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# A NEW PERSPECTIVE IN PRISONERS' RIGHTS: THE RIGHT TO REFUSE TREATMENT AND REHABILITATION

## INTRODUCTION

The evolving attitude of the courts toward judicial interference with the administration of prisons<sup>1</sup> has resulted in a decline of the traditional "hands off doctrine" under which courts had refused to entertain inmate grievances.<sup>2</sup> As a consequence, the law of corrections and prisoners' rights has emerged as a prominent part of our jurisprudence.<sup>3</sup>

A major focus of correctional litigation has been the right to treatment and rehabilitation for prisoners. It is apparent that this "right" has interested many writers as articles on a prisoner's right to treatment and rehabilitation constitute the great bulk of the recent literature of the law of corrections and prisoners' rights.<sup>4</sup> The literature, however, has been conspicuously devoid<sup>5</sup> of an analysis of a newer, more imaginative "right" which prisoners may enjoy.<sup>6</sup> This is the right to *refuse* treatment,

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1. See S. KRANTZ, *CASES AND MATERIALS ON THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS*, at ch. 14 (1973).

2. The "hands off doctrine" has been supported by claims of (1) separation of powers, in that prison administration is an executive function; (2) lack of judicial expertise in penology; and (3) fear that judicial intervention will subvert prison discipline. Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970). For an excellent criticism of the "hands off doctrine" see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). See also PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* § 10.41 (1973).

3. The law of corrections and prisoners' rights has clearly developed into a specialized area of law. For collections of cases and materials see *PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE* (Hermann & Haft eds. 1973); H. KERPER & J. KERPER, *LEGAL RIGHTS OF THE CONVICTED* (1974); S. KRANTZ, *CASES AND MATERIALS ON THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS* (1973, Supp. 1974); J. PALMER, *CONSTITUTIONAL RIGHTS OF PRISONERS* (1973); S. RUBIN, *LAW OF CRIMINAL CORRECTION* (2d ed. 1973); D. RUDOVSKY, *THE RIGHTS OF PRISONERS: THE BASIC ACLU GUIDE TO A PRISONER'S RIGHTS* (1973).

4. The cases concerning a prisoner's right to treatment and rehabilitation have been collected in the following articles: Plotkin, *Enforcing Prisoners' Rights to Medical Treatment*, 9 CRIM. L. BULL. 159 (1973); Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7 (1972); A Symposium, *The Right to Treatment*, 57 GEO. L.J. 673 (1969); Symposium, *The Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); Comment, *A Jam in the Revolving Door: A Prisoner's Right to Rehabilitation*, 60 GEO. L.J. 225 (1971); Note, *A Statutory Right to Treatment for Prisoners: Society's Right of Self-Defense*, 50 NEB. L. REV. 543 (1971). These articles are merely a representative portion of the articles examining a prisoner's right to treatment.

5. An exception is to be found in the area of behavior modification which has aroused the attention of the public. This facet of correctional treatment and rehabilitation will be analyzed in a subsequent portion of this comment.

6. One explanation for the lack of discussion of a prisoner's right

which would result from judicial acceptance of a prisoner's desire to be "let alone." "Treatment" in the correctional setting includes the traditional rehabilitative areas—prison labor, educational training, religious training, medical treatment/behavior modification—to which the prisoner is subjected.

It has been stated that:

Throughout his [the prisoner's] day, if he is in a typical institution, his life is one of sheer monotony, broken only by staccato orders of discipline or minimal activity. He may be fortunate enough to work all day on a farm, or undergo vocational training or education, but the chances are slim indeed.<sup>7</sup>

The difficulty with this view is that it is premised upon the idea that the prisoner desires to engage or will benefit from engaging in traditional rehabilitation programs. Whether the prisoner will derive a benefit or not is, perhaps, an improper point of inquiry. Instead, the focus should be upon the prisoner as the ultimate consumer of "treatment" and his decision to accept or reject treatment in the first instance.

It is the purpose of this comment to determine whether a prisoner's right to refuse treatment exists<sup>8</sup> and, if so, to what extent. The analysis will be based upon an examination of the applicable case law and constitutional provisions.

#### THE RIGHT TO REFUSE "WORK"

Prison labor programs<sup>9</sup> are designed to include prison employment in the rehabilitation of the inmate. It has been asserted that:

The aim is to prepare the inmate for a constructive life after release, and . . . to reduce the alienation of the offender from society. . . . The tasks are related to the inmate's self-interest. The rhythm of work and the conditions of employment are as similar as possible to those in the free world.<sup>10</sup>

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to refuse treatment is that the concept is at an early stage of its development. See Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 41 n.4 (1975).

7. Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U.L. REV. 365, 372 (1971).

8. One author has commented that if "inmates have the right to refrain from participating in certain religious activities, it would seem they also have a right to refrain with impunity from participating in other 'beneficial' programs." Singer, *The Coming Right to Rehabilitation*, in PRISONERS' RIGHTS SOURCEBOOK 195 (Hermann & Haft eds. 1973). To the contrary, however, Singer's thought is not supported by the case law. Determining the existence and status of a prisoner's right to refuse treatment is a more difficult task than Singer contemplates.

9. Prison labor programs traditionally have included work in metal shops, soap factories, woodworking, print shops and farms. These labor programs have become known as "prison industry."

10. Johnson, *Prison Industry*, in CORRECTIONAL INSTITUTIONS 360 (Carter, Glaser & Wilkins eds. 1972).

Useful, productive labor for all prisoners is, therefore, seen as a basic element in rehabilitation.<sup>11</sup> Moreover, prison labor has been involuntarily imposed upon inmates with overwhelming approval of the courts<sup>12</sup> based upon the provisions of the thirteenth amendment to the United States Constitution.<sup>13</sup> Consequently, prisoners have been unsuccessful in asserting a right to refuse "work."

Regarding constitutional interpretations of the thirteenth amendment, the courts have relied heavily upon *Draper v. Rhay*<sup>14</sup> in denying prisoners a right to refuse work. In *Draper* a state prisoner claimed that the Superintendent of Washington State Penitentiary deprived the prisoner of his civil rights by "forcing petitioner to work, causing slavery and peonage."<sup>15</sup> The court, in dismissing Draper's claim, held that where a person is duly tried, convicted, sentenced and imprisoned for a crime in accordance with law, no issue of peonage or involuntary servitude arises.<sup>16</sup> The court found that the required work was not the sort of involuntary servitude which violated thirteenth

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11. S. RUBIN, LAW OF CRIMINAL CORRECTION 326 (2d ed. 1973).

