COMMENT

*KAIMOWITZ V. DEPARTMENT OF MENTAL HEALTH**: INVOLUNTARY MENTAL PATIENT CANNOT GIVE INFORMED CONSENT TO EXPERIMENTAL PSYCHOSURGERY

I. INTRODUCTION

Psychosurgery[1] is the most drastic means of affecting human behavior. It produces an immediate, extensive and irreversible change in the subject's personality; it requires a physical intrusion into the brain; it is impossible for a subject to resist. So drastic a technique has naturally generated much mistrust. Congressmen have called for a moratorium[2] or ban[3] on such operations and a Senate subcommittee has recently conducted hearings in an attempt to gather information for an empirical analysis of psychosurgery.[4]

Surgery on the human brain has been practiced in the United States since lobotomies[5] were first performed in 1936.[6] Many lobotomies have caused emotional disturbances and impaired judgment;[7] it is not a procedure generally performed today. Recently there have been several hundred psychosurgical operations performed each year in this country,[8] yet no legal challenges to psychosurgery appeared until 1973. In July of that year, the Wayne County Circuit Court for the State of Michigan, in *Kaimowitz v. Department of Mental Health*,[9] held that an involuntarily committed mental patient is incapable of giving legally adequate consent to experimental psychosurgery.

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* Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973), noted in 42 U.S.L.W. 2063 (1973). The court's opinion, in edited form, appears in 2 Prison L. Rep. 433 (1973).

1. Psychosurgery is the physical removal, destruction or severing of brain tissue in order to affect behavior. See testimony of Dr. Bertram S. Brown, Hearings on S. 974, S. 878 and S.J. Res. 71 before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess., at 339 (1973) [hereinafter Senate Hearings]. Psychosurgery differs from drug therapy (which involves a chemical ingestion), shock therapy (in which the nerves are stimulated) and psychotherapy (which is based on communication between therapist and patient).

2. S.J. Res. 86, 93d Cong., 1st Sess. § 1 (1973).

3. H.R. 5371, 93d Cong., 1st Sess. (1973).

4. Senate Hearings, supra note 1.

5. Lobotomy is the destruction of the subcortical connections of the brain's frontal lobes. See testimony of Dr. Bertram S. Brown, Senate Hearings, supra note 1, at 339.

6. Id.

7. Id. at 340.

8. "[B]est estimates, [are] anywhere from 600 to 900 practices a year." Sen. Edward Kennedy, Senate Hearings, supra note 1, at 841.

9. The plaintiffs were Gabe Kaimowitz, on behalf of himself and certain members of the Medical Committee for Human Rights, Louis Smith and all other patients being considered as subjects for the experiment. The defendants were the Michigan Department of Mental Health, Dr. E.G. Yudashkin, Director of the Michigan Department of Mental Health, Dr. J.S. Gottlieb, Director of the Lafayette Clinic, a facility of the Michigan Department of Mental Health, and Dr. Ernst Rodin, Dr. Gottlieb's associate. The American Orthopsychiatric Association was granted permission to cross-examine witnesses, to bring in its own witnesses, and to file a brief as *amicus curiae*. Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973) at 1, 6.

II. FACTS AND HOLDINGS

In 1972, two doctors filed with the Michigan Department of Mental Health a "Proposal for the Study of the Treatment of Uncontrollable Aggression at the Lafayette Clinic."[10] The Proposal called for twenty-four criminal sexual psychopaths[11] involuntarily confined in the Michigan mental health system to be used as subjects. One group was to be treated with drugs, while the rest, if proper consent could be obtained, were to be the subjects of psychosurgery.[12] Electrodes would be planted in their brains in order to determine areas of abnormal brain function.[13] Once such areas had been found, the electrodes would be removed and the relevant portion of the brain destroyed.[14]

Louis Smith had been charged in 1954 with murder and rape,[15] and in 1955 was committed without trial to Michigan's Ionia State Hospital as a criminal sexual psychopath.[16] He was chosen as a subject for the experiment. After Smith and his parents signed a consent form authorizing the psychosurgery,[17] the medical and ethical aspects of the procedure were reviewed by committees established for that purpose.[18] Although Smith was the only appropriate subject who could be found,[19] the decision was made to proceed with the experiment.[20]

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10. Civil No. 73-19434-AW at Appendix 1 [hereinafter Proposal].

11. [From about the end of World War II] many people in the United States, and consequently their elected representatives, evidenced great concern over what appeared to be an alarming increase in the number and seriousness of sex crimes. As a result, many states enacted statutes providing special treatment for sex offenders, who were thought to constitute a public menace greater than ordinary law violators. For the most part, the legislation was hasty and ill-considered. Not only were relatively harmless offenders swept within the ambit of the statute, but more serious offenders frequently escaped its operation completely. In addition, because these statutes were generally characterized as 'remedial' in nature, traditional procedural safeguards for criminal defendants were sometimes wholly abandoned.

Tenney, Sex, Sanity and Stupidity in Massachusetts, 42 Boston U.L. Rev. 1, 10 (1962).

12. Civil No. 73-19434-AW at Appendix 2, 5-6.

13. Id. at 3.

14. Id.

The Proposal left open such questions as which parts of the brain would be operated on; whether operations would be undertaken without a clear demonstration of physical abnormality in the brain, and the nature and duration of follow-up studies.

Brief for American Orthopsychiatric Association as Amicus Curiae at 6, Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973) [hereinafter Amicus Brief]. If no area of electrographic abnormality was found the electrodes would be withdrawn and no further surgery performed. Id. The Amicus Brief and all other briefs cited are on file in the office of the Review of Law and Social Change.

15. A necrophiliac, Smith had strangled a nurse and sexually assaulted her dead body while committed to a psychiatric institute. Civil No. 73-19434-AW at 2. See E. Valenstein, Brain Control 342 (1973).

16. The statute under which Smith was committed, P.A. 1939, No. 165, § 1, as amended P.A. 1950, Ex. Sess., No. 25, § 1, was repealed in 1968. He was then detained under Mich. Comp. L. § 330.35(b) (Supp. 1974), which provides for further detention and release of criminal sexual psychopaths under the repealed statute. Civil No. 73-19434-AW at 2 n.2.

17. The form is reproduced in Civil No. 73-19434-AW at 4.

18. The Scientific Review Committee consisted of three physicians; the Human Rights Review Committee consisted of a lawyer-psychologist, a clergyman and an accountant. Id. at 5.

19. Id. at 3.

The experiment must have been planned to take place over a considerable period, until the requisite number of subjects could be found, though this is nowhere spelled out.

20. Shortly after the Proposal was submitted, the Michigan legislature voted $228,000 to

Upon learning of the proposed surgery early in 1973, plaintiff Kaimowitz, a professor of law at Wayne State University, filed suit on behalf of Smith. After testimony by Smith and by a psychiatrist who asserted that Smith did not pose an unreasonable danger to the community, a three-judge court held that Smith's detention was unconstitutional and ordered his release.[21] As a result of the adverse publicity surrounding the case, the Michigan Department of Mental Health withdrew funds for the project, which was subsequently terminated.[22]

With the program abandoned, the Department of Mental Health contended, in a subsequent proceeding, that the case had become moot. After full argument, however, the court ruled against the Department, properly holding that as the program could be reinstituted, "the matter was ripe for declaratory judgment."[23] Two issues were framed: (1) whether there can be valid consent for experimental or innovative psychosurgery from an adult subject involuntarily committed to the state mental health system; and, if so, (2) whether the state may permit such psychosurgery. By answering the first question in the negative, holding that "involuntarily detained mental patients cannot give informed and adequate consent to experimental psychosurgical procedures on the brain,"[24] the court avoided grappling with the issues raised by the second question. Since it is an established principle that any medical treatment given to a patient without his consent constitutes a battery,[25] the court grounded its holding partly in tort law. In addition, the court claimed that to perform the operation under the circumstances would constitute an infringement of Smith's constitutional rights.

III. THE HIGH-RISK, LOW-BENEFIT RATIO

The risk-benefit ratio is a device used by physicians to determine the advisability of a medical procedure.[26] Although not actually expressed as a ratio, the term denotes the two classes of factors to be weighed against one another: the risk of failure or adverse effects versus the probability of achieving the desired result.

