Notes

In Defense of Behavior Modification for Prisoners: Eighth Amendment Considerations

Michael S. Rubin

Behavior modification broadly refers to the systematic manipulation of one's environment for the purpose of creating a change in the individual's behavior.[1] Unlike traditional psychological approaches to behavior control, such as psychotherapy, behavior modification does not involve attempts to delve deeply into the subject's mind to determine the underlying causes of undesirable behavior.[2] Instead, it involves a systematic effort to "influence the frequency, intensity, and duration of specified target behaviors . . . ."[3] Three types of behavior modification techniques are generally recognized today:[4] operant condition-

1. *See* L. ULLMAN & L. KRASNER, A PSYCHOLOGICAL APPROACH TO ABNORMAL BEHAVIOR 171-85 (1969); Schwitzgebel, *Limitations on the Coercive Treatment of Offenders*, 8 CRIM. L. BULL. 267, 272 (1972). The idea of manipulating man's environment to affect his behavior is, of course, not an invention of 20th century theorists. *See* Gaylin & Blatte, *Behavior Modification in Prisons*, 13 AM. CRIM. L. REV. 11, 11-12 (1975). However, 20th century scientists have recently begun to develop a more exact science for this purpose, which is termed behavior modification or behavior therapy. *See* Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 SO. CALIF. L. REV. 616, 626 (1972).

2. Behavior therapists tend to select specific symptoms or behaviors as targets for change, to employ concrete, planned intervention to manipulate these behaviors, and to monitor progress continuously and quantitatively. A patient's early life history is largely ignored, except as it may provide clues about such factors as currently active events which maintain symptoms, or hierarchies of reinforcers. Behavior therapists tend to concentrate on an analysis of particular symptoms. They devote far less attention than other clinicians to subjective experiences, attitudes, insights and dreams.
F. KANFER & J. PHILLIPS, LEARNING FOUNDATIONS OF BEHAVIOR THERAPY 17 (1970).

3. Moya & Achtenberg, *Behavior Modification: Legal Limitations on Methods and Goals*, 50 NOTRE DAME LAW. 230, 233 (1974).

4. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY § 34.2, at 1219 (A. Freedman, H.S. Kaplan & H.I. Kaplan eds. 1967); Kassirer, *Behavior Modification for Patients and*

ing,[5] classical conditioning,[6] and aversion therapy.[7]

The use of behavior modification techniques on those confined in prisons for the conviction of crime raises a number of constitutional issues.[8] Behavior modification, by seeking through the use of environmental controls to change an individual's propensity to exhibit certain behavior,[9] necessarily entails physical and psychological intrusions,[10]

Prisoners: Constitutional Ramifications of Enforced Therapy, 2 J. PSYCHIATRY L. 245, 248-49 (1974); Schwitzgebel, *supra* note 1, at 273-87.

The surgical operation commonly called lobotomy or psychosurgery is not a procedure utilizing conditioning or aversion therapy principles, and thus is beyond the scope of behavior modification. *See* Kassirer, *supra* at 251-52; Note, *supra* note 1, at 626-30, 632-33.

5. Operant conditioning (also termed instrumental conditioning, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 349 (25th ed. 1965)), based largely on the work of B.F. Skinner, involves the presentation of a reinforcer, usually called a reward, upon the production of a desirable behavior, in order to increase the probability that the particular behavior will be repeated. F. KANFER & J. PHILLIPS, *supra* note 2, at 250. A classic example of operant conditioning is that of a rat being trained to depress a lever in his cage which releases food pellets. *See* B. SKINNER, THE BEHAVIOR OF ORGANISMS (1938). A reinforcer, such as the food pellet, is something that increases the rate of the behavior it follows, such as pressing the lever. Food, money, or time off from work are examples of commonly used reinforcers or rewards. Schwitzgebel, *supra* note 1, at 273.

6. Classical conditioning utilizes a stimulus to elicit an involuntary response, or a reflex. At the beginning of the program, an "unconditioned" stimulus, such as food, is employed to elicit the reflex such as salivation. A second stimulus, which by itself would not produce the involuntary, or unconditioned, response, is paired with the unconditioned stimulus. After continued pairing of the unconditioned and conditioned stimuli, the same response is obtained from the presentation of the neutral stimulus as was produced by the unconditioned stimulus. Thus, Pavlov, in his famous experiments, was able to elicit a dog's salivation upon the hearing of a bell, by the repeated pairing of the sound of the bell—conditioned stimulus—with the presentation of food—unconditioned stimulus. G. KIMBLE & N. GARMEZY, PRINCIPLES OF GENERAL PSYCHOLOGY 263-64 (1968).

7. 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 further hope that the development of such a connection will be followed by a cessation of the target behavior.

S. RACHMAN & J. TEASDALE, AVERSION THERAPY AND BEHAVIOR DISORDERS xii (1969). Aversion therapy is generally considered a separate classification of behavior modification, although it essentially consists of the presentation of negative-aversive stimuli as in both operant and classical conditioning. *See* Note, *supra* note 1, at 630. *See also* F. KANFER & J. PHILLIPS, *supra* note 2, at 102-04.

In most cases, the aversive stimulus is either an electric shock or an emetic drug that produces nausea, vomiting, or other interference with bodily functions. G. KIMBLE & N. GARMEZY, *supra* note 6, at 650-51; Schwitzgebel, *supra* note 1, at 285-86. A classic example of aversion therapy is that depicted in *A Clockwork Orange*. A. BURGESS, A CLOCKWORK ORANGE (1962).

8. For example, imposition of behavior modification may run afoul of a prisoner's rights to privacy, *see* Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973), to free speech, *see* Kaimowitz v. Michigan Dep't of Mental Health, 42 U.S.L.W. 2063, 2064 (C.A. 73-19434-AW, Cir. Ct. Wayne County, Mich., July 10, 1973), *noted in* 54 B.U.L. REV. 301 (1974), and to due process of law under the fifth and fourteenth amendments. *See* Clonce v. Richardson, 379 F. Supp. 338, 349 (W.D. Mo. 1974). *See generally* Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 56-67 (1975).

9. Schwitzgebel, *supra* note 1, at 272.

10. *See, e.g.*, Clemons, *Proposed Legal Regulation of Applied Behavior Analysis in Prisons: Consumer Issues and Concerns*, 17 ARIZ. L. REV. 127, 129 (1975); Kassirer, *supra* note 4, at 255; Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIF. L. REV. 81, 81-82 (1973).

and limits the prisoner's freedom within the institution. Because of the potentially adverse consequences behavior modification may have on a prisoner-subject, careful constitutional scrutiny is certainly appropriate. Recently, the eighth amendment's proscription against cruel and unusual punishment[11] has become a major force in judicial decisions upgrading the quality of institutional life.[12] The eighth amendment has been applied to protect prisoners against infliction of severe corporal punishments,[13] confinement in a strip cell,[14] inadequate medical care,[15] guard assaults,[16] and confinement under seriously substandard conditions.[17] Because behavior modification represents an intentional interference with a prisoner's freedom within the institution, it too has been challenged on eighth amendment grounds.[18]

Despite the fact that behavior modification involves interference with a prisoner's freedom within the prison, it differs from most practices invalidated on eighth amendment grounds in that its use is directed at rehabilitation[19] of offenders.[20] Its purpose ideally is to prevent a reoccurrence of the particular behavior that gave rise to the criminal conviction. Thus, any analysis of the eighth amendment implications of behavior modification must take into account the extent to which rehabilitation[21] of the offender is a permissible objective of the penal sys-

11. The eighth amendment provides in part that "cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

12. *See, e.g.*, Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

13. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965).

14. Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

15. Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

16. Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 22-24 (2d Cir. 1971); Tolbert v. Bragan, 451 F.2d 1020 (5th Cir. 1971).

17. For example, the totality of circumstances in the Arkansas prison system repeatedly has been held to constitute cruel and unusual punishment. Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), *vacated on other grounds*, 404 F.2d 571 (8th Cir. 1968).

18. Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973); Clonce v. Richardson, 379 F. Supp. 338, 352 (W.D. Mo. 1974) (eighth amendment question dismissed as moot).

19. Rehabilitation is defined as "the process of restoring an individual . . . to a useful and constructive place in society through some form of vocational, correctional, or therapeutic retraining . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1914 (1961). By definition, therefore, procedures should not be considered rehabilitative unless they are designed to create desirable changes in the prisoner's behavior that will carry through to his life after release. *See* Singer, *The Coming Right to Rehabilitation*, in PRISONER'S RIGHTS SOURCEBOOK 189, 192 (M. Hermann & M. Haft eds. 1973).

20. N. MORRIS, THE FUTURE OF IMPRISONMENT 14 (1974).

21. There is currently a growing trend to recognize a prisoner's right to rehabilitation, which would impose an affirmative obligation on the state to provide rehabilitation programs. *See* James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974) (motion to dismiss complaint alleging denial of opportunity to obtain rehabilitative services denied);

tem.[22] Unless behavior modification can qualify as rehabilitative, and unless rehabilitation is a sufficiently strong state interest, there would be little justification for permitting any use of behavior modification in prisons. Serious intrusions into the physical and psychological solace of prisoners simply cannot be justified under retributive or deterrent theories of penology.[23] If such intrusions are to be permitted, they necessar-

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Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (lack of a rehabilitation program one of conditions violating the eighth amendment); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (lack of rehabilitation one of factors making confinement in Arkansas prison system cruel and unusual); Note, *Title VII: A Remedy for Discrimination Against Women Prisoners*, 16 ARIZ. L. REV. 974, 982 & n.44 (1974); Comment, *A Jam in the Revolving Door: A Prisoner's Right to Rehabilitation*, 60 GEO. L.J. 225, 238 (1971) [hereinafter cited as Comment, *A Jam in the Revolving Door*]; Comment, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 660-61 (1971); 3 SETON HALL L. REV. 159, 167 (1971). *But see* Smith v. Schneckloth, 414 F.2d 680, 682 (9th Cir. 1969) (failure to provide rehabilitative services was not cruel and unusual punishment); United States v. Wyandotte County, 343 F. Supp. 1189, 1200-01 (D. Kan. 1972), *rev'd on other grounds*, 480 F.2d 969 (10th Cir. 1973) (absence of "expensive and idealistic programs" not cruel and unusual punishment); Wilson v. Kelley, 294 F. Supp. 1005, 1012 (N.D. Ga.), *aff'd*, 393 U.S. 266 (1968) (penal system only obligated to exercise ordinary care for the protection of the prisoner and keep him safe from harm). Society's right to impose rehabilitation, however, rather than the prisoner's right to rehabilitation, serves as the possible basis for behavior modification programs, and therefore this Note is concerned only with the former.

22. There are generally said to be four legitimate state interests underlying the prison system: rehabilitation, isolation, deterrence, and retribution. United States v. Brown, 381 U.S. 437, 458 (1965); Williams v. New York, 337 U.S. 241, 249 n.13 (1949); W. MIDDENDORFF, THE EFFECTIVENESS OF PUNISHMENT 49-68 (1968). Although other authorities have mentioned various other penal goals, they are substantively consistent with the current formulation. *See* S. RUBIN, THE LAW OF CRIMINAL CORRECTION 737 (2d ed. 1973); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 401 (1958).

Until recently, rehabilitation was widely touted as the most important goal of incarceration. In describing the rehabilitative ideal, a state court once asserted:

> No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man, and a rehabilitated citizen.

State *ex rel.* Kelly v. Wolfer, 119 Minn. 368, 376, 138 N.W. 315, 319 (1912). *See* Williams v. New York, 337 U.S. 241, 248 (1949); Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964); Howard v. State, 28 Ariz. 433, 437, 237 P. 203, 204 (1925); L. HALL & S. GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 9, 14 (2d ed. 1951); K. MENNINGER, THE CRIME OF PUNISHMENT 219-20 (1968).

Clearly, the rehabilitative ideal has lost some of its earlier support. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 26 (1968); Cahalan, *Certainty of Punishment*, 51 J. URBAN L. 163 (1973); Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161 (1974). Rehabilitation remains one of the legitimate goals of state penal systems, however, and certainly should be recognized as such by modern courts.

> The purpose of the penalty is not to cancel the crime—what is once done can never be made undone—but to bring the criminal and all who witness his punishment in the future to complete renunciation of such criminality, or at least to recovery in great part from the dreadful state.

PLATO, THE LAWS *934.

23. *Cf.* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

ily must be founded on some lasting benefit, such as reformation of the criminal.

In view of the state interest in rehabilitation, this Note will discuss the extent to which the eighth amendment restricts the application of bona fide behavior modification procedures within the prison setting. Initially, an effort will be made to determine whether such programs can be considered punishment at all, by examining the traditional and emerging concepts of punishment, and comparing them to the theories, objectives, and effects of behavior modification. Next, behavior modification procedures which may be classified as punishment will be scrutinized under the eighth amendment standards proscribing cruel and unusual punishment. Where behavior modification is found to conflict with the eighth amendment, the question of waiver of constitutional rights arises. This question will be discussed to determine whether the protection against cruel and unusual punishment can be waived by a prisoner willing to undergo an otherwise unconstitutional treatment. Finally, consideration will be given to the revocability of such a waiver.

