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Prisoner Access To Psychosurgery: A Constitutional Perspective

With the development of an increasingly sophisticated medical technology, the possibility that the state may intervene in an individual's personality and thereby control his behavior has become a reality.¹ As evinced in such landmarks of modern literature as Anthony Burgess' *A Clockwork Orange*² and Ken Kesey's *One Flew Over the Cuckoo's Nest*,³ there is much concern that sophisticated behavioral techniques could be employed on unwilling prisoners and mental patients. Courts and legislators are aware of the peculiar vulnerability of the prisoner and the mental patient and have taken steps guaranteeing the prisoner and the mental patient certain rights.⁴ In particular, legislators have sought to eliminate the employment of treatment modalities that attempt to control behavior on unconsenting prisoners and mental patients. In California, the legislature has enacted statutes⁵ guaranteeing prisoners⁶ and mental patients⁷ the right to refuse treatment modalities,

1. See Note, *Conditioning and Other Technologies to "Treat?", "Rehabilitate?" "Demolish?" Prisoners And Mental Patients*, 45 S. CAL. L. REV. 616, 616 (1972).

2. A. BURGESS, *A CLOCKWORK ORANGE* (1962).

3. K. KESEY, *ONE FLEW OVER THE CUCKOO'S NEST* (1961).

4. See *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970); *Aden v. Younger*, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976).

5. See CAL. PENAL CODE §§2670-2680 and CAL. WELF. & INST. CODE §§5325-5328.9.

6. CAL. PENAL CODE §2670:

It is hereby recognized and declared that all persons, including all persons involuntarily confined, have a fundamental right against enforced interference with their thought processes, states of mind, and patterns of mentation through the use of organic therapies; that this fundamental right requires that no person with the capacity for informed consent who refuses organic therapy shall be compelled to undergo such therapy; and that in order to justify the use of organic therapy upon a person who lacks the capacity for informed consent, other than psychosurgery as referred to in subdivision (c) of Section 2670.5 which is not to be administered to such persons, the state shall establish that the organic therapy would be beneficial to the person, that there is a compelling interest in administering such therapy, and that there are no less onerous alternatives to such therapy.

7. CAL. WELF. & INST. CODE §5325:

Each person involuntarily detained for evaluation or treatment under provisions of this part, each person admitted as a voluntary patient to any facility as defined in Section 1250 of the Health and Safety Code in which psychiatric evaluation or treatment is offered, and each mentally retarded person committed to a state hospital pursuant to Article 5 (commencing with Section 6500), Chapter 2 of Part 2 of Division 6 shall have the following rights, a list of which shall be prominently posted in English

specifically organic therapies,⁸ which are employed to control human behavior. This legislation effectively preserves the autonomy of the prisoner and mental patient to refuse procedures that can have drastic and potentially dangerous effects on human behavior.

The statute guaranteeing prisoners a right to refuse organic therapies, however, falls short of being a comprehensive regulation of organic therapies by its failure to address those situations in which a prisoner, of his own initiative and with full knowledge of the risks involved, seeks access to organic therapy.⁹ This comment will examine criteria that should be implemented in determining whether to grant a prisoner access to one type of organic therapy—psychosurgery.¹⁰ At the outset, consideration will be given to California Penal Code Sections 2670-2680 which regulate the state's ability to impose psychosurgery and other forms of organic therapy on prisoners. Attention will next be focused on two cases, *Kaimowitz v. Department of Mental Health*,¹¹ and *Aden v. Younger*,¹² which address the

and Spanish in all facilities providing such services and otherwise brought to his attention by such additional means as the Director of Health may designate by regulation:

- (a) To wear his own clothes; to keep and use his own personal possessions including his toilet articles; and to keep and be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases.
- (b) To have access to individual storage space for his private use.
- (c) To see visitors each day.
- (d) To have reasonable access to telephones, both to make and receive confidential calls.
- (e) To have ready access to letter writing materials, including stamps, and to mail and receive unopened correspondence.
- (f) To refuse convulsive treatment including, but not limited to, any electroconvulsive treatment, any treatment of the mental condition which depends on the induction of a convulsion by any means, and insulin coma treatment.
- (g) To refuse psychosurgery. Psychosurgery is defined as those operations currently referred to as lobotomy, psychiatric surgery, and behavioral surgery and all other forms of brain surgery if the surgery is performed for the purpose of the following:
 - (1) Modification or control of thoughts, feelings, actions, or behavior rather than the treatment of a known and diagnosed physical disease of the brain;
 - (2) Modification of normal brain function or normal brain tissue in order to control thoughts, feelings, action, or behavior; or
 - (3) Treatment of abnormal brain function or abnormal brain tissue in order to modify thoughts, feelings, actions or behavior when the abnormality is not an established cause for those thoughts, feelings, action, or behavior.

Psychosurgery does not include prefrontal sonic treatment wherein there is no destruction of brain tissue. The Director of Health shall promulgate appropriate regulations to assure adequate protection of patients' rights in such treatment.

(h) Other rights, as specified by regulation.

8. See CAL. PENAL CODE §2670.5(c):

The term organic therapy refers to:

- (1) Psychosurgery, including lobotomy, stereotactic surgery, electronic, chemical or other destruction of brain tissues, or implantation of electrodes into brain tissue.
- (2) Shock therapy, including but not limited to any convulsive therapy and insulin shock treatments.
- (3) The use of any drugs, electric shocks, electronic stimulation of the brain, or infliction of physical pain when used as an aversive or reinforcing stimulus in a program of aversive, classical, or operant conditioning.

9. See Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 324-25 (1974) [hereinafter cited as Shapiro].

10. See Note 16, *infra*.

11. *Kaimowitz v. Dep't of Mental Health*, Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973). This case is unreported and all references herein will be to the

question of prisoner and mental patient access to psychosurgery. Using the aforementioned statute and cases as a framework, the comment will center on relevant constitutional issues raised by the question of prisoner access to psychosurgery. Issues to be discussed include whether mentation¹³ is protected by the first amendment guarantee of free speech and the right of privacy. Additional consideration will be given to whether the right of privacy protects the prisoner's decision, as manifest by informed consent, to undergo psychosurgery. Finally, the discussion will conclude with an analysis of whether a prisoner's right to equal protection is violated by attempts to limit prisoner and mental patient access to psychosurgery while allowing the public unfettered access to such procedures. Through this analysis, it will be determined whether a prisoner has a right of access to psychosurgery.

As will become evident, there is much repetition among the concepts involved. Throughout the discussion, therefore, it should be kept in mind that Penal Code Sections 2670-2680 represent California's *statutory* scheme to prevent enforced interference with a prisoner's mentation; *Kaimowitz* represents one state's *judicial* review of prisoner access to psychosurgery; and *Aden* represents California's judicial review of the mental patient's right of access to psychosurgery. Though none are directly on point, all are instructive of the rights and legal considerations involved. That the same rights and considerations reappear in each instance is especially indicative of their relevance.

AN ANALYTICAL FRAMEWORK: RECENT LEGISLATIVE AND JUDICIAL REACTION TO PSYCHOSURGERY

The question of prisoner access to psychosurgery became a matter of public attention during the summer of 1976 when Edmund Kemper,¹⁴ a prisoner at the California Medical Facility in Vacaville, petitioned the Superior Court of Solano County for permission to undergo stereotactic neurosurgery, a sophisticated form of psychosurgery. Kemper's original petition was denied by the Superior Court with the understanding that if he could demonstrate he has a right to psychosurgery, his request would be given further consideration.¹⁵ Subsequently, Kemper filed an application for psychosurgery which application was denied by the Superior Court on the basis that no showing had been made that psychosurgery would benefit the

slip opinion. The opinion is also reprinted in part in *State Court Bars Experimental Brain Surgery*, 2 PRISON L. REP. 433 (1973).

12. 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976).

13. Mentation is defined as mental activity. MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (3d ed. 1976).

14. See generally M. CHENEY, THE COED KILLER (1976).

15. Order Assigning Public Defender, *In re Organic Therapy for Edmund Emil Kemper III* (No. 11422, Solano County Superior Court, Cal., June 3, 1976).

recipient.¹⁶ In order to understand the rationale of this denial, attention must be given to the nature and past uses of psychosurgery.

Psychosurgery, statutorily designated a form of organic therapy,¹⁷ is simplistically understood as a means of altering, hopefully improving, a person's behavior by performing surgery on a portion of the brain.¹⁸ Over the years, the procedures employed in psychosurgery have advanced from the cruder forms of frontal lobotomy to what one commentator sees as the electronic age of psychosurgery.¹⁹ The advocates of psychosurgery claim that through the use of an increasingly sophisticated technology, both the specificity and reliability of psychosurgery have been improved.²⁰ The developers of these more sophisticated techniques believe that it is now possible to selectively alter specific personality traits²¹ without the general dampening of emotions which often accompanied the frontal lobotomy.²²

The optimism of the proponents of psychosurgery is not universally maintained. Opponents of psychosurgery voice many concerns including the fear that sufficient technology has not been attained to allow the procedure to be categorized as therapeutic.²³ Other opponents find psychosurgery itself abhorrent on ethical, spiritual, or political grounds.²⁴ The concern of the opponents of psychosurgery, particularly those whose reservations are based on a claim of insufficient technological expertise, is that psychosurgery has irreversible effects, but no proven therapeutic value.²⁵ An additional objection to the use of psychosurgery is the substantial danger it poses to human

16. Order, *In re* Application of Edmund E. Kemper for writ of Habeas Corpus (No. 11422, Solano County Superior Court, Cal., August 31, 1977).

17. See note 8 *supra*.

18. See Chorover, *Psychosurgery: A Neuropsychological Perspective*, 54 B.U.L. REV. 231, 231 (1974) [hereinafter cited as Chorover].