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fund the project for the fiscal year 1972. In response to adverse public reaction, the grant was subsequently cancelled. E. Valenstein, Brain Control 342 (1973).

21. Civil No. 73-19434-AW at 6.

22. Smith himself withdrew his consent to the experiment after the project was cancelled and he had been released. N.Y. Times, Apr. 5, 1973, at 26, cols. 1-8.

23. Civil No. 73-19434-AW at 7. The Supreme Court in United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968) held that

> [t]he test for mootness in cases such as these is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); see, e.g., *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes.

24. Civil No. 73-19434-AW at 31.

25. Fiske v. Stone, 8 Ariz. App. 585, 448 P.2d 429 (1968); R. Long, The Physician and the Law 39 (1968); Kelly, The Physician, the Patient, and the Consent, 8 Kan. L. Rev. 405 (1960); Smith, Battery in Medical Torts, 16 Clev.-Mar. L. Rev. 22 (1967).

26.

> 6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

United States v. Karl Brandt, 2 Trial of War Criminals Before the Nuernberg Military Tribunals

In considering the risks involved, the court was acutely sensitive to the operation's innovative nature, excluding "accepted" forms of psychosurgery[27] from the scope of the decision. Because of the paucity of knowledge about the brain, the complexity of interaction among its various sections, the irreversible nature of brain surgery, and the common law and constitutional interests at stake, the court stressed that any intrusion must be tempered with the utmost caution.[28] Since neither "animal experimentation" nor "non-intrusive human experimentation" had been exhausted, the court concluded that the procedure presented a very considerable risk.[29]

Turning to the possible benefit to the subject, the court found that no relation of brain function to abnormal aggressive behavior had been clinically established,[30] and noted that absent a "medically recognized syndrome for aggression and objectionable behavior associated with nonorganic brain abnormality, . . . nothing pinpoints the exact location in the brain of the cause of undesirable behavior."[31] On the other hand, there was a possibility of certain adverse consequences, such as a sedative effect upon behavior[32] or even a heightened rage reaction,[33] making it unclear that the operation could provide any benefit for Smith. Taking into account the high risk[34]

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182 (1947) [hereinafter Nuernberg Tribunals]. The ten principles enunciated therein have come to be known, and will hereinafter be referred to as, the Nuremberg Code.

> In routine medical practice, if the use of a vaccine . . . involved the risk of causing some disease, such risk must be weighed carefully against the risk the patient runs if he does *not* receive the vaccine. In the case of a drug, the undesirable side effects it may produce must be weighed against what may happen to the patient if he does *not* take it. Thus a cancer therapy that might prolong the patient's life but also cause his hair to fall out would undoubtedly be judged acceptable.

Smith, Human Experimentation: A Game Without Rules, 6 Family Health, June 1974, at 24, 48. See Senate Hearings, supra note 1, at 727.

27.

> The surgical treatment of epilepsy, while in one sense a form of psychosurgery since behavioral symptoms are altered, should be excluded from this discussion when the disease can be clearly diagnosed and there is convincing evidence that epilepsy is caused by organic pathology in the brain.

Statement of Dr. Bertram S. Brown, Senate Hearings, supra note 1, at 339. In addition to epilepsy, "accepted" forms of psychosurgery would include treatment of Parkinson's disease, tumor, stroke or trauma of the brain. U.S. Dep't of Health, Educ. & Welfare, Psychosurgery: Perspective on a Current Issue 1 (1973).

28. Civil No. 73-19434-AW at 12.

29. Id. at 13; see note 134 infra.

30. See note 136 infra.

31. Civil No. 73-19434-AW at 15, 17; see note 137 infra.

32.

> Psychosurgery flattens emotional responses, leads to lack of abstract reasoning ability, leads to a loss of capacity for new learning and causes general sedation and apathy.

Civil No. 73-19434-AW at 17.

> [P]sychosurgery . . . often leads to the blunting of emotions, the deadening of memory, the reduction of affect, and limits the ability to generate new ideas.

Id. at 36.

33. One doctor reported "worse rages in his patients post-operatively, subsequently replaced by placidity combined with a generally more infantile volatile behavior." Amicus Brief, supra note 14, at 36.

34. "A very small chance of death or serious disablement may well be significant." Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972). That case held that a 1% chance of paralysis constituted a risk of serious harm. Compare the risks of the instant experiment:

> These risks include infection, bleeding, temporary or permanent weakness or paralysis of one or more of my legs or arms, difficulties with speech and thinking, as well as the ability to

and uncertain benefit of the experiment, the court concluded that the "risk-benefit ratio" was quite high,[35] and in this instance clearly militated against the propriety of the experiment.

IV. INFORMED CONSENT

Informed consent is a *sine qua non* for human experimentation.[36] A subject must give his informed consent to any experiment—indeed, to any medical procedure to be used on him.[37]

In response to plaintiff's contention that no involuntarily confined mental patient is capable of informed consent, one of the defense attorneys advanced three arguments in support of the proposition that consent which is truly informed is rarely achieved in most medical procedures: (1) by the very nature of the doctor-patient relationship "[p]atients are likely to consent to almost anything a competent doctor wants;" (2) a layman's difficulty in understanding the medical procedure he is consenting to may preclude a "knowing" consent; and (3) patients are often anxious to consent to innovative procedures without considering the risks involved.[38] Therefore the state urged that the adequacy of consent should be determined not by categories—e.g., whether the patient is involuntarily confined in a mental hospital—but "only by evaluation on an individual basis in terms of what the doctor said, did and how [he did it], to which patient and under what circumstances, and for what purpose."[39] The court interpreted this as an attack on the concept of informed consent and rejected the argument, unwilling to forsake a principle so well established.[40]

The opinion conceded that those situations in which informed consent may be legally acceptable cannot be classified in absolute terms.[41] However, the court's criterion in a case-by-case analysis would be the risk-benefit ratio of the experiment,[42] rather than the standards suggested by defense counsel. This does not necessarily mean that there would be different standards for informed consent depending on the risk-benefit ratio. It need only mean that where the possible risk to the subject increases, so too must the scrutiny with which the court examines his consent.[43] Accordingly, rather than apply a different legal yardstick for each situation, the court determined that legally adequate consent must be obtained in all situations, and that those cases with an inordinately high risk-benefit ratio warrant a more intensive evaluation.[44]

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feel, touch, pain and temperature. Under extraordinary circumstances, it is also possible that I might not survive the operation.

"Informed consent" form, reproduced in Civil No. 73-19434-AW at 4.

35. Id. at 13, 16, 22, 29.

36. Fortner v. Koch, 272 Mich. 273, 261 N.W. 762 (1935); Fiorentino v. Wenger, 26 App. Div. 2d 693, 272 N.Y.S.2d 557 (1966), rev'd as to defendant hospital, 19 N.Y.2d 407, 227 N.E.2d 296, 280 N.Y.S.2d 373 (1967); Waltz & Scheuneman, Informed Consent to Therapy, 64 Nw. U.L. Rev. 628, 632-34, 640 (1969). Standards of informed consent have been codified in the Nuremberg Code, supra note 26; World Medical Ass'n, *Declaration of Helsinki*, in Experimentation with Human Beings (J. Katz ed. 1972).

37. See case and materials cited in note 25 supra.

38. Brief for defendants Rodin and Gottlieb at 26-27, Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973).

39. Id. at 28.

40. Civil No. 73-19434-AW at 20-21.

41. Id. at 22.

42. "When a procedure is experimental, dangerous, and intrusive, special safeguards are necessary." Id.