FACTORS DISTINGUISHING TREATMENT FROM PUNISHMENT

The eighth amendment proscribes only punishments that are cruel and unusual; therefore, before the eighth amendment will apply, a punishment of some kind must be inflicted.[24] Courts[25] and commentators[26] often have chosen to draw a strict distinction between treatment and punishment, giving constitutional consideration only to the latter. In determining whether a particular condition or procedure constitutes punishment, courts using this strict delineation have tended to rely on the name given a particular procedure or its stated purpose, declining

24. Negrich v. Hohn, 246 F. Supp. 173, 176 (W.D. Pa. 1965), *aff'd*, 379 F.2d 213 (3d Cir. 1967); Barie v. Lavine, 48 App. Div. 2d 36, 38, 367 N.Y.S.2d 587, 590 (1975); J. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 51 (1973). Punishment may be defined as "any damage or pain inflicted on an offender through judicial procedure aiming at either prevention, retribution, or reformation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1965); *accord*, BLACK'S LAW DICTIONARY 1398 (4th ed. 1951). The Supreme Court has indicated in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), that among the factors to be considered in determining whether a procedure is of a punitive nature are

> [w]hether the sanction involves an affirmative disability or restraint, . . . whether it has historically been regarded as a punishment, . . . whether its operation will promote the traditional aims of punishment—retribution and deterrence, . . . whether the behavior to which it applies is already a crime, . . . whether an alternative purpose to which it may rationally be connected is assignable for it, . . . and whether it appears excessive in relation to the alternative purpose assigned . . . .

Id. at 168-69.

25. *See, e.g.*, Pope v. United States, 298 F.2d 507, 509 (5th Cir. 1962), *cert. denied*, 381 U.S. 941 (1965); Owens v. Alldridge, 311 F. Supp. 667, 669 (W.D. Okla. 1970); Barie v. Lavine, 48 App. Div. 2d 36, 38, 367 N.Y.S.2d 587, 590 (1975).

26. J. PALMER, *supra* note 24; Kassirer, *supra* note 4, at 252-53; Note, *What*

further examination.[27] Generally, under this analysis the eighth amendment is held inapplicable where the stated purpose of a procedure is other than to punish.[28] Among the procedures sustained by such reasoning have been forced sterilization of those afflicted with "congenital feeblemindedness,"[29] indefinite confinement of a juvenile where an adult could be confined for the same act for a short period,[30] indefinite commitment of a child molester,[31] forced injection of a prisoner with a tranquilizing drug,[32] and the jailing of a chronic alcoholic.[33] The result of such analysis has been to insulate from constitutional scrutiny some highly questionable practices that may in reality be punitive in nature.

Conversely, some commentators favor obliterating any distinction between treatment and punishment.[34] Under this view, all procedures utilized in the prison setting would be subject to eighth amendment analysis. Scrutinizing all forms of prison treatment under eighth amendment standards could very well lead to reliance on that clause for pursuit of largely frivolous claims, which in turn might impose an undue burden on the judicial system. Neither this broad approach favored by the commentators nor the minimal scrutiny practiced by the courts provides a reasoned basis for deciding when to give a procedure eighth amendment examination. The eighth amendment instead requires a discriminating analysis. An objective determination of whether a given procedure is punishment, and therefore subject to cruel and unusual

Constitutes Punishment?, 39 NOTRE DAME LAW. 594 (1964); 23 CATHOLIC U.L. REV. 774 (1974).

27. *See, e.g.*, Roberts v. Pegelow, 313 F.2d 548, 550 (4th Cir. 1963) (confinement in maximum security ward for violation of prison regulations termed a security measure); Pope v. United States, 298 F.2d 507, 509 (5th Cir. 1962), *cert. denied*, 381 U.S. 941 (1965) (confinement in mental institution of one convicted of robbery held not punishment); Meola v. Fitzpatrick, 322 F. Supp. 878, 887 (D. Mass. 1971) (statutory commitment of "sexually dangerous person" deemed nonpunitive); Negrich v. Hohn, 246 F. Supp. 173, 176-77 (W.D. Pa. 1965), *aff'd*, 379 F.2d 213 (3d Cir. 1967) (solitary confinement for jail break and assault held not punishment, but prison discipline); *In re* Gary W., 5 Cal. 3d 296, 302, 486 P.2d 1201, 1206, 96 Cal. Rptr. 1, 6 (1971) (detention of juvenile on child molesting charge not punishment because statute is for civil purpose of treatment); Barie v. Lavine, 48 App. Div. 2d 36, 38, 367 N.Y.S.2d 587, 590 (1975) (disqualification from receiving public assistance payment not punishment).

28. *See, e.g.*, Pope v. United States, 298 F.2d 507, 509 (5th Cir. 1962), *cert. denied*, 381 U.S. 941 (1965); Smith v. Baker, 326 F. Supp. 787 (W.D. Mo. 1970), *aff'd*, 442 F.2d 928 (8th Cir. 1971); *In re* Gary W., 5 Cal. 3d 296, 302, 486 P.2d 1201, 1206, 96 Cal. Rptr. 1, 6 (1971); State v. Troutman, 50 Idaho 673, —, 299 P. 668, 670 (1931).

29. State v. Troutman, 50 Idaho 673, 299 P. 668 (1931); *In re* Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968), *appeal dismissed*, 396 U.S. 996 (1970). Both of these cases held that sterilization of mentally incompetent persons did not constitute cruel and unusual punishment because its purpose was not to punish for crime.

30. R.R. v. State, 448 S.W.2d 187 (Tex. Civ. App. 1969), *appeal dismissed*, 400 U.S. 808 (1970).

31. Howland v. State, 51 Wis. 2d 162, 186 N.W.2d 319 (1971).

32. Smith v. Baker, 326 F. Supp. 787 (W.D. Mo. 1970), *aff'd*, 442 F.2d 928 (1971); Peek v. Ciccone, 288 F. Supp. 329, 337 (W.D. Mo. 1968).

33. Powell v. Texas, 392 U.S. 514 (1968).

34. T. SZASZ, THE MANUFACTURE OF MADNESS 143 (1970); Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605, 620-22 (1974); *cf.* Note, *supra* note 26, at 594.

punishment standards, should go beyond the name given to the procedure and its stated purpose; the procedure's actual value and effect also should be examined.

A realistic distinction between treatment and punishment[35] can better be drawn by considering several factors: the purposes of the behavior modification procedure,[36] the prognosis for its success,[37] the relative medical and scientific acceptance of the procedure,[38] the degree of intrusiveness,[39] and the consent of the prisoner.[40] These factors should be balanced carefully in the individual case, with each factor receiving roughly equivalent weight; however, results of any one factor clearly indicating one classification would require strong contradiction from the remaining factors to alter the final designation. If a balancing of these factors weighs in favor of punishment, the procedure should be subject to eighth amendment scrutiny. This objective approach subjects more procedures to eighth amendment evaluation than the strict treatment-punishment delineation analysis, but, unlike the no-distinction approach, does not subject all treatment procedures to such scrutiny. In practical effect, then, this balancing process gives maximum constitutional protection to those procedures that are arguably punitive, while reducing the likelihood of frivolous claims of cruel and unusual punishment. Like other practices which have a rehabilitative purpose, behavior modification is not always punitive; a determination in any instance must depend on an analysis of the factors set out above.

Purpose

The first factor to be considered is the purpose of the procedure.[41]

35. To avoid confusion, the terms "treatment" and "punishment" will be utilized. However, even procedures that are found to be punishment may constitute rehabilitative treatment, and such procedures may be sustained if they are not deemed cruel and unusual under the eighth amendment. Thus, the more precise terminology would be "nonpunishment treatment" and "punishment treatment."

36. *See* Howard v. Smyth, 365 F.2d 428, 429-30 (4th Cir.), *cert. denied*, 385 U.S. 908 (1966) (relocation to maximum security unit in response to request for religious worship for Muslims was for the purpose of punishing the individual); Friedman, *supra* note 8, at 70-71 n.159.

37. *See* Powell v. Texas, 392 U.S. 514, 538-39 (1968) (Black, J., concurring).

38. *See* Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973).

39. *See* Wright v. McMann, 387 F.2d 519, 525-26 (2d Cir. 1967); *cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (dictum) (recognizing the penal nature of a statute requiring deportation of an individual for remaining out of the United States to avoid military service); Trop v. Dulles, 356 U.S. 86, 101 (1958) (expatriation held to be punishment because of the punitive effect on the individual); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1867) (holding that disqualification from elective office or other employment is a punishment because it involves deprivation of rights); Friedman, *supra* note 8, at 70-71 & n.159.

40. Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973); Friedman, *supra* note 8, at 70-71 n.159.

41. It is the purpose of the particular procedure, rather than the purpose or motive of the individual applying the procedure, that is of primary significance. Where the purpose of the particular procedure, applied to the particular case, is treatment, the state

This factor is relevant in order to distinguish those procedures with rehabilitative value from those without such value. Although behavior modification is ideally aimed at rehabilitation of the offender, the purposes of the individual procedures may vary: some may be aimed at institutional rehabilitation, while others are focused on permanent rehabilitation. A procedure intended to achieve permanent rehabilitation of the prisoner is more likely to survive this phase of the punishment-treatment test than one serving only institutional purposes. For example, procedures utilized merely to secure compliance with prison rules would have a dubious rehabilitative purpose.[42] Similarly, procedures which are purely experimental will tend to be classified as punishment since they are less likely than bona fide rehabilitative programs to further a sufficient state interest.[43]

In assessing the validity of a particular procedure's purpose, the permanence of the anticipated results also should be examined. Although all legitimate behavior modification programs will be directed toward the prisoner's successful reorientation into society, some resulting behavioral changes will be of a more permanent nature than others.[44] Since the rehabilitative ideal aims for lasting alteration of a prisoner's eventual behavior outside the institution, procedures producing a higher degree of anticipated permanence should be given additional weight as nonpunishment.[45] Courts should look past mere labels and purported purposes to determine instead the actual purpose of the procedure, favoring those comporting with the stated definition of behavior modification.[46]

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of mind of the individual imposing the procedure is largely irrelevant. *See* Friedman, *supra* note 8, at 64 n.123, 70-71 n.159.

42. *See* Clonce v. Richardson, 379 F. Supp. 338, 344 (W.D. Mo. 1974) (procedure aimed at institutional goals). A presumption of an inadequate rehabilitative purpose may arise when the procedure is administered by prison officials or other nonbehavioralists. A behavioralist, also called a behaviorist or behavior therapist, is a qualified individual administering a behavior modification program. *See generally* F. KANFER & J. PHILLIPS, *supra* note 2; Ayllon, *Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 3 (1975); Friedman, *supra* note 8, at 39.

An example of a procedure that would be classified as punishment under this phase of the balancing test is a behavior modification technique utilized on a prisoner serving a life sentence without possibility of parole.

43. *See* Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973) (procedures alleged to be experimental). This is not meant to imply that such procedures necessarily constitute punishment subject to the eighth amendment. They are, however, more likely to be so classified since they are not as apt to satisfy a legitimate penal objective as is a bona fide rehabilitation program.

44. For example, an aversive procedure such as electric shock treatments of homosexuals is likely to produce far more permanent behavior changes than a token economy utilizing operant conditioning principles. *See* Note, *supra* note 1, at 628-29.

45. Kenton, *Prisons: Rehabilitative or Custodial Institutions?*, in THE CRUMBLING WALLS 3-7 (R. Hosford & C. Moss eds. 1975); *see* Knecht v. Gillman, 488 F.2d 1136, 1137 (8th Cir. 1973) (procedures not aimed at long term improvement of prisoners).

46. See text & notes 1-7 *supra*. A procedure should not be considered punishment for eighth amendment purposes simply because it is so labeled by behavioralists. Punishment is simply a term of art in the medical community, without necessary

Prognosis for Success

The second factor to be weighed in determining the proper classification of a behavior modification procedure as treatment or punishment for eighth amendment purposes, is the prognosis for success.[47] The importance of this factor is to separate clearly rehabilitative procedures from those whose rehabilitative effects are largely unknown. Although all bona fide behavior modification procedures are ultimately intended to produce certain desired, permanent changes in the subject's behavior, they will not be equally successful in achieving this goal. This is especially true when prisoners are the subjects, since the prison atmosphere, as well as the prisoner's cooperation in the program, are often coercive,[48] to a great extent hindering the learning process.[49] A procedure having a low prospect of success is less likely to achieve rehabilitation, and therefore could more appropriately be viewed as punishment.

A balancing of the procedure's probable rehabilitative success against the likelihood of failure is necessary in analyzing this particular factor. At the present time, with the science of behavior modification in its relatively infant stage, many techniques promise uncertain results.[50] This is especially true where the procedure is experimental in nature, since the results necessarily will be uncertain and somewhat unpredictable. These procedures should be viewed as punishment weighing in favor of eighth amendment analysis unless the other factors weigh heavily toward classifying the procedure as nonpunishment. Particularly in the prison atmosphere, where some procedures are of questionable value,[51] the balance in terms of this factor should always be struck in

connection to the legal concept. It is utilized frequently by behavioralists when referring to a variety of aversive procedures. F. KANFER & J. PHILLIPS, *supra* note 2, at 325-26; G. KIMBLE & N. GARMEZY, *supra* note 6, at 650. Punishment in the context of behavior modification should in no way be considered the equivalent of punishment in the legal sense.

47. Although a procedure may satisfy the purpose element of the test by having a clear rehabilitative goal, it may be extremely likely to fall short of that goal. It is that possibility which makes this second phase of the test important.

48. According to some authorities, certain procedures are not ideally suited for use in the prison setting. *See* examples discussed in Note, *Aversion Therapy: Its Limited Potential for Use in the Correctional Setting*, 26 STAN. L. REV. 1327, 1334-37 (1974); *cf.* Kant, *The Use of Conditioned Reflex in the Treatment of Alcohol Addicts*, 44 WIS. MED. J. 217, 221 (1945).

49. *See generally* Bliss, *A Thousand Men and I*, in THE CRUMBLING WALLS, *supra* note 45, at 72-87.

50. As one commentator has stated:

> Behavior modification, as a separate area of study, began to emerge clearly in the early 1950s. Its direction as a new discipline is still not clear. The emphasis upon the treatment of overt behaviors and the measurement of observable events in the patient's environment give the discipline a great heuristic value over some of the more traditional, psychoanalytically oriented treatment procedures. Its theoretical bases are, however, still in the process of being formulated.