[Psychosurgery may be defined as brain surgery that has as its primary purpose the alteration of thoughts, social behavior patterns, personality characteristics, emotional reactions, or some similar aspects of subjective experience in human beings. In the broadest sense, psychosurgery is predicated upon the undeniable existence of a relationship between brain and mind. Its proponents, however, make the more specific claim that with respect to certain forms of mental illness, behavior disorder, or emotional disturbance, significant therapeutic results may be obtained following the surgical destruction of particular brain regions.

19. *Id.* at 234-35. Chorover explains lobotomy as the technological conclusion to the premise that mental functions are localized in the brain. Lobotomy is a technique by which the frontal lobes of the brain are isolated and in effect destroyed. This was initially achieved by alcohol injections which coagulated the fibers comprising the perimeters of the frontal lobe and later by use of a special knife, the leucotome, to sever these fibers.

Lobotomy, as a psychosurgical procedure, was found to be inadequate because it permitted access only to the superficial portions of the brain such as the frontal lobe. In an effort to reach areas of the brain inaccessible by manual procedures, stereotactic techniques permit the surgeon to pinpoint areas of suspected brain dysfunction. The surgeon would then drill a small hole in the skull of the patient and under precise mechanical control, direct probes, electrodes or chemicals toward the target of brain dysfunction without demolishing the external portions of the brain. *Id.* at 232-39.

20. *Id.*

21. *Id.*

22. *Id.* at 235.

23. Annas & Glantz, *Psychosurgery: The Law's Response*, 54 B.U.L. REV. 249, 249 (1974).

24. *Id.*

25. See Shapiro, *supra* note 9, at 247.

freedom when, in a custodial situation, it is used in a punitive rather than a rehabilitative or therapeutic manner.²⁶ Thus, opponents of the use of psychosurgery find both the techniques employed and the motive behind its employment suspect.

The history of psychosurgery's use in the California prison system is neither consistent nor laudable. Perhaps the most publicized use of psychosurgery in California was upon three inmates in 1968 as a treatment for epilepsy.²⁷ There is some doubt whether adequate consent was obtained from the inmates for these procedures.²⁸ Several years later, the California Department of Corrections again demonstrated its willingness to employ psychosurgery by making a request for the funding of a program designed to evaluate and treat violent inmates by surgical and diagnostic procedures involving the brain.²⁹ Public disclosure of this request created a great deal of controversy and eventually the request was rejected.³⁰ At present, the California Department of Corrections maintains a strict policy prohibiting the use of psychosurgery in institutions under its direction.³¹ It must be questioned, however, whether the state may properly deny a requesting prisoner access to psychosurgery in light of the possible infringement of constitutional rights.³² Discussion will begin with a brief analysis of the California Penal Code Sections restricting the use of psychosurgery.³³

A. California Penal Code Section 2670

In 1976 the California Legislature adopted exacting restrictions on the use of organic therapy within the penal system by the addition of California Penal Code Sections 2670-2680.³⁴ This legislation deals exclusively with the use of "organic therapy" within the penal system.³⁵ By statutory definition, organic therapy includes psychosurgery, shock therapy and cer-

26. Shapiro, *supra* note 9 at 244-45 n.10; J. MITFORD, *KIND AND UNUSUAL PUNISHMENT* (1973) [hereinafter cited as J. MITFORD] in which it is stated that:

[P]sychiatry in the prison consists primarily in therapeutic practices which can have punitive or disciplinary implications, electric shock, insulin shock, fever treatment, hydrotherapy, Amytal and Pentothal interviews, spinals, and cisternals [insertion of needle into spinal cord] and so on—that is, everything except psychotherapy.

27. See Shapiro, *supra* note 9, at 247 n.16; Note, *Medical and Psychological Experimentation on California Prisoners*, 7 U. Cal. D.L. Rev. 351, 363 (1974).

28. See Shapiro, *supra* note 9, at 247 n.16.

29. J. MITFORD, *supra* note 26, at 128-29; Shapiro, *supra* note 9, at 248 n.23.

30. J. MITFORD, *supra* note 26, at 129.

31. 15 CAL. ADM. CODE §3343:

Psychosurgery, including lobotomy, stereotactic surgery, electronic, chemical or other destruction of brain tissue, or implantation of electrodes into brain tissue, is not and will not be performed on persons committed to or in the custody of the Department of Corrections.

32. See text accompanying notes 78-110 (first amendment), 111-164 (privacy), 164-203 (equal protection) *infra*.

33. It should be noted that there is a possible conflict between California Penal Code Section 2670 and Title 15, Section 3343 of the California Administrative Code. The Penal Code states only that the prisoner has the same right as an ordinary citizen insofar as refusing to undergo psychosurgery. By implication, this statute permits psychosurgery when consented to. Because the Administrative Code prohibits psychosurgery within the prison system under all circumstances, an inconsistency is apparent.

34. CAL. PENAL CODE §§2670-2680, CAL. STATS. 1974, c. 1513, §1, at 3325.

35. See note 8 *supra*.

tain forms of aversive and reinforcing stimuli used in conditioning programs.³⁶ The purpose of this statute, as suggested by one commentator, is:

[T]o insure that rigorous restraints are placed on any *state* efforts toward mental "demolition" masquerading as "therapy" . . . without jeopardizing the plainly admirable goals of curing or arresting severe mental illness—and thereby achieving some measure of benefit to the victim/patient/prisoner, and some measure of public protection and benefit. . . .³⁷

These concerns are also reflected in the statute's declaration of policy which states:

It is hereby recognized and declared that all persons including all persons involuntarily confined have a *fundamental right* against enforced interference with their thought processes, states of mind, and powers of mentation through the use of organic therapies; that this fundamental right requires that no person with the capacity for informed consent who refuses organic therapy shall be compelled to undergo such therapy.³⁸

From the declaration of policy found in the statute and the aforementioned history of psychosurgery in California penal institutions, several facts may be drawn. The most salient fact drawn from the codifications of Penal Code Sections 2670 to 2680 is that a prisoner has a statutorily recognized interest in his own "thought processes, states of mind and powers of mentation."³⁹ The statute affords protection to these interests by permitting the use of organic therapies upon a competent prisoner⁴⁰ only after having obtained his informed consent.⁴¹ Even so, when organic therapies other than psychosurgery are in question, the state will be able in certain narrow instances to override the choice of the prisoner not to undergo the procedure by demonstrating a compelling interest that will be served by having the prisoner undergo the procedure.⁴² In the case of psychosurgery, however,

36. CAL. PENAL CODE §2670.5.

37. Shapiro, *supra* note 9, at 249 (emphasis added).

38. CAL. PENAL CODE §2670 (emphasis added).

39. CAL. PENAL CODE §2670.

40. Hereinafter, a "competent prisoner" will be used to denote one capable of giving legally adequate informed consent. For a discussion of informed consent, see text accompanying notes 136-158 *infra*.

41. CAL. PENAL CODE §2670.5; CAL. PENAL CODE §2672:

(a) For purposes of this article, "informed consent" means that a person must knowingly and intelligently, without duress or coercion, and clearly and explicitly manifest his consent to the proposed organic therapy to the attending physician.

(b) A person confined shall not be deemed incapable of informed consent solely by virtue of being diagnosed as a mentally ill, disordered, abnormal or mentally defective person.

42. CAL. PENAL CODE §2670 provides in pertinent part that:

[I]n order to justify the use of organic therapy upon a person who lacks the capacity for informed consent . . . the state shall establish that the organic therapy would be beneficial to the person, that there is a compelling interest in administering such therapy, and that there are no less onerous alternatives to such therapy.

See also, CAL. PENAL CODE §2671, which provides for the use of shock therapy upon an unconsenting prisoner in emergency situations.

the statute specifies that all prisoners, competent or not, have an absolute right to refuse to undergo the procedure.⁴³ The fact that the statute grants to the prisoner an absolute right to refuse to undergo psychosurgery and a qualified right to refuse to undergo other forms of organic therapy demonstrates the state's high regard for the prisoner's autonomous choice in the giving or withholding of consent to these treatments.

A second fact drawn from the declaration of policy is the recognition that mentation involves a "fundamental right"⁴⁴ thus necessitating a "compelling interest"⁴⁵ and a showing of no "least onerous alternatives" before the state may interfere with a prisoner's mentation by forcing organic therapy upon an unwilling or incompetent prisoner. The use of the "compelling interest" and "least onerous alternative"⁴⁶ language is important insofar as it indicates the test to be employed in determining when an interference with mentation will be warranted. While the statute makes this test inapplicable to the state's ability to *impose* psychosurgery upon a prisoner,⁴⁷ the fact that psychosurgery affects mentation may allow this test to be employed in determining whether the state may deny a prisoner *access* to psychosurgery. This language is of further import in that it echoes the considerations evaluated in equal protection cases.⁴⁸

In general, the declaration of policy contained in Penal Code Section 2670 demonstrates a strong belief that the fundamental right of mentation is retained by the prisoner to largely the same extent it is held by those not subject to criminal confinement.⁴⁹ The statute is not a grant of a right to the prisoner; more accurately, it is an expression of a right not lost as an incident of confinement. The expression of this right may be seen as an extension of the policy regarding prisoner's rights set forth in California Penal Code Section 2600. This section declares that a prisoner, as a result of his status as a prisoner, forfeits *only* those rights necessary to provide security of the institution and protection of the public.⁵⁰ In the face of the declaration of policy found in Section 2670, the use of psychosurgery upon an unwilling or incompetent prisoner is clearly beyond the scope of power necessary to protect the public or to insure the security of the penal institution.

