, 408 U.S. 238 (1972) (banning the death penalty as cruel and unusual punishment because arbitrarily administered), Justice Brennan suggested a four-point test for eighth amendment questions.

namely, abuse of administrative discretion and informed consent problems. In *Knecht v. Gillman*, the court of appeals had an opportunity to delineate the limits of tolerable conduct of those supervising the care and treatment of the mentally ill. It failed to do so. True, the court did restrict the administration of a highly controversial therapy to consenting inmates. But the court never set objective standards for measuring the quality of inmate consent nor did it establish adequate guidelines for judging the propriety of administrative treatment decisions, particularly as they effect fundamental constitutional rights.

The difficulty with the *Knecht* decision lies in the court's failure to examine thoroughly all the complexities and to impose restrictions which a more reasoned examination of the real world of mental institutions would have required. In its best light, the *Knecht* decision represents a welcome attempt by a federal court to curb, at least in flagrantly abusive situations, the therapeutic regimens which mental health professionals can inflict upon their unwary charges.

Louise Porac

CONSTITUTIONAL LAW—CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE—RIGHT OF CONFRONTATION—CROSS EXAMINATION—The Supreme Court of the United States has held that the right of confrontation is denied when a juvenile cannot be cross-examined concerning his probationary status by a defendant charged with the same type of offense.

Davis v. Alaska, 415 U.S. 308 (1974).

The safe of the Polar Bar in Anchorage was stolen in the early

Brennan would strike down a practice as cruel and unusual punishment if: the punishment is unusually severe; there is a strong possibility that it is inflicted arbitrarily; it is substantially rejected by contemporary society; and there is no reason to believe that it serves a penal purpose more effectively than some less severe punishment. *Id.* at 271-81.

Employing this standard, even the most liberal medical and psychiatric opinion regards aversion therapy as an extreme form of treatment. Ample recorded evidence exists to indicate ISMF officials administered the treatment arbitrarily and often without regard to individual sensibilities. Expert testimony cast doubt on its remedial benefits. In more than one instance, contemporary society has forced the cessation of aversion therapy experimentation. *See generally* J. MITFORD, KIND AND UNUSUAL PUNISHMENT (1973).