Schwitzgebel, *supra* note 1. *See also* Friedman, *supra* note 8, at 47-48 & n.30; Opton, *Institutional Behavior Modification as a Fraud and Sham*, 17 ARIZ. L. REV. 20 (1975).

51. See text & notes 48-49 *supra*.

favor of a classification as punishment, enabling the eighth amendment to come into play. In this way closer scrutiny will be given the proposed procedure, necessitating proof of its rehabilitative value, while not automatically invalidating the procedure.[52] On the other hand, where a procedure, such as a token economy program utilizing rewards and incentives, has proven itself effective, it should not be presumed to be punishment under this phase of the balancing test.[53]

Professional Acceptance

The third factor to be analyzed in separating treatment from punishment is the relative medical and scientific acceptance of the practice.[54] This factor, which is somewhat related to the prognosis of success aspect, focuses on the status of the procedure to be used. A procedure professionally regarded as purely experimental should naturally require more careful scrutiny than one which has widespread support.[55] However, a procedure need not have universal acceptance in the scientific community before it can be considered a bona fide treatment program.[56] Once again, a sliding scale balancing test is necessary. The greater the scientific and medical acceptance and familiarity a particular procedure enjoys, the less likely the procedure should be deemed punitive.[57] A behavior modification technique without substantial support from the scientific community should not be presumed to produce legitimate rehabilitative behavior changes. Instead, lack of medical support should weigh in favor of classifying the procedure as punishment for eighth amendment purposes.[58] Such an examination of the recognized value of a given practice also will serve as a check on the discretion of prison behavioralists, preventing their automatic acceptance of the value of a procedure.

Intrusiveness

The intrusiveness factor examines the most traditional aspect of punishment theory—the effect on the individual.[59] In essence, this part

52. *See generally* Schwitzgebel, *supra* note 1, at 305.
53. *See* Ayllon, *supra* note 42, at 5.
54. *See* Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973); Friedman, *supra* note 8, at 70-71 n.159.
55. *Cf.* Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973).
56. For example, where treatment techniques have undergone extensive testing, revealing a high degree of success, the procedure begins to gain support from the scientific community. *See* Hosford & Rifkin, *Application of Behavior Therapy to Compulsive Exhibitionism and Homosexuality*, in THE CRUMBLING WALLS, *supra* note 45, at 136-46.
57. See discussion note 74 *infra*.
58. *Cf.* Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1975) (holding that intramuscular injections of certain drugs without medical prescription or approval were punishments and violative of the eighth amendment).
59. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

of the test focuses on the nature of the procedure and its effects on the subject.[60] All behavior modification is to some extent intrusive to the individual, whether in the strictly physical sense, or in the psychological sense.[61] Whether or not the individual prisoner consents to the procedure he will be subject to some degree of tampering with his mind, body, or both.[62] Procedures that entail serious pain, suffering, or other physical dangers[63]—such as the use of nausea-inducing drugs[64] or the employment of many other aversive procedures[65]—and those that entail severe deprivations of basic necessities[66] should be presumed to be punishment, unless an evaluation in conjunction with other factors clearly dictates a contrary conclusion.[67] Less serious instances of intrusiveness should give rise to no such presumption; thus the remaining factors would be given equal weight in reaching a final determination.

The reasons for presuming punishment in the case of physically painful or intrusive methods are several. First, the definition of punishment speaks in terms of the infliction of pain, suffering, damage, or loss.[68] A second and perhaps more important reason for classifying

60. Courts have often examined the effects of a given procedure to determine whether or not it constitutes punishment in the context of a particular fact situation. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Trop v. Dulles, 356 U.S. 86, 98-99 (1958); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866); Howard v. Smyth, 365 F.2d 428, 429-30 (4th Cir.), *cert. denied*, 385 U.S. 1008 (1966).

This factor is primarily concerned with the impact of the particular procedure, measured in terms of "[p]hysical offensiveness or deprivation of things desired . . . ." Friedman, *supra* note 8, at 70-71 n.159.

61. Kassirer, *supra* note 4, at 255; Wexler, *supra* note 10, at 82; Note, *Prison Discipline and the Eighth Amendment: A Psychological Perspective*, 43 U. CIN. L. REV. 101, 113 (1974).

62. Friedman, *supra* note 8, at 45.

63. Any examination of the procedure's probable effects must include analysis of the possible or probable side effects the procedure may have on the subject. In the area of negative reinforcement, there seems to be widespread acceptance of the danger of unfortunate results not intended by the procedures: "[m]any adverse side effects are associated with aversion therapy—'pain, frustration, increased aggressiveness, arousal, general and specific anxieties, somatic and physiological malfunctions, and development of various unexpected and often pathological operant behaviors.'" Note, *supra* note 1, at 631; *see* F. KANFER & J. PHILLIPS, *supra* note 2, at 364-67.

64. *See* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); F. KANFER & J. PHILLIPS, *supra* note 2, at 111.

65. Common examples of aversive procedures that involve a high degree of pain or discomfort are drugs that induce uncontrollable vomiting or partial temporary paralysis, and electrical shock treatments. *See* Note, *supra* note 48, at 1329-31. See discussion note 63 *supra*.

66. *See, e.g.*, Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974) (safety and security); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967) (clothing, personal hygiene); Howard v. State, 28 Ariz. 433, 438, 237 P. 203, 205 (1925) (food other than bread and water); Kassirer, *supra* note 4, at 255; Wexler, *Reflections on the Legal Regulation of Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 132, 138 (1975).

67. An example of a procedure involving a great deal of physical pain or discomfort, but not constituting punishment due to other factors, is a relatively routine surgical procedure such as an appendectomy, as discussed in Friedman, *supra* note 8, at 70-71 n.159. In view of the purpose of this procedure, its relatively high prognosis for success, and its nearly universal medical acceptance, a nonpunishment designation is mandated. Although this procedure is not behavior modification, it illustrates the cumulative and balanced nature of the punishment test.

68. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (1961). Indeed,

physically intrusive procedures as prima facie punishment is their relative facility for objective determination. While many of the other factors are somewhat difficult to measure, the potential for physical pain and discomfort is to a large extent ascertainable.

Consent

The final factor to be considered in determining whether a behavior modification procedure is treatment or punishment is consent of the prisoner,[69] the attitude of the subject being important to a determination of whether the procedure is punitive.[70] In determining whether consent may weigh in favor of classifying the procedure as treatment, the relative medical and scientific acceptance of the procedure should receive particular attention, as the two are interrelated.[71] Since historically a person has not been permitted to agree to his own substantial harm or detriment,[72] a painful intrusive procedure totally lacking medical acceptance and rehabilitative value may vitiate a prisoner's attempted consent.[73] Thus consent should not heavily influence a nonpunishment classifica-

several courts have presumed procedures involving physical touching to be punishment and consequently have moved directly to an eighth amendment analysis. *See, e.g.*, Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974) (paddling of high school students held to constitute cruel and unusual punishment when excessive); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975) (paddling sixth-grade student); Balser v. State, 57 Del. 206, 195 A.2d 757 (1963) ("20 lashes" held not to violate cruel and unusual punishment clauses). *But see* Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (holding that the eighth amendment does not apply to school discipline).

69. An argument is frequently asserted that any consent in an institutional setting is inherently coerced due to the coercive nature of confinement, and hence invalid. *See, e.g.*, Kaimowitz v. Michigan Dep't of Mental Health, 42 U.S.L.W. 2063 (C.A. 73-19434-AW, Cir. Ct. Wayne County, Mich., July 10, 1973); Note, *Medical and Psychological Experimentation on California Prisoners*, in *Problems in Law and Medicine*, 7 U.C.D.L. REV. 351, 352 (1974); 6 U. TOL. L. REV. 252, 271 (1974). This argument is based largely on the supposition that any consent by an institutionalized person is given for an improper reason, for example, for anticipated release or better treatment, thereby tainting the voluntariness of the consent. This argument, however, overlooks the fact that individual choice is permitted in many other situations within the criminal justice process despite the presence of pressure or inducements, for example, a defendant's entering a guilty plea in return for a lighter sentence. *See* North Carolina v. Alford, 400 U.S. 25, 31 (1970). Indeed, society encourages perpetrators of crime to come forward and give evidence of others' crimes by promising and granting immunity from prosecution. Since many individual decisions are made in spite of, or because of, pressures or inducements, lack of capacity for informed consent should not be presumed just because the individual is institutionalized. *See, e.g.*, Ayllon, *supra* note 42, at 12; Goldiamond, *Singling Out Behavior Modification for Legal Regulation: Some Effects of Patient Care, Psychotherapy, and Research in General*, 17 ARIZ. L. REV. 105, 123-25 (1975); Wexler, *supra* note 66, at 132-33. Consent by an institutionalized individual should be treated much the same as that of other persons, that is, based on voluntariness and knowledge, and with proper procedural safeguards. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970); Illinois v. Allen, 397 U.S. 337 (1970); Boykin v. Alabama, 395 U.S. 238 (1969).

70. *Cf.* N. MORRIS, *supra* note 20, at 15.

71. *See* Friedman, *supra* note 8, at 70-71 n.159. Friedman uses the phrase "recognized therapeutic value," which seemingly parallels the term "relative medical and scientific acceptance" used here.

72. *See, e.g.*, People v. Samuels, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (Ct. App. 1967), *cert. denied*, 390 U.S. 1024 (1968); Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948); State v. Fransua, 85 N.M. 173, 510 P.2d 106 (1973).

73. Friedman, *supra* note 8, at 70-71 & n.159.

tion where the procedure in question does not have medical or scientific support.

Even where a procedure has some therapeutic value, however, consent should not conclusively remove it from the realm of punishment, but rather should remain only one of the factors to be weighed.[74] The relative therapeutic value, as recognized by behavioralists, will differ not only from procedure to procedure, but from subject to subject.[75] A court, faced with the problem of determining whether consent removes a procedure from eighth amendment scrutiny, must therefore look to the other four factors as well, and make an objective determination in light of the particular circumstances before it.[76]

Therefore, the test of whether a procedure should be classified as punishment, subject to eighth amendment review, or rather as treatment, immune from eighth amendment attack, should be a cumulative one, dependent on the interrelation of the various factors discussed above. No one factor should be conclusive in the classification process, although in certain instances the conclusion as to one factor may raise a presumption one way or the other that requires strong evidence to the contrary from the other factors to alter the classification. Such a presumption should arise, for example, when a procedure is without significant scientific support, when a procedure has little chance of achieving successful results, or when a procedure entails substantial physical pain or deprivation. Although balancing of the various factors will undoubtedly involve some judicial guesswork in evaluating behavior modification procedures, it represents a significant improvement over blindly relying on the label given a procedure, or automatically classifying all procedures

74. Although it has been suggested that a procedure either has or lacks recognized therapeutic value, Friedman, *supra* note 8, at 70-71 & n.159, and that when such value is present, the procedure cannot be punishment if imposed with the subject's consent, *id.*, a different position is taken here. The problem with Friedman's black and white analysis is that recognized therapeutic value is an overly broad and ambiguous phrase, potentially including all procedures having the slightest scientific recognition. Recognized therapeutic value is necessarily a relative term, with most procedures falling somewhere between the two extremes. Although it is arguable that any procedure universally recognized as having high therapeutic value would not be considered punishment if consent were obtained, in the field of behavior modification there do not seem to be any procedures that have universal scientific support, especially when employed in the prison setting. *See* Breger & McGaugh, *Critique and Reformation of "Learning-Theory" Approaches to Psychotherapy and Neurosis*, 63 PSYCHOLOGICAL BULL. 338, 339-54 (1965); Opton, *supra* note 50. Under this formulation, therefore, consent is merely one factor in determining whether a procedure constitutes punishment. Consent, however, is treated further as possibly giving rise to waiver of the right against cruel and unusual punishment. See text & notes 177-229 *infra*.

75. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (intramuscular injections unacceptable as applied); Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973) (use of apomorphine not acceptable practice under circumstances); Peek v. Ciccone, 288 F. Supp. 329, 337 (W.D. Mo. 1968) (method employed was reasonable and acceptable in view of the particular facts).

