

## CASES and COMMENTS PSYCHOSURGERY

by

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During the past year psychosurgery made headlines here and abroad. Of the dozen active psychosurgery projects around the country, attention first focused on Dr. M. Hunter Brown's 280 psychosurgery patients in California, which included some prisoners and institutionalized patients. A proposal to extend this treatment to other prisoners in the California state system was halted following objections from the Medical Committee for Human Rights, a national activist group, that prisoners, hoping for release, would be willing to subject themselves to excessive risks.

Another project under strong attack was the psychosurgery performed on hyperactive children by Dr. Orlando J. Andy, Chairman of the Department of Neurosurgery at the University of Mississippi Medical Center. In a public statement, Dr. Andy said that he operated as a last resort on children or adults displaying uncontrollable destructive hyperactivity; he claimed that three-fourths of his patients showed fair to good results with minimal adverse effects. The operations, though, were criticized as a means to repress blacks. *Ebony* carried that message in an article entitled, "New Threat to Blacks: Brain Surgery to Control Behavior."

While litigation was in contemplation in Mississippi, attention shifted to Michigan involving the case of a 36-year-old man who had been confined in 1955 as a sexual psychopath in Ionia State Hospital when he was 18, at which time he confessed to the murder and rape (necrophilia) of a nurse. The prospect of psychosurgery stemmed out of a research proposal from the state-funded Lafayette Clinic, the psychiatric teaching hospital of Wayne State University, to attempt to deal with uncontrollable violence in state hospital patients.

John Doe, now known to the public as Louis Smith, and his parents both signed consent forms. Doe appeared eager to have the operation, although he was fully informed of possible undesirable side effects, including death. With the concurrence of two committees, one to review candidate selection, the other to guard Doe's interests, the operation was scheduled for January 15, 1973. In late 1972, Doe willingly appeared in one of the author's seminar meetings on law-psychiatry. A number of the group in attendance believed that Doe was willing to undergo the operation as a means of obtaining release. Others felt that he felt a sense of guilt for his crime and wanted to expiate and to do something useful by contributing to scientific knowledge. Still others felt that he had developed a relationship with the doctors, the only people who showed an interest in him in nearly 18 years of confinement, and he was willing to trust in their judgment. During his years of confinement he exhibited no outbursts of violent aggression, but he felt that he had a problem in self-control. He said to the group that he would seek psychosurgery, even if there were other ways to obtain release, if "it is the only means of helping my physical problem."

Shortly before the scheduled operation, Gabe Kaimowitz, a Michigan Legal Services lawyer and member of the Medical Committee for Human Rights, found out about the proposed experiment. He contacted and worked closely with the *Detroit Free Press*, which brought the case to public attention. It was sensationalized, with a page one headline, "Surgery May Cure — Or Kill — Rapist" (Jan. 7, 1973). Kaimowitz, without seeing or consulting Doe, asked the Wayne County Circuit Court for review of the matter, claiming that Doe was being detained under a now-obsolete law, that the circumstances made informed consent impossible, and that the use of public funds for the project was inappropriate. The Clinic did not challenge the standing of Kaimowitz, an attorney without a client, to bring suit, since it was actually interested in having the court set out standards or procedures it should follow as a matter of law. The setting of legal standards would likely help to protect experimenters from public ridicule or from suits based on malpractice or lack of informed consent.

Doe, like the attorney, seemed to enjoy the publicity. Prior to court proceedings, he received an invitation to appear on a local television program, which he accepted, and restated his desire to undergo psychosurgery. Town hall meetings attracted overflow audiences. One program was entitled, "Psychosurgery – The Scalpel Therapy"; another, "Psychosurgery in a Democratic Society." It prompted an open seminar at Wayne State University in biomedical ethics.

Halpern, along with Alex Sanders of the Mental Health Law Project, offered assistance to Kaimowitz, who declined, wanting to go it alone. Thereupon, representing the American Orthopsychiatric Association, Halpern and Sanders were permitted by the court to enter as *amicus curiae*. Like Kaimowitz, they took the position that psychosurgery should not be performed on involuntarily institutionalized individuals, irrespective of their wishes. Realizing that the setting of standards would not really affect the practice of psychosurgery, they took the view that it was against public policy and must be stopped until such time as it is shown to have specific curable effect. They too worked closely with the press, turning the story over to the *Washington Evening Star* (Feb. 21, 1973). A few weeks later an extensive story appeared on page one of the *New York Times* (March 12, 1973). CBS and NBC national television also featured the story.

Not to forget Doe, the court appointed Professor Robert Burt and Dean Francis Allen of the Michigan Law School to represent him. In a newspaper interview Professor Burt said, "There's a sparkle to this patient that might be gone as a result of surgery." He took the position that the subject, although he had been in a hospital institution for 18 years, must be given a chance at long-term, intensive psychotherapy or else released. If released, Burt observed, the subject would not really be free to consent to psychosurgery "as long as the possibility of a civil commitment hangs over his head." As a matter of probability, people approaching middle age tend not to commit violent crime, hence it could have been argued in this case that Doe had been cured or "burned out" as a simple consequence of aging. The criteria for measuring success of psychosurgery in such a case are particularly muddled.<sup>1</sup> On the issue of probability, Dr. Andy says, "One must be very careful in drawing conclusions from probabilities based upon a normal population and transferring those probabilities to a population characterized by some form of abnormality."<sup>2</sup>

Shortly after the filing of suit, 13 of the other 23 inmates at Ionia who had been under consideration wrote to Kaimowitz saying that they preferred not being asked to volunteer for the experiment. Doe, though, remained interested in having the experiment performed. Then, on the first day of trial, on March 12, 1973, Dr. E. Gordon Yudashkin, director of the state Department of Mental Health, withdrew authorization of the experiment because of the adverse public reaction to news reports about it (e.g., *Neglect Produces Today's Witch Hunt. Mich. Catholic*, Feb. 14, 1973). In his testimony, Dr. Yudashkin said issues raised in law briefs on the case "placed the department in a bad light" and gave a "distorted" picture of the proposed experiment. He said the briefs conveyed "an impression of malicious activities against patients" and, from an administrative point of view, he decided it was not feasible to go ahead with the project. He added that he would hesitate to consider a similar experimental project in the future because of "the public's attitude toward medical intervention into the skull."