12. *Shields v. Hopper*, 519 F.2d 1131 (5th Cir. 1975) (regular prison work detail did not amount to cruel and unusual punishment or deprivation of due process); *Draper v. Rhay*, 315 F.2d 193 (9th Cir. 1963) (no federally protected right of a state prisoner not to work while imprisoned after conviction, even though his conviction is being appealed); *Cassidy v. Superintendent*, 392 F. Supp. 330 (W.D. Va. 1975) (there is no federally protected right of a state prisoner not to work while imprisoned after conviction, even though that conviction is being appealed); *Claybrone v. Long*, 371 F. Supp. 1320 (N.D. Ala. 1974) (prisoners are required to work and if an able prisoner will not work, his freedoms may be further restrained); *Leahy v. Estelle*, 371 F. Supp. 951 (N.D. Tex. 1974) (state prisoner does not have a federally protected right not to work while his conviction is being appealed); *Howerton v. Mississippi County*, 361 F. Supp. 356 (E.D. Ark. 1973) (reasonable work requirements may be imposed on one convicted of a crime, whether misdemeanor or felony, without running afoul of the thirteenth or eighth amendments); *Laaman v. Hancock*, 351 F. Supp. 1265 (D.N.H. 1972) (prison inmate may be punished for refusing to work in profit-making prison industry); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich. 1971) (requirement that prison inmates, who were lawfully incarcerated, perform services in clinics operated inside the prison by private drug manufacturers did not constitute a form of involuntary servitude); *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968) (work and labor by prisoners is not in itself unconstitutional or unlawful); *Wilkinson v. McManus*, 299 Minn. 112, 216 N.W.2d 264 (1974) (requiring prisoners to work does not violate the thirteenth amendment).

13. U.S. CONST. amend. XIII, § 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

14. 315 F.2d 193 (9th Cir. 1963).

15. *Id.* The question which the prisoner presented to the court was: "19. Can slavery and/or peonage and/or involuntary servitude be practiced in this Country, in any manner, before there is a final judgment of conviction for a felonious crime." *Id.* at 196.

16. *Id.* at 197.

amendment rights.<sup>17</sup> With the possible exception of forced labor for the purpose of "working off" a fine<sup>18</sup> it is not clear which types of involuntary prison labor would contravene the thirteenth amendment.

The prohibition of cruel and unusual punishment by the eighth amendment to the Constitution<sup>19</sup> has also proved to be no obstacle in the path of forced labor in correctional institutions. In *Wilson v. Kelley*<sup>20</sup> inmates argued that forced participation in "hard labor" work camps constituted cruel and unusual punishment under the eighth amendment.<sup>21</sup> In refusing to accept this argument the court held that "a work camp per se does not constitute such 'inhuman, barbarous or tortuous punishment' as to violate the Eighth Amendment."<sup>22</sup>

Some prisoners have contended that a right to refuse work exists while their convictions are being appealed. This contention appears to be based on the premise that imprisonment pursuant to a conviction which is being appealed is less certain than imprisonment pursuant to an unchallenged conviction. Prisoners have urged that forced labor under these circumstances deprives them of the time necessary to prepare an appeal and access to legal materials, books and counsel.<sup>23</sup> This claim has been to no avail. Without exception, every court considering this issue has held that there is no constitutionally guaranteed right not to work while imprisoned after conviction, even though that conviction is being appealed.<sup>24</sup>

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17. *Id.* The *Draper* court cited with approval *Butler v. Perry*, 240 U.S. 328, 332 (1916):

[The thirteenth amendment] was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.

18. *Tate v. Short*, 401 U.S. 395 (1971). In *Tate*, the United States Supreme Court reversed the conviction of an indigent defendant who was sent to a municipal prison farm to "work off" his accumulated fines for traffic offenses. The Supreme Court did not reverse based upon the thirteenth amendment but upon the equal protection clause of the fourteenth amendment. The Court did not entertain a thirteenth amendment argument, thus, it is impossible to determine if the defendant's conviction could have been reversed on thirteenth amendment grounds.

19. U.S. CONST. amend. VIII, § 1:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

20. 294 F. Supp. 1005 (N.D. Ga. 1968).

21. The inmates also argued that hard labor constituted involuntary servitude under the thirteenth amendment. *Id.* at 1012.

22. *Id.*

23. *Leahy v. Estelle*, 371 F. Supp. 951 (N.D. Tex. 1974).

24. See *Draper v. Rhay*, 315 F.2d 193 (9th Cir. 1963). See also *Casidy v. Superintendent*, 392 F. Supp. 330 (W.D. Va. 1975); *Leahy v. Estelle*, 371 F. Supp. 951 (N.D. Tex. 1974); *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968).

The classification of prisoners as felons or misdemeanants and the right to refuse work have presented a problem easily resolved by one court. In *Howerton v. Mississippi County*<sup>25</sup> inmates convicted of misdemeanors alleged that the working of misdemeanants without compensation on public projects was contrary to constitutional principles. It was claimed that a person convicted of a misdemeanor could not be compelled to work, but must be given a choice, or else incarceration in a county penal farm would contravene the constitutional proscriptions of involuntary servitude and cruel and unusual punishment. The court was not persuaded by this argument and held that reasonable work requirements may be imposed on one convicted of a crime whether misdemeanor or felony, without running afoul of the thirteenth or eighth amendments.<sup>26</sup>

Since a prisoner cannot justify his refusal to work, if physically able, failure to comply with work orders may lead to undesirable results. In *Laaman v. Hancock*<sup>27</sup> a prisoner claimed that he could not, in good faith, work in a profit-making prison industry as this would be in direct violation of his deeply-held principles and conscience. He had expressed his willingness to work in any other job capacity so long as the work did not involve a profit-making shop. In spite of this desire, the prisoner was assigned to work in a profit-making print shop. Upon refusal to work, disciplinary action was taken and the prisoner was confined to his cell for twenty-three and one-half hours per day. The court, in approving the disciplinary action, adopted the "hands off doctrine," holding that:

Since petitioner has not shown any deprivation of his constitutional rights<sup>28</sup> and since petitioner can voluntarily end his confinement by returning to work at the job to which he was assigned, we will not intervene in disciplinary matters peculiarly within the discretion of state prison authorities.<sup>29</sup>

The law of corrections and prisoners' rights clearly does not include a right to refuse work. Prisoners not only can be constitutionally forced to work but can also be disciplined for failure to do so. Although forced and unrewarded labor in prison provides little incentive for diligence and development of skill,<sup>30</sup> the prisoner cannot complain with impunity. He must work.

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25. 361 F. Supp. 356 (E.D. Ark. 1973).

26. *Id.* at 364.

27. 351 F. Supp. 1265 (D.N.H. 1972).

28. The prisoner's eighth and fourteenth amendment arguments failed.

29. *Laaman v. Hancock*, 351 F. Supp. 1265, 1270 (D.N.H. 1972).