76. *See* Comment, *Aversion Therapy and the Involuntarily Confined: Rehabilitation or Retribution?*, 27 U. FLA. L. REV. 224, 232-34 (1974).

employed in the prison setting as punishment.[77] As an added protection against the possible abridgment of a constitutional right, doubt at

77. *Id.* at 228-30. To illustrate how the balancing test might be employed in actual practice, several cases decided within the broad spectrum of behavior modification may be analyzed. In Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973), inmates of the Iowa Security Medical Facility brought an action to enjoin use of apomorphine, a drug employed to induce vomiting. The Eighth Circuit Court of Appeals, in holding that such use constituted cruel and unusual punishment, carefully scrutinized the technique employed. The court's reasoning could serve as a model for future courts faced with similar problems. Viewing the facts in *Knecht* in light of the punishment factors suggested in this Note, the same result is likely. With regard to the first factor, the purpose underlying usage of the drug in *Knecht* tended to be punitive rather than rehabilitative in nature. The procedure was not aimed at long term rehabilitation since the drug was administered for such institutional rule infractions as "not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying." *Id.* at 1137. The second factor similarly points towards classifying the procedure as punishment since there was medical testimony that such programs were successful in only 20 to 50 percent of cases. *Id.* at 1138. As to the third factor, the *Knecht* court noted that "it is not possible to say that the use of apomorphine is a recognized and acceptable medical practice in institutions such as [Iowa Security Medical Facility]." *Id.* The court might have gone further and found use of apomorphine, even if generally permissible, unacceptable when employed on an ad hoc basis for institutional rule infractions. The intrusiveness of the procedure, the focus of the fourth factor, was considered briefly by the court, which noted that vomiting induced by the drug lasted from 15 minutes to an hour, and that several temporary cardiovascular changes were known to occur. *Id.* at 1137. The court recognized that such prolonged vomiting "is a painful and debilitating experience." *Id.* at 1140. Although the court seemingly gave the final factor of consent more weight than necessary, the ultimate decision remains sound. Attaching great importance to the issue of consent, the court indicated that since voluntary and informed consent had not been obtained, the procedure constituted punishment in excess of that permitted by the eighth amendment. *Id.* The *Knecht* court thus suggested that a finding of valid consent would legitimize a procedure otherwise deemed unconstitutional cruel and unusual punishment. This suggestion notwithstanding, the presence of consent under these circumstances arguably would not have been sufficient to make this procedure nonpunishment. In view of the analysis of the remaining four factors, the procedure employed in *Knecht* should be viewed as punishment for eighth amendment purposes, and if the procedure were found to constitute cruel and unusual punishment, the court could then move to a consideration of whether there had been a waiver of the eighth amendment protection. For a discussion of the waivability of the right against cruel and unusual punishment, see text & notes 177-229 *infra.*

In Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973), the sufficiency of a complaint filed by a prisoner confined at the California Medical Facility at Vacaville, alleging violation of the eighth amendment through the administration of the drug succinycholine, was in issue. Since no evidence had been taken in the case as yet, the court was concerned only with the sufficiency of the allegations. Although it did not fully apply the test formulated here, the court's finding the complaint adequate seemingly comports with the balancing approach suggested here. According to the allegations of the complaint, the procedure was carried out as an experiment and was not part of a treatment program for which the prisoner was sent to Vacaville. *Id.* at 878. Since the purpose was not properly rehabilitative, the first factor weighs in favor of punishment categorization. The court did not discuss the prognosis for success of this procedure, but since it was called experimental, it can reasonably be concluded that the results were speculative. The third factor, that of the medical and scientific acceptance of the procedure, also supports punishment classification as expert testimony taken at the hearing on the motion to dismiss indicated that succinycholine is recommended as an adjunct to electric-shock therapy and is not recommended for use on fully conscious patients. *Id.* The fourth factor, the intrusiveness of the procedure, may also be indicative of punishment. The drug succinycholine was said to be a "breath-stopping and paralyzing 'fright drug,'" *id.* at 877, which may, as the court noted, be extremely intrusive psychologically as well as physically. *Id.* at 878. With regard to the element of consent, the court found that although the prisoner consented to his transfer to Vacaville for "shock treatment," he allegedly had not consented to this separate procedure. *Id.* at 877. As in *Knecht*, if consent had been obtained, it probably would not have altered the procedure's classification as punishment when weighed against the other four factors.

any point should be resolved in favor of classifying the procedure as punishment, thus triggering examination by eighth amendment standards.[78]

BEHAVIOR MODIFICATION— CRUEL AND UNUSUAL PUNISHMENT?

Having concluded that at least some behavior modification programs constitute punishment, thereby requiring eighth amendment analysis, eighth amendment standards must now be examined in order to determine when those behavior modification techniques constituting punishment can be considered cruel and unusual.[79] Although the language of the amendment seems to defy precise definition,[80] and courts have often failed to state expressly the applicable standards for evaluating eighth amendment challenges,[81] it is possible to identify the parameters of the eighth amendment's proscription against the infliction of cruel and unusual punishment.[82] A brief examination of the early history of the constitutional phrase "cruel and unusual" will be helpful in defining these boundaries, and should lend insight into the modern

78. *Cf.* Gobert, *Psychosurgery, Conditioning and the Prisoner's Right to Refuse "Rehabilitation,"* 61 VA. L. REV. 155, 182 (1975); Note, *supra* note 26. The primary reason for resolving doubts in favor of punishment classification is that much of the information used to determine whether a procedure is punishment must come from behavioralists, who are apt to minimize the unfavorable aspects of the procedure in order to sustain it.

79. It should be repeated that behavior modification must meet numerous legal and constitutional standards, of which the eighth amendment is only one. See discussion note 8 *supra.* As one commentator has noted:

> One danger, therefore, with which advocates relying on eighth amendment theories should be concerned is that the regular evaluation of punitive therapies by the eighth amendment standard might lead judges to a false sense that they were taking all necessary steps to safeguard mental patients and prisoners. This false confidence in the eighth amendment protections could lead to a judicial disinterest in recognizing other right to refuse treatment theories which might ultimately provide a higher standard of protection.

Friedman, *supra* note 8, at 65.

80. Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring); Trop v. Dulles, 356 U.S. 86, 100-01 (1958); Weems v. United States, 217 U.S. 349, 368-75 (1910).

81. *See, e.g.*, McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1366-67 (D.R.I. 1972); Baker v. Hamilton, 345 F. Supp. 345, 352 (W.D. Ky. 1972).

82. Prior to last term, the Supreme Court had dealt with the eighth amendment on only 11 occasions, *see* Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973), and found only four punishments cruel and unusual. Furman v. Georgia, 408 U.S. 238 (1972) (death penalty as applied); Robinson v. California, 370 U.S. 660 (1962) (criminal penalty for the "status" of drug addiction); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for 1-day desertion of the military); Weems v. United States, 217 U.S. 349 (1910) (15-year prison sentence at hard labor and a large fine for falsifying a public document). However, on July 2, 1976, the Court rendered five opinions discussing the eighth amendment validity of the death penalty, holding for the first time that the death penalty was not per se unconstitutional. *See* Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Gregg v. Georgia, 96 S. Ct. 2909 (1976). See discussion note 95 *infra.*

meaning of the eighth amendment. This historical analysis is especially relevant to the question of whether the words "cruel" and "unusual" have independent meanings.

The phrase "cruel and unusual" was adopted directly from the English Bill of Rights of 1689, although it appears that the American drafters misinterpreted the intention of the English version.[83] The initial draft of the English Bill of Rights prohibited "illegal punishments,"[84] referring to those unauthorized by statute.[85] The second draft similarly referred to "illegal and cruel punishments,"[86] while the version finally adopted, proscribing "cruel and unusual punishments," was apparently a mistake in drafting.[87] The English Bill of Rights, therefore, was aimed first at "punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties."[88] Despite the apparent English view that disproportionate punishments were the main prohibition of the clause, the American framers interpreted the words to proscribe punishments that were barbarous.[89] This interpretation has led to the often stated rule that the eighth amendment is based on the preservation of human dignity,[90] and that eighth amendment standards "must draw [their] meaning from the evolving standards of decency that mark the progress of a maturing society."[91]

Impact of Furman v. Georgia

An important question of interpretation raised by the words of the eighth amendment, in view of the original English version,[92] is whether the phrase should be construed in the conjunctive or the disjunctive, essentially whether the word "unusual" is intended to have a meaning independent of the word "cruel."[93] It is generally stated that the two

83. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 839 (1969).

84. 10 H.C. JOUR. 17 (1688-89); *see* Granucci, *supra* note 83, at 855.

85. Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting); Weems v. United States, 217 U.S. 349, 402 (1910) (White, J., dissenting); Granucci, *supra* note 83, at 860.

86. *See* Granucci, *supra* note 83, at 855.

87. *Id.*

88. *Id.*

89. *Id.* at 839; *see* Weems v. United States, 217 U.S. 349, 397 (1910) (White, J., dissenting); *In re* Kemmler, 136 U.S. 436, 447 (1890).

90. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring); Trop v. Dulles, 356 U.S. 86, 100 (1958); Sostre v. McGinnis, 442 F.2d 178, 191-92 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Schwitzgebel, *supra* note 1, at 297; Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 635 (1966).

91. Trop v. Dulles, 356 U.S. 86, 101 (1958); *accord*, Rudolph v. Alabama, 375 U.S. 889, 890 (1963) (Goldberg, J., dissenting to denial of certiorari).

92. See text accompanying notes 83-88 *supra*.

93. The question may have special significance when the challenged punishment is a form of behavior modification, which in its infant stages may seem unusual, at least

words are intended in the conjunctive, and that a punishment will not violate the eighth amendment unless it is unusual and involves some cruelty.[94] This construction, of course, comports with the literal language of the clause. The landmark case of *Furman v. Georgia*,[95] however, seemingly indicated that a punishment may violate the eighth amendment if imposed arbitrarily or indiscriminately, which may give independent meaning to the word "unusual."[96] If this is so, "unusual" would seem to mean those punishments which are "wantonly and . . . freakishly imposed."[97]

Courts and prison officials have long had wide discretionary power to impose punishment for criminal conduct.[98] Although it has been

insofar as the word is defined to mean not "in accordance with usage, custom, or habit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2524 (1961). If the phrase "cruel and unusual" is viewed in the disjunctive, behavior modification seemingly would be more open to challenge as being unusual, although it may not necessarily be cruel.

94. *See* Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting); Trop v. Dulles, 356 U.S. 86, 100-01 n.32 (1958); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1789 & n.77 (1970). *But see* Furman v. Georgia, *supra* at 330-32 (Marshall, J., concurring).

95. 408 U.S. 238 (1972) (per curiam). The *Furman* Court, in holding the capital punishment systems of three states violative of the eighth amendment, was able to muster a majority only for the ultimate result. Nine separate opinions were written, with none of the concurring opinions reflecting the view of anyone other than the writer. It is therefore extremely difficult to determine the legal significance of the *Furman* decision. *See* Comment, *Capital Punishment After Furman*, 64 J. CRIM. L. 281 (1973). The indiscriminate application of the death penalty was a common problem cited in the majority opinions, and may be the factor of primary significance in the *Furman* decision. *See* Goldberg, *supra* note 82, at 366. This assertion is bolstered by the Court's recent holdings that the death penalty does not necessarily inflict cruel and unusual punishment:

> *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant,

Gregg v. Georgia, 96 S. Ct. 2909, 2937 (1976). In *Gregg*, the Court upheld a Georgia statute imposing the death penalty for murder committed in the course of an armed robbery, and approved the specific application of the sentence to the defendant. *Id.* at 2941. The same day, the Court also upheld imposition of the death penalty under Texas and Florida statutes, Proffit v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976), but struck down the statutes of Louisiana and North Carolina, which imposed a mandatory death sentence for certain offenses. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976). These statutes were invalidated for largely the same reasons as the Georgia law in *Furman*—they vested "standardless sentencing power in the jury. . . ." 96 S. Ct. at 2990; *see* 96 S. Ct. at 3007. The reasonable inference that can be drawn from these recent death penalty cases is that unbridled discretion is forbidden by the eighth amendment, but bridled discretion is not.

96. It is not clear that the majority in *Furman* was giving independent meaning to the word "unusual." However, several Justices did discuss the fact that imposition of the death penalty had become "unusual." 408 U.S. at 242 (Douglas, J., concurring) (arguing that arbitrary and discriminatory punishments are prohibited); *id.* at 305 (Brennan, J., concurring) (concluding death penalty now uniquely and unusually severe); *id.* at 309 (Stewart, J., concurring) ("In the second place, it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."); *id.* at 313 (White, J., concurring) (noting infrequent imposition of death sentence).

97. *Id.* at 310 (Stewart, J., concurring).

98. *See* Williams v. New York, 337 U.S. 241, 247 (1949) (individualized sentences

argued that *Furman* may spell doom for all discretion in imposing punishment,[99] such an interpretation would read entirely too much into the *Furman* opinions. The case dealt with the imposition of the death penalty, which has traditionally been viewed with extra care because of its irreversibility.[100] Lower federal courts and state courts seemingly have not allowed *Furman* to interfere with judicial discretion in imposing other, less harsh sentences,[101] consistent with individualistic theories of penology.[102] Discretion plays a vital role in a system which ideally molds the punishment to the individual rather than to the crime.[103] It is only in retaining, and perhaps enlarging, discretionary powers, that the penal system can hope to accomplish one of its important goals—rehabilitation of offenders. Similarly, the eighth amendment should not be held violated by behavior modification procedures on the ground of unusualness, based on their recent addition to the arsenal of rehabilita-

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encouraged); Ford v. Board of Managers, 407 F.2d 937, 940 (3d Cir. 1969) (solitary confinement approved); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967) (use of tear gas approved); Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) (sentence not disproportionate to offense).

99. Cahalan, *supra* note 22, at 166-68. It is difficult to see in which sense discretion was disfavored in *Furman*. Arguably, the *Furman* opinions dealing with discretion were speaking not of the broad discretionary powers allowed by the statutes in question, but only the historically "freakish" application of the death penalty. The Court may have been concerned that the death sentence had not been applied uniformly to similar offenses. However, subsequent decisions of the Court indicate that *Furman* was indeed concerned with the degree of discretion allowed the sentencing authority in imposing death. See discussion note 95 *supra*.

100. *See* Stein v. New York, 346 U.S. 156, 196 (1953) ("When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance."); Goldberg & Dershowitz, *supra* note 94, at 1799.

101. *See* United States v. Velazquez, 482 F.2d 139 (2d Cir. 1973); Woosley v. United States, 478 F.2d 139, 144 (8th Cir. 1973); State v. Starr, 110 Ariz. 580, 581, 521 P.2d 1126, 1127 (1974); State v. O'Donnal, 110 Ariz. 552, 554, 521 P.2d 984, 986 (1974); People v. Kingston, 44 Cal. App. 3d 629, 637, 118 Cal. Rptr. 896, 901 (Ct. App. 1975). Indeed, the Supreme Court has now held that it was not the discretionary aspect per se that led to the *Furman* holding, but rather the standardless discretion allowed by the Georgia statute construed in *Furman*. *See* discussion note 95 *supra*.

Although *Furman* dealt with the discretionary power of the sentencing judge or jury, the decision has implications for the discretionary imposition of punishment in all phases of the criminal justice system. The import of the *Furman* decision should not be dismissed merely because behavior modification is not normally imposed by a court in the form of a sentence. The eighth amendment has repeatedly been held applicable to nonsentence punishments. *See, e.g.*, McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975) (punitive isolation); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (strip cell); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (conditions of confinement); Jackson v. Bishop, 268 F. Supp. 804, 815 (E.D. Ark. 1967), *vacated on other grounds*, 404 F.2d 571 (8th Cir. 1968) (corporal punishment).

