KNECHT v. GILLMAN[1]: *Drawing the Line Between Punishment and Treatment*

Gary Knecht and Ronald Stevenson, inmates confined to the Iowa Security Medical Facility, brought an action against officials of the state of Iowa[2] for injunctive relief under the Civil Rights Act.[3] Their complaint alleged that the drug apromorphine[4] was being administered in conjunction with an "aversive stimuli" program[5] without their consent; that the drug was used to punish them for violating certain behavioral regulations established at the institution; and that the use of the drug under these conditions was in violation of their constitutional right to be free from cruel and unusual punishment as guaranteed by the eighth amendment.

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1 488 F.2d 1136 (8th Cir. 1973).

2 The officials named as defendants were: James M. Gillman, Commissioner, State of Iowa Department of Social Services; Nolan Ellandson, Director, Bureau of Adult Corrections; and Calvin Auguer, Superintendent, Iowa Security Medical Facility.

3 Civil Rights Act of 1871 § 1, R.S. § 1979, 42 U.S.C. § 1983 (1970). Civil action for deprivation of rights:

> 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 any action at law, suit in equity or other proper proceeding for redress.

4 Apromorphine is used in conjunction with an "Aversive stimuli" therapy program at ISMF and is based on Pavlovian conditioning. 488 F.2d at 1137.

5 Conceptually, the practice seeks to effectuate a connection between the prohibited act and an aversive stimulus. If the individual engages in a similar prohibited act at a subsequent time, the act induces stimuli which, through classical conditioning, have become aversive. *See, e.g.*, Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 423 (1970). On the particular meanings of "aversion therapy" and "classical conditioning," *see* AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY, 13-14, 22-23 (3d ed. 1969). *See generally* Shapiro, *Legislating Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 236 (1974).

Aversion therapy has been defined as

> an attempt to associate an undesirable behavior pattern with unpleasant stimulation *or* to make the unpleasant stimulation a consequence of the undesirable behavior. In either case it is hoped that an acquired connection between the behavior and the unpleasantness will develop. There is a further hope that the development of such a connection will be followed by a cessation of the target behavior.

S. RACHMAN and J. TEASDALE, AVERSION THERAPY AND BEHAVIOR DISORDERS: AN ANALYSIS *xii* (1969).

In the District Court for the Southern District of Iowa, Central Division,[6] Judge William C. Stewart appointed a United States magistrate for the fact-finding process, adhering to procedure outlined by the Federal Rules of Civil Procedure.[7] Subsequent to the hearing conducted by the magistrate, a "Report and Recommendation"[8] was filed in the District Court advising dismissal of the complaint.[9]

The Circuit Court of Appeals[10] reversed the judgment of the District Court and remanded the case with instructions to enjoin the defendants from the further use of the drug except as permitted by specific guidelines.[11]

Writing for the three-judge court, Judge Ross held that the administration of the drug apromorphine to nonconsenting patients in mental institutions for violation of the institution's behavioral protocol was repugnant to the eighth amendment's ban against cruel and unusual punishment. Judge Stephenson concurred with the result.

PROCEDURAL DUE PROCESS AND SUBSTANTIVE RIGHTS

The state of Iowa recently established a medical facility[12] to provide custodial care in a security setting for those

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6 Knecht v. Gillman, Civil Docket No. 72-63-1, 1972.

7 FED. R. CIV. P 53. There is, however, a split of authority regarding utilization of magistrates in civil matters and habeas corpus proceedings. 488 F.2d at 1137 n.1.

8 A summary of the evidence contained in the magistrates report indicated that the use of an "aversive therapy" concept was for a behavior modification program designed for the treatment of inmates with behavioral problems. Any act that violated behavioral protocol established by the staff, such as not getting up when so ordered, giving cigarettes against orders, talking, swearing, or lying, reported by a member of the staff or another inmate, would warrant an intramuscular injection of the drug. Within a few minutes of the injection the drug induced violent fits of vomiting lasting from fifteen minutes to one hour. However, the use of the drug was suspect for three reasons: 1) the violent physical reaction upon injection, 2) the questionable "therapeutic" value of the treatment, and 3) the post-treatment effects on the individual.