43. CAL. PENAL CODE §2670 provides that a competent prisoner has an absolute right to refuse to undergo any form of organic therapy. In the case of the incompetent prisoner, the state may impose organic therapy, other than psychosurgery, only upon a showing that organic therapy would benefit the prisoner and would serve a compelling interest. In no situation, however, may the state impose psychosurgery on an incompetent or unconsenting prisoner.

44. CAL. PENAL CODE §2670.

45. CAL. PENAL CODE §2670.

46. CAL. PENAL CODE §2670.

47. CAL. PENAL CODE §2670.

48. See text accompanying notes 166-171 *infra*.

49. CAL. PENAL CODE §2670 provides: "It is hereby recognized and declared that *all persons, including all persons involuntarily confined, have a fundamental right . . . against organic therapy . . .*" (emphasis added).

50. CAL. PENAL CODE §2600; CAL. PENAL CODE §2601 provides for the retention of rights within the ambit of the first amendment.

The basic shortcoming of Section 2670, however, is its failure to address the situation in which the prisoner of his own initiative seeks access to psychosurgery. This statute was prompted by situations in which the state sought to impose organic therapy upon a prisoner. Edmund Kemper's petition presents a somewhat different problem in that the prisoner, independent of any state encouragement, seeks access to such therapy. The Solano County Superior Court, while dismissing the petition, made note of the legislature's silence on the matter, remarking that, "it does not appear that the legislature thus far has provided for the initiation of [such] proceedings by an individual prisoner"⁵¹

While the statute, on its face, appears inapplicable to a prisoner's request for access to psychosurgery, the considerations underlying the statute may be useful in determining whether the prisoner has a right of access. As previously stated, these considerations include the protection of the prisoner's right of mentation, his right to control interferences with mentation by exercising informed consent, and the prisoner's retention of rights except as necessary for prison security and public protection. It is noteworthy that the principal decision dealing with a prisoner's right of access to psychosurgery, *Kaimowitz v. Department of Mental Health*,⁵² was based on considerations similar to those found in the California statute.

B. The Kaimowitz Decision

The *Kaimowitz* case involved a prisoner, Doe, who had been committed under the Michigan Criminal Sexual Psychopath statute.⁵³ While he was confined, the Department of Mental Health approved an experimental program in which prisoners would be used as subjects in scientific tests. The program's purpose was to explore the control of violence through the application of various treatments, including psychosurgery. Doe was selected as a subject for the experiment and the consent of both Doe and his parents was obtained. Prior to implementation of psychosurgery, Doe was released when it was found that the statute under which he had been convicted was unconstitutional. This suit was initiated by Kaimowitz, a Michigan attorney, who claimed that the experimental use of psychosurgery was against the public policy of the State of Michigan. The Superior Court of Wayne County, seeing the potential for a similar case to arise in the future, elected to hear the case rather than to declare it moot.⁵⁴

In deciding the case, the Michigan court relied heavily on the concept of informed consent. The court employed the concept of the inviolability of the

51. Order Assigning Public Defender, *In re Organic Therapy for Edmund Emil Kemper III* (No. 11422, Solano County Superior Court, Cal., June 3, 1976).

52. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973).

53. MICH. COMP. LAWS ANN. §780.501 (repealed by 1968 Mich. Pub. Acts, No. 143, §2).

54. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich. at 1-7).

person and stated that any intrusion upon this inviolability is warranted only by the individual's informed consent.⁵⁵ The court went on to state that the adequacy of one's informed consent was based upon the consent being competent, knowing and voluntary.⁵⁶ The court held that consent is a concept of variable demands⁵⁷ and as applied to a prisoner seeking experimental psychosurgery, consent could not, as a matter of law, be adequate.⁵⁸

While the *Kaimowitz* decision is based upon the informed consent requirement, the court also mentions by way of dicta that, due to the possible adverse effects of psychosurgery upon mentation, certain constitutional rights of a prisoner may also be endangered. The court recognized that mentation may be protected as a right to generate ideas under the first amendment⁵⁹ and by a right of privacy.⁶⁰

The *Kaimowitz* decision is distinguishable from the situation presented by Kemper's request for psychosurgery. The most prominent distinction is that the *Kaimowitz* decision was based upon a procedure that was specifically part of an experimental program. The procedure to which Kemper seeks access is clearly not a part of an experimental program, and therefore, the rationale upon which the *Kaimowitz* decision is based, is not entirely apposite.⁶¹

The *Kaimowitz* decision is important for its discernment of issues similar to those articulated in California Penal Code Section 2670. Both place emphasis on the need for the informed consent of the prisoner before psychosurgery may be employed. In addition, both recognize that there is a significant interest in mentation which may be affected by psychosurgery.

C. The Aden Decision

While neither the California Penal Code nor the *Kaimowitz* court address the issue of a prisoner's right of access to non-experimental psychosurgery, a recent California decision did touch upon a mental patient's right of access to such therapy. In the case of *Aden v. Younger*,⁶² the court ruled upon the constitutionality of sections of the California Welfare and Institutions Code concerning a patient's right to refuse electroshock therapy and psychosurgery, and the circumstances under which a patient would be allowed to undergo such procedures.⁶³ The court stated that the procedures in question, as with any other medical procedures, were properly the subject

55. *Id.* at 18.

56. *Id.* at 22.

57. *Id.*

58. *Id.* at 31.

59. *Id.* at 32-36.

60. *Id.* at 36-39.

61. See text accompanying notes 151-153, *infra*.

62. 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976).

63. *Id.* This case was brought by two mental patients and their physicians in order to test the constitutionality of CAL. WELF. & INST. CODE §§5325, 5326, 5326.3, 5326.4. One patient sought further electroshock treatment, while the other sought psychosurgery.

of state regulation.⁶⁴ Moreover, due to the varying levels of acceptance for these treatments within the medical community, and the varying effects these treatments have upon the patient, this state-imposed regulation could take different forms and go to different extents.⁶⁵

The court stated that some regulation of these procedures was proper because of their drastic effects upon the patient.⁶⁶ Further, the court said that the state had a valid interest in regulating psychosurgery and electroshock therapy in order to protect the patient from "unwarranted, unreasonable and unconsented-to invasions of body and mind."⁶⁷

While recognizing the state's interest in regulating the patient's decision to undergo psychosurgery and electroshock therapy, the court also stated that regulating the patient's access to such procedures has a significant effect upon the patient's rights. Among the patient's rights affected by regulating access to psychosurgery and electroshock therapy are rights of privacy and speech.⁶⁸ Concerning the possibility that such regulation would infringe upon the patient's freedom of speech, the court stated that speech and thought are so intimately related that any regulation that curtailed freedom of thought had the necessary consequence of limiting freedom of speech.⁶⁹ In light of the fact that freedom of thought and thereby freedom of speech may be lost through such regulation, the court required that the state demonstrate a compelling interest in such regulation.⁷⁰

As noted, the court also expressed concern that the patient's right of privacy may be invaded by these regulations. With regard to the right of privacy, the court appeared to be concerned with affording protection in two areas. The first area was the preservation of the patient's right of privacy by protecting the inviolability of the patient's mind.⁷¹ In the second area, the court questioned whether the state, by substituting its judgment for that of the patient by means of a substantive review of the patient's decision to

64. 57 Cal. App. 3d at 678, 129 Cal. Rptr. at 545.

65. *Id.*

66. *Id.* at 674, 129 Cal. Rptr. at 543.

67. *Id.* at 678, 129 Cal. Rptr. at 545-46.

68. *Id.* at 678, 129 Cal. Rptr. at 546: "Arrayed against these legitimate state interests are equally valid considerations of rights of privacy, freedom of speech and thought, and the right to medical treatment."

69. *Id.*

70. *Id.* at 679, 129 Cal. Rptr. at 546:

The right to be free in the exercise of one's own thoughts is essential to the exercise of other constitutionally guaranteed rights. First Amendment rights of free speech would mean little if the state were to control thought . . . Here the state has sought to control neither what is thought by mental patients, nor how they think. Rather, the state is attempting to regulate the use of procedures which touch upon thought processes in significant ways, with neither the intention nor the effect of regulating thought processes, per se. Yet despite the lack of any showing the state has attempted to regulate freedom of thought, this legislation may diminish this right. If so, the legislation can only be sustained by showing (1) it is necessary to further a "compelling state interest" and (2) the least drastic means has been employed to further those interests.

71. *Id.* at 678, 129 Cal. Rptr. at 545-46. See text accompanying notes 111-118 *infra*.

undergo an organic therapy, effected an invasion of the patient's privacy rights.⁷²

The *Aden* decision, while pertinent to the issue of a mental patient's right of access to psychosurgery, is not directly applicable to the question of a prisoner's access to psychosurgery. The case, however, remains instructive on the question of prisoner access to psychosurgery in its recognition that denial of such access may also represent a loss of constitutional rights. Implicit in the *Aden* decision is judicial recognition of a constitutional presumption in favor of personal autonomy⁷³ that may only be overcome if the state demonstrates that the regulation serves a compelling interest.