102. *See* Levin, *Toward a More Enlightened Sentencing Procedure*, in THE TASKS OF PENOLOGY 137, 138 (H. Perlman & T. Allington eds. 1969); Youngdahl, *Developments and Accomplishments of Sentencing Institutes in the Federal Judicial System*, in *id.* at 152, 159.

103. There is widespread agreement among professional penologists that punishment must be geared toward the individual rather than the crime in order to achieve positive results. *See, e.g.*, Levin, *supra* note 102; Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1077-78 (1964); Youngdahl, *supra* note 102, at 159; Comment, *A Jam in the Revolving Door*, *supra* note 21, at 243. *But see* Cahalan, *supra* note 22, at 170.

tive tools.[104] It must be recognized that eighth amendment standards are evolving, so that what was considered unusual a century ago may be commonplace and acceptable in present times.[105]

Furman should therefore have no effect on those procedures which on balance are punishments, but are geared toward rehabilitation of the offender, so long as they are imposed through the exercise of sound professional judgment.[106] Assuming the exercise of a sound, reasoned, professional decision in selecting both the subjects for behavior modification and the means for eliminating undesired behavior,[107] *Furman* should not condemn use of bona fide behavior modification programs.

Traditional Eighth Amendment Standards

Although the *Furman* decision is somewhat amorphous,[108] concrete standards can be derived from other eighth amendment decisions which better define the scope of the cruel and unusual punishment clause. Out of these decisions have emerged basically three ways in which a punishment can violate the eighth amendment.[109] A punish-

104. See discussion note 93 *supra*.

105. See text & note 91 *supra*.

106. It is unlikely that behavior modification will ever be imposed as part of a sentence by the judge because of the expertise needed to determine whether a particular individual will be a good candidate for behavior modification, and the type of therapy that promises the best results on that individual. Discretion to make such evaluations must rest with behavioralists. In effect, the judge sentences the offender for the purpose of rehabilitation, while the behavioralist determines how to best achieve that purpose. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 478-84 (1972).

107. That behavioralists justify their decisions before an independent review board to assure the exercise of sound discretion may be required by due process. *See* Friedman, *supra* note 8, at 94, 95-100.

108. See discussion notes 95-96 *supra*. It seems clear that the core of the *Furman* decision was the arbitrary and discriminatory use of the death sanction. However, the fact that there was no majority opinion except for a brief per curiam opinion, and the fact that the death penalty, with all its emotional overtones, was in issue somewhat clouds the significance of *Furman* as a definitive statement of eighth amendment standards. This is not to say that *Furman* is not an important eighth amendment decision; it only suggests that other eighth amendment cases must be analyzed to discover more accurately the historical boundaries of the proscription against cruel and unusual punishment.

109. *See* Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., dissenting to denial of certiorari); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968). Former Supreme Court Justice Goldberg, in a recent article, restated his version of the eighth amendment standards:

> (1) Giving full weight to reasonable legislative findings, a punishment is cruel and unusual if a less severe one can as effectively achieve the permissible ends of punishment such as deterrence, isolation, rehabilitation or whatever the contemporary society considers the permissible object of punishment. . . .
>
> (2) Regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if it offends the contemporary sense of decency. . . .
>
> (3) Regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if the evil it produces is disproportionately higher than the harm it seeks to prevent.

Goldberg, *supra* note 82, at 359-60. These standards, based largely on those enumerated in Weems v. United States, 217 U.S. 349, 367, 371-73, 375, 380-81 (1910), subsume the various tests that have been stated by courts in their attempts to interpret the eighth

ment is cruel and unusual if it goes beyond that which is necessary to achieve a legitimate penal goal,[110] is shocking to the community conscience,[111] or is disproportionate to the crime it follows.[112] The institutionality of behavior modification can be evaluated with reference to each of these standards.

Excessiveness. The first test—whether the procedure goes beyond what is necessary to achieve a legitimate penal goal—asks whether the particular procedure chosen is the least severe punishment that is capable of achieving the legitimate aims of the penal system.[113] This standard recognizes that there are multiple state interests involved in the incarceration of offenders.[114] Behavior modification is intended to serve a rehabilitative function,[115] long a recognized penal goal.[116] It can

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amendment, and are essentially the ones utilized here. Generally, four separate tests have been recognized by judges and commentators. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 330-32 (1972) (Marshall, J., concurring) (stating that a punishment can be cruel and unusual if it involves physical pain and suffering, is unusual or previously unknown, is excessive and serves no valid legislative purpose, or is abhorred by popular sentiment); *id.* at 282 (Brennan, J., concurring) (stating a cumulative test for determining "cruel and unusual": whether the punishment is unusually severe, whether it is or may be inflicted arbitrarily, whether it is substantially rejected by contemporary standards, or whether there is or may be a less severe alternative); Note, *supra* note 90 (hypothesizing that the eighth amendment primarily prohibits "cruelly excessive" punishments); Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964) ("inherently cruel" and "cruelly excessive" punishments violate the eighth amendment); Note, *supra* note 61, at 126 (eighth amendment analysis involves consideration of whether the punishment is necessary to achieve a legitimate penal goal, whether the punishment is reasonably related to the maintenance of prison discipline, whether it is disproportionate to the offense, and whether it shocks the conscience of the court).

110. Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting); Weems v. United States, 217 U.S. 349, 381 (1910); *id.* at 386-87 (White, J., dissenting); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968).

111. Rudolph v. Alabama, 375 U.S. 889, 890 (1963) (Goldberg, J., dissenting); Robinson v. California, 370 U.S. 660, 666 (1962); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 473 (1947) (Burton, J., dissenting); Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967).

112. Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting); Weems v. United States, 217 U.S. 349, 366-67 (1910); Downey v. Perini, 518 F.2d 1288, 1290 (6th Cir.), *vacated on other grounds*, 423 U.S. 993 (1975); Adams v. Carlson, 488 F.2d 619, 635-36 (7th Cir. 1973).

113. This "least restrictive alternative" standard will also be referred to as the excessiveness test, the fundamental inquiry being whether a particular procedure exceeds that necessary for effectuating a legitimate penal goal.

114. Courts have long recognized that state interests in rehabilitation, deterrence, isolation, and retribution, traditionally suggested in support of penal systems, have a common ultimate goal of reducing the incidence of crime. The state's interest in attaining this ultimate objective is beyond dispute. *See* Williams v. New York, 337 U.S. 241, 247-50 (1949); Sostre v. McGinnis, 442 F.2d 178, 190-91 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); Sas v. Maryland, 334 F.2d 506, 509 (4th Cir. 1964); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir.), *cert. denied*, 375 U.S. 915 (1963); Lunsford v. Reynolds, 376 F. Supp. 526, 528 (W.D. Va. 1974); Allen v. Nelson, 354 F. Supp. 505, 511 (N.D. Cal.), *aff'd*, 484 F.2d 960 (9th Cir. 1973); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); State v. English, 198 Kan. 196, 209, 424 P.2d 601, 611 (1967); State *ex rel.* Kelly v. Wolfer, 119 Minn. 368, 376, 138 N.W. 315, 318 (1912).

115. See text & notes 19-23 *supra*.

116. As the Arizona supreme court once stated:

> [O]ur state at present adheres to the general policy, that while for the protec-

survive eighth amendment scrutiny under this first test only if it sufficiently serves that interest and is no more intrusive than necessary to achieve the rehabilitative goal. In that the state and society have a legitimate interest in the rehabilitation of prisoners, the issue becomes whether behavior modification sufficiently serves that interest and does not exceed the means necessary to achieve the rehabilitative goal.

Behavior modification has been heavily criticized on the basis that it effects only temporary changes in the individual's behavior.[117] This argument seems to be based on the fact that behavior modification focuses on a particular behavior, affecting its frequency by altering environmental conditions.[118] The critics of behavior modification contend that once removed from the prison environment, where the desirable behavior changes have occurred, the subject will return to previous behavior patterns.[119]

Although this criticism is of justifiable concern, there are countervailing arguments that support behavior modification's therapeutic and rehabilitative value. First, the more traditional efforts to rehabilitate, such as individual counseling, psychotherapy, and group therapy, are subject to the same criticism as behavior modification— all are incapable of assuring positive behavior changes that will carry through to postprison life.[120] Moreover, there appears to be substantial evidence that behavior modification may be a more effective method of causing permanent behavior improvements than these traditional verbal therapies;[121] therefore, behavior modification techniques deserve exploration and development.

Major problems have arisen in attempting to rehabilitate prisoners by conventional means. A substantial stumbling block is created by the fact that prisoners, being primarily from low socioeconomic levels of American society,[122] are difficult to reeducate and often lack motivation

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> tion of society it is necessary to deprive the offender against its laws of his liberty for a greater or lesser period, yet such deprivation should be conducted as humanely as possible, and with the view of eventually, if that happy result is possible of realization, restoring him as a useful citizen to society.

Howard v. State, 28 Ariz. 433, 437, 237 P. 203, 204 (1925); *see* Williams v. New York, 337 U.S. 241, 248 (1949); Benson v. United States, 332 F.2d 288, 292 (5th Cir. 1964); State *ex rel.* Ronan v. Stevens, 93 Ariz. 375, 378, 381 P.2d 100, 102-03 (1963); People v. Harpole, 97 Ill. App. 2d 28, 33, 239 N.E.2d 471, 474 (1968); State *ex rel.* Kelly v. Wolfer, 119 Minn. 368, 376, 138 N.W. 315, 318 (1912); S. RUBIN, *supra* note 22, at 755.

117. Opton, *supra* note 50, at 22; Rangel, *Introduction* to *Symposium—Behavior Modification in Prisons*, 13 AM. CRIM. L. REV. 3, 7 (1975).

118. See text & notes 1-2 *supra*.

119. *See* Opton, *supra* note 50, at 22; Rangel, *supra* note 117.

120. Schwitzgebel, *supra* note 1, at 270-71.

121. *See* Moss & Hosford, *Afterword—And the Walls Came Tumbling Down*, in THE CRUMBLING WALLS, *supra* note 45, at 237-38; Moya & Achtenberg, *supra* note 3; Schwitzgebel, *supra* note 1, at 271-72.

122. *See* R. CLARK, CRIME IN AMERICA 56-67 (1970); W. LUNDEN, CRIMES AND CRIMINALS 113 (1967); U.S. DEP'T OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENFORCE-

to learn.[123] A second obstacle is posed by the relative ease with which prisoners are able to manipulate the system to obtain early release or other benefits.[124] "Shamming," the practice of feigning cooperation and personal reform, is a widespread problem in American prisons, and is the tool prisoners often utilize to manipulate traditional rehabilitative devices and undermine their effectiveness.[125] Behavior modification represents an alternative rehabilitative device, and one that is not so easily manipulated by prison inmates,[126] since changes in overt behavior are required rather than mere verbal assurances of changes in attitude.

Another frequent argument directed against behavior modification is that it represents a serious intrusion into the prisoner's physical and mental privacy.[127] In response to this charge, it can be argued that behavior modification, in concentrating on a specific behavior and attempting to influence its frequency, is less intrusive than traditional therapies.[128] Instead of focusing on broad areas of one's personality, looking for character defects or personality traits, behavior modification is able to limit its focus to the elimination of the specific acts that earned the individual his place in the prison. Since prisoners are confined because they have committed some act that society has labeled undesirable, behavior modification, designed to eliminate specific behaviors, is an ideal tool to carry out the state interest in rehabilitation.[129] Thus, behavior modification may properly be viewed as the least drastic means of promoting rehabilitation.

Although behavior modification as a whole thus arguably qualifies as the least severe method of accomplishing the legitimate state goal of rehabilitation, determining the constitutionality of behavior modification also requires analysis on a case by case basis of the particular procedures used and their value. Thus, as a second inquiry under the legitimate-

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MENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 45 (1967). *But see* authorities cited in W. LUNDEN, *supra* at 111-12.

123. Gobert, *supra* note 78, at 159.

124. For an excellent case study illustrating inmate manipulation of the prison system, see A. MANOCCHIO & J. DUNN, THE TIME GAME (1970), especially at 45, 59-64. *See also* Hosford & Moss, *Counseling in the Prison: Implications for Counselor Training*, in THE CRUMBLING WALLS, *supra* note 45, at 91, 100; Gobert, *supra* note 78, at 159-60.

125. *See* A. MANOCCHIO & J. DUNN, *supra* note 124, at 45, 57-72; Gobert, *supra* note 78, at 160.

126. Gobert, *supra* note 78, at 163-64.

127. *See* Gotkin, *New Words for an Old Power Trip: A Critique of Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 29, 32 (1975); Opton, *supra* note 50, at 23.

128. F. KANFER & J. PHILLIPS, *supra* note 2.

129. It should be remembered that rehabilitation is not necessary for, nor suited to, all incarcerated individuals. Careful selection of those individuals for whom rehabilitation will be useful is a necessary part of the proposed scheme. Nor is it argued that behavior modification is the only rehabilitative device that should be utilized. Undoubtedly there are prisoners who will respond well to verbal therapy, and for such individuals, that therapy should be used.

penal-goal test for eighth amendment compliance, the court's function is to act as a vital check on the discretion of the behavioralist in the particular case.[130] The behavioralist, in choosing the method of modifying a specific prisoner's behavior, must choose the least severe method available that has a substantial potential for success in eliminating the undesirable behavior.[131] A sound, reasoned decision on the part of the behavior therapist is required, taking into account the nature of the behavior to be eliminated, the techniques available to extinguish that behavior, and the relative intrusiveness of the procedures.