43. See Amicus Brief, supra note 14, at 53-54.

44. Civil No. 73-19434-AW at 22.

Traditionally, judicial scrutiny of consent has been stricter in instances of nontherapeutic experimentation than in therapeutic cases.[45] One way for a court to categorize an experiment in this manner is to ask whether the doctor is doing it for the patient, or the patient is doing it for the doctor.[46] The procedure is therapeutic if the former question is answered in the affirmative and the latter in the negative. Of course, the range of medical techniques may embrace a variety of purposes, and, as in the instant case, the question often can be answered both ways—the experiment will provide scientific knowledge and, at the same time, it is hoped that it will provide some benefit to the patient. In the present case, however, there are several reasons which indicate that the therapeutic consideration was secondary. First, the Proposal was made, and the experiment planned, before the experimenters knew of the existence of Louis Smith.[47] Furthermore, the experiment continued even after it became apparent that Smith did not suffer from frequent and recurring attacks of violence.[48] Indeed, the evidence that such an operation would be of any benefit to Smith was inconclusive,[49] while the risks of adverse effects were admittedly great.[50] It is also significant that the experiment was cancelled as soon as unfavorable publicity ensued, apparently with little thought given to the possible denial of therapy to Smith.[51] In short, the conduct of the physicians in charge of the project and the circumstances surrounding their acts indicate that the experiment was primarily nontherapeutic, and therefore one which, under the reasoning of the court, warranted strict judicial scrutiny with regard to Smith's consent.

Turning to the task of ascertaining whether Smith was in fact capable of informed consent, the court adopted from the Nuremberg Code[52] three standards

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45. See Grad, Regulation of Clinical Research by the State, 169 N.Y. Acad. of Sciences, Annals 533, 534 (1970); Shartel & Plant, *Consent to Experimental Medical Procedures, Failure to Follow Standard Procedures*, in Clinical Investigation in Medicine 223 (I. Ladimer & R. Newman eds. 1953).

46. Grad, supra note 45, at 534.

47. The Proposal was first prepared in the late summer or early fall of 1970. Amicus Brief, supra note 14, at 6. Smith, however, did not consent to the experiment until October 27, 1972. Civil No. 73-19434-AW at 4.

48. It is difficult to disagree with the statement of Smith's counsel:

> The central bases for [Smith's] eligibility . . . were an aggressive act eighteen years earlier, his reports of "undesirable emotional surges," and a somewhat abnormal scalp EEG reading.

Brief for Plaintiff Smith at 45, Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973) [hereinafter Smith Brief]. This was supported by testimony at the trial:

> Dr. Watson said that he had read the whole history of Mr. [Smith] and that he would be "very hard-pressed to identify one episode as one of uncontrollable anger."

N.Y. Times, Apr. 5, 1973, at 26, col. 8.

49. See text accompanying notes 30-33 supra, 133-45 infra.

50. See notes 32-34 supra.

51. There is no direct documentary evidence on this point.

52.

> 1. The voluntary consent of the human subject is absolutely essential.
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> This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the nature, duration and purpose of the experiment; the methods and means by which it is to be con-

governing an individual's capacity to give informed consent: competency, knowledge and voluntariness.

A. Competency

Competency, the court recognized, "requires the ability of the subject to understand rationally the nature of the procedure, its risks, and other relevant information."[53] The court found that Smith's competency was "particularly vulnerable as a result of his mental condition, the deprivation stemming from involuntary confinement, and the effects of the phenomenon of 'institutionalization.' "[54]

The opinion, however, seems to ignore the absence of any evidence that Smith was mentally incapable of understanding the proposed experiment. In addition, the criteria determining eligibility for the project, which Smith is said to have met, included the requirement that "[t]he patient should be mentally competent to the extent that he fully comprehends the procedure of depthelectrography and possible stereotactic surgery."[55] The court appears to concede Smith's intellectual competency, and at one point distinguishes between the capacity to make a competent decision and intellectual competency itself.[56] Yet this distinction is nowhere defined, and seems to violate the court's own definition of competency.[57] While the court maintains that institutional confinement undermines the ability to give adequate consent, it fails to explain how this bears on the question of competency. A more logical analysis would recognize that what is really being diminished by confinement is not the patient's competency, which has to do with his general intellectual capacity, but rather his ability to give voluntary consent.

Since "the damaged organ is the consenting organ" in the case of psychosurgery,[58] it is likely that the patient's competency may be severely diminished or eliminated entirely. Mental patients may have disabilities which impair their intellectual processes to such an extent that they are incapable of understanding the procedure involved.[59] While this group would be *per se* incompetent to give informed

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> ducted, all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

Nuernberg Tribunals, supra note 26, at 181-82.

53. Civil No. 73-19434-AW at 25. Compare the basic test for competency to stand trial: that the defendant be able to comprehend his position and to participate rationally in his defense. The Mentally Disabled and the Law 409 (2d ed. S. Brakel & R. Rock eds. 1971).

54. Civil No. 73-19434-AW at 25.

55. *Id.* at Appendix 8.

56. "The fact of institutional confinement has special force in undermining the capacity of the mental patient to make a competent decision on this issue, even though he be intellectually competent to do so." Id. at 26.

57. See text accompanying note 53 supra.

58. Testimony of Dr. Willard Gaylin, Senate Hearings, supra note 1, at 377.

59. In some states the very fact of involuntary hospitalization for mental illness is equivalent to a prior adjudication of incompetency. For example, West Virginia provides:

> The entry of an order ordering hospitalization for an indeterminate period shall relieve the patient of legal capacity.

W. Va. Code Ann. 27-5-4 (1971). In other states there is express provision that an involuntarily hospitalized mental patient is not necessarily incompetent. In Oregon, for example:

> No person admitted to a state hospital for the treatment of mental illness shall be considered by virtue of the admission to be incompetent.

Ore. Rev. Stat. 426.295(1) (1973). However, it should be noted that such statutes refer to competency regarding the management of property, which is not necessarily the same as competency to give informed consent to a medical procedure.

consent, there is no reason why those with intellectual competency should automatically be excluded from those who are capable of consenting.[60]

B. Knowledge

The opinion suggests that a knowledgeable consent was "literally impossible" because of the dearth of scientific information regarding psychosurgery of this kind.[61] Indeed, such an experiment had never been performed anywhere.[62] But if the court's reasoning is given full effect here, the second issue regarding the legality of such an operation[63] is implicitly resolved. If there exists insufficient knowledge for informed consent, it is insufficient for *everybody,* not just for patients like Smith. On the other hand, the court explicitly disavowed any ruling on the second question.[64]

While the opinion did not refer to this inconsistency, the briefs of *amicus curiae* and counsel for Smith did acknowledge it, and provided an explanation.[65] Owing to the lack of sufficient medical research into many important aspects of the procedure, there are "substantial doubts" about whether consent to such an experiment can be knowing. There are also significant doubts regarding the patient's voluntariness. It is the conjunction of these doubts with the high risk-benefit ratio of this case that compelled the court to hold there could be no knowing consent. In other words, the court did not decide that there is not enough knowledge for *any* adequate consent to this operation, but rather that the lack of knowledge pertaining to *this* experiment put the operation "at the far end of legally permissible experiments," and that such an operation therefore could not be performed "on a population whose participation is . . . at the far end of the legally permissible spectrum for truly voluntary consent."[66]

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60. The latter group, of course, would be subject to the general limitations on the informed consent of otherwise competent patients, i.e., there may be no consent to murder or mayhem.

> [T]he common law so vehemently assumes that the layman would not understand the technicalities of an experiment that the rule was created that a subject's "informed consent" would not be likely to survive a retrospectively proven hazard of a level which the law would condone in the employment contracts of police and firemen and which is imposed by the Selective Service System.

Lederberg, The Freedoms and the Control of Science: Notes from the Ivory Tower, 45 S. Cal. L. Rev. 596, 599 n.8 (1972). See Note, Experimentation on Human Beings, 20 Stan. L. Rev. 99, 116 (1967); Kidd, *Limits of the Right of a Person to Consent to Experimentation on Himself,* in Clinical Investigation in Medicine 233, 236 (I. Ladimer & R. Newman eds. 1953).

61. Civil No. 73-19434-AW at 27.

62.

> Depth electrography has never been utilized on a person who did not suffer from epilepsy, Parkinson's Disease, or other major neurological disorders. There are *no* depth EEG readings for anyone like [Louis Smith].

Amicus Brief, supra note 14, at 29, referring to testimony of Dr. Richard D. Walter and Dr. Ernst Rodin.