30. Johnson, *Prison Industry*, in *CORRECTIONAL INSTITUTIONS* 363 (Carter, Glaser & Wilkins eds. 1972).

REFUSING EDUCATION AS TREATMENT:  
A PRISONER'S RIGHT TO BE IGNORANT

Educational programs in correctional institutions have had limited effect because of: (1) a failure to interest the inmate and (2) a failure to allow the inmate to believe that he is regarded within the program as personally important.<sup>31</sup> Nevertheless, participation in correctional education may be involuntary. These incompatible factors perhaps have combined as the basis, in two recent cases,<sup>32</sup> for the claim that a prisoner has a right to refuse to be educated.

In *Rutherford v. Hutto*,<sup>33</sup> an illiterate prisoner claimed that his forced attendance at elementary school classes in an Arkansas prison violated his first, eighth and fourteenth amendment rights. Participation in the school program was voluntary for inmates who had attained a fourth grade educational level, but was required for those not possessed of a fourth grade education. The classes were ungraded and the prisoners were not under pressure to progress at any specific pace. In fact, Rutherford had increased his reading skills and mathematical ability despite his involuntary participation.

Rutherford, with no interest in participating, complained that forced education caused him nervousness and asserted that he had a constitutional right to remain ignorant and illiterate. The court, without entertaining the prisoner's specific constitutional arguments, rejected the assertion, holding that the constitutional right to be ignorant or uneducated does not exist. The court found that the state had a sufficient interest in eliminating illiteracy among its convicts to justify it in requiring illiterate convicts, including adults, to attend classes designed to bring them up to at least the fourth grade level.<sup>34</sup> This involuntary participation presumably would be constitutional so long as the educational instruction had no adverse affect and prisoners were not punished for failure to learn.<sup>35</sup> The court did not make a

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31. See Glaser, *The Effectiveness of Correctional Education*, in *CORRECTIONAL INSTITUTIONS* 328 (Carter, Glaser & Wilkins eds. 1972).

32. *Jackson v. McLemore*, 523 F.2d 838 (8th Cir. 1975); *Rutherford v. Hutto*, 377 F. Supp. 268 (E.D. Ark. 1974).

33. 377 F. Supp. 268 (E.D. Ark. 1974).

34. *Id.* at 272.

35. *Id.* There was also very strong dicta urging that a prisoner has no right to refuse *any* rehabilitation or treatment offered in a correctional institution.

[The] Court does not think that it should necessarily be left up to an individual convict to determine whether or not he is to participate in a rehabilitative program such as the one involved here. To put it another way, if a State can compel a convict to perform uncompensated labor for the benefit of the State, as can constitutionally be done, . . . a fortiori a State has the constitutional power to require

determination as to involuntary vocational education or elementary education beyond the fourth grade. However, from the rationale employed, the court would seemingly favor required education if faced with either of these situations.<sup>36</sup>

In *Jackson v. McLemore*<sup>37</sup> the Arkansas Department of Corrections was again involved in litigation regarding the right to refuse educational "treatment." In fact, at issue was the same compulsory educational program which was considered in *Rutherford*. In *Jackson*, the prisoner refused to spell certain words in class and as a consequence was placed in segregated confinement pending disciplinary action. Citing *Rutherford* with approval, the court upheld the compulsory education program up to the fourth grade level and the disciplinary action.

While a prisoner may not be punished simply because he failed to learn, either through inability or lack of motivation, he may be required to participate in the program. . . . Refusal to participate is clearly distinguishable from a stated inability to perform, and such refusal in a penal institution may properly result in disciplinary action.<sup>38</sup>

It is important to note that neither *Rutherford* nor *Jackson* concerned vocational education. An argument can be made that vocational education, unlike elementary education, is more than basic and hence unnecessary for the inmate to make a successful return to society and therefore should not be compulsory. On the other hand vocational training may be a major factor in the prisoner's favor when the prisoner is released and searches for employment. It has been urged that, in the ideal situation, prison vocational education would wed job requirements with inmate self interest.<sup>39</sup> This "ideal situation," however, assumes compulsory vocational training and suggests "right" to refuse treatment arguments not yet entertained by the courts. A counter argument focuses upon the inmate as the beneficiary of a vocational education program and allows the inmate to make the decision whether or not to participate in the first instance.

Neither the *Rutherford* nor *Jackson* court considered the effect of "inmate ignorance" on the correctional institution and society. The purpose of compulsory education for prisoners,

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a convict to participate in a rehabilitative program designed to benefit the convict.

[The] Court does not consider that a convict has any more right to refuse to be given a chance to benefit from a rehabilitative program than he has to refuse work or to obey other lawful orders that may be given him by prison personnel.

*Id.*

36. See note 35 *supra*.

37. 523 F.2d 838 (8th Cir. 1975).

38. *Id.* at 839.

39. Johnson, *Prison Industry*, in *CORRECTIONAL INSTITUTIONS* 361 (Carter, Glaser & Wilkins eds. 1972).



other than to limit idleness, was never clarified by either court. Consequently it is not clear why the state was held to have an interest to justify the compulsory education of illiterate prisoners. In fact, in *Rutherford* the court found that without compulsory education the prisoner could make a living as a machine operator—the occupation specifically desired by the inmate.<sup>40</sup>

Neither court expressed the belief that the correctional institution or society would be endangered if educational treatment was not required. As a consequence, there is an absence of logical support for the decisions in *Rutherford* and *Jackson*. Unless it is clear that prisoners choosing to avoid educational programs represent more serious threats to the correctional institutions and society than if they were educated, it is indefensible to require participation in educational programs on an involuntary basis.<sup>41</sup> Because of the weaknesses of present programs and their questionable value to the inmate, there may be a point at which a prisoner has a right to refuse participation.

#### REFUSING RELIGION AS "TREATMENT"

Opposition to compulsory religious activity was recently the basis of a claim in at least one correctional institution.<sup>42</sup> Although attendance at religious services or conferences with clergy may have some rehabilitative value, involuntary religious participation cannot be justified under the establishment and free exercise clause of the first amendment.<sup>43</sup> Therefore, to deny atheists or agnostics in prison the freedom of movement, assembly, and visits from nonreligious purposes equal to those granted to other inmates who profess a religion violates the protections of the first amendment.<sup>44</sup>

That nonparticipation in religious activity within a correctional institution cannot be considered in an inmate's parole evaluation is exemplified by *Theriault v. Carlson*.<sup>45</sup> In *Theriault*, prison chaplains had submitted reports to caseworkers at the Atlanta federal penitentiary in which they commented on the inmates' participation or lack of participation in religious

40. *Rutherford v. Hutto*, 377 F. Supp. 268, 270 (E.D. Ark. 1974).

41. Geis, *Ethical and Legal Issues in Experimentation with Offender Populations*, in *CORRECTIONAL INSTITUTIONS* 497 (Carter, Glaser & Wilkins eds. 1972).