In courts' evaluation of a behavioralist's discretionary decisions, a limited amount of deference must be given to the judgment of the professional behavior therapist, because of his close contact with the prisoner, his familiarity with the prisoner's needs and abilities, and his own scientific and expert knowledge. Only a clear abuse of discretion, unsupported by objective data, should be struck down.[132] Given the professional input for such decisions and the necessary requirement of full disclosure[133] before some programs are instituted,[134] abuses of discretion will probably be infrequent. Therefore, this first test of cruel and unusual punishment will likely sustain most behavior modification procedures, and the other tests will be more important for evaluating eighth amendment challenges.

Community Offensiveness. The second test under the eighth amendment is whether a proposed or inflicted punishment "offends the contemporary sense of decency."[135] This is obviously a highly subjective test, and one that depends largely on changing community or societal norms.[136] It is also the test which will likely provide the most serious challenges to behavior modification. In the past, many conditions or procedures have been found cruel and unusual and therefore violative of the eighth amendment because they shock the conscience,[137]

130. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 483 (1972).

131. This test is derived from focusing the first standard on the particular case. See text accompanying notes 113-15 *supra.*

132. *Cf.* Wolff v. McDonnell, 418 U.S. 539, 566-67 (1974).

133. Due process of law may require such additional protection where a behavior modification program would entail a substantial change in the conditions of confinement. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

134. *See* Friedman, *supra* note 8, at 91-94.

135. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958); Weems v. United States, 217 U.S. 349, 378 (1910); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). *See also* Furman v. Georgia, 408 U.S. 238, 278-79 (1972) (Brennan, J., concurring).

136. See text accompanying notes 90-91 *supra.*

As stated by the United States Supreme Court: " The [eighth amendment] in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378 (1910).

137. Goldberg, *supra* note 82, at 360.

While the State has the power to punish, the Amendment stands to assure that

or otherwise offend what the court perceives to be contemporary standards of decency.[138] Behavior modification, as a relatively new and unknown discipline, often evokes the specter of fear[139] suggested by literary classics such as *1984*[140] and *A Clockwork Orange*,[141] by conjuring up notions of Orwellian mind and body control robbing the individual of his personal autonomy. Since the test is highly subjective, largely varying from individual to individual, it is impossible to determine what will shock the community conscience.[142] However, certain objective guidelines for determining what types of behavior modification procedures may be expected to evoke such a reaction can be propounded.

As previously noted,[143] all eighth amendment standards are based to some extent on evolving notions of humane justice.[144] Today, the

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this power be exercised within the limits of civilized standards. . . . The Court recognized in [Weems v. United States, 217 U.S. 349 (1910),] that the words of the Amendment are not precise, . . . and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. 86, 100-01 (1958). This test has also been framed to inquire whether the punishment is abhorred by popular sentiment or is morally unacceptable. Furman v. Georgia, 408 U.S. 238, 333-42 (1972) (Marshall, J., concurring). It is essentially a test of whether the punishment shocks the conscience of the court. *See* Note, *supra* note 61, at 126. *See generally* cases cited note 138 *infra*.

138. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 102 (1958) (expatriation violated fundamental standards of decency); Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 215 (8th Cir. 1974) (conditions in the Arkansas prison system continue to violate the eighth amendment); Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967) (conditions of confinement in a strip cell for 33 days constituted cruel and unusual punishment); Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) ("The cruelty is a refined sort, much more comparable to the Chinese water torture than to such crudities as breaking on the wheel."); Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966) (conditions in solitary confinement "of a shocking and debased nature"); *cf.* Robinson v. California, 370 U.S. 660, 666-67 (1962).

139. *See, e.g.*, Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973) (use of succinycholine, a "fright drug," on nonconsenting prisoners said to "raise serious constitutional questions respecting cruel and unusual punishment . . . or impermissible tinkering with the mental processes . . . "); Clemons, *supra* note 10, at 129-30; Kassirer, *supra* note 4, at 246; Moya & Achtenberg, *supra* note 3, at 237; Singer, *supra* note 19, at 194.

140. G. ORWELL, 1984 (1949).

141. A. BURGESS, A CLOCKWORK ORANGE (1962).

142. Although it would seem that castration as punishment for sexual offenses would shock the conscience of many persons in modern society, a recent case in California illustrates the subjectivity of the test. A superior court judge in San Diego recently gave two sex offenders the choice of castration or life prison terms. Apparently this sentence did not shock the conscience of this particular judge. *See* N.Y. Times, May 11, 1975, § 4, at 10, col. 1.

143. See text & notes 90-91 *supra*.

144. On its face, the "human decency" test of the eighth amendment does not take into account legitimate societal objectives arguably supporting a proposed procedure, but merely considers whether the procedure violates concepts of human decency. Goldberg, *supra* note 82, at 360. However, such objectives seemingly influence the initial determination of whether the procedure shocks the conscience. For example, open heart surgery, conducted for the sole purpose of research into the mechanics of heart functioning, would be much more likely to offend contemporary notions of decency than would the same procedure undertaken to save a life. Similarly, an electric shock procedure utilized solely to punish a prisoner would be more likely to shock the conscience than a like

concept of humane justice seemingly favors rehabilitation of prisoners.[145] Having advanced somewhat from the primitive notion that justice is best meted out by use of the rack and screw, any genuine effort to rehabilitate an offender should be viewed favorably, and ordinarily should not be considered shocking to the public conscience. The fact that behavior modification is aimed at the lofty ideal of returning offenders to the community as constructive, or at least nondestructive, citizens should serve to temper the community abhorrence of many of its techniques. This rehabilitative ideal should not be clouded by irrational fears that the use of behavior modification on prison inmates signifies the beginning of the Orwellian age.[146] The law must recognize that although behavior modification interferes temporarily with a person's individuality, it represents an important scientific advance, and may be a partial answer to correctional problems.[147] The law needs to recognize further that behavior modification is very different from more traditional forms of punishment that have shocked the community conscience, such as torture,[148] starvation,[149] public humiliation,[150] and expatria-

procedure used to treat schizophrenic personalities. For an example of such a procedure violating this eighth amendment test when used for punitive purposes, see Holt v. Sarver, 309 F. Supp. 362, 372 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

145. *See, e.g.*, H. BARNES, THE REPRESSION OF CRIME 151-58 (1969); Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959); Levin, *supra* note 102, at 137-48.

> A just sentence will reflect the divergent backgrounds and present circumstances of each individual offender, his present attitudes, and the nature of the offending act itself. Judges, years ago, often had no alternatives to the imposition of blind, so-called "straight," sentences. Years of effort on the part of lawyers, judges, and other interested persons have effected departures from concepts of punishment unrelated even to the public welfare, let alone the welfare of individual offenders. Public policy, in recent years, has increasingly emphasized those factors most likely to fashion a sentence to serve and protect the public and, where possible, to develop the offender into a useful citizen.

Id. at 138.

146. *See* Kassirer, *supra* note 4, at 246:

> Behavior modification can be frightening, but perhaps no more so than any other form of therapy. Belief that with the advent of behavior therapy came man's first attempt to control man is unfounded. For as long as man has lived within society there has been such control: parents have tried to mold the behavior of their children, teachers have tried to control their pupils, and so on. One of the major problems with the use of behavior modification in our institutions is that it is relatively new. We are more comfortable with more traditional psychological methods of treatment, possibly for no other reason than because we are more accustomed to them . . . .

See also Moya & Achtenberg, *supra* note 3, at 250.

147. Numerous studies have indicated already that behavior modification can effectively deal with many behavior problems, including some criminal behaviors. *See, e.g.*, J. ARONSON, BEHAVIOR THERAPY IN PSYCHIATRY—A REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON BEHAVIOR THERAPY 79-81 (1974) (giving results of numerous studies in different behavioral areas); Barker & Miller, *Some Clinical Applications of Aversion Therapy*, in PROGRESS IN BEHAVIOR THERAPY 73-87 (H. Freeman ed. 1968) (indicating success in treating transvestism, compulsive gambling, infidelity, exhibitionism, homosexuality and criminal behavior); Kraft, *Experience in the Treatment of Alcoholism*, in *id.* at 25-33. *See also* L. ULLMAN & L. KRASNER, CASE STUDIES IN BEHAVIOR MODIFICATION (1965); Schwitzgebel, *supra* note 1, at 305.

148. *See* Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967).

149. *See* Howard v. State, 28 Ariz. 433, 237 P. 203 (1925).

150. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

tion.[151] In short, the beneficial purposes of behavior modification as a form of rehabilitation must be considered in light of the eighth amendment's concern for humane justice.

The worthy goals of behavior modification, however, will not insulate it entirely from eighth amendment attack under the shock-the-conscience test. Certain procedures, no matter how likely to rehabilitate, are probably beyond the power of the state due to community standards for decent treatment of offenders. Society should not tolerate the use of extremely painful procedures,[152] or those that entail severe deprivations of basic necessities of life.[153] Such forms of treatment would undoubtedly offend the community conscience, perhaps because they give the appearance of extreme cruelty.[154] Thus, the infliction of severely painful electric shocks over long periods of time probably could not survive this test.[155] Similarly, a token economy program that deprives an uncooperative prisoner of fundamental physical needs, such as food, water, clothing, and light, would be forbidden.[156]

Only such extreme forms of deprivation and pain, however, should fail constitutional scrutiny under this test.[157] Other, lesser deprivations or punishments, whether involving positive or negative reinforcement, should not be deemed to offend the community conscience.[158] In

151. *See id.*

152. *See* Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring); O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).

153. *See* Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967); Howard v. State, 28 Ariz. 433, 237 P. 203 (1925).

154. An analogy can be drawn to cases construing the due process clause of the fourteenth amendment, in which a similar shock-the-conscience test has been applied. *See, e.g.*, Breithaupt v. Abram, 352 U.S. 432 (1957) (holding that a blood test to determine alcohol content, administered by a physician, did not shock the conscience); Rochin v. California, 342 U.S. 165 (1952) (holding that stomach pumping, and the surrounding circumstances, did shock the conscience); Brown v. Mississippi, 297 U.S. 278, 285 (1936) (holding that a confession obtained by brutal beating was offensive to the community conscience). *See also* Furman v. Georgia, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring):

> The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

155. *Cf.* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). *See also* discussion note 144 *supra*.

156. *See* Schwitzgebel, *supra* note 1, at 302-03.

157. This standard should not be confused with the excessiveness standard. See text & notes 113-34 *supra*. The question under the shock-the-conscience test is whether the challenged procedure is itself extremely painful or involves extreme deprivation, while the least-restrictive-alternative requirement of the first eighth amendment test raises the question whether there is another method that is less severe that would accomplish the same purpose.

158. Our society historically has allowed a great deal of punishment and deprivation to exist in the prison atmosphere, even absent the lofty objective of rehabilitation. *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (upholding the state's authority to carry out a death sentence despite failure of the device to electrocute the defendant on a previous attempt); Adams v. Carlson, 488 F.2d 619, 635-36 (7th Cir. 1973) (11 months in solitary confinement for violation of prison work rules upheld); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972)

drawing a line between punishments that shock the conscience and those that do not, care must be taken to avoid frustration of bona fide efforts to rehabilitate criminal offenders. Only those punishments that cannot be sustained by modern notions of enlightened justice should violate the eighth amendment.

Disproportionality. The final test of a punishment's unconstitutionality under the eighth amendment is one of proportionality.[159] This test derives basically from *Weems v. United States*,[160] in which the Supreme Court, using an eighth amendment analysis,[161] struck down a sentence of 15 years in prison and a large monetary fine for the crime of falsifying a public document by a government official. The penalty was held to be cruel and unusual because it was not "graduated and proportioned to the offense."[162] The problem in *Weems* essentially was that the punishment inflicted was to an impermissible degree more severe than the act punished.[163]

The proportionality test arguably may be viewed as a balancing exercise, whereby the severity of the punishment, measured both in kind and degree, is weighed against the nature and seriousness of the behavior to be modified, that constituting the crime. In the behavior modifi-

(extended solitary confinement upheld); Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970) (improper or inadequate medical treatment not cruel and unusual unless continuing, unsupported by any competent recognized school of medicine, and a denial of needed treatment); State v. Cannon, 55 Del. 587, 190 A.2d 514 (1963) (use of whipping post held constitutional).

159. This test has been described in the following manner: "Regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if the evil it produces is disproportionately higher than the harm it seeks to prevent." Goldberg, *supra* note 82, at 360.

160. 217 U.S. 349 (1910). For application of the *Weems* test, see, *e.g.*, Downey v. Perini, 518 F.2d 1288, 1290 (6th Cir.), *vacated on other grounds*, 423 U.S. 993 (1975); Adams v. Carlson, 488 F.2d 619, 635-36 (7th Cir. 1973); *In re* Lynch, 8 Cal. 3d 410, 421, 503 P.2d 921, 928, 105 Cal. Rptr. 217, 224 (1972).

161. The Court technically applied a provision of the Philippine Bill of Rights, taken verbatim from the eighth amendment of the United States Constitution, because the eighth amendment itself was found inapplicable to an American official of the Philippine government. 217 U.S. at 367.

162. *Id.* at 366-67; *accord*, Downey v. Perini, 518 F.2d 1288 (6th Cir.), *vacated on other grounds*, 423 U.S. 993 (1975) (indeterminate sentence for the first drug-related offense of possession of a small amount of marijuana for sale violated the eighth amendment as disproportionate to the offense); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (1-year to life sentence for second-offense indecent exposure found cruel and unusual).