63. See text accompanying note 24 supra.

64. Civil No. 73-19434-AW at 40.

65. Amicus Brief, supra note 14, at 64-67; Smith Brief, supra note 48, at 17, 42.

66. Smith Brief, supra note 48, at 42.

It has been noted by several commentators that all experimentation involves unknown risks—that, indeed, if all the risks were known there would be no need for the experiment. See Barber, Experimenting with Humans, in Senate Hearings, supra note 1, at 1146; Beecher, *Experimentation in Man,* in Clinical Investigation in Medicine 31 (I. Ladimer & R. Newman eds. 1953); McCance, *The Practice of Experimental Medicine,* in Experimentation with Human Beings (J. Katz ed. 1972); Mulford, Experimentation on Human Beings, 20 Stan. L. Rev. 99, 106 (1967); Waltz & Scheuneman, supra note 36, at 632. Although the court does not say how much knowledge the experimenter must have in order to be able to impart an adequate amount

C. Voluntariness

Turning to the third component of informed consent, voluntariness, the court noted that the Nuremberg Code refers to a "free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion."[67] The court found that mental institutions create a pervasive atmosphere of constraint and coercion.[68] One conspicuous example noted by the court is the control which institutional authorities have over the patient's privileges.[69] The involuntary patient becomes dependent on the doctor, and tends to tell the physician what he thinks the physician wants to hear.[70] Furthermore, the inability to make decisions about one's life may foster habits of assent which are difficult to break. Finally, the patient may believe—and testimony indicated that this was the case with Smith[71]—that evidence of "cooperativeness" will hasten his release.[72]

A diminished capacity for voluntary consent has often been ascribed to inmates of penal institutions,[73] and has led many writers to advocate a total ban on the use of prisoners for medical experimentation.[74] All who have discussed the subject stress the need for close control and supervision where such experimentation is undertaken.[75] The opportunities for coercion or constraint in mental hospitals are

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of information to the subject, it has been stated elsewhere that in experimental situations the standard of reasonable medical practice controls. Id. at 633. The applicable test becomes, therefore, whether a reasonable physician would have felt that his knowledge of the procedure and its possible risks was sufficient to justify the experiment. See text accompanying notes 133-45 infra.

67. Civil No. 73-19434-AW at 27.

68. Id. at 26.

69. Id. at 28. Erving Goffman has described the process of "self-mortification" prevalent in "total institutions":

> [Such institutions are places] of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.

E. Goffman, Asylums xiii (1961). See D. Vail, Dehumanization and the Institutional Career (1966); Total Institutions (S. Wallace ed. 1971).

70. Testimony of Dr. E.G. Yudashkin, Amicus Brief, supra note 14, at 71.

71. Civil No. 73-19434-AW at 28; Amicus Brief, supra note 14, at 69.

72. It was stated at the trial that the inmate's lack of freedom causes him to believe that his life is not as worthwhile as before, which leads him "to not prize his own bodily integrity as much as someone on the outside." Statement of counsel, assented to by Dr. Paul Lowinger, Brief for Plaintiff Kaimowitz at 24, Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973) [hereinafter Kaimowitz Brief].

73. See, e.g., Experimentation with Human Beings 1013-52 (J. Katz ed. 1972); Clinical Investigations in Medicine 461-72 (I. Ladimer & R. Newman eds. 1963); Senate Hearings, supra note 1, at 793-1024; E. Valenstein, Brain Control 342-45 (1973); Bach-y-Rita, The Prisoner as an Experimental Subject, 229 J. Amer. Med. Ass'n 45 (1974); Capron, Medical Research in Prisons, 3 Hastings Center Report, June 1973, at 4. Morris & Mills, Prisoners as Laboratory Subjects, The Wall Street Journal, Apr. 2, 1974, at 12, col. 3.

74. The authorities cited in note 73 supra contain several such proposals. In addition, see Feinberg, Medicine and Liberty, Civil Liberties, No. 288, July 1972, at 1, col. 1. Dr. Vernon Mark, a noted psychosurgeon, has written:

> Prison inmates suffering from epilepsy should receive only medical treatment; surgical therapy should not be carried out, because of the difficulty in obtaining truly informed consent.

Mark, Brain Surgery in Aggressive Epileptics, 3 Hastings Center Report, Feb. 1973, at 1, 5 n.1.

75. Two reasons are frequently given in support of these conclusions: first, volunteering for experiments is one of the few ways to obtain money and relieve the boredom of prison life;

at least as great as those in prisons. There are several reasons for this. First, since the length of a patient's stay is undetermined, and the experimental procedure may directly affect the mental condition responsible for his confinement, his belief that he can secure his freedom by cooperating will consequently be stronger.[76] Second, the patient's urgent desire to recover, coupled with his dependence upon the doctor as the individual who can help him get well, gives rise to a psychological phenomenon common to institutionalized mental patients generally, whether or not involuntarily committed: a high degree of receptivity to any treatment the doctor may suggest. As a result the physician has a great deal of power which might be wielded to induce the patient to become an experimental subject.[77] Indeed, it has been proposed that doctors generally should never be allowed to recruit their own patients for experiments.[78] Finally, a patient who is continually treated as mentally defective may come to suspect the workings of his own mind and subconsciously to feel that he cannot trust his own decisions.[79]

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second, a convict may believe, with or without cause, that he will hasten his parole by submitting to the experiment. See the authorities cited in note 73 supra.

Moreover, there is some evidence that proportionately more prisoners than nonprisoners will volunteer for a given experiment. A recent study reports that 66% of prisoners were willing to volunteer for malaria research, but only 7.5% of the firemen and policemen, and none of the professionals interviewed. Martin, Human Subjects in Clinical Research, 279 New Eng. J. of Med. 1426 (1968). It is noteworthy that 96 of 175 inmates at a Pennsylvania prison had protested the state's ban on prisoner experimentation, claiming that the research did not harm them, but rather enabled them to pay court costs and fines. Morris & Mills, supra note 73.

76.

> [I] find it difficult to believe that a person who is incarcerated, with an indefinite sentence, will—can really be a volunteer in such a test, because there is a very strong motivation which is always present that he is going to reap some benefit from this in terms of his personal freedom . . . .

Testimony of Dr. A.K. Ommaya, Kaimowitz Brief, supra note 72, at 18. According to one commentator, "though not feeling compelled to consent, the inmate may do so to curry favor with the therapist who may later give him a break." Note, Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients, 45 S. Cal. L. Rev. 616, 672 (1972) [hereinafter Note, Conditioning and other Technologies].

77. "The position of the therapist and inmate in this setting is arguably akin to that of parent and child—the inmate may feel that he must consent." Note, Conditioning and Other Technologies, supra note 76, at 672.

78. Guttentag, *The Problem of Experimentation on Human Beings: The Physician's Point of View*, in Clinical Investigations in Medicine 63 (I. Ladimer & R. Newman eds. 1963).

79. E. Goffman, Asylums, ch. 2 (1961).

The court's strict distinction between voluntarily and involuntarily committed patients is open to criticism, for the effects of institutionalization may be felt by both types of patients. While it is true that a patient free to enter and leave at his own discretion will not be vulnerable to pressure for consent to an experiment in order to gain release, most states give hospitals the authority to apply for the involuntary commitment of a previously voluntary patient. Eighteen states permit any person to make such an application; many of the others specifically mention resident physicians or hospital superintendents. The Mentally Disabled and the Law 72-79 (2d ed. S. Brakel & R. Rock eds. 1971). It has been suggested that

> [a] patient may hesitate to apply for treatment during the incipient stages of his illness if he knows that his later requests for release may be denied, and he himself hospitalized as an involuntary patient, with the resulting loss of civil rights, for an indefinite period.

Id. at 24. Thus the power to convert the status of voluntary to involuntary may leave the voluntary patient unsure that he will be free to leave when he chooses.

