The Devil's Advocate

Kaimowitz v. Department of Mental Health held that an adult involuntarily committed to the Michigan mental health system could not give a valid consent for experimental or innovative psychosurgery. The three-judge Michigan court found that capacity to give an *informed consent* depended upon the three factors of *competency, knowledge,* and *voluntariness.*

The patient involved, who in 1954 had been charged with murder and rape, in 1955 was committed without trial to the Ionia State Hospital as a criminal "sexual psychopath." He and his parents had signed a consent form authorizing possible surgery in a project involving the "treatment of uncontrollable aggression."

The court held that under the circumstances there was no informed consent. *Competency,* the court said, "requires the ability of the subject to understand rationally the nature of the procedure, its risks, and other relevant information," and this patient's competence was "particularly vulnerable as a result of his mental condition, the deprivation stemming from involuntary confinement, and the effects of the phenomenon of 'institutionalization.'" Moreover, the factor of *knowledge* was missing because of the dearth of scientific information regarding psychosurgery of the kind contemplated. Finally, with reference to the element of *voluntariness,* the court found that it was lacking because the patient's institutionalization created a pervasive atmosphere of constraint and coercion.

Counsel for the state argued that the doctrine of informed consent was a fiction and that it almost never is really achieved because of the nature of the doctor-patient relationship. "Patients are likely to consent to almost anything a competent doctor wants," he said, because it is difficult for a layman to understand the medical procedure he is consenting to, and he often will consent to innovative procedures without considering the risks involved. The adequacy of consent should not be determined by categories, such as voluntary or involuntary commitment, but "only by evaluation on an individual basis in terms of what the doctor said, did and how, to which patient and under what circumstances, and for what purpose." The court rejected the above argument and emphasized the effect of *involuntary* hospitalization, pointing out that the involuntary patient is very dependent on the doctor, tending to tell the physician what he thinks the physician wants to hear, and that such a patient often is unable to make decisions, and may be overly cooperative if he feels it may hasten his release. There is no equality of bargaining power, according to the court.

Although the finding that there was a lack of informed consent resolved the merits of the case, the Michigan court further held that to permit an involuntarily confined mental patient to agree to experimental psychosurgery would violate his First Amendment freedom to "generate ideas" which was a component of free speech, and his constitutional right to privacy because of the "intrusion into one's intellect." The court claimed that the "privacy of mental processes" ranked higher than the right to view obscenity or to use contraceptives and no compelling state interest had been shown to justify the state's proposed invasion of the patient's privacy.

It is interesting to note that at the time of decision the issue was moot as to the particular patient who had been released from the hospital. The court, moreover, refused to say that the proposed experiment was prima facie illegal, and it stopped short of holding that an involuntarily detained mental patient can never consent to innovative medical procedure.

It is the claimed constitutional basis for the court's opinion that is of the most interest because it was virtually unprecedented and may be termed "innovative and experimental." (the only case in point known to this author is *Mackey v. Procunier,* 447 F.2d 877 (C.C.A. 9th 1973) where the use of an experimental drug on a prisoner without his consent was said to raise serious constitutional questions regarding "impermissible tinkering with the mental processes.") Let's take a look at the claimed constitutional rights of freedom to generate ideas and to mental privacy.

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The implications of *Kaimowitz* are mind bending. What are the ambits of the claimed constitutional right to generate ideas and to preserve mental privacy? If private pornography and contraception cases may serve as precedents for such a constitutional claim, *Kaimowitz* itself may be extended by another court beyond psychosurgery to any form of therapy. Medication and various forms of psychotherapy inevitably impair "freedom to generate ideas" and "mental privacy" even though directed at behavior control. Does this mean that psychiatry, religion, the criminal law, and the institution of marriage are all per se unconstitutional? The worst culprit of all may be the educational system, if not the mass media.

It is one thing to attempt to exercise legal control over actions (reading pornography or using contraceptives in private), it is another to proscribe intrusion into mental processes. There simply are too many invasions: Take advertising for example or any communication.

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Tort law relative to assault and battery and the doctrine of informed consent appear to be adequate to the task of protecting the patient and there is no need to raise experimental constitutional theories to reinforce civil law.

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Although the *Kaimowitz* decision ends with the statement that *accepted* neurosurgical procedures are permissible as therapy on an involuntary mental patient it also would countenance *experimental* psychotherapy upon voluntary patients (who presumably may give an "informed consent"). Thus, there are dichotomies such as voluntary and involuntary, accepted and experimental, and the legal (and constitutional) result hinges upon the label chosen. Instead of lobotomy we have labelectomy.

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"2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' . . . 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' . . . 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . ." Mr. Justice Brandeis concurring in *Ashwander v. T.V.A.*, 297 U.S. 288 (1936).

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Res ipsa loquitur.