After three days of hearings on whether or not the case was moot, the court ruled that the issues raised in the suit are of sufficient public importance to be decided by the court in a declaratory decree. No one, except the State Attorney General, wanted to let go of the case. All of the participating attorneys contended that the trial should be continued in order to establish the rights of institutionalized persons. While the original research proposal was scrapped as a result of the publicity it generated, the clinic had a substitute proposal involving psychosurgery on epileptics and retarded persons, and the court agreed to render a declaratory judgment dealing with the core issues of consent to radical treatments on institutionalized persons and the use of psychosurgery as a medical tool.<sup>3</sup>

A panel of three judges listened patiently to three weeks of testimony. As the issues were not concrete, the proceedings sounded like a seminar. It was a replica of the Kennedy congressional hearings, held about a month earlier.<sup>4</sup> One byproduct of the proceeding was that

Doe, committed under a sexual psychopath law subsequently repealed and considered by the experimenters to be so dangerous he needed brain surgery to curb his aggressiveness, was ordered released. At this point Doe said that while no pressure was put on him to consent to psychosurgery, he consented to show that he was being cooperative and to improve his chances for release. He also said that since the court case he had read newspaper and magazine articles and a book on psychosurgery, and that after thinking about it, he had become more aware of some of the risks and had changed his mind about the experiment. In view of the manner of his commitment, the judges felt that legally they had to release him, but they wanted some assurance that he would not endanger society. The alternative to release would have been civil commitment proceedings, which may have been difficult, according to the state mental health director, because "he is not overtly psychotic." (Prosecution under the original murder charge apparently was precluded under Michigan law once the criminal psychopath route was taken. Rather than go to trial, Doe's attorney in 1955 had the court commit him to Ionia State Hospital under the now-repealed sexual psychopath law.) Dr. Andrew S. Watson, psychiatrist, gave the judges the assurance they wanted. He testified, "It is my unqualified opinion that he should be released and that he represents a minimal risk to society." He added that Doe needs a halfway house, job training, and psychotherapy. Doe put it thus, "Being locked up as long as I have, going out into the free world is scary."<sup>5</sup>

Over a thousand pages of legal briefs were submitted. The three-judge panel ruled that "informed consent cannot be given by an involuntarily detained mental patient for experimental psychosurgery." In its 41-page opinion, drawing verbatim from the briefs submitted by Burt and Halpern, the court said that "Psychosurgery is clearly experimental, poses substantial danger to research subjects, and carries substantial unknown risks." "Psychosurgery," the court concluded, "should never be undertaken upon involuntarily committed populations, when there is a high-risk, low-benefits ratio as demonstrated in this case."

This case for sheer publicity will be hard to beat. The torrent of adverse reaction to the project points out vividly that public sensitivity is an essential consideration in the undertaking of an experiment, whatever its scientific promise.

Probably no operation is more fearsome or provokes more anxiety than brain surgery. The brain is the "seat of the soul" and traditionally untouchable, just as the penis is the locus of the passions and beyond the pale, necessitating a trip all the way to Sweden for sex-change surgery. Even as late as the sixteenth century the makeup of the human brain was such a taboo subject that when dissection of the cadaver was permitted, by special dispensation, the cranial cavity was not opened and the contents were not studied.

This decision involves "low-benefit, high-risk" experimentation. The court expressly stated that patients and prisoners could consent to undergo established therapies, even though they might consider an element of risk.<sup>6</sup>

## FOOTNOTES

<sup>1</sup> Brody, J. E. Psychosurgery Will Face Key Test in Court Today. *New York Times*, March 12, 1973, p. 1; Psychosurgery: Legitimate Therapy or Laundered Lobotomy? *Science*, March 16, 1973, p. 1109.

<sup>2</sup> Letter of April 16, 1973 to Ralph Slovenko from Dr. O. J. Andy.

<sup>3</sup> Brody, J. E. Myriad Tough Questions. *New York Times*, March 18, 1973, p. 14; *Med. Trib.*, April 18, 1973, p. 11; *Psychiatr. News*, April 18, 1973, p. 3.

<sup>4</sup> *Detroit Free Press*, March 24, 1973, p. 3; March 29, p. 1; *Detroit News*, April 5, 1973, p. 1; *New York Times*, March 23, 1973, p. 34; April 2, p. 19; April 5, p. 26.

<sup>5</sup> *Detroit Free Press*, April 6, 1973, p. 3; April 10, p. 3; April 13, p. 1, April 15, p. 3; *Detroit News*, April 5, 1973, p. 1; April 8, p. 3; April 11, p. 13; *New York Times*, April 8, 1973, p. 64; April 10, p. 24.

<sup>6</sup> *John Doe at al. v. Department of Mental Health for the State of Michigan et al.*, decided July 10, 1973.