It has also been argued that there are often subtle forms of coercion involved in the act of committing oneself to a mental institution, and that once committed the pressures on a voluntary patient are much the same as on an involuntary one, though the former is free to leave at any

D. Guardian Consent

The opinion states that since the patient cannot give informed consent, neither can his parent or guardian.[80] Although the court does not intend this holding to apply to "traditional circumstances," by which term it presumably means the use of established therapies,[81] it nevertheless fails to explain how the parent's or guardian's authority (or lack of same) in the present situation differs from that found in the "traditional" one. It is true that experimental psychosurgery is of much higher risk and more uncertain benefit than more conventional medical procedures. But in both situations the same consideration of possible intimidation by the staff may apply as well to the guardian as to the patient himself, though probably with lesser force to the former. Additionally, in both situations the guardian may not have the patient's best interests in mind.[82]

Notwithstanding these arguments, the court's distinction between traditional and experimental circumstances appears to be well-grounded. In the experimental situation the consideration of lack of existing knowledge about possible risks and benefits applies with equal force to both the guardian and the patient. Furthermore, for the court to say that a guardian may give consent on behalf of a legally incompetent patient, after it has held that a legally competent patient may not give consent at all, would be to open the door to the exploitation of incompetent patients. That is, the incompetent could be used for experiments for which competent patients could not be used. All of these considerations, taken together with the dangerous, intrusive, irreversible and primarily nontherapeutic nature of the proposed operation, led the court to apply to all legal incompetents what was recently said of minors: "In the strict view of the [English] law parents and guardians of minors cannot give consent on their behalf to any procedures which are of no particular benefit to them and which may carry some risk of harm."[83] By analogy to situations involving an inequality in bargaining power (e.g., contracts and wills) and to confessions which are not clearly voluntary, the court concluded that the careful scrutiny given to those situations should be applied in the instant case.[84]

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time. Note, Conditioning and Other Technologies, supra note 76, at 668-70. A similar though less persuasive argument may be advanced on behalf of convalescent mental patients, who might be returned to the hospital. In either case, it might be decided that the patient is unable to give his informed consent to an operation like that in the instant case.

80. Civil No. 73-19434-AW at 26.

81. See note 27 supra. Prohibiting a guardian from consenting under such circumstances would undermine the "right to treatment" of mental patients which has recently been recognized. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). There have been cases holding that a guardian *must* consent to the use of a medical procedure on his ward. See, e.g., Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941).

82.

> Some parents with a high tolerance for their children will maintain a child at home, whereas, another parent would put one in the hospital. If you have a child in the hospital with a guardian, it is a strong possibility there is a low threshold, though it may not be in the child's best interest when it comes to doing something for the child to make the child less troublesome.

Testimony of Dr. Peter R. Breggin, Kaimowitz Brief, supra note 72, at 35. For cases where the guardian's power to act on behalf of the patient was restricted, see Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

83. British Medical Research Council, *Responsibility in Investigations on Human Subjects*, in Experimentation with Human Beings 974 (J. Katz ed. 1972).

84. Civil No. 73-19434-AW at 30-31.

V. CONSTITUTIONAL CONSIDERATIONS

Although the disposition of the consent issue fully resolved the merits of the case, the court further held that to permit an involuntarily confined mental patient to agree to experimental psychosurgery would violate his right to privacy[85] and deny him the protection of the first amendment.[86]

A. Right to Privacy

The court maintained that an individual's right to privacy would be violated by "[i]ntrusion into one's intellect" under the circumstances of this case.[87] Citing recent Supreme Court cases involving privacy, the court stated that the privacy of "mental processes" ranks higher than the right to view obscenity or to use contraceptives.[88]

The finding of a constitutional right to privacy in the circumstances of this case is completely unprecedented.[89] Dean Prosser divides the tort of invasion of privacy into four distinct categories,[90] none of which is applicable to this case.[91] The Su-

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85. A constitutional right to privacy has recently been articulated from a combination of the first, fifth, ninth, and fourteenth amendments. See cases cited in note 88 infra.

86. U.S. Const. amend. I:

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

87. Civil No. 73-19434-AW at 40.

88. Id. at 37, citing Roe v. Wade, 410 U.S. 113 (1973) (procuring or performing an abortion); Stanley v. Georgia, 394 U.S. 557 (1969) (possessing obscene materials); Griswold v. Connecticut, 381 U.S. 479 (1962) (prescribing, selling and using contraceptives). A relevant case not cited by the court is Eisenstadt v. Baird, 405 U.S. 438 (1972) (distributing contraceptives).

89. The only prior discussions which consider psychosurgery in the context of the right to privacy may be found in Shapiro, Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies, 47 S. Cal. L. Rev. 237 (1974); Note, Conditioning and Other Technologies, supra note 76; Shapiro, The Uses of Behavior Control Technologies: A Response, 7 Issues in Criminology, Fall 1972, at 55; testimony of Sen. Ervin, Senate Hearings, supra note 1, at 1030-32.

90. Appropriation of plaintiff's name or likeness; intrusion upon plaintiff's physical solitude or seclusion (as by invading his home); public disclosure of private facts; publicity which places the plaintiff in a false light in the public eye. W. Prosser, Law of Torts 802-18 (4th ed. 1971).

91.

> [T]here has been discussion of possible expansion [of the right to privacy] at common law, to include anything involving an "affront to human dignity"—a concept sufficiently broad to include almost all personal torts, from assault and battery and false imprisonment through all insults, whether or not amounting to extreme outrage, defamation, and no doubt many others. Thus far no expansion has occurred; and there is as yet no decided case allowing recovery which does not fall fairly within one of the four categories . . . .

Id. at 816. But Professor Bloustein, whom Dean Prosser cites for the broad "affront to human dignity" concept, actually distinguishes between privacy on the one hand, and assault, battery and false imprisonment on the other:

> What distinguishes the invasion of privacy as a tort from the other torts which involve insults to human dignity and individuality is merely the means used to perpetuate the wrong . . . . Whereas the affront to dignity in the one category of cases is affected by physical interference with the person, the affront in the other category of cases is affected, among other means, by physically intruding on personal intimacy and by using techniques of publicity to make a public spectacle of an otherwise private life.

Bloustein, Privacy as an Aspect of Human Dignity, 39 N.Y.U.L. Rev. 962, 1002 (1964).

preme Court cases cited in *Kaimowitz*[92] all involved legal control over *actions* alleged to be private, as distinguished from actual intrusion into an individual's "mental processes." Indeed, the most recent of those cases states: "[I]t is not clear . . . that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions,"[93] which at the very least casts doubt upon the *Kaimowitz* court's interpretation of the right of privacy.

The great difficulty with the court's privacy holding is that it makes an invasion of privacy virtually indistinguishable from the tort of battery.[94] There is nothing in the opinion to distinguish this case from *any* unwarranted interference with one's "personal integrity."[95] Smith's right to privacy would no more be violated by performing psychosurgery upon him than by subjecting him to any other intentional and unpermitted contact. Under the court's analysis, the right to privacy becomes superfluous as an unnecessary duplication of the rights already available under tort law.[96]

B. First Amendment

In support of its first amendment holding the court stated that the freedom to express ideas is illusory unless there is also a concomitant freedom to "generate ideas."[97] This argument was equally unanticipated by the commentators.[98] Heretofore no first amendment case has dealt with the control of man's mind, as distinguished from restrictions on expression or belief.[99] A physical intrusion into the brain has never before been accorded constitutional protection, and it is unlikely the founding fathers contemplated applying the first amendment to brain surgery. Nevertheless, the first amendment argument is somewhat more convincing that the privacy argument; it is also more troubling.

If psychosurgery violates the first amendment, then it might also be argued that other activities which similarly affect the generation of ideas, such as penal rehabilitation, education, advertising and psychotherapy are proscribed under *Kaimowitz*. Yet each of these activities can be distinguished from psychosurgery on three separate grounds. First, the techniques mentioned produce a gradual and partial change in one's personality, whereas changes induced by psychosurgery are immediate and extensive. Second, psychotherapy and other behavior-modifying techniques, unlike psychosurgery, do not require a physical intrusion. Finally, the effects of those techniques can be avoided by a recalcitrant individual, while a patient

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92. See note 88 supra.

93. Roe v. Wade, 410 U.S. 113, 154 (1973). The Supreme Court goes on to say: "The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization)." Id.