9 488 F.2d 1136, 1137. The report suggested that if the drug was to be used in the future, certain precautionary measures should be taken regarding the administration of the drug and the use of inmate aides for reporting violations of the behavioral protocol.

10 488 F.2d 1136.

11 *Id.* at 1140, 1141.

12 IOWA CODE ANN. § 223.1 (West Supp. 1974).

persons transferred to its jurisdiction from within the state.[13] Summary commitment to this facility must be accompanied by procedural safeguards in order to protect the individual's rights. In the opinion of one commentator.

> [i]nvoluntary civil commitment of the Mentally ill [sic], although attended by supposed benefit to the committed individual, is nonetheless a deprivation of freedom in a very real sense. Recognition of fundamental constitutional rights demands the formulation and application of standards for commitment which embody current medical and legal developments. Mental illness, in and of itself, does not provide a justifiable criterion for compelling commitment.[14]

It appears that once a person's liberty is threatened, procedural safeguards exist which usually shield him, but "if these safeguards are absent, then there must be a concomitant *quid pro quo* (in this case treatment). If that *quid pro quo* is lacking, so is procedural due process."[15] And, as the majority stated in In re *Williams:*

> This court is conscious of the need for protection not only of the community but also of the individuals in need of psychiatric care and treatment. But these laudable purposes, under our form

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[13] IOWA CODE ANN. § 223.4 (West Supp. 1974) which states that patients may originate from the following sources:

1) Residents of any institution under the jurisdiction of the Department of Social Services.
2) Commitments by the courts as mentally incompetent to stand trial under Ch. 783 of the Iowa Code.
3) Referrals by the court for psychological diagnosis and recommendation as part of the pretrial or presentence procedures or determination of mental competency to stand trial.
4) Mentally ill prisoners from county and city jails for diagnosis, evaluation or treatment.

See 488 F.2d 1136, 1138.

[14] Wiehl, *Involuntary Civil Commitment of the Nondangerous Mentally Ill: Substantive Limitations,* 18 S.DAK. L. REV. 407 (1973).

[15] Spece, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients,* 45 CALIF. L. REV. 616, 641-42 (1972). *See also* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Whitree v. State, 290 N.Y.S.2d 486 (Ct. Cl. 1968); Maatallah v. Warden, Nevada State Prison, 470 P.2d 122 (Nev. Sup. Ct. 1970); Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E.2d 908 (1968).

> of government, must be accompanied by procedures which are legal and not at the cost of disregarding constitutional safeguards by deprivation of liberty without due process of law. The mere fact that a commitment without due process is temporary and for the purposes of psychiatric examination renders it no less unlawful.[16]

In *Knecht,* Judge Ross concluded that "the constitutional justification of this compromise of procedure is that the purpose of commitment is treatment not punishment."[17]

Although the court found that the committal procedure for treatment met constitutional due process requirements, it also examined the substantive scope of the statutory language. The court declared that "[b]eyond this justification for treatment is the clear command of the statute that the purpose of confinement at ISMF [Iowa Security Medical Facility] is not penal in nature but rather one of examination, diagnosis and treatment."[18]

Since examination and diagnosis do not involve the use of drugs, the court reasoned that once the transfer was effectuated, the facility could administer drugs if and when the patient required treatment.

While the court recognized the procedural and substantive rights of the petitioners, it determined that the case would not rest on the question of the use of the drug for punishment *per se.* Rather, it would decide the question of whether knowing and intelligent consent given prior to the administration of the drug would alleviate or obstruct any claim of cruel and unusual punishment.

Opening the Door to the Eighth Amendment

The petitioners were mentally-ill prisoners transferred to the Iowa Security Medical Facility to receive diagnosis, eval-

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16 *In re* Williams, 157 F. Supp. 871, 876 (D.C. Cir. 1958).