42. *Cassidy v. Superintendent*, 392 F. Supp. 330, 334 (W.D. Va. 1975). The court found no truth to the allegation and held that this portion of Cassidy's pleadings was without merit.

43. U.S. CONST. amend. I, § 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

44. H. KERPER & J. KERPER, *LEGAL RIGHTS OF THE CONVICTED* 391 (1974).

45. 339 F. Supp. 375 (N.D. Ga. 1972).

activities. These reports constituted part of the inmates' profiles which had been presented to the Board of Parole. The religious reports submitted by the chaplains were potentially an important consideration in the granting or denial of parole.

In holding the evaluation procedure unconstitutional, the court noted that the correctional institution had violated the neutrality which must be maintained with respect to religion. The court found that in allowing the submission of the religious reports, religion was being promoted and atheistic or agnostic prisoners, who had declined to participate, were being indirectly punished.<sup>46</sup> The *Theriault* court cited the opinion of the United States Supreme Court in *Epperson v. Arkansas*,<sup>47</sup> quoting the following language:

Government in our democracy, . . . must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.<sup>48</sup>

As a consequence the submission of religious reports was enjoined.

Voluntary participation by prisoners in religious activities has been recently established by a correctional institution<sup>49</sup> and urged by model rules and regulations for prisoners' rights and responsibilities.<sup>50</sup> These recommendations in conjunction with the religious protection of the first amendment suggest by analogy that the right to refuse religious activity as "treatment" is an integral part of the law of corrections and prisoners' rights.

46. *Id.* at 382.

47. 393 U.S. 97, 103-04 (1968).

48. *Theriault v. Carlson*, 339 F. Supp. 375, 382 (N.D. Ga. 1972).

49. *Howerton v. Mississippi County*, 361 F. Supp. 356 (E.D. Ark. 1973). The court stated:

Religious services are and will be held each week at the penal farm. Attendance will be voluntary. Religious freedom is and will be encouraged at the institution and no inmate's freedom to worship in the religion of his choice will be hampered or interfered with by the institution.

*Id.* at 362.

50. AMERICAN LAW INSTITUTE, MODEL PENAL CODE-PART III ON TREATMENT AND CORRECTION (1962):

Section 303.5, 304.6 Program of Rehabilitation

No prisoner shall be ordered or compelled, however to participate in religious activities.

FOURTH UNITED NATIONS CONGRESS ON PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS (1955):

Religion 41. (3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude should be fully respected.

S. KRANTZ, R. BELL, J. BRANDT, M. MAGRUDER, MODEL RULES AND REGU-

## REFUSING MEDICAL CARE AND BEHAVIOR MODIFICATION

Medical treatment in correctional institutions is of two types. Medical aid may be offered to cure a physical disability or it may be for behavior modification/rehabilitation purposes. While the former is designed to restore the prisoner's health, the latter type of medical treatment is a "mind shaping" device and has received great attention from the legal community.<sup>51</sup> Under either form of medical treatment, questions of a prisoner's right to refuse such treatment arises.

*Medical Treatment for Physical Disability*

Courts have been reluctant to involve themselves in claims

## LATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES 32-33 (1973):

## Rule 1B-1 Religious Coercion

a. There will be no discrimination against an inmate because of his religious belief or practice. No inmate shall be compelled to attend religious services, nor be dissuaded from participating in any religious program or attending any service unless otherwise proscribed in these rules. An inmate shall be permitted to change his religious affiliation at any time without interference. Participation or non-participation in religious activity shall not be used as a criteria in determining eligibility or recommendation for any specific program within the institution.

## NATIONAL ADVISORY COMM'N ON CRIMINAL STANDARDS AND GOALS (1973):

## Standard 2.16 Exercise of Religious Beliefs and Practices

... In making judgments regarding the adjustment or rehabilitation of an offender, the correctional agency may consider the attitudes and perceptions of the offender but should not:

2. Impose, as a condition of confinement, parole, probation, or release, adherence to the active practice of any religion or religious belief.

## NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS (1972):

## § 2 Inhumane Treatment Prohibited

Inhumane treatment includes but is not limited to the following acts or activities and is hereby prohibited:

(f) Any discriminatory treatment based upon the prisoner's race, religion, nationality, or political beliefs.

## NATIONAL SHERIFFS' ASS'N, STANDARDS FOR INMATES' LEGAL RIGHTS (1974):

## 18. Religious Freedom

Prisoners have the right to freedom of religious affiliation and voluntary religious worship. . . .

51. See Moya & Achtenberg, *Behavior Modification: Legal Limitations on Methods and Goals*, 50 N.D. LAW. 230 (1974); Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605 (1974); Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974); Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972); Wexler, *Of Rights and Reinforcers*, 11 SAN DIEGO L. REV. 957 (1974); Comment, *Aversion Therapy: Its Limited Potential for Use in the Correctional Setting*, 26 STAN. L. REV. 1327 (1974); Note, *Kaimowitz v. Department of Mental Health: A Right to be Free from Experimental Psychosurgery?*, 54 B.U.L. REV. 301 (1974); Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972); Note, *Behavior Modification in Prison and the Eighth Amendment*, 6 TOLEDO L. REV. 252 (1974).

of medical mistreatment in prisons,<sup>52</sup> because judges tend to assume that a physician aims to help his patients.<sup>53</sup> Nevertheless, the advice and treatment recommended by a physician to a non-prisoner need not be accepted by the patient. Consequently, the issue arises as to whether a prisoner, by reason of his inmate status, loses the right to reject medical treatment which is enjoyed by non-prisoners.

*Sawyer v. Sigler*<sup>54</sup> illustrates the judicial approach to the claim of a right to refuse medical treatment by a prisoner based upon the cruel and unusual punishment clause of the eighth amendment.<sup>55</sup> In *Sawyer*, the prisoner had been treated for emphysema with medicine in pill or capsule form. In an effort to curtail pill and capsule hoarding by prisoners, the prison changed its policy and required prisoners to take medication in crushed or liquid form. Sawyer refused to take the medicine in altered form and wrapped the crushed medication in paper before swallowing it so as to avoid the nausea which he experienced from the changed medication.

The prison administration refused to allow Sawyer to continue his "personalized" approach to his medical treatment. Sawyer then brought a civil rights action<sup>56</sup> urging that the forced medical treatment constituted cruel and inhuman punishment proscribed by the eighth amendment.

In evaluating medical treatment, such as that rendered in *Sawyer*, for violations of the eighth amendment a major conceptual problem arises. The eighth amendment prohibits cruel and unusual *punishment*, not treatment. Perhaps, therefore, treatment must initially be determined to be punishment prior to its being held cruel and unusual. This two step analysis is supported by analogy with the traditional tests for the determination of cruel and unusual punishment.