163. *Weems* is often cited for the proposition that punishment must be apportioned to the offense. *See, e.g.*, Downey v. Perini, 518 F.2d 1288, 1290 (6th Cir.), *vacated on other grounds*, 423 U.S. 993 (1975); Adams v. Carlson, 488 F.2d 619, 635-36 (7th Cir. 1973); *In re* Lynch, 8 Cal. 3d 410, 421, 503 P.2d 921, 928, 105 Cal. Rptr. 217, 224 (1972). The emphasis on proportionality is essentially a retributivist's point of view, Armstrong, *The Right to Punish*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 136 (G. Ezorsky ed. 1972), based on the principle that the punishment inflicted on the individual may not be more harmful than the harm that necessitated his punishment—the crime he committed. Under this approach, the deletorious effects of punishment, even if administered for rehabilitative purposes, cannot exceed the harm to society suffered by virtue of the criminal act. *See* Goldberg, *supra* note 82, at 361. With regard to behavior modification, this means that the harmful effects of the procedure chosen cannot be disproportionate to the harm to the state from the original criminal behavior.

cation context, the effects produced by a particular program are relevant factors in assessing the severity of the procedures vis-à-vis the benefits to be derived from altering the behavioral problems. Since behavior modification is a relative newcomer to the field of psychology, there remains a great deal to be learned about its advantages and drawbacks. Although behavior therapists undoubtedly can use their skills to effect important changes in behavior,[164] it is equally clear that at least some behavior modification procedures have the capacity to produce significant adverse side effects.[165] For example, whether or not a treatment program successfully alters the individual's behavior, it may cause other problems—pain, frustration, or increased aggressiveness.[166] In determining proportionality, the adverse effects of the particular procedure should be weighed against its rehabilitative value—the value derived from possible elimination of the criminal behavior. In order to achieve rehabilitation, however, a certain amount of adversity must be expected and tolerated. Only those procedures which produce grossly disproportionate adverse effects should fail.

A similar danger may arise where certain procedures are too effective, eliminating some behavior that is desirable as well as that which is undesirable. For example, a treatment that "cures" a shoplifter of his stealing habit may also result in his inability to walk into a department store to make a normal purchase.[167] In such situations, the punishment arguably exceeds that deemed commensurate with the nature or seriousness of the behavior sought to be altered. Thus, by overachieving its legitimate purpose, the procedure may violate the proportionality test of the eighth amendment.

The proportionality test, therefore, should balance all that is presently known about the particular procedure, including its success in the past in achieving the desired changes in behavior, its permanency, the nature and seriousness of the behavior to be extinguished, and the prognosis for success on the particular subject.[168] In addition, the side effects that have occurred in the past, the types of individuals who experienced those side effects their likely occurrence in the future, and the possibility of additional adverse effects, should be considered.[169] Where negative results are likely to outweigh the advantages to society

164. Moya & Achtenberg, *supra* note 3; Schwitzgebel, *supra* note 1, at 271, 287; Wexler, *supra* note 10, at 86-87, 102.

165. Schwitzgebel, *supra* note 1, at 287; Note, *supra* note 1, at 631.

166. These particular side effects, as well as several others, generally are associated with aversive therapy. *See* MIAMI SYMPOSIUM ON THE PREDICTION OF BEHAVIOR: AVERSIVE STIMULATION 78 (M. Jones ed. 1967).

167. Wheeler, *Introduction: A Nonpunitive World*, in BEYOND THE PUNITIVE SOCIETY 9-10 (1973).

168. *See* Friedman, *supra* note 8, at 98.

169. *Id.*

and the individual from the elimination of the target behavior, the procedure should be held to inflict cruel and unusual punishment. In doubtful situations, such as where little is known about the relative benefits and disadvantages of the proposed procedure, all presumptions should be drawn against its use.[170]

To illustrate how this balancing process would operate, consider the case of a shoplifter convicted numerous times. A system of aversion therapy, utilizing dangerous drugs, may well violate the eighth amendment proportionality test.[171] Weighed against the benefit to society and the individual from the elimination of the criminal behavior are the adverse physical effects it may produce. Although such therapy appears to achieve relatively high levels of success,[172] it also tends to produce significant side effects that are or may be harmful to the subject.[173] The probability of increased aggressiveness and the possibility of permanent damage to the subject's nervous system seem to outweigh the benefit from elimination of the shoplifting habit: the harm likely to result is disproportionate to the benefit to society accruing from successful completion of the procedure, making its imposition a violation of the eighth amendment.[174]

In summary, once a particular behavior modification procedure is classified as punishment, the program can be challenged on eighth amendment grounds. It is cruel and unusual if it is more severe than necessary to extinguish the undesirable behavior, that is, if a less drastic

170. Before initiating a behavior modification program on a prisoner, therefore, prison officials and behavioralists should carry the burden of showing the benefits of the particular program, and of showing that the benefits will most likely outweigh any negative effects on the individual prisoner.

171. *Cf.* Schwitzgebel, *supra* note 1, at 303.

172. *See* Barker & Miller, *supra* note 147.

173. See text & note 166 *supra.*

174. Although the excessiveness and disproportionality theories at first may appear synonomous, there is an important distinction between the two. The excessiveness test, requiring use of the least restrictive means of behavior modification, focuses on whether there is a less drastic procedure that can effectuate the state's legitimate penal goal. Under this test, all possible alternative procedures must necessarily be considered. See text accompanying note 113 *supra.* In contrast, the proportionality test ignores the possible alternative procedures, but instead balances the severity of the particular procedures at issue against the nature and seriousness of the behavior to be modified. *Compare* Robinson v. California, 370 U.S. 660, 667-68 (1962), *with* Downey v. Perini, 518 F.2d 1288, 1290 (6th Cir.), *vacated on other grounds,* 423 U.S. 993 (1975). *See also In re* Lynch, 8 Cal. 3d 410, 420-23, 503 P.2d 921, 927-29, 105 Cal. Rptr. 217, 223-25 (1972). Other similar or related punishments often are considered or compared under the proportionality test; unlike the inquiry under the excessiveness test, however, such comparisons are made only for the purpose of determining whether the particular procedure is disproportionate to the behavioral problems, rather than for the purpose of determining whether a less severe procedure exists for the particular situation at hand. An example involving the use of drug therapy on a convicted shoplifter provides clarification. Such therapy may be the least severe method of rehabilitating the individual, thus satisfying the excessiveness standard. The procedure, however, may necessarily induce uncontrolled vomiting, a harm that may clearly outweigh the harm of the initial crime. The procedure, therefore, would violate the proportionality test, even though it is not excessive in light of its legitimate penal goal.

method may instead be used to modify the behavior. Similarly, the procedure is unconstitutional if it offends the community sense of decency. Finally, the eighth amendment is violated if the procedure's negative effects clearly outweigh the benefit to society and the individual from the change in behavior.[175] Where a procedure violates the eighth amendment under any one of these three different standards, society cannot unilaterally impose it on the individual, regardless of the interest it seeks to further.[176] However, the eighth amendment may not be an absolute bar to behavior modification, even though deemed cruel and unusual punishment, if the individual can choose to submit to an otherwise unconstitutional procedure by waiving his rights under the eighth amendment. This possibility will now be explored.

WAIVER OF EIGHTH AMENDMENT PROTECTION

Having concluded that at least some behavior modification techniques may not survive examination under the cruel and unusual punishment clause of the eighth amendment, it is necessary to consider whether the individual, by consenting[177] to such a procedure, can waive any eighth amendment objections.[178] There are two questions raised in this regard. The first is whether the eighth amendment right is one that can properly be waived. Second, if the right is waivable, it becomes necessary to determine the circumstances under which it can be waived.

There is always a strong presumption against the waiver of constitutional rights,[179] with the usual requirement being a knowing and

175. In addition, the procedure must not be imposed through the exercise of arbitrary and discriminatory decisionmaking authority. *See* Furman v. Georgia, 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring); text & notes 95-107 *supra*; discussion note 108 *supra*.

176. *See* Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring); Trop v. Dulles, 356 U.S. 86, 99 (1958); United States *ex rel.* Kaganovitch v. Wilkins, 305 F.2d 715, 716 (2d Cir.), *cert. denied*, 371 U.S. 929 (1962).

177. It has already been argued that informed consent may properly be obtained in an institutional setting and should not be presumed invalid. See discussion note 69 *supra*. This argument, however, does not resolve the issue of whether waiver, the constitutional counterpart of informed consent, is possible in the eighth amendment context to justify imposition of procedures deemed cruel and unusual punishment.

178. Recognizing that punishment is largely subjective, one commentator has suggested that consent removes a procedure having recognized therapeutic value from the category of punishment, rendering a waiver analysis under the eighth amendment superfluous. *See* Friedman, *supra* note 8, at 70-71 n.159. That view has been rejected here, however, with consent relegated to only one of a number of objective factors considered in determining whether a procedure constitutes punishment. Under this approach, consent alone cannot render a procedure nonpunitive. See text & notes 69-76 *supra*. However, where an individual consents to a procedure classified as punishment, it becomes necessary to determine whether that consent will be a sufficient waiver of the right against cruel and unusual punishment. Therefore, possible waiver of the eighth amendment right against cruel and unusual punishment is a viable issue in situations where the procedure is found violative of the eighth amendment despite the individual's consent thereto.

179. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970); Boykin v. Alabama, 395 U.S. 238, 243 (1969); Miranda v. Arizona, 384 U.S. 436, 475 (1966); Johnson v. Zerbst,

voluntary relinquishment.[180] Nonetheless, many constitutional guarantees have been expressly held waivable, including the fourth amendment right against unreasonable search and seizure;[181] the fifth amendment protections against double jeopardy[182] and self-incrimination;[183] the sixth amendment rights to a speedy trial,[184] confrontation,[185] and counsel;[186] and the seventh amendment right to trial by jury.[187] Conversely, there appears to be no decision holding that any particular constitutional right cannot be waived.[188] Generally, "[w]hen there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he has been given the right to enjoy."[189] As this quotation suggests, however, there are several categories of rights that are not considered waivable. Where public policy is intertwined with the right so that the right belongs to the public as well as the individual, or the public has some interest in its absolute maintenance, it may not be waivable.[190] The rights that have been thus tied to public

304 U.S. 458, 464 (1938). *But cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973).

180. Brady v. United States, 397 U.S. 742, 748 (1970); Brookhart v. Janis, 384 U.S. 1, 4 (1966); Emspak v. United States, 349 U.S. 190, 197-98 (1955); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *But cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973).

181. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

182. *See, e.g.*, United States v. Hill, 473 F.2d 759, 763 (9th Cir. 1972); Oksanen v. United States, 362 F.2d 74, 81 (8th Cir. 1966); Hayes v. United States, 249 F.2d 516, 517 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); Robinson v. Neil, 366 F. Supp. 924, 926 (E.D. Tenn. 1973).

183. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966).

184. *See* Barker v. Wingo, 407 U.S. 514 (1972).

185. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970).

186. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966).

187. *See* Patton v. United States, 281 U.S. 276, 298 (1930); "Competency to Waive Constitutional Rights," 17 ARIZ. L. REV. 639, 729 (1975); *cf.* Brady v. United States, 397 U.S. 742 (1970).

188. *But cf.* Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970), *aff'd*, 403 U.S. 955 (1971), discussing the first amendment:

> Under prospectively favorable circumstances the non-public school institution might very well be willing to waive (as the defendants, in effect, offered to do here) the discomforts of entanglement, assured they would be made minimal and innocuous in sympathetic official hands. The Establishment Clause is the guardian of the interest of society as a whole and is particularly invested with the rights of minorities. It cannot be "waived" by individuals or institutions, any more than the unconstitutionality of state-prescribed school prayers could be "waived" by certain pupils absenting themselves from the classroom while they were conducted.

Id. at 432-33 n.32.

189. Schick v. United States, 195 U.S. 65, 72 (1904); *accord*, Patton v. United States, 281 U.S. 276 (1930); Barkman v. Sanford, 162 F.2d 592, 593 (5th Cir.), *cert. denied*, 332 U.S. 816 (1947).

190. *See, e.g.*, State v. Loveless, 62 Nev. 17, 26, 136 P.2d 236, 240 (1943) (dictum) (waiver of faulty verdict disallowed as "jurisdictional"); State v. Fransua, 85 N.M. 173, 174, 510 P.2d 106, 107 (1973) (consent no defense to aggravated battery); People *ex rel.* Battista v. Christian, 131 Misc. 411, 414, 227 N.Y.S. 142, 149-50 (Sup. Ct.), *rev'd on other grounds*, 224 App. Div. 243, 229 N.Y.S. 644, *rev'd on other grounds*, 249 N.Y. 314, 164 N.E. 111 (1928) (indictment is jurisdictional requisite and not waivable); *In re* Poston, 281 P.2d 776, 782-83 (Okla. Crim. App. 1955) (dictum) (lack of venue not jurisdictional and may be waived). "Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding

policy indicate that society has an interest in protecting the individual from himself. The issue essentially is whether the eighth amendment grants a right so strongly supported by public interest or public policy that waiver is forbidden.

To determine whether the public has an interest in the preservation of the eighth amendment right, it is necessary to recall the nature of this right. As noted,[191] the eighth amendment is based primarily on the concept of human decency.[192] Thus, it is the community sense of decency that determines in part what is violative of the eighth amendment. To this extent, the public has an interest in safeguarding the right thereby granted. Indeed, commentators and at least one court have stated that the eighth amendment proscription against cruel and unusual punishment is a right in which the public has an interest, thus foreclosing waiver.[193] This position, based largely on the argument that public policy forbids a person's consent to his own substantial injury,[194] is supported by repeated judicial refusals to allow consent to be raised as a defense to crimes and torts such as aggravated assault, battery, and mayhem.[195] This argument seems to be unassailable in certain eighth amendment situations, for example, where some physical abuse is contemplated. In such situations, the eighth amendment should not be considered waivable, since the public interest would be harmed thereby.[196] Public policy cannot tolerate a prisoner's consent to a punishment having no useful purpose in modern society, such as confinement in a strip cell with less than minimal facilities for food, water, and

interest in preventing and prohibiting acts such as these." State v. Fransua, *supra* at 174, 510 P.2d at 107.