As previously noted, neither Penal Code Section 2670, the *Kaimowitz* decision, nor the *Aden* decision may be relied upon to resolve the question of a prisoner's right of access to psychosurgery. These authorities are useful, however, in pointing out which interests of the prisoner are to be protected. The first interest to be protected, as seen in both Penal Code Section 2670 and the *Kaimowitz* decision, is the prisoner's right of mentation.⁷⁴ As demonstrated by the *Aden* decision, however, psychosurgery should not be considered solely on the basis of the possible adverse effects of psychosurgery. Consideration should also be given to the possibility that insofar as psychosurgery may be therapeutic, denial of access to it may effect a denial of a right to mentation.⁷⁵

In both Penal Code Section 2670 and the *Kaimowitz* decision, the use of informed consent was deemed essential to safeguarding the interests of the prisoner.⁷⁶ Particularly in the *Kaimowitz* decision, the quality of consent was explored in recognition of the drastic procedures that were in question. Also of note is that in both Penal Code Section 2670 and the *Aden* decision, the standard that must be met before the state will be permitted to substitute its judgment for that of the patient/prisoner is the demonstration of a compelling interest.⁷⁷

The remaining portions of this comment will explore the relevant constitutional issues raised by the question of prisoner access to psychosurgery. In particular, attention will be directed toward the effect that a denial of access would have upon first amendment and privacy rights. Consideration will also be given to whether equal protection is violated by limiting the regulation of access to psychosurgery to prisoners.

72. 57 Cal. App. 3d at 683, 129 Cal. Rptr. at 548:

The substantive review of proposed treatments for competent and voluntary patients is a different problem. Once the competency of the patient and voluntariness of the consent is confirmed, what interest of the state can justify the substitution of the review committee's decision for that of the patient and his physician?

See text accompanying notes 119-130 *infra*.

73. See note 135 *infra*.

74. See text accompanying notes 34-61 *supra*.

75. See text accompanying notes 61-73 *supra*.

76. See text accompanying notes 34-61 *supra*.

77. See text accompanying notes 61-73 *supra*.

MENTATION AND THE FIRST AMENDMENT

The first amendment guarantee of freedom of speech is not limited in application to speech itself. As set forth in Justice Brandeis' concurring opinion in *Whitney v. California*,⁷⁸ the theory underlying a broad application of first amendment protection is that:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.⁷⁹

It would seem then, that the first amendment would protect not only speech itself but also the sum of thought processes that are necessarily antecedent to communication. This notion finds support in the case of *Stanley v. Georgia*,⁸⁰ wherein the United States Supreme Court held unconstitutional a Georgia statute that made mere possession of obscene material a crime.⁸¹ The Court maintained that the very concept of the first amendment protected the reception of ideas and any attempt to regulate the mere reception of ideas is repugnant to the first amendment.⁸² The *Stanley* Court found regulation of the reception of ideas impermissible because of the potential that such regulation would be used by the state to implement mind control.⁸³ The essence of the Court's decision is that in order for the first amendment to provide meaningful protection of speech, it must also protect mentation, the antecedent of speech.

That mentation is a protectable interest under the first amendment is consonant with both the *Kaimowitz* and *Aden* decisions as well as with California Penal Code Section 2670. In dicta, the *Kaimowitz* court stated that its decision denying the implementation of psychosurgery on an involuntarily confined person is in accord with the mandate of the first amendment which recognizes that "[g]overnment has no power or right to control men's minds, thoughts and expressions."⁸⁴ The *Aden* court is even more explicit in its statement that, "First Amendment rights of free speech would mean little if the state were to control thought."⁸⁵ California Penal Code Section 2670, while not specifying a right derived from the first amendment, recognizes a "fundamental right against enforced interference with [prisoners'] thought processes, states of mind and patterns of mentation."⁸⁶ In terms of a prisoner's right of access to psychosurgery, each of

78. 274 U.S. 357 (1927).

79. *Id.* at 375 (Brandeis, J., concurring).

80. 394 U.S. 557 (1969).

81. *Id.* at 568.

82. *Id.* at 564.

83. *Id.* at 565.

84. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 35.

85. 57 Cal. App. 3d at 679, 129 Cal. Rptr. at 546.

86. CAL. PENAL CODE §2670.

these examples is pertinent insofar as they recognize that psychosurgery has an effect upon mentative capacity, and that because of this effect, regulation of the use of the procedure is subject to scrutiny under the first amendment.

It has been argued that while implementation of psychosurgery upon an unconsenting prisoner would violate the prisoner's first amendment right, denial of access to psychosurgery to a consenting prisoner may also violate this right.⁸⁷ Fundamental to this argument is the aforementioned proposition that the first amendment protects not only speech, but also the necessary antecedent of speech, mentation.⁸⁸ Mentation that is actually involved in speech, however, is not susceptible to prior discernment. That is, though only a portion of one's thought processes are teleologically related to communication, there are no means of discerning those portions that are from those that are not. Therefore, in order to protect speech, protection must be afforded all mentation.⁸⁹ With regard to the effect of psychosurgery upon mentation, two conclusions are available. The first conclusion, consistent with California Penal Code Section 2670 and the *Kaimowitz* decision, is that because psychosurgery alters and interferes with mentation, the regulation of the enforced use of psychosurgery upon an unconsenting prisoner is within the ambit of the first amendment.⁹⁰ The second conclusion is that to the extent that the alteration of mentation effected by psychosurgery improves mentation, denial of access to the procedure would also violate the prisoner's first amendment rights.⁹¹

This second conclusion is dependent upon the proposition that the employment of psychosurgery may actually be of aid to the subject. The *Kaimowitz* decision with its heavy emphasis upon the experimental nature of psychosurgery, would seem to suggest the court did not accept this proposition.⁹² What the *Kaimowitz* court failed to fully consider is that while psychosurgery may result in a dampening of mental functioning and thereby severely limit the patient's mentative capacity, "this very dampening may also involve the elimination of dysfunctional responses to certain stimuli, and thus might enlarge the set of opportunities for rational action."⁹³

87. Shapiro, *supra* note 9, at 256-57.

88. Shapiro, *supra* note 9 at 256-57. In accord with this proposition is CAL. PENAL CODE §2670. See text accompanying note 39 *supra*.

89. Shapiro, *supra* note 9, at 256-57. Cf. *Kunz v. New York*, 340 U.S. 290 (1951)(a case forbidding prior restraints of speech).

90. Shapiro, *supra* note 9, at 257.

91. Shapiro, *supra* note 9, at 257, 324-26. Similarly, in *Aden* the court states: Freedom of thought is intimately touched upon by any regulation of procedures affecting thought and feelings. In an effort to protect freedom of thought, the state has put procedural and substantive obstacles in the path of those who both need and desire certain forms of treatment, and in that way their freedom of thought remains impaired because they cannot get treatment.

57 Cal. App. 3d at 680, 129 Cal. Rptr. at 546.

92. See text accompanying notes 54-61 *supra*.

93. Shapiro, *supra* note 9, at 330-31.

The proposition that psychosurgery may enhance mentative opportunity by decreasing brain dysfunction finds support in *Aden*. The *Aden* court recognized that regulation of access to psychosurgery may diminish the patient's freedom of thought.⁹⁴ One interpretation of this statement is that the patient's freedom of thought is diminished by denying him access to a procedure that would reduce dysfunction. The *Aden* decision is instructive here in that it recognizes that a denial of access to psychosurgery may be an impermissible act by the state to the same extent that forcing such a procedure upon an unwilling patient would be.⁹⁵ This is not to suggest that a prisoner would have an unlimited right of access to psychosurgery.⁹⁶ The suggestion, rather, is that in view of the possible enhancement of mentative capacity resulting from the use of psychosurgery, the state must demonstrate some basis for a denial of access.⁹⁷

The contention that access to psychosurgery may be protected by the first amendment guarantee of free speech has met with criticism. One source of this criticism is the continued rejection of a right of access to mind altering narcotics.⁹⁸ In *Leary v. United States*,⁹⁹ the court held that a denial of access to a mentation altering narcotic, marijuana, is not a violation of the free exercise clause of the first amendment. Leary maintained that the altered mentative state he achieved through the use of marijuana was necessary for the practice of his religion and therefore governmental regulation of marijuana infringed upon his first amendment right to follow the religion of his choice.¹⁰⁰ While the court rejected this contention, at least two crucial factors distinguish access to marijuana from access to psychosurgery. These factors are Leary's failure to demonstrate that mari-

94. See note 91 *supra*.

95. See 57 Cal. App. 3d at 680, 129 Cal. Rptr. at 547:

Some patients will be denied treatment as a natural and intended result of this legislation. Although the reasons for such denials may be the patient's own best interests, such regulation must be justified by a compelling state interest.

96. *Id.*

97. Cf. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). Although the rights of free speech and assembly are fundamental, they are not in their nature absolute. "Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic, or moral." *Id.* at 373.

The possibility that mentative capacity which affects only the person in question would be beyond the control of the state can be drawn from *Stanley v. Georgia*, 395 U.S. 557, 565-66 (1969) wherein the Court states:

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.

A possible reading of *Stanley* would foreclose any first amendment regulation aimed solely at the quality of mentation. Psychosurgery, however, would probably involve more than the quality of mentation, and insofar as it involves questions beyond the quality of mentation, regulation of psychosurgery would not be prohibited by *Stanley*.

98. Shapiro, *supra* note 9, at 327 n.310.

99. 383 F.2d 851 (5th Cir. 1967).

100. *Id.* at 858.

juana was necessary to the practice of his religion, Hinduism,¹⁰¹ and, the established legislative policy against marijuana.¹⁰²

In applying the *Leary* holding to the question of access to psychosurgery, it is initially apparent that unlike marijuana there exists no established legislative policy against the use of psychosurgery. The California statutes that address the question of access to psychosurgery do so from the perspective of prohibiting its imposition upon an unconsenting patient or prisoner.¹⁰³ It has been suggested that the very presence of these statutes implies acceptance of psychosurgery under other conditions.¹⁰⁴ Additionally, the spurious nature of Leary's claim that marijuana is necessary to the practice of Hinduism is more easily dismissed than the medical judgment of the proponents of psychosurgery.¹⁰⁵

It is clear that both the courts and the California Legislature have recognized that mentation is protected by the first amendment.¹⁰⁶ Furthermore, the fact that psychosurgery affects mentation has placed psychosurgery within the ambit of the first amendment.¹⁰⁷ Though statutes and decisions to date have declared only the use of psychosurgery on an unwilling subject to be in violation of the first amendment, there is no apparent rationale for rejecting the corollary that a denial of access to psychosurgery may also violate the first amendment. The test employed in Penal Code Section 2670 by which the state must justify unconsented interference with mentation is a showing of compelling interest in the interference. To the extent that denying a prisoner access to psychosurgery interferes with mentation by foreclosing the reduction of brain dysfunction, this denial of access must also be justified by a compelling state interest.