94. Dean Prosser defines the interest protected by the law against battery as "[t]he interest in freedom from intentional and unpermitted contacts with the plaintiff's person . . . Interest in personal integrity . . . ." Prosser, supra note 90, at 34, 35.

95. See note 94 supra.

Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973), implied that the right of privacy might be violated in a similar situation, where a prisoner is given an experimental drug without his consent, but it too fails to distinguish the case from any other battery. Indeed, the dissent in that case points out that medical malpractice in a penal institution does not violate a civil right. Id. at 879.

96. One commentator has asserted that tort law was a sufficient ground for the holding in *Kaimowitz*, and that there should have been no constitutional holding at all. The Devils Advocate, 2 Bulletin of the Amer. Acad. of Psychiatry and the Law 64, 65 (1974).

97. Civil No. 73-19434-AW at 35.

98. See note 89 supra.

99. See T. Emerson, The System of Freedom of Expression (1970).

under anesthesia is powerless to resist the scalpel.[100] Hence it would appear that these forms of "persuasion" are not invalidated by the reasoning of the court.[101]

It may be argued that psychosurgery seeks to prevent violent *action,* not thought, and therefore a first amendment claim would not be relevant. There are two responses to this argument. The first is to cite *Stanley v. Georgia,*[102] in which the plaintiff had contended that a law prohibiting the possession of obscene material was valid because contact with obscene literature might lead to the commission of sex crimes. The Supreme Court rejected this contention, stating that the state could not punish a man because of the possibility that he may commit a crime in the future.[103] Second, in order to *prevent*—not punish—future action, psychosurgery eradicates thoughts and impulses. Thus a first amendment issue is raised.

Despite the fact that psychosurgery intrudes upon intellectual processes, there might be situations where a patient has had frequent attacks of violence which show no signs of abating,[104] and where psychosurgery might therefore be appropriate. If there were a great deal of evidence that destruction of a certain part of his brain would eliminate the attacks, it might even be unethical not to perform such an operation.[105] The patient might be able to leave the back ward of the mental hospital in order to live a more human life, with a greater capacity for generating ideas than before.[106] The operation would increase the patient's ability to attain self-fulfill-

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100. See Note, Conditioning and Other Technologies, supra note 76, at 619-20; Katz, The Right to Treatment—An Enchanting Legal Fiction? 36 U. Chi. L. Rev. 755, 776-77 (1969).

101. The argument might be more applicable to a Brave New World-1984 propaganda campaign, or to subliminal advertising, which is not easily resisted.

102. 394 U.S. 557 (1969).

103. Id. at 566-67. The Court quoted from Whitney v. California, 274 U.S. 357, 378 (1927), where Justice Brandeis said: "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . ."

It is true that unlike Stanley, Smith had in fact committed a violent crime. But the crime was eighteen years earlier, so remote that the surgery could not practically be said to deal with its commission. The surgery was clearly intended to be directed at Smith's present impulses.

104. For example,

> [Dr. Vernon] Mark related the case of Arthur P . . . who displays episodic, violent behavior that may take a very dangerous form . . . .
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> . . . .
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> . . . Over a six and one half year period he has received various types of psychiatric treatment. In addition, intensive anticonvulsant and antidepressant drug regimes have been tried with no success. . . . [T]he VA staff is trying to commit him for life to the St. Peter Hospital for the Criminally Insane "where he will be in permanent isolation, in a dungeon."

E. Valenstein, Brain Control 227-28 (1973).

105. Thus the "right to treatment" would become relevant. See cases and materials cited in note 81 supra.

106. A recent report describes a patient with a history of violence, who was found to suffer from anterior temporal lobe spiking. Under drug therapy, his acts of violence ceased. In addition, he learned to read and write, and was able to hold a steady job for the first time. B. Maletzky, Treatable Violence, in Senate Hearings, supra note 1, at 424. If psychosurgery could have a similar effect, it would be fulfilling the first amendment. As Dean Hutchins has written, the first amendment means

> that every American is encouraged to express himself on public questions—or on any other subject. The notion is that of a self-governing community of self-governing citizens locked in argument. This was the kind of community the founders wanted . . . . They had to have citizens who could think, and think for themselves.

Hutchins, The Schools Must Stay, 6 The Center Magazine Jan.-Feb. 1973, at 12, 16.

For a suggestion that the fourteenth amendment right to privacy recognized in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), prohibits state interference with

ment, to search for truth and to participate in the social and political dialogue of his society, all of which are the purposes of the first amendment.[107] On the other hand, along with eliminating his violent outbursts, the surgery might destroy what potential the patient had to live a fully conscious, creative life, and thus hinder his exercise of first amendment rights.[108] And of course one cannot ignore the possibility that a mental hospital might use psychosurgery as a method of patient control.[109]

Once it is possible to pinpoint an area of the brain which controls a certain characteristic, such as outbreaks of violence, and once it is medically predictable that removal of that area will eradicate that characteristic, a value judgment must be made as to whether elimination of that area will benefit or harm the individual. The problem is less a medical than a moral one.[110]

The first amendment must be kept in mind—freedom of thought and the ability to generate ideas are of paramount importance—but the first amendment alone should not be controlling. The decision must be made on the basis of all the medical facts, facts about the patient's condition, the nature of the operation, the possible risks and benefits and the probability of their materializing. Once these facts are known and balanced, the decision can be made on an individual basis as to whether the operation will indeed serve the patient's best interests.[111]

C. The Court's Compelling State Interest Standard

The court stated that the state can legitimately "violate" a constitutional right only if it meets the burden of demonstrating a compelling state interest, and that no such interest had been shown here.[112] The compelling state interest standard is, of course, generally used when an alleged violation of a "fundamental" right or a "suspect" classification is challenged on equal protection grounds.[113] The standard was not developed for first amendment cases.[114] But the tests which have been employed to judge the validity of first amendment claims—the balancing test, the clear

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psychosurgery where the operation, despite its serious risks, presents a real prospect of lasting beneficial change, see Wexler, Foreword—Mental Health Law and the Movement Toward Voluntary Treatment, 62 Calif. L. Rev. 671, 682-83 (1974).

107. T. Emerson, Toward a General Theory of the First Amendment 3 (1966).

108.

> NIMH [National Institute of Mental Health] . . . touts the surgery on a woman known as Julia. But we have a signed document from a highly responsible professional on the ward that at the moment they were touting her . . . the nurses and staff on the ward were so disturbed over her disastrous outcome that they were literally crying. She had lost her ability to play music, to carry on her formerly lively interchanges with the nurses and staff, and she was intellectually deteriorating. She was suicidal.

Testimony of Dr. Peter R. Breggin, Senate Hearings, supra note 1, at 362.

109.

> [O]ne of the big characteristics of institutions is conservatism, and if you don't know what somebody is going to do and you have a technique which you know promises to invoke control, then why don't you use it.

Testimony of Dr. Andrew S. Watson, Kaimowitz Brief, supra note 72, at 19.

110. See testimony of Dr. Willard Gaylin, Senate Hearings, supra note 1, at 374; testimony of Dr. A.K. Ommaya, Smith Brief, supra note 48, at 57.

111. Since this is not solely a medical decision, it would be improper for physicians alone to assume the responsibility. See the authorities cited in note 45 supra.

112. Civil No. 73-19434-AW at 36, 39.

113. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

114. However, the Court has held that first amendment rights "are susceptible to restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

and present danger test—do consist of ascertaining the existence of a state interest which could be balanced against or endangered by the exercise of a first amendment right.[115] The court thus seems only to be using a traditional first amendment test, though stating it somewhat misleadingly. Since the Supreme Court has called privacy a "fundamental" right,[116] the use of the compelling state interest standard would appear appropriate for the privacy issue.