It is also generally recognized that rights which are "jurisdictional," or fundamental to the procedural system, "the exercise of which [are] requisite to jurisdiction to try, condemn, and punish, [are] binding upon the individual and cannot be disregarded by him." Simonson v. Cohn, 27 N.Y.2d 1, 3-4, 261 N.E.2d 246, 247, 313 N.Y.S.2d 97, 99 (1970) (indictment under New York constitution). Since the eighth amendment right against cruel and unusual punishment is not of a procedural nature, it should not be subject to this limitation.

191. See text & notes 90-91 *supra.*

192. Trop v. Dulles, 356 U.S. 86, 101 (1958); Weems v. United States, 217 U.S. 349, 378 (1910).

193. *See, e.g.*, People *ex rel.* Battista v. Christian, 131 Misc. 411, 414, 227 N.Y.S. 142, 149 (Sup. Ct.), *rev'd on other grounds*, 224 App. Div. 243, 229 N.Y.S. 644, *rev'd on other grounds*, 249 N.Y. 314, 164 N.E. 111 (1928) (dictum); Friedman, *supra* note 8, at 70; 6 U. TOL. L. REV. 252, 271 (1974). The statements in these authorities were mere conclusions unsupported by analysis. *But cf.* Gilmore v. Utah, 97 S. Ct. —, 20 Crim. L. Rep. 3031 (U.S. Dec. 13, 1976), where the Supreme Court upheld a convicted murderer's waiver "of his right to seek an appeal," 20 Crim. L. Rep. at 3032, despite the possibility that such an appeal might successfully challenge the Utah death penalty statute. *Id.* at 3032 n.3. Three justices dissented on the ground that eighth amendment rights, rather than merely the right to appeal, were being waived; these justices concluded that such a waiver would be invalid, although no authority was cited. *Id.* at 3033 (White, Brennan & Marshall, JJ., dissenting).

194. *See* Friedman, *supra* note 8, at 69; text & note 72 *supra.*

195. *See, e.g.*, People v. Samuels, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (Ct. App. 1967), *cert. denied*, 390 U.S. 1024 (1968); Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948); State v. Fransua, 85 N.M. 173, 510 P.2d 106 (1973).

196. Friedman, *supra* note 8, at 70-71 n.159.

hygiene.[197] Where the procedure has some rehabilitative value, however, the waivability of eighth amendment rights should not be so easily dismissed. Although the public has an interest in preserving an individual's right against cruel and unusual punishment, that interest should not preclude an individual's opportunity to receive treatment that may improve his chances of reentering society as a contributing member. In such situations, there are very strong policy arguments favoring waiver.

The strongest such argument is the status of rehabilitation as an important function of incarceration.[198] Permitting an individual, for the sake of his own rehabilitation, to submit to procedures found to be cruel and unusual would further this purpose.[199] Rehabilitation is not only a legitimate interest of the state,[200] but also an interest of the public, since it is the public that will ultimately derive the benefits of successful rehabilitation.[201] Arguably, then, the public has an interest in the waiver of the right against cruel and unusual punishment[202] in this situation, to avoid potential frustration of rehabilitative efforts.

A second argument for allowing an individual to submit voluntarily to cruel and unusual behavior modification procedures stems from developing constitutional rights, such as the limited right to control one's own body,[203] the right to personal privacy,[204] the possible right to rehabilitation for persons confined in public institutions,[205] and first amendment religious freedoms.[206] A person has a definite interest in

197. *Cf.* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

198. *See* Comment, *A Jam in the Revolving Door*, *supra* note 21, at 238; Note, *supra* note 1, at 646-47; Comment, *The Role of the Eighth Amendment in Prison Reform*, *supra* note 21, at 659; 3 SETON HALL L. REV. 159, 167 (1971).

199. For example, an individual may prefer to undergo a treatment procedure that does not objectively qualify as the least severe method of rehabilitation, or one that is disproportionate to the criminal act, again on an objective level. On a subjective level, however, the alternative may be more appealing to the individual prisoner. *Cf.* example cited note 142 *supra*. Even though an objectively less severe punishment, or one that is more commensurate with the crime, may be a recognized treatment for the criminal behavior, the individual's decision to undergo another, perhaps more experimental, procedure should be considered.

200. See discussion note 21 *supra*.

201. That the rehabilitation of the criminal offender would be of value to society is self-evident. The criminal harms society by his activities; the ideal way in which to safeguard society is so to change the offender that he will cease harming society, that he will conform to societal norms instead of contravening them.

Leopold, *What is Wrong with the Prison System?*, in THE TASKS OF PENOLOGY, *supra* note 102, at 21, 22.

202. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973) (involving consent as waiver of a fourth amendment right against warrantless search and seizure): "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense."

203. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

204. Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess pornographic material in the privacy of the home); Ravin v. State, 537 P.2d 494 (Alas. 1975) (right to possess marijuana for personal consumption in the privacy of one's home).

205. *See* discussion & authorities cited note 21 *supra*.

206. A number of first amendment decisions indicate that an individual may choose to exercise religious preferences that are contrary to the beliefs and practices of the

determining what happens to his body and mind, despite society's abhorrence of the decision.[207] Such an interest, if recognized to any extent for a person confined in the prison environment,[208] would weigh strongly in favor of permitting waiver of eighth amendment protection.[209]

These arguments suggest that public policy does not necessarily prohibit the waiver of eighth amendment rights, at least in some instances. In order to determine the extent to which public policy should prevent waiver of eighth amendment rights, the issue of waivability should be examined separately under each of the three eighth amendment tests—excessiveness, community offensiveness, and disproportionality.

Public policy in part determines what is cruel and unusual punishment.[210] However, public policy also determines in large part those rights that can be waived.[211] In order for a right to be waivable, there must be no community sentiment for disallowing it;[212] that is, waiver must not contravene subjective sentiment reflected in public policy.

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majority of Americans, and that it is their constitutional right to make such a choice. *See* Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Holmes v. Silver Cross Hosp., 340 F. Supp. 125, 130 (N.D. Ill. 1972); *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972); *cf.* Craig v. State, 220 Md. 590, 155 A.2d 684 (1959); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

207. *See* Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A.L. REV. 89 (1976); Note, *The Right to Decide—Individual Liberty Versus State Police Powers*, 18 ARIZ. L. REV. 207 (1976).

208. The mere fact of imprisonment seemingly is not sufficient to abridge these basic personal rights. As the Supreme Court recently stated:

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen . . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. . . . They retain right of access to the courts. . . . Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. . . . Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.

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

209. A third argument supporting waiver exists in the situation where the only treatment program that is likely to eliminate the undesirable antisocial behavior has been held to contravene the eighth amendment. There are certain prisoners that can be considered incorrigible by normal standards, for whom only extraordinary means may achieve rehabilitation. Where the individual seeks to undergo a treatment which seems to be his only realistic opportunity for rehabilitation, a refusal to allow waiver of eighth amendment rights may preclude all rehabilitative attempts, in disregard of the prisoner's express desires.

210. The community conscience, as reflected in current public policy, determines whether a punishment violates the shock-the-conscience test. *See* Goldberg, *supra* note 82, at 359-60. Although the entire thrust of the eighth amendment concerns standards of human decency, the least-restrictive-means and proportionality tests are based on fairly objective standards and do not reflect the same community abhorrence that characterizes the shock-the-conscience test. *See In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

211. *See, e.g.*, People *ex rel.* Battista v. Christian, 131 Misc. 411, 414, 227 N.Y.S. 142, 149 (Sup. Ct.), *rev'd on other grounds*, 224 App. Div. 243, 229 N.Y.S. 644, *rev'd on other grounds*, 249 N.Y. 314, 164 N.E. 111 (1928); Friedman, *supra* note 8, at 70; 6 U. TOL. L. REV. 252, 271 (1974).

212. See text accompanying notes 189-90 *supra*.

Whereas excessiveness and proportionality are tests that admit of fairly objective standards,[213] the "human decency" or shock-the-conscience test is highly subjective.[214] The latter test may yield conflicting results from generation to generation, or perhaps even from one individual to the next. For this reason, it would seem that where a procedure fails to survive constitutional scrutiny under the human decency standard, public policy should also forbid waiver of eighth amendment protection.[215] The same public policy considerations leading to the determination that a punishment is cruel and unusual compel the conclusion that in these circumstances the eighth amendment cannot be waived. In such cases, the protection afforded by the eighth amendment under this subjective analysis is undermined by allowing an objective consent to what society deems shocking. On the other hand, where a procedure is violative of the eighth amendment because of its excessiveness in light of a legitimate penal objective or because of its disproportionality to the offense punished, no such subjective public policy considerations prohibit waiver.[216] Waiver of the safeguards against cruel and unusual punishment for a procedure violating the eighth amendment on one of these two grounds therefore should be respected.

Under properly rigorous procedural safeguards,[217] then, an individual should be permitted to consent to behavior modification techniques that contravene the eighth amendment's proscription against cruel and unusual punishment unless the reason that the procedure violates the eighth amendment is that it shocks the community conscience or common sense of decency. Where waiver is allowed, both the individual and society will benefit from the possible changes in the individual's behavior.

Once waiver has been made, an issue may arise as to its revocability, whether an individual is irretrievably foreclosed from withdrawing his consent once it is given. Some constitutional rights, although waived, can be reinstated at a later time.[218] The fifth amendment right

213. The excessiveness test deals with whether a less severe punishment is available for accomplishing a legitimate penal goal—it involves a balancing of the alternative procedures available. See text & notes 113-34 *supra*. The proportionality test also requires a balancing, in this case weighing the punishment imposed against the evil of the criminal behavior. See text & notes 159-76 *supra*.

214. See text & notes 135-58 *supra*.

215. It is likely, however, that in many cases the fact that a prisoner has given intelligent and voluntary consent to a procedure may mitigate against the court's finding that the procedure is shocking to the conscience in the first instance. Additionally, valid consent will weigh in favor of classifying the procedure as nonpunishment, thereby avoiding eighth amendment scrutiny altogether. See text & notes 69-76 *supra*.

216. A problem that develops from this analysis is the fact that courts have frequently held punishments violative of the eighth amendment without stating the test used. *See* authorities cited note 81 *supra*.

217. *See, e.g.*, CAL. PENAL CODE, §§ 2670-2680 (West Supp. 1976); Ayllon, *supra* note 42, at 11-13; Friedman, *supra* note 8, at 95-100.

218. *See* Stevens v. Marks, 383 U.S. 234, 243-44 (1966); United States v. Marcello, 423 F.2d 993, 1005-06 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970).

against self-incrimination, for example, is waivable, but such a waiver is revocable at any time in the subsequent course of the criminal process.[219] Similarly, the sixth amendment right to counsel, though initially waived, also can be recalled at any time during the pendency of the action.[220] Other rights, however, once waived, may not be subject to recall.[221] Thus, waiver of the right to confrontation,[222] the right to a speedy trial,[223] or the fourth amendment protection against unreasonable search and seizure,[224] can and in most cases will be irrevocable. An important distinction appears between those instances in which waiver is revocable and those in which it is not. The rights which are revocable seem to entail ongoing judicial procedures, thus facilitating adjustments which may be required by the revocation.[225] On the other hand, waivers deemed irrevocable seem to be so classified because the relevant portion of the criminal process would be seriously disrupted or prejudiced by the revocation. In such cases, the opportunity to revoke the waiver is considered to have passed. Therefore, revocation seemingly is based primarily on the opportunity to alter the criminal process in such manner as may be required by the revocation.[226]

With regard to behavior modification in the prison setting, no serious disruption would appear to be occasioned were the program required to halt upon the prisoner's withdrawal of consent. The individual therefore should be free to reassert his eighth amendment rights at any time during the program,[227] even though the ultimate purpose of the program may thus be defeated.[228] However, where the procedure has advanced to the point where irreparable harm would result to the prisoner from its suspension, waiver should be considered irrevocable.[229] In this way, maximum societal and individual benefit can be derived from the waiver, while preserving the individual's right against cruel and unusual punishment at the same time.

CONCLUSION

Society has grappled for centuries with the problem of reducing the

219. Miranda v. Arizona, 384 U.S. 436, 479 (1966).
220. *Id.*
221. *See* United States v. Marcello, 423 F.2d 993, 1005-06 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970). *See also* authorities cited notes 222-25 *infra.*
222. *See* Illinois v. Allen, 397 U.S. 337 (1970).
223. *See* Barker v. Wingo, 407 U.S. 514 (1972).
224. *Compare* United States v. Hughes, 441 F.2d 12, 16 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971), *with* United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973). *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
225. *See* Stevens v. Marks, 383 U.S. 234, 243-44 & n.10 (1966).
226. *See* United States v. Ives, 504 F.2d 935, 939-40 (9th Cir. 1974); United States *ex rel.* Rush v. Ziegele, 474 F.2d 1356, 1359 (3d Cir. 1973).
227. *See* Ayllon, *supra* note 42, at 12.
228. *See* Wexler, *supra* note 66, at 139.
229. *Cf.* United States v. Marcello, 423 F.2d 993, 1005-06 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970).

incidence of crime through some form of punishment, and has yet to find a solution which is both effective and acceptable. While traditional purposes of punishment have failed to make significant inroads on the rising crime rate, rehabilitation may reasonably afford such results. It is imperative that the rehabilitative ideal not be rejected before it is fully tested. Rehabilitation of offenders has the potential for benefiting both the offender and society. The rehabilitative device of behavior modification, although in its scientific infancy, has already shown potential for use in the correctional setting. The important societal goal of reducing crime should temper the public's emotional fears of new methods such as behavior modification, and under carefully prescribed conditions, the eighth amendment should not stand as a bar to the use of all behavior modification procedures in American prisons. Courts must objectively analyze the merits of a proposed or challenged program in order to afford maximum constitutional protection without stifling the rehabilitative ideal. This result may be achieved by striking a reasonable balance between the interests of society in reducing the incidence of crime through rehabilitation and the eighth amendment guarantee against cruel and unusual punishment.