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52. See Comment, *Constitutional Limitations of Prisoners' Right to Medical Treatment*, 44 Miss. L.J. 525-28 (1973). See also *Patmore v. Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975) regarding the "hands off doctrine" of judicial intervention and a prisoner's claim of medical mistreatment.

53. *Opton, Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 Miss. L.J. 605, 620 (1974).

54. 320 F. Supp. 690 (D. Neb. 1970).

55. U.S. CONST. amend. VIII, § 1:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

56. 42 U.S.C. § 1983 (1974) states:

Every person who, under color of any statute, ordinance, regulations, 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 first traditional test is whether under all the circumstances the *punishment* in question is of such character as to shock the general conscience or to be intolerable to fundamental fairness.<sup>57</sup> According to a second test, *punishment* may be cruel and unusual if greatly disproportionate to the offense for which it is imposed.<sup>58</sup> Finally, a *punishment* may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used.<sup>59</sup>

The *Sawyer* court, in finding that the change in Sawyer's medicine to a crushed or liquid form constituted "cruel and inhuman" punishment did not rely on any of the traditional tests. Instead the court looked to the results of the medical treatment—Sawyer's nausea—to find an eighth amendment violation. The court stated:

[N]o effort has been made in this case to show that Sawyer has or ever has had any tendency to hoard narcotics or that a policy against hoarding cannot reasonably be carried out on a selective basis. In the absence of that kind of showing, [we] conclude that requiring Sawyer to take his medication in a form which results in nausea is sufficiently unusual, exceptional and arbitrary to constitute . . . cruel and inhuman punishment . . .<sup>60</sup>

In fact, the court cited with approval, *Cates v. Ciccone*,<sup>61</sup> noting that "the prisoner cannot be the ultimate judge of what medical treatment is necessary or proper for his care."<sup>62</sup> This language seems to reject the "type of treatment as punishment" approach which is illustrated by the three traditional tests.

Consequently, *Sawyer* provides a fourth test which does not require a finding that the type of medical treatment administered constitutes punishment for that treatment to contravene the provisions of the eighth amendment. Focusing on the result of medical treatment rather than its form clearly provides a prisoner with a better opportunity to assert a right to refuse medical treatment.

When medical treatment for the purpose of curing physical disability is in the form of surgery, the recent case of *Runnels v. Rosendale*<sup>63</sup> provides an imaginative approach to the prisoner's right to refuse treatment. Runnels, an inmate at the Folsom State Prison in California, was subjected to a hemorrhoidectomy

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57. *Lee v. Tahash*, 352 F.2d 970 (8th Cir. 1965).

58. *Robinson v. California*, 370 U.S. 660 (1962).

59. *Weems v. U.S.*, 217 U.S. 349, 370 (1910).

60. *Sawyer v. Sigler*, 320 F. Supp. 690, 694 (D. Neb. 1970).

61. 422 F.2d 926 (8th Cir. 1970).

62. 320 F. Supp. 690, 693 (D. Neb. 1970).

63. 499 F.2d 733 (9th Cir. 1974).

though he had "vigorously and repeatedly refused to give his consent to such an operation."<sup>64</sup> Consequently, Runnels filed a civil rights<sup>65</sup> action against the two prison physicians who had allegedly conducted the surgery. Summary judgment was granted in favor of the physicians.

On appeal, the court of appeals reversed, finding interesting constitutional bases for the prisoner's claim. The court first found that the prisoner's constitutionally protected right to be secure in the privacy of his own body was violated in the course of his treatment by prison medical personnel. Secondly, the court found that there had been a violation of the prisoner's constitutional right to be free from unprovoked physical assault by agents of the state while in state custody.<sup>66</sup> The court, however, limited the application of these constitutional rights to cases of "major surgery, when such surgery is neither consented to nor required for purposes of imprisonment or security."<sup>67</sup>

If the inmate has the right to refuse major surgical medical treatment, as the *Runnels* court suggests, it is not clear how this right is qualified or limited if surgery is "required for purposes of imprisonment or security." It is not clear to whose "security" the court refers. If the court refers to the physical security of the inmate, an inconsistency in the court's reasoning appears, because the court found the unwanted surgery analogous to an assault though the surgery was performed to improve the inmate's physical security. If, on the other hand, the court refers to the security of the correctional institution, how will the institution become endangered if the surgery is not performed? This was not explained.

The surgery in *Runnels* does not appear to have been administered under emergency circumstances. If emergency circumstances did exist would the interest of the correctional institution in curing inmates of physical disabilities outweigh the inmate's interest in refusing the medical aid? The *Runnels* court did not speak to this issue and, presently, the issue seems unresolved.

Apart from any constitutionally based argument, a prisoner would seem to have a right to refuse medical treatment based upon the law of torts. Medical treatment consists of contact with

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64. *Id.* at 734.

65. 42 U.S.C. § 1983 (1974). See note 56 *supra*.

66. This second constitutional right was derived from a series of ninth circuit cases: *Allison v. California Adult Authority*, 419 F.2d 822 (9th Cir. 1969); *Wiltzie v. California Dep't of Corrections*, 406 F.2d 515 (9th Cir. 1968); *Brown v. Brown*, 368 F.2d 922 (9th Cir. 1966). None of these cases, however, were concerned with unwanted medical treatment, but rather dealt with prisoner beatings.

67. 499 F.2d at 735.

the patient's body, and any intentional and unpermitted contact with a person is battery.<sup>68</sup> The problem with this approach is that upon imprisonment, the prisoner may suffer "civil death," resulting in the loss of many civil rights including the right to bring a civil suit.<sup>69</sup> Nevertheless, even if a prisoner is precluded from bringing a civil suit for battery based upon unwanted medical treatment, a right to refuse medical treatment founded upon tort principles would not seem implausible.

It has been proposed that medical treatment imposed to cure a prisoner's physical disability does not fit well within the traditional approaches to determine the existence of cruel and unusual punishment under the eighth amendment. Unwanted medical treatment in the form of surgery, resulting in a violation of the constitutional "right" to be free from unprovoked assaults, accounts for an analysis fraught with inconsistency. A tort basis for refusal of treatment is equally strained due to the notion of "civil death." Pragmatically, whether a prisoner can refuse medical treatment may depend upon the policy of the correctional administrator and his sensitivities to the dilemma of whether to impose unwanted medical treatment or to stand aside.<sup>70</sup> To be sure, this is not a sound manner of discovering a "right"—cautious reliance should be placed upon it. Consequently, until definitive cases are forthcoming, the right to refuse medical treatment, imposed to cure a physical disability, remains an uncertain segment of the law of corrections and prisoners' rights.

### *Behavior Modification*

It is clear that some courts have recognized a prisoner's right to refuse medical treatment when that treatment was for purposes of behavior modification.<sup>71</sup> Medical treatment of such "mind shaping" dimensions may be psychiatric, surgical or drug related in nature. Each of these medical treatments seeks to introduce into the prisoner a stimulus by which the prisoner's behavior will be altered. The difficulty with this type of treatment is that it severs from the prisoner certain behavior in a

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68. See PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 9 (1971).