In response to a claim that the denial of access to psychosurgery violates the right of expression protected by the first amendment, the most probable basis for finding a compelling state interest in such denial would appear to be that the procedure itself is unsound and more likely to dampen mentative capacity than to enhance it. The court in *Kaimowitz* cites this as a factor in its decision.¹⁰⁸ The *Kaimowitz* holding is distinguishable from the question of prisoner access to psychosurgery, due to the presence of an experimental program that is not present in the situation where a prisoner requests access

101. *Id.* at 860.

102. *Id.* at 861

103. See CAL. PENAL CODE §§2670-2680; CAL. WELF. & INST. CODE §§5325-5326.6.

104. Shapiro, *supra* note 9, at 325.

105. Cf. *People v. Woody*, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964), a case in which peyote use was permitted where it was shown to be the cornerstone of a legitimate religion, established prior to regulation of the procedure in question. This is distinguished from *Leary* in that marijuana use is not a cornerstone of Hinduism and Leary's attempt to make it so occurred after legislation had established a policy prohibiting marijuana use.

106. See text accompanying notes 78-86 *supra*.

107. See text accompanying notes 84-86 *supra*.

108. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 36.

to psychosurgery.¹⁰⁹ Thus, *Kaimowitz* should be limited accordingly.¹¹⁰

Additionally, one should bear in mind that California has no legislatively declared policy against the use of psychosurgery. Prior legislation concerning psychosurgery addresses only the prisoners' unqualified right to refuse psychosurgery and the conditions under which a mental patient would be permitted to undergo psychosurgery. The fact that these statutes restrict the use of psychosurgery only in limited circumstances demonstrates the legislature's tacit acceptance of psychosurgery in other circumstances. Where the denial of access is based upon the shortcomings of the procedure itself, an essentially medical judgment has been made. Psychosurgery remains, however, the subject of medical controversy. This controversy is properly one for the legislature rather than the courts to resolve. The legislature, however, has through its silence tacitly condoned the use of psychosurgery. In light of this silence, it seems doubtful that the state could establish a sufficiently compelling state interest to deny a prisoner access to psychosurgery.

MENTATION AND THE RIGHT OF PRIVACY

While the protectability of mentation may be derived from the first amendment guarantee of free speech, mentation may also be protected by a right of privacy. In *Stanley v. Georgia*,¹¹¹ the Court stated that the Constitution confers upon the citizenry a fundamental right "to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."¹¹² In making this statement the *Stanley* Court expressly endorsed¹¹³ the dissenting opinion of Justice Brandeis in *Olmstead v. United States*,¹¹⁴ wherein it was stated that the Constitution protects citizens in their thoughts, emotions and sensations by conferring upon them a right to be left alone.¹¹⁵

109. See text accompanying notes 153-155 *infra*, for a discussion of the special problems in consenting to an experiment.

110. It should be noted that the *Kaimowitz* court was unwilling to distinguish between procedures that are innovative and in that sense termed experimental, and those procedures that are specifically part of an experimental program. The *Kaimowitz* court stated that:

The two issues framed for decision in this declaratory judgment action are as follows:

1. After failure of established therapies, may an adult or a legally appointed guardian . . . give legally adequate consent to an innovative or experimental surgical procedure on the brain . . .

Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 8-9.

111. 394 U.S. 557 (1969).

112. *Id.* at 564.

113. *Id.*

114. 277 U.S. 438 (1928) (Brandeis, J., dissenting).

115. *Id.* at 478:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

With regard to organic therapies, courts have also recognized the patient's right to be let alone. One court stated that the use of aversive drug therapies, where unconsented to, raises "serious constitutional questions respecting . . . impermissible tinkering with the mental processes."¹¹⁶ The *Kaimowitz* court was more specific concerning what constitutional right it felt such impermissible tinkering affected. The court stated that "there is no privacy more deserving of protection than that of one's mind."¹¹⁷ Similarly, the *Aden* court expressed its concern with protecting the patient from unconsented to invasions of body and mind.¹¹⁸

In each of the above instances, the courts were concerned with preserving the inviolability of the patient's mentation. Though the protection of mentation is closely related to the protection of speech, the protection afforded mentation by a right of privacy is distinguishable from that afforded by the first amendment's protection of speech in that privacy affects mentation independent of any possibility of communication.¹¹⁹ Despite this distinguishing feature, the employment of a privacy argument of this type to protect access to psychosurgery would employ essentially the same considerations as those used in a first amendment speech argument.¹²⁰

The right of privacy, however, is not limited to a right to be let alone. As articulated in the leading case of *Roe v. Wade*,¹²¹ the right of privacy may also afford access to the medical procedure of one's choosing. The respect which is thereby given to one's autonomous choice to undergo a medical procedure, particularly as this choice is manifest by informed consent, may be crucial to a prisoner's right of access to psychosurgery.

In *Roe*, a right of privacy, derived from the fourteenth amendment, was held to ensure the right of a woman to a non-therapeutic abortion in the first trimester of her pregnancy.¹²² With regard to the right of privacy, the Court noted:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.¹²³

What is important here is that the Court sought to protect the woman's right to make her decision free of unwarranted regulation. This interpretation is consistent with the concurring opinion of Justice Douglas in *Doe v. Bol-*

116. *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973).

117. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 38.

118. 57 Cal. App. 3d at 678, 129 Cal. Rptr. at 545-46.

119. Shapiro, *supra* note 9, at 274-75.

120. See text accompanying notes 78-110 *supra*.

121. 410 U.S. 113 (1973).

122. *Id.*

123. *Id.* at 153 (emphasis added).

ton,¹²⁴ *Roe*'s companion case. Therein he stated that the essence of the right of privacy as found in the fourteenth amendment is "the autonomous control over the development and expression of one's intellect, interests, tastes and personality."¹²⁵

Though the *Roe* Court granted the right of privacy high regard, it further noted that this right is not absolute and may be overcome by a showing of compelling state interest.¹²⁶ The Court stated that the power of a woman to terminate her pregnancy, while protected by the right of privacy, must be considered against important state interests in regulation of abortion. The state's interest in protecting the health of the mother was found insufficient to obviate the mother's choice to have an abortion in the first trimester of her pregnancy due to a medical determination that up until this point, the possibility of mortality in abortion may be less than in childbirth.¹²⁷ The Court rejected the contention that the state had a legitimate and compelling interest in protecting the fetus in the absence of a prior legally recognized concern for the fetus.¹²⁸

In *Aden*, the court also addressed the question of whether denying a patient access to a medical procedure which the patient had consented to violated the patient's right of privacy. The court stated its adherence to the *Roe* formulation of the right of privacy¹²⁹ and declined to decide whether the right of privacy included the selection of and consent to medical procedures.¹³⁰ In a later portion of the opinion, however, the *Aden* court stated that:

The state's interest in protecting patients from unconsented to and unnecessary administrations of psychosurgery clearly justifies a review procedure which insures the competency of the patient and the truly voluntary nature of his consent. The incompetent patient is incapable of consenting to such a procedure, and the state's interest in protecting him from such procedure fully justifies the attendant invasion of privacy.¹³¹

The essence of this statement appears to be that any attempt by the state to regulate the decision-making process is also an infringement upon the privacy rights of the person whose decision is being reviewed. If the patient's right of privacy is violated by state interference in the decision-

124. 410 U.S. 179 (1973).

125. *Id.* at 211.

126. 410 U.S. at 154.

127. *Id.* at 163-64.

128. *Id.* at 161-62.

129. *Id.* at 154.

The privacy right, involved, therefore cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* 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. The Court has refused to recognize an unlimited right of this kind in the past.

130. 57 Cal. App. 3d at 679, 129 Cal. Rptr. at 546.

131. *Id.* at 682, 129 Cal. Rptr. at 548.

making process, it would seem that what the right of privacy is protecting is the decision-making process itself. Though the *Aden* court expressly stated that they would not extend the right of privacy to include the decision to undergo a medical procedure, it appears that in effect the court has done just that.

Even if the contention that the *Aden* court has extended the right of privacy to encompass the decision to undergo any medical procedure is not accepted, the *Aden* court supplied an independent basis for placing the decision to undergo psychosurgery within the ambit of the right to privacy. The court stated that when the decision is whether to undergo a procedure that is closely related to fundamental rights, that decision is necessarily within the right to privacy.¹³² Based upon either line of reasoning, the court concluded that regulation of a competent mental patient's decision to undergo psychosurgery must be justified by a compelling state interest.¹³³ This conclusion is clearly contrary to that of the Solano County Superior Court which sought to place the burden upon the prisoner to show he had a right of access to the procedure.¹³⁴ Based upon the rationale of privacy cases such as *Roe* and endorsed by the *Aden* court, the burden must be put upon the *state* to demonstrate the constitutionality of any regulation it seeks to impose upon the prisoner's choice to undergo psychosurgery.

When the right of privacy is derived from the fourteenth amendment as in the *Roe* case, the focal point of the right becomes the preservation of personal autonomy. It has been contended that the fourteenth amendment infuses the entire Constitution with a presumption in favor of personal autonomy and against substitution of judgment by the state.¹³⁵ With regard to medical procedures, the manifestation of personal autonomy has traditionally been the patient's informed consent to the procedure.