17 488 F.2d 1136, 1138. *Cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring); Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964).

18 488 F.2d 1136, 1138.

uation and treatment. The court, citing *Trop v. Dulles*,[19] ruled that the legislative classification of acts as "treatment" would not preclude an eighth amendment examination of such acts. Thus the administering of the drug apromorphine, even though characterized as "treatment" within the "aversive stimuli" program, was not an act beyond constitutional review Statutory enactments, while not intended to be penal in nature, are nonetheless susceptible to scrutiny within constitutional limitations; legislative classifications do not close the door to judicial investigation.[20] Rather, the *Knecht* court found that "even a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute."[21]

Treatment Deemed Cruel and Unusual Punishment

Punishment, as practiced in the prison systems of the United States, has always found itself under the watchful eye of the judiciary, especially where its form deviated from the usual, accepted practices.[22] The right to be free from cruel and unusual punishment has remained an important, if not pervasive, ingredient in the scheme of recent prisoners' rights controversies.[23] A prisoner incarcerated in a state prison retains most of the civil rights afforded to citizens of the United

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19 Trop v. Dulles, 356 U.S. 86 (1958).

20 *Id. See also* Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

21 Trop v. Dulles, 356 U.S. 86, 95 (1958).

22 Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962) (penal incarceration for status); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Martarella v. Kelly, 349 F. Supp. 575 (S.D.N.Y. 1972) (civil commitment for status without treatment); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972) (tranquilizing drugs); Jackson v. Bishop, 404 F. Supp. 571 (8th Cir. 1968); Landman v. Royster, 333 F. Supp. 575 (S.D.N.Y. 1972) (corporal punishment for prisoners).

23 *See* Lee v. Tabash, 325 F.2d 970, 972 (8th Cir. 1965) (dictum); Tally v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1966); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); United States *ex rel.* Hancock v. Pate, 223 F. Supp. 202, 204 (N.D. Ill. 1963); Redding v. Pate, 220 F. Supp. 124, 127 (N.D. Ill. 1963); Bershen v. Swenson, 331 F. Supp. 1227, 1233 (D. Mo. 1971).

States. Specifically, he remains protected by the due process and equal protection clauses of the constitution which "follow him through the prison doors."[24] Accompanying this conceptual practice of maintaining prisoners' rights is the well-entrenched principle that no state prisoner may be the object of cruel or unusual punishment as prohibited by the eighth amendment.[25]

In spite of the relatively rapid accession of certain prisoners' rights to the threshold of constitutional guarantees and freedoms, the recognition of synonymous rights for those confined to mental institutions has been slow and tedious. Only recently have the courts begun to evidence an awareness of certain deprivations within the country's mental institutions.[26]

Perhaps the most enlightened area in the adjudication of mental patients' rights has been in challenges to the treatment received by individuals upon involuntary confinement to hos-

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24 Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968). *See, e.g.,* Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966); Tally v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1966). *See also* 5 SUFFOLK L. REV. 259, 262 (1970); Note, *Prisoners' Rights,* 57 GEO. L.J. 1270, 1279 (1969).

Recent cases decided under the 14th amendment include Johnson v. Avery, 393 U.S. 483 (1969); Jackson v. Godwin, 404 F.2d 529 (5th Cir. 1968); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970); Dabney v. Cunningham, 317 F. Supp. 57 (E.D. Va. 1970) (freedom from arbitrary or discriminatory punishment); Gilmore v. Lynch, 319 F. Supp. 125 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (access to courts); Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd* 390 U.S. 333 (1968) (freedom from racial segregation).

Recent cases decided under the 1st amendment include Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964) (restraints upon religious activities prohibited); Mackay v. Procunier, Civil No. C-71-543, R.C.W (N.D. Cal. 1973); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (dictum); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971) (access to press); Sobell v. Reed, 307 F. Supp. 1294 (S.D.N.Y. 1971) (political beliefs and expression); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970) (possession of literature); Grothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (correspondence).