69. Civil death, which deprives the criminal of all or almost all of his civil rights while he is serving a prison sentence, is not existent in all states. Some civil death statutes specifically grant the right to sue. See H. KERFER & J. KERFER, *LEGAL RIGHTS OF THE CONVICTED*, ch. 2 at 55 & n.59 (1974).

70. See SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *THE EMERGING RIGHTS OF THE CONFINED* 153-54 (1972).

71. *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); *Mackey v. Procnier*, 477 F.2d 877 (9th Cir. 1973); *Kaimowitz v. Department of Mental Health*, Civil No. 73-19434-AW (Cir. Ct., Wayne Co., Mich., July 10, 1973).

particularly intrusive way. As a consequence, novel constitutional protections have been developed and traditional protections relied upon to safeguard the prisoner from unwanted behavior modification. Not every court recognizing a prisoner's right to refuse behavior modification has invoked all of the available constitutional protections. Theoretically, however, each protection could have been applied in each case. Therefore, the entire constitutional foundation of a prisoner's right to refuse behavior modification will be set forth prior to a discussion of the cases.

A novel, but quite persuasive first amendment<sup>72</sup> basis for a prisoner's right to refuse behavior modification has been developed. This approach requires a belief that the first amendment protects not only the freedom of expression but also the "power to generate thought, ideas and mental activity,"<sup>73</sup> referred to as the "freedom of mentation."<sup>74</sup> From this, the following argument has been made:

- (1) The first amendment protects communication of virtually all kinds, whether in written, verbal, pictorial or any symbolic form, and whether cognitive or emotive in nature.
- (2) Communication entails the transmission and reception of whatever is communicated.
- (3) Transmission and reception necessarily involve mentation on the part of both the person transmitting and the person receiving.
- (4) It is in fact impossible to distinguish in advance mentation which will be involved in or necessary to transmission and reception from mentation which will not.
- (5) If communication is to be protected, all mentation (regardless of its potential involvement in transmission or reception) must therefore be protected.
- (6) [Behavior modification] intrusively alters or interferes with mentation.
- (7) The first amendment therefore protects persons against enforced alteration or interference with their mentation by [behavior modification].<sup>75</sup>

If this argument is accepted, unwanted but enforced behavior modification would infringe upon the protections of the first amendment.

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72. U.S. CONST. amend. I, § 1:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

73. Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 255-56 (1974).

74. *Id.* at 255-56.

75. This illustration of the first amendment argument has been adopted from Shapiro. *Id.* at 256-57.



The fourth amendment<sup>76</sup> provides another imaginative basis for a prisoner's right to refuse behavior modification. If the constitutional right of privacy is embodied in the fourth amendment, it arguably protects the sanctity of the body, including the mind. Unwanted behavior modification, as a mind altering process would violate the right of privacy. Furthermore, behavior modification by psychosurgery removes a portion of the brain and the thought incident to it. Consequently, an "unreasonable seizure," prohibited by the fourth amendment, may occur.

The more traditional constitutional approach to behavior modification concerns the cruel and unusual punishment clause of the eighth amendment.<sup>77</sup> With respect to behavior modification constituting an extreme method of treatment, there may not be the initial problem of finding the behavior modification to be punishment and subsequently determining it to be cruel and unusual. One court has noted:

Since—the argument runs—by definition . . . treatment is not "punishment," it obviously cannot be "cruel and unusual punishment." But neither the label which a State places on its own conduct, nor even the legitimacy of its motivation can avoid the applicability of the Federal Constitution. We have no doubt that well intentioned attempts to rehabilitate a [prisoner] could, in extreme circumstances, constitute cruel and unusual punishment proscribed by the Eighth Amendment.<sup>78</sup>

The essence of these constitutional foundations of a prisoner's right to refuse behavior modification is that the constitution prohibits the "impermissible tinkering with [a prisoner's] mental processes."<sup>79</sup> Keeping these foundations in mind, the behavior modification cases can be analyzed with a view to a court's use of these foundations, or lack thereof where the foundations may have been applicable.

The United States Supreme Court, in *McNeil v. Director, Patuxent Institution*<sup>80</sup> declined the opportunity to determine whether an inmate had a right to refuse psychiatric treatment. McNeil had been convicted of assault and sentenced to five years imprisonment. Instead of committing him to prison, the sentencing court referred him to the Patuxent Institution for examina-

76. U.S. CONST. amend. IV, § 1:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

77. U.S. CONST. amend. VIII, § 1:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

78. *Knecht v. Gillman*, 488 F.2d 1136, 1139 (8th Cir. 1973).

79. *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973).

80. 407 U.S. 245 (1972).

tion, to determine whether he should be committed to that institution for an indeterminate term under Maryland's Defective Delinquency Law.<sup>81</sup>

McNeil refused to cooperate with the examining psychiatrists and was confined for six years without a complete adversary hearing on his status as a defective delinquent. After the fifth year McNeil sought post-conviction relief alleging that his confinement violated due process of law. The trial court denied relief and the court of appeals denied leave to appeal. The Supreme Court reversed, agreeing with McNeil's contention that his fourteenth amendment right to due process of law had been violated. His sentence having expired, McNeil was ordered to be released.<sup>82</sup> The Supreme Court did not entertain the fact that McNeil had refused psychiatric treatment and, as a consequence, added no support to the concept of a prisoner's right to refuse behavior modification.

In 1973, through two significant cases,<sup>83</sup> the Eighth and Ninth Circuit Courts of Appeals struck major blows for a prisoner's right to refuse behavior modification by means of aversive drug therapy. Aversion therapy consists of:

[A]ttempts to train the [prisoner] to be disgusted by or at least ambivalent toward the deviant objects and experiences that he formerly valued highly. To accomplish this result, the behavior therapist presents the deviant object to the [prisoner] or induces the [prisoner] to engage or imagine engaging in the deviant behavior. Immediately thereafter, the therapist induces an aversive reaction in the [prisoner] by a nausea-creating . . . or a paralyzing drug.<sup>84</sup>

In *Mackey v. Procunier*<sup>85</sup> the Court of Appeals for the Ninth Circuit held that a state prisoner's complaint of receiving unwanted "fright drug" treatment sufficiently alleged a violation of the eighth amendment's prohibition of cruel and unusual punishment. The prisoner had consented to be sent to the California Medical Facility for the purpose of undergoing shock treatment. However, without consent, and not as part of the shock treat-

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81. MD. ANN. CODE, art. 31B (1971). Section 5 of the statute defines defective delinquent as:

[A]n individual who, by the demonstration of persistent aggravated antisocial or criminal behavior evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, . . . .