At common law, the theory of informed consent is rooted in the notion of *volenti non fit injuria*—to one who is willing, no harm is done.¹³⁶ Providing that no public policy has been contravened, courts leave the consenting

132. *Id.* at 679, 129 Cal. Rptr. at 546:

While the decision to terminate a pregnancy is includable within those "fundamental" rights as an activity closely related to the above activities, we need not decide whether the decision to undergo medical treatment is deserving of constitutional protection in and of itself . . . because the right to privacy so clearly includes privacy of the mind.

133. *Id.* at 682-84, 129 Cal. Rptr. at 548-49.

134. See text accompanying note 15 *supra*.

135. Ratner, *The Function Of The Due Process Clause*, 116 U. PA. L. REV. 1048, 1070 (1968):

The Due Process and residual rights concepts connote a basic limitation upon governmental authority, derived from the function of government and the official-citizen relationship. They imply that government may restrict human activity only for a socially useful purpose, that every government regulation should implement some community value.

This limitation sustains individual autonomy in choice of goals. It preserves for each person optimal freedom to determine his needs and the ways to fulfill them.

136. W. PROSSER, *LAW OF TORTS* 101 (4th ed. 1971).

individual to determine his own destiny.¹³⁷ Though informed consent was originally utilized as a defense to certain intentional torts,¹³⁸ its common contemporary use is as a defense to medical malpractice.¹³⁹ Although commonly used as a defense to medical malpractice, the true purpose of informed consent is to underscore the role of the patient's autonomous choice in electing to undergo a medical procedure. As stated by Justice Cardozo, the requirement of informed consent means that "every human being of adult years and sound mind, has a right to determine what shall be done with his body."¹⁴⁰

The concept of informed consent honors the right of a person to determine what he would have done to his body. In this sense, the giving of consent is also a manifestation of the right to choose a medical procedure which *Roe* held protected by a right of privacy.¹⁴¹ While the *Roe* Court was careful to note that the right to choose a medical procedure is not unlimited, it also made clear that this choice is not one the state can easily ignore.¹⁴²

Though similarly limited, informed consent, as the manifestation of this right of privacy, remains a powerful vehicle for expressing the individual's autonomy which may not be easily overridden. In California decisions, courts have held that after consent is given to a procedure, the physician has not only a right, but also a duty, to provide treatment.¹⁴³ Case law further maintains that even when such a procedure will incidentally affect the fundamental rights of others, the consent of the patient alone is sufficient.¹⁴⁴ In general, informed consent represents an exercise of personal autonomy and is initially sufficient to warrant the medical procedure in question.¹⁴⁵

In both the *Kaimowitz* and *Aden* decisions, it was successfully contended that circumstances exist under which the judgment of the state may be used as a substitute for, and in abridgment of, the consent of the prisoner or patient.¹⁴⁶ Prefacing the *Kaimowitz* analysis of what constitutes adequate consent are suggestions as to the nature of informed consent. The court states:

137. *Id.*

138. *Id.*

139. *Cobbs v. Grant*, 8 Cal. 3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972).

140. *Schloendorff v. Society of New York Hosps.*, 211 N.Y. 125, 126, 105 N.E. 92, 93 (1914).

141. See text accompanying notes 125-131 *supra*.

142. 410 U.S. at 154.

143. *Rosenberg v. Feigin*, 119 Cal. App. 2d 783, 786, 260 P.2d 143, 144 (1953).

144. *Kritzer v. Citron*, 101 Cal. App. 2d 33, 38, 224 P.2d 808, 811 (1950). The question before the court was whether a physician must obtain the consent of the husband in addition to that of the patient/wife before the wife could be sterilized. The court noted:

Although the appellants also assert that the consent of both husband and wife was necessary, they cite no authority in support of such proposition. On the contrary, the consent of the patient alone is sufficient.

Id.

145. While the patient's consent is sufficient to warrant the procedure, the fact that the rendering of all medical services is subject to the sound discretion of the attending physician should not be overlooked.

146. See text accompanying notes 54-61 *supra*, for a discussion of the *Kaimowitz* decision; text accompanying notes 62-73 *supra*, for a discussion of the *Aden* decision.

Informed consent is a requirement of variable demands. Being certain that a patient has consented adequately to an operation, for example, is much more important when doctors are going to undertake an experimental, dangerous, and intrusive procedure than, for example, when they are going to remove an appendix. When a procedure is experimental, dangerous and intrusive, special safeguards are necessary. The risk-benefit ratio must be carefully considered, and the question of consent thoroughly explored.¹⁴⁷

This statement is crucial in its implication that adequacy of consent is to be tested against the gravity of the procedure to be employed. Accepting the notion that consent is a requirement of variable demands, the court then bases its analysis of the adequacy of consent on three factors. These factors are competence, knowledge, and voluntariness.¹⁴⁸

The *Kaimowitz* court's discussion of the first factor, competence, was focused upon the effects of incarceration upon a prisoner. The court states that the very fact of incarceration diminishes the capacity of the prisoner to give adequate consent.¹⁴⁹ A finding of impaired competency to consent based upon the very fact of incarceration appears to be at odds with statutes recognizing the ability of the prisoner to give informed consent.¹⁵⁰ Due to the clear conflict between these statutes that recognize competency to consent despite confinement, and the contention of the *Kaimowitz* court that confinement diminishes the capacity to consent, it appears that the *Kaimowitz* holding lacks legal basis in this regard and should not be followed.

In considering the second factor, voluntariness, the *Kaimowitz* court again relies upon the fact of confinement. The court states that due to the inequality of position between the confined and the confiners, the consent of the confined cannot be voluntary.¹⁵¹ In *Kaimowitz*, the inequality of position is twofold. In one sense there is inequality merely because of the prisoner's position as confined. This contention is not compelling because as previously stated, statutes express that prisoners will not be held to lack the capacity to consent merely because of confinement.¹⁵² A more convincing rationale in support of a lack of voluntariness in the *Kaimowitz* situation

147. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 22.

148. *Id.* See note 41 *supra* for an exposition of informed consent found in Penal Code Section 2672(a).

149. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 25.

150. See CAL. PENAL CODE §2600 which implicitly recognizes the competency of a prisoner to give informed consent in its statement that the prisoner loses only those rights that are necessary for the security of the institution and the protection of the public. Penal Code Section 2670 expressly provides that certain medical procedures, including psychosurgery, may only be employed upon a prisoner who has given informed consent. Penal Code Section 2672(b) expressly states that even where a prisoner is diagnosed as mentally ill, he will not be presumed incapable of giving informed consent.

151. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 29-30.

152. See text accompanying note 146 *supra*.

would be based upon the fact that the procedure is experimental.¹⁵³ Participation in an experimental program is often rewarded with attractive and otherwise unattainable benefits. Insofar as these benefits are an inducement for a prisoner to participate in the experiment, they may impair the voluntariness of consent.¹⁵⁴ As previously stated, such conclusion is not pertinent to a situation such as Kemper's where the procedure in question is not part of an experimental program.¹⁵⁵

Considering the final requisite to adequate informed consent, that it be knowing, the *Kaimowitz* court maintained that the evidence surrounding psychosurgery is so uncertain as to make knowing consent to the procedure impossible.¹⁵⁶ This position appears untenable, however, as a misunderstanding of what must be known to consent. The fact that the result of a procedure is uncertain seems of less importance than that the patient is informed of and accepts the possibilities.¹⁵⁷ One commentator, citing *Kaimowitz* as an example of overprotection, states that:

153. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 1-7.

154. See Ratnoff & Smith, *Human Laboratory Animals: Martyrs for Medicine*, 36 *FORDHAM L. REV.* 673, 684 (1968) [hereinafter cited as Ratnoff & Smith]; Note, *Medical and Psychological Experimentation on California Prisoners*, 7 *U. Cal. D. L. Rev.* 351, 363-66 (1974).

It has been noted that participation in an experiment by a prisoner can be induced by several extraneous factors. First, the prisoner is paid for his participation in the experiment. Second, participation in an experiment gives the prisoner opportunity to relate to individuals from outside the prison community. In the same vein, participation may also place the prisoner in a special project area that is more comfortable, has better food and allows the prisoner more than the ordinary prison regimen. Third, the prisoner believes that his participation in the experiment is viewed favorably by prison officials. Under these circumstances, the voluntariness of consent to the experiment has been seriously questioned.

155. See text accompanying notes 14-16 *supra*. See Ratnoff & Smith, *supra* note 154, at 676:

Obviously, some physicians must move away from the established drug or practice. One physician had to be the first to undertake an organ transplant. In this regard, two types of innovation must be distinguished—those experiments designed for the treatment or cure of a particular person, who is the patient-subject of the experiment, and those experiments designed to add to our understanding of normal and abnormal functioning of the body, including the effects of drugs and various techniques. This second type of research, in which the subject has ordinarily nothing to gain either diagnostically or therapeutically, creates the principal problem and the one which concerns us here.

This statement distinguishes between the use of a procedure that, though arguably therapeutic, is so innovative as to be deemed experimental, and a procedure that is part of a program designed only to add to the pool of knowledge. The latter situation appears more closely related to *Kaimowitz*, while the former situation more closely resembles a prisoner who seeks access to psychosurgery absent an experimental program. But see note 106, *supra*, in which the *Kaimowitz* court makes clear that they intend their decision to encompass innovative psychosurgery as well as psychosurgery within experimental programs.

156. Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 26-27.