25 U.S. CONST. amend. XIII. *See* cases cited at note 23, *supra.*

26 Clonce v. Richardson, 15 Crim. L. Rep. 2504 (W.D. Mo. 1974); Welsh v Likens, 43 U.S.L.W 2151 (D. Minn. 1974) (holding that a state mental hospital's use of tranquilizing drugs without proper evaluation, monitoring and supervision erodes therapeutic value of drugs and constitutes cruel and unusual punishment). *See also* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (dealing with a patient's right to treatment, based on the 1964 Hospitalization of the Mentally Ill Act, D.C. CODE ANN. § 21-562 (1963), which provided in part that "a person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment.").

pitals for the mentally ill.[27] In the *Knecht* decision the court definitively concludes that the treatment received by the petitioners was constitutionally impermissible punishment in violation of the eighth amendment.

The prohibition against the use of punishment deemed cruel and unusual has been held to bind the states through the fourteenth amendment.[28] This standard is applicable not only to convicted persons but to non-convicted persons who are being held in custody.[29] The Supreme Court has articulated a number of tests delineating the parameters of punishment which our society accepts as constitutionally permissible.[30]

Relying on *Robinson v California*,[31] several courts have held that confinement for a mental disability without access to, or provision for, treatment is unconstitutional.[32] Decisions

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27 Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), *appeal after remodification*, 387 F.2d 241 (the purpose of involuntary hospitalization is treatment, not punishment).

See, e.g., Overholser v. Lynch, 288 F.2d 388, 394 (1961) (en banc), *rev'd on other grounds*, 369 U.S. 705 (1962), where the court found that "hospitalization bears no relation to a jail sentence. A jail sentence is punitive and is to be imposed by the judge within the limits set by the legislature. Hospitalization is remedial and its limits are determined by the condition to be treated." *See also* Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960); Haigh v. United States, 271 F.2d 458, 462 (D.C. Cir. 1962); Williams v. United States, 250 F.2d 19, 25-26 (D.C. Cir. 1957).

28 Robinson v. California, 370 U.S. 660 (1962); Francis v. Resweber, 327 U.S. 459 (1924).

29 Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971), *cited in* Morales v. Turner, 364 F. Supp. 166, 173 (E.D. Tex. 1973).

30 Among the more outstanding is Chief Justice Warren's majority opinion in *Trop v. Dulles:*

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

356 U.S. 86, 100 (1957). *See also* Furman v. Georgia, 408 U.S. 238, 279 (1971); Weems v. United States, 217 U.S. 349 (1909); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968); Lee v. Tabash, 352 F.2d 970 (8th Cir. 1965).

31 370 U.S. 660 (1962).

32 Welsh v. Likens, 373 F. Supp. 487 (D. Minn. 1974) (mentally retarded); Martarella v. Kelly, 349 F. Supp. 575, 585, 594-600 (S.D.N.Y. 1972) (persons in need of supervision); United States v. Walker, 325 F. Supp. 705, 708-09 (N.D. Cal. 1971); United States v. Jackson, 306 F. Supp. 416 (N.D. Cal. 1969). *See also In re* Bailey, 482 F.2d 648, 659-60 (D.C. Cir. 1973) (dictum); Vann v. Scott, 467 F.2d 1235, 1237-41 (7th Cir. 1972); Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) (dictum).

with respect to poor institutional conditions[33] and some forms of treatment[34] demonstrate the success of the above-mentioned claims as indicators of the rationale for continuing to attack certain forms of treatment on the basis of cruel and unusual punishment. In *Knecht,* Judge Ross stated that

> [t]he act of forcing someone to vomit for a fifteen minute period for committing some minor breach of the rules can only be regarded as cruel and unusual unless the treatment is being administered to a patient who knowingly and intelligently consented to it. The use of this unproven drug for this purpose on an involuntary basis is, in our opinion, cruel and unusual punishment prohibited by the 8th amendment.[35]