It appears as if McNeil, if found to be a defective delinquent, would have been subjected to some psychiatric behavior modification.

82. 407 U.S. 245, 252 (1972).

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

84. Comment, *Aversion Therapy: Its Limited Potential for Use in the Correctional Setting*, 26 STAN. L. REV. 1327, 1328-29 (1974).

85. 477 F.2d 877 (9th Cir. 1973).

ment, the prisoner was administered the drug succinylcholine, which the prisoner characterized as a "breath-stopping and paralyzing fright drug."<sup>86</sup> There was no error in the prisoner's characterization of the drug.<sup>87</sup>

The court found that the prisoner stated a claim for violation of his civil rights:

Proof of such matters could, in our judgment, raise serious constitutional questions respecting cruel and unusual punishment or impermissible tinkering with the mental processes.<sup>88</sup>

In *Knecht v. Gillman*<sup>89</sup> the Court of Appeals for the Eighth Circuit found forced aversion drug therapy at the Iowa Security Medical Facility to be cruel and unusual punishment in much the same manner as the *Mackey* court. The Iowa Security Medical Facility is an institution for persons displaying evidence of mental illness or psychological disorders and requiring diagnostic services and treatment in a security setting. Mentally ill persons constitute a portion of the Facility's population.

In *Knecht*, the drug apomorphine was administered to prisoners without their consent for minor violations of Facility rules.<sup>90</sup> The drug induced vomiting and a temporary adverse cardiovascular effect.<sup>91</sup> The testimony relating to the success of behavior modification through the use of apomorphine as an aversive stimulus was inconclusive<sup>92</sup> and this uncertainty afforded the court the opportunity to find the administration of the drug without consent to be cruel and unusual punishment. The court stated:

86. *Id.*

87. See PHYSICIANS' DESK REFERENCE 645 (28th ed. 1974). Succinylcholine causes skeletal muscle paralysis.

88. 477 F.2d at 878.

89. 488 F.2d 1136 (8th Cir. 1973).

90. These violations included "not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying."  
*Id.* at 1137.

91. The chemistry and effect of apomorphine is well documented in L. GOODMAN & A. GILLMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 252 (4th ed. 1970).

92. The court acknowledged the questionable value of the administration of apomorphine:

The testimony relating to the medical acceptability of this treatment is not conclusive. Dr. Steven Fox of the University of Iowa testified that behavior modification by aversive stimuli is "highly questionable technique" and that only a 20% to 50% success is claimed. He stated that it is not being used elsewhere to his knowledge and that its use is really punishment worse than a controlled beating since the one administering the drug can't control it after it is administered.

On the other hand, Dr. Loeffelholz of the ISMF staff testified that there had been a 50% to 60% effect in modifying behavior by the use of apomorphine at ISMF. There is no evidence that the drug is used at any other inmate medical facility in any other state.  
488 F.2d at 1138.

The use of apomorphine, then, can be justified, only if it can be said to be treatment. Based upon the testimony adduced at the hearing and the finding made by the magistrate and adopted by the trial court, it is not possible to say that the use of apomorphine is a recognized and acceptable medical practice in institutions such as ISMF. . . .<sup>93</sup>

Based on the unproven character of the drug and its administration without the consent of the prisoners, the court found a violation of the eighth amendment's prohibition of cruel and unusual punishment. The court enjoined the use of apomorphine at the Facility except when there was compliance with the following conditions:

1. A written consent must be obtained from the inmate specifying the nature of the treatment, a written description of the purpose, risks and effects of treatment, and advising the inmate of his right to terminate the consent at any time. This consent must include a certification by a physician that the patient has read and understands all of the terms of the consent and that the inmate is mentally competent to understand fully all of the provisions thereof and give his consent thereto.
2. The consent may be revoked at any time after it is given and if an inmate orally expresses an intention to revoke it to any member of the staff, a revocation form shall be provided for his signature at once. . . .<sup>94</sup>

These conditions, limiting the use of apomorphine as an aversive stimulus, clearly define a prisoner's right to refuse this type of behavior modification. *Mackey* and *Knecht* constitute a strong constitutional foundation for this "right" and should be highly persuasive in other jurisdictions.

The most intrusive type of behavior modification, violating two constitutional protections, has been the psychosurgery considered in *Kaimowitz v. Department of Mental Health*.<sup>95</sup> In *Kaimowitz*, John Doe<sup>96</sup> had been committed to a state hospital as a criminal sexual psychopath without a trial of criminal charges. Doe had been charged with the rape and murder of a student nurse at another hospital where he had been a mental patient. Since these are criminal charges for which Doe presumably could have been convicted, it is reasonable to include Doe's proposed behavior modification in a discussion of prisoners' rights.

Under a study funded by the Michigan legislature, Doe was found to be a suitable research subject for the study of uncon-

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93. *Id.* at 1138.

94. *Id.* at 1140.

95. Civil No. 73-19434-AW (Cir. Ct., Wayne Co., Mich., July 10, 1973).

96. The name John Doe was used throughout the proceedings to protect the identity of the subject. Subsequently, his true identity, Louis Smith, was revealed. He will be referred to as Doe.

trollable aggression by experimental psychosurgery.<sup>97</sup> Kaimowitz, on behalf of Doe, brought a habeas corpus action, alleging that Doe was being illegally detained for the purpose of experimental psychosurgery. Doe was subsequently released and the funds for the study withdrawn. Nevertheless, the court refused to find Doe's allegations moot as the study could be instituted at a later date.

According to the court, the proposed psychosurgery would have violated Doe's first and fourth amendment rights. The violations were derived from the initial finding that Doe could not have given an informed consent<sup>98</sup> to the psychosurgery.<sup>99</sup> The

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97. Psychosurgery was defined in *Kaimowitz* by Dr. Bertram S. Brown, Director of the National Institute of Mental Health.

[A] surgical removal or destruction of brain tissue or the cutting of brain tissue to disconnect one part of the brain from another, with the intent of altering the behavior even though there may be no direct evidence of structural disease or damage to the brain. *Kaimowitz v. Department of Mental Health*, Civil No. 73-19434-AW (Cir. Ct., Wayne Co., Mich., July 10, 1973).

98. Doe did sign a consent to the psychosurgery which was held invalid by the court upon finding that as an involuntarily confined mental patient, Doe could not give informed consent. Doe signed the following "consent":

Since conventional treatment efforts over a period of several years have not enabled me to control my outbursts of rage and anti-social behavior, I submit an application to be a subject in a research project which may offer me a form of effective therapy. This therapy is based upon the idea that episodes of anti-social rage and sexuality might be triggered by a disturbance in certain portions of my brain. I understand that in order to be certain that a significant brain disturbance exists, which might relate to my anti-social behavior, an initial operation will have to be performed. This procedure consists of placing fine wires into my brain, which will record the electrical activity from those structures which play a part in anger and sexuality. These electrical waves can then be studied to determine the presence of an abnormality.