157. See *Cobbs v. Grant*, 8 Cal. 3d 229, 243, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972). The court held that consent to a medical procedure requires only a full disclosure of possibilities, risks and alternatives. See Ritts, *A Physicians View of Informed Consent in Human Experimentation*, 36 *FORDHAM L. REV.* 631, 632 (1968):

[I]t is submitted that "consent" or "informed consent" means the patient-subject has agreed to participate in a bio-medical experiment under the direction of a physician responsible for his physical and mental health and that his agreement has been given after he understands what procedures will be performed on him, the possible risks and benefits as far as can be predicted on the basis of available knowledge and that he is always privileged to withdraw from the study consonant with his own safety.

[T]he patient should not be so protected by the requirement of informed consent that even when he knows procedures will be used and accepts them, he is not allowed to participate in a rehabilitative program.¹⁵⁸

In sum, the findings of the *Kaimowitz* court are rebuttable and probably would not be followed by a California court in determining a prisoner's right of access to psychosurgery.

The logic of the *Aden* decision seems to support the concept that informed consent entails varying demands. The *Aden* court's concurrence in the variable demands concept is evidenced by the fact that while substantive review of a voluntary and competent patient's decision to undergo psychosurgery is upheld, a similar review of a decision to undergo electroshock therapy is deemed an unwarranted incursion upon the patient's right to privacy.¹⁵⁹ It must be questioned whether the patient's consent to psychosurgery is any less competent, knowing and voluntary than his consent to electroshock therapy. The answer would seem to be that by employing the concept of variable demands, the state does not seek to determine the adequacy of consent, but rather seeks to prohibit the use of certain disfavored procedures.

Support for this proposition is found in *Kaimowitz* where the court notes that if the state of medical knowledge reaches a level at which psychosurgery would no longer be considered experimental, consent to the procedure by one involuntarily confined would be considered adequate.¹⁶⁰ Similarly, the *Aden* court found review of the decision to undergo electroshock treatment impermissible while upholding similar review of the decision to undergo psychosurgery. This decision was based upon the contention that electroshock treatment finds greater acceptance in medical circles than does psychosurgery.¹⁶¹ In both the *Aden* and *Kaimowitz* decisions, the courts have demonstrated that their concern lies less with the adequacy of consent than with the court's view of the propriety of the procedure in question. Thus, it seems that under the guise of variable demands, the courts are attempting to prohibit the use of psychosurgery within the institutional setting.

Since access to psychosurgery involves a fundamental right of privacy, any regulation of access to psychosurgery would be justified only if the state were able to demonstrate a compelling reason for the regulation of this

158. Allyon, *Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 3, 12 (1975).

159. 57 Cal. App. 3d at 683-84, 129 Cal. Rptr. at 548-49. Compare 15 CAL. ADM. CODE §3345(b) which would permit shock therapy under limited circumstances with 15 CAL. ADM. CODE §3343 which would absolutely prohibit the use of psychosurgery within the Department of Corrections.

160. See Civil No. 73-19434-AW (Cir. Ct. Wayne County, Mich.) at 38.

161. 57 Cal. App. 3d at 683-84, 129 Cal. Rptr. at 548-49. The court expressly endorses the rationale regarding incapacity of one confined to consent to these procedures expressed in *Kaimowitz*. *Id.* at 674, 129 Cal. Rptr. at 542-43.

particular procedure.¹⁶² As previously discussed, informed consent as an authorization for a medical procedure may be considered as a manifestation of the type of privacy right upheld in *Roe v. Wade*.¹⁶³ In *Roe*, the burden is put upon the state to demonstrate a compelling interest for any regulation that would infringe upon this right of privacy. In light of the characterization of psychosurgery as a hazardous and irreversible procedure by both the *Kaimowitz* and *Aden* courts, it would seem that both courts would establish the protection of the prisoner/patient as the compelling state interest served by regulation of access to psychosurgery.

The state's claim that regulation of prisoner access to psychosurgery serves a compelling state interest by protecting the prisoner from the hazardous and irreversible effects of psychosurgery is without merit. The fact that the legislature has made no determination that psychosurgery is a dangerous procedure which should not be used, is evidence that the state has no articulated interest in regulating prisoner access to psychosurgery. The Court in *Roe* used similar reasoning to refute a claim that regulation of abortion served a compelling interest by protecting the unborn fetus. The Court found that the absence of prior legislative concern for the well-being of the fetus prevented the state from claiming a compelling state interest in their protection.¹⁶⁴

The fact that the state seeks to regulate only the access of prisoners and mental patients to psychosurgery, is evidence that the state has no compelling interest in regulation of the procedure. The state may assert, however, that the very incident of confinement creates a compelling state interest warranting regulation of access to psychosurgery by those confined. As will be discussed, the contention that confinement itself creates a compelling state interest for the regulation of access to psychosurgery, may be subject to attack for its failure to provide equal protection.

EQUAL PROTECTION

While both prisoners' and mental patients' rights of access to psychosurgery have been virtually eliminated,¹⁶⁵ the right of the general public to undergo such procedure remains unfettered. Because the regulation of access to psychosurgery has been limited to prisoners and mental

162. See text accompanying notes 111-134 *supra*.

163. See text accompanying notes 135-136 *supra*.

164. 410 U.S. at 155-63. The Court rejected the state's claim of a compelling state interest served by regulation of abortion based upon saving the fetus. The Court held that since the state had failed to demonstrate substantial interest in the fetus through prior statutes and regulations, the instant claim could not be deemed compelling. *Id.* at 161-62:

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life as we recognize it, begins before live birth or to accord legal rights to the unborn. In short, the unborn have never been recognized in the law as persons in the whole sense.

165. See text accompanying notes 34-52 and 62-73 *supra*.

patients, the possibility of an attack on these regulations based upon failure to provide equal protection exists.

In *Dunn v. Blumstein*,¹⁶⁶ the United States Supreme Court outlined the factors to be considered under a claim that a regulation fails to provide equal protection of law. The Court required an examination of the character of the classification in question, the individual interests affected and the government interests asserted.¹⁶⁷ The Court further noted that while various tests have been used to determine whether the regulation in question violates the equal protection clause, the test to be employed when fundamental rights are at issue is the exacting scrutiny of compelling state interest.¹⁶⁸ The Court also stated that any regulation of a fundamental right must be so narrowly drawn as to comprise the least restrictive means of furthering this compelling state interest.¹⁶⁹ An examination of a potential violation of equal protection by denying a prisoner access to psychosurgery must include a determination of whether the rights affected by the regulation are fundamental. If the rights affected are fundamental, the burden is placed upon the state to show, first, that the regulation serves a compelling state interest, and second, that the regulation is the least onerous alternative to effectuate this interest.¹⁷⁰

Fundamental rights are those rights that are explicitly or implicitly guaranteed by the Constitution.¹⁷¹ This being the case, mentation, insofar as it is protected by the first amendment,¹⁷² is a fundamental right that would call forth the stricter scrutiny of compelling state interest. Similarly, privacy rights, whether considered as the right to be let alone or the right to determine what becomes of one's body, have been considered fundamental rights by the Court.¹⁷³ To the extent that psychosurgery affects fundamental rights of privacy¹⁷⁴ and mentation,¹⁷⁵ the regulation of access to

166. 405 U.S. 330 (1972).

167. *Id.* at 335.

168. *Id.*; see *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

169. 405 U.S. at 343; see *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

170. In equal protection cases a second means available to trigger the compelling state interest test is the presence of a suspect class. See *Frontiero v. Richardson*, 411 U.S. 677, 682-83, (1973); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28-29, (1973). As noted by Justice Powell in *San Antonio*, the determination of whether the class is suspect is based upon:

[Whether] the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

411 U.S. at 28. While the class of prisoners would appear to bear many of the indicia of a suspect class, the Court has never called prisoners a suspect class and generally appears reluctant to categorize a class as suspect. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (the Court refused to term sexual classifications suspect).

171. 411 U.S. at 33.

172. See text accompanying notes 78-111 *supra*.

173. See *Roe v. Wade*, 410 U.S. 113, 152 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965).

174. See text accompanying notes 111-162 *supra*.

175. See text accompanying notes 78-111 *supra*.

psychosurgery must be subjected to judicial scrutiny under the compelling state interest test. Such a finding would be in accord with the aforementioned declaration of policy found in Penal Code Section 2670 in which it is stated that mentation is a fundamental right.¹⁷⁶ The statute further mandates that in the limited situations in which the state may enforce interference with a prisoner's mentation, the interference is only warranted when the state is able to show a compelling interest that will be served by the interference and no less onerous alternative.¹⁷⁷

As has been suggested in the analysis of the *Aden* and *Kaimowitz* decisions, there is a question whether the regulation of access to psychosurgery was conditioned upon the nature of the procedure or the situation of those who sought the procedure.¹⁷⁸ It has been suggested that regulations placed upon psychosurgery thus far have been predicated upon the nature of psychosurgery as an experimental, hazardous and irreversible medical procedure.¹⁷⁹ While it is accepted that medical procedures may be regulated as safety and public welfare demand,¹⁸⁰ the question remains whether the demands of safety and public welfare require any greater regulation of prisoner or mental patient's access to psychosurgery than the regulation placed upon the general public.

In *Aden*, the court quickly disposed of a claim that regulation of the decision of a competent and voluntary patient to undergo psychosurgery violated equal protection. The court stated that it is within the power of the legislature to make reasonable classifications of persons and activities provided such classification is not arbitrary and bears reasonable relationship to a legitimate goal.¹⁸¹ The court stated that because psychosurgery is a hazardous procedure and mental patients are a class in need of special protection, regulation of a mental patient's access to psychosurgery is a proper exercise of the police power.¹⁸²

The disposition of the equal protection claim set forth in *Aden* is based upon both the characterization of psychosurgery as an extremely dangerous

176. CAL. PENAL CODE §2670. See text accompanying notes 28-46, *supra*.

177. CAL. PENAL CODE §2670.

178. See text accompanying notes 156-160 *supra*.

179. *Id.*

180. See *Jacobsen v. Massachusetts*, 197 U.S. 11, 29 (1905), in which the Court states that a citizen does not have the right to refuse to be vaccinated. The Court states:

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well ordered society charged with the duty of conserving the safety of its members the rights of the individual with respect of his liberty may at times, under pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id.