Although this holding raises the status of involuntarily-committed mental patients to the level already achieved by prisoners in the criminal sector, it is inherently weak in the protections it supposedly affords to those involuntarily committed to institutions analogous to the Iowa Security Medical Facility

Guidelines for the Protection of Mental Patients' Civil Rights

Upon a finding that the officials of the state of Iowa had violated petitioners' rights under the Civil Rights Act, the court ordered injunctive relief to prevent the administration of the drug unless stated guidelines were followed.[36]

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33 Razechi v. Gaughan, 459 F.2d 6 (1st Cir. 1972) (mental institutions); Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973) (home for retarded); Martarella v. Kelly, 349 F. Supp. 575, 585-87 (S.D.N.Y. 1972) (juvenile facility).

34 Nelson v. Heyne, 491 F.2d 352 (1974); Welsh v. Likens, 373 F. Supp. 487 (D. Minn. 1974).

35 488 F.2d at 1141.

36 The guidelines promulgated were:

(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 the terms of 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.

By imposing these guidelines the court glosses over the entire issue of abusive drug treatment programs and the rights of involuntarily-incarcerated mental patients. Not only does the court sanction the continued use of the drug, but its guidelines do not meet the minimal protections which the court purportedly seeks to establish.

The only barrier preventing the use of the drug is the consent of the inmate. But who at the institution is to determine whether an inmate's consent is, in fact, knowingly and intelligently given?[37] The court here fails to require either an independent medical specialist or legal counsel, or both, to assist in the determination of the inmate's capacity to consent. More importantly, the court overlooks the motivational forces behind an inmate's willingness to consent to such an obviously uncivilized practice.

At the heart of the issue of treatment programs within prison facilities is the inmate himself. It is the inmate who is more than willing, regardless of the consequences, to consent to the administration of such a treatment. One who consents to treatment places himself in a very favorable light and most often expects to be rewarded by the prison personnel. Often those who do not consent are further segregated as the staff members begin to play "favorites." Obviously there are forces interacting behind the "veil of protections" that are supposedly afforded by these guidelines. But in the course of

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(3) Each apromorphine injection shall be individually authorized by a doctor and administered by a doctor, or by a nurse. It shall be authorized in each instance only upon information based on the personal observation of the professional staff. Information from inmates or inmate aides in the observation of behavior in violation of an inmate's protocol shall not be sufficient to warrant such authorization.

488 F.2d at 1140-41.

37 *See* Kaimowitz v. Dep't of Mental Health, 42 U.S.L.W 2063 (Mich. Cir. Ct., Wayne Co., 1973). [Full opinion may be found in A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902 (1974)—EDS.]. According to the court, which adjudicated the rights of an individual scheduled to receive irreversible brain surgery, involuntarily-committed mental patients cannot generally meet the requirements of informed consent because such consent "is not competent, voluntary and knowledgeable." Slip op. at 23. *See also* Note, *Informed Consent—A Proposed Standard for Medical Disclosure*, 48 N.Y. L. REV. 548, 551 (1973); Note, *Kaimowitz v. Michigan Dep't of Mental Health: Right to be Free from Experimental Psychosurgery?*, 54 B.U. L. REV. 301, 314 (1974).

judicial decision-making, the realities of the effect of the decision are often ignored or forgotten by the court. It is abhorrent to normal sensibilities to even suggest that the court's guidelines have interposed the constitutional protections it seeks so adamantly to defend.

Unfortunately, the *Knecht* decision is nothing more than a condoning of unethical, illegal and immoral conduct within prison walls. It is hardly believable that the judiciary continues to support practices that it says are patently unconstitutional. If this case is appealed[38] to the Supreme Court it is nearly certain that certiorari will be denied based upon the apparent acquiescence of the parties in the decision. However, many other patient-inmates may not be so fortunate. It is suggested that this one decision will not be enough to stem the growing tide of official use and abuse of drugs within the prisons and mental institutions of this country

STEVEN D KESSLER

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[38] As of this writing there appears to have been no attempt to appeal.