The court did not venture to say what state interest it would have found compelling, but reference may be made to those cases where the interests of society have led to a suspension of the consent requirement.[117] By analogy to these cases, at least three tests would have to be met to show a state interest compelling enough to justify performing psychosurgery on a patient who withholds consent or is mentally or legally incapable of giving it. First, there must be a well-grounded prediction that the patient would be very dangerous if the operation is not performed. Such predictions are not possible to the necessary degree of accuracy at the present time,[118] except in rare cases. Second, the operation must eliminate the patient's dangerousness, and only his dangerousness.[119] Third, there must be no reasonable alternative which would better safeguard the patient's rights. Such a reasonable alternative might well be provided by continued institutionalization. These tests would make it extremely difficult for the state to prove an interest compelling enough to justify psychosurgery without consent.[120]

VI. SOME LEGAL AND PRACTICAL RAMIFICATIONS OF *KAIMOWITZ*

The scope of the court's constitutional holdings is not clearly delineated. The opinion concludes that "compelling constitutional considerations preclude the involuntarily detained mental patient from giving effective consent" to experimental psychosurgery.[121] Yet the court fails to explain why its constitutional holdings should be limited to the involuntarily detained.[122] The most plausible explanation of this difficulty is that the court did not mean that the infringement of constitutional rights

115. See T. Emerson, Toward a General Theory of the First Amendment 48-56 (1966).

116. Roe v. Wade, 410 U.S. 113, 152-53 (1973). See Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. Rev. 670, 702 (1973).

117. See Breithaupt v. Abram, 352 U.S. 432 (1957) (blood test for alcohol on unconscious man held valid); Rochin v. California, 342 U.S. 165 (1952) (compulsory blood test for suspected drunken drivers held valid); Buck v. Bell, 274 U.S. 200 (1927) (compulsory sterilization for mental defective held valid); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination held valid).

118. Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 711-16 (1974).

119. See notes 32-33, 108 supra and text accompanying them for an indication of how far medical knowledge is from meeting this test.

120. On the other hand, we compel children to attend school in order that they may better fulfill the purposes of the first amendment.

> Every child must be given the chance to become the kind of citizen the First Amendment demands. This obligation is too important to be left to parents. The community must compel them to allow their children to have this opportunity . . . .

Hutchins, supra note 106, at 16. If the first two conditions mentioned in the text are met, it is arguable that compulsory psychosurgery is as justified as compulsory schooling.

121. Civil No. 73-19434-AW at 32.

122. Certainly the two constitutionally guaranteed liberties cited, namely those embodied in the first amendment and the right to privacy, ostensibly apply with equal force to those who are not involunatrily detained.

vitiates the patient's informed consent; rather, the infringement *results from* the lack of consent.[123] The constitutional issues arise only after it has been shown that no informed consent has been given. While this explanation contradicts an explicit statement of the court,[124] it seems the most plausible possibility. To say that the experiment is unconstitutional *per se* would be to say that the second question —that is, whether psychosurgery is illegal irrespective of consent—is being decided, while the court explicitly states that it has not decided that issue.[125]

The court concludes its opinion by stating that accepted neurosurgical procedures are permissible forms of therapy for involuntarily confined mental patients.[126] Although the court does not elaborate, the implied standard is whether the therapy has in fact become the custom among physicians.[127] This standard, however, may be unnecessarily strict. The line between "accepted" and "unaccepted" is not precise; many therapies are "accepted" only by certain elements of the medical profession, and there can be different degrees of acceptance, from therapies to be used only as a last resort to those consistently relied upon. In addition, novel and innovative medical procedures must inevitably be performed on humans before they can gain medical acceptance, although the application of these procedures to humans generally does not and should not precede thorough scientific investigation, animal experimentation and nonintrusive human experimentation. But given the need for experimentation, the strict standard posited by the court may make it extremely difficult to find suitable subjects for innovative procedures. The criteria for the Proposal required that the subject "should have had several attacks of severe aggressive behavior" and should have "a high recurrence risk."[128] It would be difficult to find such a subject outside of a mental hospital, and such a person would probably be placed in an institution after his violent tendencies had caused him to run afoul of the law.[129] Thus to say that only an established procedure may be used on an involuntarily committed mental patient may be to impede the development of those procedures which would be most helpful to that particular patient. A standard of reasonable medical procedure, as judged by those engaged in clinical research involving similar medical procedures, would be sufficient to protect the patient, and at the same time flexible enough not to impede medical progress.[130] A standard of rea-

123. Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973), a case decided three months earlier and cited in *Kaimowitz*, seems to support this viewpoint. In *Mackey*, the use of an experimental drug on a prison inmate without his consent was said to "raise serious constitutional questions respecting . . . impermissible tinkering with the mental processes." Id. at 878 (footnote omitted). The court of appeals claimed that these questions might be raised upon proof that "the plaintiff was subjected to experimentation without consent." Id.

124. See text accompanying note 121 supra.

125. Civil No. 73-19434-AW at 40.

126. Id.

127. See Smith Brief, supra note 48, at 42; Restatement (Second) Torts § 295-A and comment b; Waltz & Scheuneman, supra note 36, at 632.

128. Civil No. 73-19434-AW at Appendix 8, 9.

129. However, there was testimony at the trial that there might be sufficient numbers of volunteers for experimental psychosurgery who are not involuntarily detained. Amicus Brief, supra note 14, at 77.

130. Waltz & Scheuneman, supra note 36, at 628. William J. Curran, an authoritative writer in the field, reaches a similar conclusion. Referring to the statement in Fortner v. Koch, 272 Mich. 273, 282, 261 N.W. 763, 765 (1935) (quoted by the *Kaimowitz* court, Civil No. 73-19434-AW at 22) that an experiment "must not vary too radically from the accepted method of procedure," he notes that

> [t]his restriction would seem clearly unacceptable to research interests, at least in many instances. Almost by definition, clinical investigation must deviate from the normal or traditional in some *significant* degree. As Renée Fox has said, "Human experimentation, like all research, is to some extent a voyage into the unknown." This voyage cannot

sonableness would permit medical research to continue, but would be violated by the Proposal as much as would the court's test of "acceptance." Such a standard would consist in the physician's determining whether the risks of the experiment outweigh the possible benefits in the light of the existing medical data, without regard to whether the procedure has become "accepted."

Such a standard would be helpful in resolving another problem that may arise in the future. Recent decisions have held that an involuntarily committed mental patient has a due process "right to treatment"—when therapy is possible his confinement may not consist of mere incarceration without treatment.[131] Since the treatment of mental disorders generally does not involve great physical risk, there has been little discussion of when the obligation to use an experimental technique on a patient might arise. Here too the standard of reasonableness seems most appropriate. Where there is sufficient scientific evidence of psychosurgery's efficacy and safety to make it a reasonable medical procedure, the "right to treatment" would imply the obligation to give a patient the option of undergoing psychosurgery. Provided a patient is capable of giving informed consent to psychosurgery, it should be offered if the patient's condition and the prognosis for successful results make it a reasonable therapy.

The psychosurgery proposed in *Kaimowitz* fell far short of that standard. What was wrong with the experiment described in the Proposal was not that it was unaccepted, but that the scientific evidence was wholly inadequate, either to offer any prospect of reaping significant medical knowledge or to provide adequate safeguards for the subject,[132] and thus that it was an unreasonable medical procedure. Although animal experimentation for the treatment of human mental or neurological disorders is of limited value due to the great differences between the brains of man and of other animals,[133] there was not even sufficient animal experimentation to

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be undertaken on fully charted seas, at least not if the voyager wishes to discover something new.

Curran, Government Regulation of the Use of Human Subjects in Medical Research: The Approach of Two Federal Agencies, 98 Daedalus 542, 544 (1969) (footnote omitted). Noting that the *Fortner* court recognized the necessity of experimentation, he inquires:

> What, then, did the Michigan Court mean by its restrictive language? I submit that it can only mean to contain experimentation within the bounds of reasonableness as judged by other colleagues engaged in similar practice involving clinical research. In research, acceptable standards would be determined by examining the practice and procedure followed by reputable and qualified clinical investigators. Today, even more than in 1935 when *Fortner v. Koch* was decided, a "researcher's test" of reasonableness should be applied to clinical medical investigation . . . .

Id. at 545.

It has been predicted that the standard of accepted practice "will probably give way to a new rule of reasonableness" in *all* informed consent cases. Mills, Whither Informed Consent? 229 J. Amer. Med. Ass'n 305 (1974).

131. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

132. See Restatement (Second) Torts § 300 (1965).

> A physician is not limited to the most generally used of several approved modes of treatment and the use of another mode known and approved by the profession is proper, but every new method of treatment should pass through an experimental stage in its development and a physician is not authorized in trying untested experiments on patients.

Board of Medical Registration and Examination v. Kaadt, 225 Ind. 625, 634, 76 N.E.2d 669, 672 (1948).

133. See Ritts, A Physician's View of Informed Consent in Human Experimentation, 36 Fordham L. Rev. 631, 632 (1968); Ivy, *The History and Ethics of the Use of Human Subjects in Medical Experiments*, in Clinical Investigation in Medicine 39, 48 (I. Ladimer & R. Newman eds. 1963).

support the type of surgery outlined in the Proposal.[134]

Moreover, there was no testimony that an abnormal electroencephalogram indicates a physical violence factor in the brain,[135] that violence is either accompanied or caused by a physical factor in the brain,[136] or that such areas of the brain could be located by means of depth electrodes.[137] No scientific data established the existence or nonexistence of a link between any physical violence factor and epilepsy or other recognized disease.[138] Furthermore, there was no evidence regarding the effect of a change of environment, without surgery, on a violent individual.[139] In short, there was no assurance that the operation would lead to a diminution of violent tendencies[140]

134.

> I think there is still room for experimentation in animals . . . . As a matter of fact, relatively little work has been done in that field.

Testimony of Dr. Earl Walker, Smith Brief, supra note 48, at 11.

> 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

Nuernberg Tribunals, supra note 26, at 182.

135. Dr. A.K. Ommaya has said that "the mere presence of irregular brain waves did not mean there was structural damage in the brain . . . ." N.Y. Times, Apr. 2, 1973, at 19, col. 5. See Levy & Kennard, A Study of the Electroecephalogram as Related to Personality Structure in A Group of Inmates in a State Penitentiary, 109 Am. J. Psychiat. 832 (1953).

136.

> There has not been established a syndrome that [there is a causal relationship between aggression and some brain abnormality] in patients who do not have a brain tumor, who do not have a gross structural change . . . .

Testimony of Dr. A.K. Ommaya, Smith Brief, supra note 48, at 10.

137. See note 62 supra.

> What is the likelihood that stimulation and recording technique, using depth electrodes, can locate specific abnormal brain foci that trigger violence? The data obtained from animal and human brain stimulation studies suggest that it may be . . . difficult to locate such foci . . . .
>
> . . . If tissue is destroyed on the basis of the capacity of an electrode to elicit a particular response, the results are likely to be disappointing.

E. Valenstein, Brain Control 243-45 (1973).

138. Dr. Velasco testified at the trial: "I have the impression that epilepsy and non-episodic behavioral disorder are not necessarily related." Dr. Robert Heimburger stated: "I had always thought . . . that they were associated and closely related but they may not be . . . ." Quoted in Kaimowitz Brief, supra note 72, at 87.

139.

> Researchers have found that in some instances the mere fact that the person exhibiting violent behavior is removed from his environment and placed in a treatment setting—without any other medical or drug regimen—is enough to reduce the frequency and/or the severity of the violent symptoms.

Testimony of Dr. Bertram S. Brown, Senate Hearings, supra note 1, at 342.

> [S]ince I have been out from under the pressure of Ionia and I see that I have gotten a future and I have settled down quite a bit and the feelings that I was constantly going through have decreased a considerable amount. And I think that when I am out from under the institutional life and policies that I think that I will become even more stable. And I have become even less [sic] with problems of nervousness and so forth.

Testimony of plaintiff Smith, Smith Brief, supra note 48, at 39.

140. See text accompanying notes 30-31 supra. "It should be apparent that the changes that follow amygdalectomy can be very unpredictable and far reaching." E. Valenstein, Brain Control 142 (1973).

or, if it did, that such an effect would be permanent.[141] On the other hand, there was testimony establishing that alternative treatments had not been exhausted,[142] that the proposed surgery would blunt the subject's emotions and reasoning ability,[143] that the collateral risks were very great,[144] and that the proposed subject was not inordinately violent.[145]

VII. CONCLUSION

The court's holding requires the presence of two factors in order to invalidate a subject's consent to the proposed operation, and thereby to render it a battery and a violation of the patient's constitutional rights: (1) the proposed operation must be classifiable as experimental psychosurgery, and (2) the proposed subject must be involuntarily detained in a mental institution. Psychosurgery's effect on the personality structure, with its latent potential for mind control, may have impelled the court beyond tort law to a holding that psychosurgery would violate the first amendment. However, freedom from physical intrusion has rarely been held to be protected by the Constitution,[146] since tort remedies have usually been sufficient. As noted earlier,[147] it is difficult to see what the privacy rationale adds to the decision.[148]

There will be very few cases like *Kaimowitz*. If a potential subject does not want to go through with an experiment, all he need do is withdraw his consent. Aside from guaranteeing that an experiment like that in the Proposal may not be performed in its jurisdiction, *Kaimowitz* is important chiefly where a third party is given standing to sue on behalf of a patient who has given his consent, or where a ruling is sought to declare an entire class of individuals improper subjects.

It has been correctly stated that a subject's best protection lies not with the law, but with the responsiveness of the physician to his conscience and the opinion of his peers.[149] But often, as in *Kaimowitz*, these safeguards prove to be inadequate. Because of the great potential for misuse of such experiments and the opportunity for manipulation of such patients, the court felt obliged to intervene, despite the fact that courts have been loath to tread upon ground traditionally within the guarded

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141. Drs. Sweet, Mark and Ervin report that in three cases where a unilateral amygdalectomy was performed, objectionable behavior disappeared for only six to nine months, and then reappeared. Amicus Brief, supra note 14, at 40. Professor Valenstein notes that several such operations have caused an increase in sexual libido. E. Valenstein, Brain Control 218-19 (1973). This would hardly benefit a criminal sexual psychopath.

142.

> I would say he has not had access to adequate therapy, simply because I don't believe the facilities for adequate therapy exist at Ionia.

Testimony of Dr. A. Watson, Smith Brief, supra note 48, at 50.

143. Amicus Brief, supra note 14, at 35. See also E. Valenstein, Brain Control 231 (1973).

144. See note 34 supra; Amicus Brief, supra note 14, at 32-33. See also E. Valenstein, Brain Control 221 (1973).

145. See note 48 supra.

146. Rochin v. California, 342 U.S. 165 (1952) (forcible pumping of defendant's stomach for evidence violated due process); Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891) (court cannot order person to submit to surgical examination). Contra, see cases cited in note 117 supra.

147. See text accompanying notes 94-95 supra.

148. However, the constitutional holdings may have practical ramifications, namely that the plaintiff may sue in federal court, instead of taking the suit to state court as Kaimowitz did, since any statute which does not conform to the decision in *Kaimowitz* may be challenged on constitutional grounds.

149. Ingelfinger, 287 New Eng. J. of Med. 466 (1972), quoted in Civil No. 73-19434-AW at 21.

custody of the medical profession.[150] Steering between the Scylla of viewing psychosurgery as a panacea[151] and the Charybdis of banning it altogether,[152] the *Kaimowitz* court tries to pursue a moderate course. But its constitutional holdings are in large part superfluous, and its concern for the rights of the patient is not matched by a sufficient regard for the needs of medical progress.

JAY ALEXANDER GOLD

150.

> [T]here has never been a decision in a common law country, nor to our knowledge in a civil law country, where a court has acted to impose a prohibition upon a therapeutic intervention in some general category of cases.

Brief for defendants Rodin and Gottlieb at 58, Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973). In view of this fact, it is noteworthy that the National Institute of Mental Health has pronounced itself in "full and complete accord" with the decision in *Kaimowitz*. Memorandum of Dr. Bertram S. Brown to Ass't Sec. for Health, Psychosurgery Report of the NIMH—INFORMATION 6 (1974).

151. See, e.g., testimony of Dr. O.J. Andy, Senate Hearings, supra note 1, at 348 et seq.

152. Dr. Peter R. Breggin is the foremost exponent of this point of view. See his testimony in Senate Hearings, supra note 1, at 357 et seq.