In addition electrical stimulation with weak currents passed through these wires will be done in order to find out if one or several points in the brain can trigger my episodes of violence or unlawful sexuality. In other words this stimulation may cause me to want to commit an aggressive or sexual act, but every effort will be made to have a sufficient number of people present to control me. If the brain disturbance is limited to a small area, I understand that the investigators will destroy this part of my brain with an electrical current. If the abnormality comes from a larger part of my brain, I agree that it should be surgically removed, if the doctors determine that it can be done so, without risk of side effects. Should the electrical activity from the parts of my brain into which the wires have been placed reveal that there is no significant abnormality, the wires will simply be withdrawn.

I realize that any operation on the brain carries a number of risks which may be slight, but could be potentially serious. These risks include infection, bleeding, temporary or permanent weakness or paralysis of one or more of my legs or arms, difficulties with speech and thinking, as well as the ability to feel, touch, pain and temperature. Under extraordinary circumstances, it is also possible that I might not survive the operation.

Fully aware of the risks detailed in the paragraphs above, I authorize the physicians of Lafayette Clinic and Providence Hospital to perform the procedures as outlined above.

See *id.* at 4.

99. *Kaimowitz v. Department of Mental Health*, Civil No. 19434-AW, 18-31 (Cir. Ct. Wayne Co. Mich., July 10, 1973).

court found a first amendment guarantee of the freedom to generate new ideas in addition to guaranteeing the expression of ideas already formulated. The history of psychosurgery had illustrated the irreversibility of destruction or diminution of the subject's ability to engage in these first amendment freedoms. Consequently, the court held that this dulling effect upon a subject's mental processes due to psychosurgery would be a violation of his first amendment rights.<sup>100</sup>

The *Kaimowitz* court also stated that the proposed psychosurgery would constitute a violation of Doe's fourth amendment protections. Psychosurgery performed upon a subject incapable of consenting would not only violate his general right of privacy but arguably would constitute an illegal seizure as well, due to the removal of a portion of the subject's brain.<sup>101</sup>

*Kaimowitz* represents another major stepping stone, along with *Mackey* and *Knecht*, to the formulation of a prisoner's right to refuse a specific type of behavior modification. A remaining issue, however, is whether a court, upon finding unwanted behavior modification, should enjoin its use summarily. The argument against this approach is that:

[I]f society is to balance the objectives of preserving human autonomy and achieving conforming behavior, it must not speak of general rights against treatment and rehabilitation. Rather, it must ask which specific therapies an inmate should have a right against. Factors that would be relevant in such an analysis include: (1) the extent and duration of changes in behavior patterns and mental activity effected by the therapy—the degree of change in personality; (2) the side effects associated with the therapy; (3) the extent to which the therapy requires physical intrusion into the inmate's body; (4) the degree of pain, if any, associated with the therapy; and (5) the extent to which an uncooperative inmate can avoid the effects of the therapy.<sup>102</sup>

Summary treatment of behavior modification is less likely to occur since courts generally decide issues involved in any case in a narrow fashion. However, in *Clonice v. Richardson*<sup>103</sup> the opportunity for a sweeping decision on involuntary behavior modification did exist. In *Clonice*, the Special Treatment and Rehabilitative Training Program<sup>104</sup> for federal prisoners was scrutinized by the United States District Court. Project START

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100. See text accompanying notes 73-76 *supra*.

101. See text accompanying notes 76-81 *supra*. *Id.* at 36-39.

102. Note, *Conditioning and Other Technologies Used to "Treat"? "Rehabilitate"? "Demolish"? Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616, 658 (1972).

103. 379 F. Supp. 338 (W.D. Mo. 1974).

104. Hereinafter referred to as START.

was developed for prisoners who had failed to adjust to their respective prison environments. START was a positive reinforcement behavior modification device wherein participating inmates were stripped of many rights and privileges which could be regained only through appropriate behavior. The right to religious freedom, access to reading materials, freedom of speech and freedom from unreasonable searches and seizures were severely restricted under the START project. In *Clonce*, the inmate petitioners urged that these restrictions and the involuntary behavior modification program violated their first, fourth and eighth amendment protections.<sup>105</sup>

During the course of the litigation, START was terminated by the Federal Bureau of Prisons due to the insufficient number of inmates selected for the program. The court noted comments by the Director of the Bureau of Prisons, Norman A. Carlson, regarding behavior modification, that:

We recognize that 'behavior modification' does not represent a panacea or cure all for the deficiencies in correctional programming. It is, however, a valuable treatment technique which can be effectively used to motivate some groups of offenders. For this reason, 'behavior modification' using positive rewards is an integral part of many of our correctional programs and the Bureau of Prisons will continue to use this technique whenever appropriate.<sup>106</sup>

Thus, it was found that some of the issues raised by the prisoners remained justiciable, and others were rendered moot due to the termination of the START project.

The court found that the issue of whether a prisoner has the right to refuse behavior modification was rendered moot by the voluntary termination of START. Consequently, the court failed to resolve the issue and stated:

[T]he resolution of that question in regard to some new program will involve a very precise examination of the specific factual circumstances involved in the new program, when and if challenged.

A program patterned on the experience of S.T.A.R.T. may be instituted by the Bureau of Prisons at some future time but that a program exactly like S.T.A.R.T. will be instituted is highly unlikely. An examination of a possible program to determine its susceptibility to an Eighth Amendment challenge is impossible.

. . .<sup>107</sup>

Consequently, examination of specific types of behavior modification has been the only approach utilized by the courts.

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105. 379 F. Supp. 338, 346-48 (W.D. Mo. 1974).

106. *Id.* at 343.

107. *Id.* at 352.

Due to the judicial tendency to analyze legal problems narrowly, this approach should retain popularity.

#### CONCLUSION

Of the four areas of treatment and rehabilitation analyzed—prison labor, education, religion, medical treatment/behavior modification—only two, prison labor and religion, appear to be conclusive regarding a prisoner's right to refuse such treatment or rehabilitation. The thirteenth amendment and the cases arising thereunder provide for involuntary prison labor, and the first amendment freedom of religion provides for the free exercise of atheism by a prisoner. Compulsory educational participation by prisoners has been recognized in the eighth circuit but remains a tenuous proposition. While the cases indicating that a prisoner has a right to refuse medical treatment/behavior modification are compelling and frequently discussed<sup>108</sup> they remain too few in number to be an effective survey.

Consequently, time will be the determining factor for a prisoner's right to refuse treatment and rehabilitation. One can only wait to discover whether such a "right" will be firmly embedded in, rejected by, or remain on the periphery of the law of corrections and prisoners' rights.

*Marc D. Ginsberg*

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108. See note 51 *supra*.