181. 57 Cal. App. 3d at 673, 129 Cal. Rptr. at 542. There is some question as to the test applied by the court. It appears that the court failed to apply the stricter scrutiny of the compelling state interest test, but rather relied upon a showing of legitimate interest and rational basis. *Id.*

182. *Id.*

procedure and the characterization of mental patients as a group in need of special attention.¹⁸³ The characterization of psychosurgery as a medical procedure requiring greater regulation is beyond the scope of this comment. A more germane point, however, is raised by the rationale set forth in *Aden* concerning why the class in question was in need of special protection in the decisionmaking process.

The court in *Aden* noted that while mental patients are presumed competent to consent by statute,¹⁸⁴ "it is common knowledge [that] mentally-ill persons are more likely to lack the ability to understand the nature of a medical procedure and appreciate its risks."¹⁸⁵ Further, the court questioned the ability of one confined to give adequate consent due to the very fact of confinement.¹⁸⁶ The court held that measures regulating the decisionmaking process of a mental patient are consonant with the purposes of legislation which are to insure that the patient desires the procedure in question and that the procedure is necessary.¹⁸⁷

The *Kaimowitz* court also relied upon the contentions that those confined are in need of special protection in the decisionmaking process and that psychosurgery was a hazardous procedure requiring stringent regulation. *Kaimowitz*, however, involved the use of psychosurgery upon prisoners in a context which was primarily experimental rather than therapeutic. As previously noted, the presence of an experimental program brings forth problems not otherwise encountered in ascertaining the adequacy of consent to a medical procedure.¹⁸⁸ The attractive and otherwise unattainable benefits that accompany participation in an experiment may induce the prisoner or mental patient to undergo a procedure despite that procedure's lack of therapeutic value. Due to the presence of such inducements, it is granted that the decision of a prisoner or a mental patient to participate in an experimental program should be closely scrutinized. It is submitted, however, that when inducements such as those found in an experimental program are not present, the prisoner should be able to make a decision to undergo a given medical procedure without state interference in the decision-making process.¹⁸⁹ The *Kaimowitz* decision would then be properly limited to regulating the decisionmaking process of the subclass of prisoners who desire to participate in an extremely hazardous experimental program.

183. *Id.* It should be noted that both the characterization of psychosurgery as an extremely hazardous procedure and the classification of mental patients as a group in need of special protection appear necessary to the result reached in *Aden*. Without the former, no reason exists to regulate psychosurgery to a greater degree than electroshock therapy. Without the latter, no reason appears to limit the regulation of psychosurgery to a limited class.

184. CAL. WELF. & INST. CODE §5331.

185. 57 Cal. App. 3d 674, 129 Cal. Rptr. at 542.

186. *Id.*

187. *Id.* at 673, 129 Cal. Rptr. at 542.

188. See text accompanying notes 154-155, *supra*.

189. *Id.*

In both the *Kaimowitz* and *Aden* decisions, the courts posited definite reasons why the prisoner's and mental patient's access to psychosurgery could be more strictly regulated than that of the general public.¹⁹⁰ While the *Kaimowitz* court never addressed the issue of equal protection,¹⁹¹ and the *Aden* court erred in the test to be applied,¹⁹² one may accept for the sake of argument that the reasoning of both courts could have satisfied the compelling state interest test of equal protection. The question remains, however, whether similar reasoning can be used to defeat an equal protection attack based upon denial of a prisoner's request for access to psychosurgery.

The situation of a prisoner who, of his own initiative, seeks access to psychosurgery apart from an experimental program is clearly distinguishable from the situation of a mental patient seeking similar treatment. The common sense notion of the incapacity of a mental patient to give adequate consent, while doing violence to the express wording of the statutes, retains some ring of plausibility.¹⁹³ The prisoner, however, by virtue of his competence to stand trial, has been found able to understand the nature of the proceedings taken against him and to assist counsel in conducting a rational defense.¹⁹⁴ While it is not contended that the standard of competency to stand trial is equivalent to the standard of competency to give adequate consent, both types of competency require knowledge or understanding. At trial, the prisoner as defendant is presumed sane and bears the burden of disproving knowledge and understanding of the nature and quality of his acts.¹⁹⁵ It would appear, then, that the prisoner who fails to rebut the presumption of his sanity at trial should enjoy no less a presumption of sanity during his confinement.¹⁹⁶ In particular, the presumption of a prison-

190. See text accompanying notes 154-162 *supra*.

191. Because the *Kaimowitz* court addressed the question of psychosurgery from the perspective of the state attempting to impose psychosurgery upon one incapable of consenting, the question of whether equal protection was violated never became an issue.

192. See note 181 *supra*.

193. See text accompanying notes 183-187 *supra*.

194. CAL. PENAL CODE §1367:

A person cannot be tried or adjudged to punishment while he is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder, he is unable to understand the nature of the proceedings taken against him and to assist counsel in the conduct of a defense in a rational manner.

195. See *People v. Wolff*, 61 Cal. 2d 795, 816, 394 P.2d 959, 972, 40 Cal. Rptr. 271, 285 (1964); CALJIC §4.00, at 97 (3d ed. 1970):

Legal insanity, as the words are used in these instructions, means a diseased or deranged condition of the mind which makes a person incapable of knowing or understanding the nature and quality of his act, or makes a person incapable of knowing or understanding that his act was wrong.

CAL. EVID. CODE §522: "The party claiming that any person, including himself, is or was insane has the burden of proof on that issue."

196. This statement should be construed narrowly as finding a presumption of sanity for the class of prisoners, which presumption may be rebutted by the state. Particularly as applied to the competency of a prisoner to give informed consent to psychosurgery, sanity at time of trial may not reflect later competency to give informed consent. For example, assume a prisoner had been convicted of a lesser offense than that charged because of his successful contention that diminished capacity rendered him incapable of an element of the offense in question. The successful defense of diminished capacity may be evidence of some degree of mental illness and thereby warrant the finding of a common sense incompetency as found in

er's sanity may be available to negate the application to prisoners of the type of common sense presumption of incapacity found with regard to mental patients in *Aden*. It is probable, therefore, that the finding of incompetency put forth for the regulation of the mental patient's decisionmaking process would not attach in the case of a prisoner.

The ability of a prisoner to initiate a medical procedure by exercise of his informed consent is given specific recognition by an opinion of the California Attorney General.¹⁹⁷ This opinion upholds the right of a prisoner to a voluntary, nontherapeutic sterilization.¹⁹⁸ The opinion maintains that to authorize the procedure, the consent of the prisoner is, of itself, sufficient. The opinion is noteworthy in its declaration that the right of a prisoner to undergo a medical procedure to which he has consented is the same as that of the public at large.¹⁹⁹

The common sense notion of the incapacity of a mental patient to adequately consent to psychosurgery, upon which the *Aden* court based its characterization of mental patients as a class in need of special protection in the decisionmaking process, would not seem to attach to the prisoner. Since this common sense approach is inapplicable to a prisoner, the state would then have no basis for characterizing prisoners as a group in need of special protection in the decisionmaking process. Further, since there is no special need for regulation of the prisoner's decisionmaking process, the state has no compelling interest in limiting regulation of access to psychosurgery to prisoners while allowing the general public unfettered access to the procedure. In the absence of a compelling state interest served by such limitation, the regulation would be in violation of equal protection.

Aden. See *People v. Cantrell*, 8 Cal. 3d 672, 685-86, 504 P.2d 1256, 1264-65, 105 Cal. Rptr. 792, 800-01 (1973).

A second possibility is that during the course of incarceration, a prisoner, fully competent prior to incarceration, becomes mentally ill. See *Morris*, "Criminality" and the Right to Treatment, 36 U. CHI. L. REV. 784, 791 (1969).

An inference of a prisoner's competence may also be rebutted by confinement within particular types of penal institutions. An example would be confinement in an institution such as the California Medical Facility which houses Kemper. CAL. PENAL CODE §6102 states the purpose of this institution is "segregation, confinement, treatment and care of males under the custody of the Department of Corrections . . . who are either mentally ill, mentally defective, or mentally abnormal."

It has been suggested, however, that confinement in an institution such as the Medical Facility where an express statutory purpose is treatment may also give rise to a right to treatment. Note, *Conditioning and Other Technologies Used To "Treat?" "Rehabilitate?" "Demolish?" Prisoners And Mental Patients*, 45 S. CAL. L. REV. 616, 647 (1972). Such a statutory right to treatment has been upheld for mental patients, but the extent to which this right to treatment permits a mental patient to dictate what procedures will be employed in his treatment is as yet unknown. See *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

It should also be noted that for purposes of refusing to consent to organic therapy suggested by the state, CAL. PENAL CODE §2672(b) states that incapacity will not be presumed based upon a diagnosis of mental illness. It would seem a similar presumption should also attach in the case of a prisoner seeking access to psychosurgery.

197. 53 OP. ATT'Y GEN. 298, 299 (1970).

198. *Id.*

199. *Id.*

It may be contended, however, that denying a prisoner access to psychosurgery can be justified as a legitimate result of his status as a prisoner. California courts, while recognizing legitimate penal goals of rehabilitation, isolation and deterrence,²⁰⁰ also note that a prisoner does *not* forfeit *all* rights upon entering prison, but *only* those rights that are *necessary* for prison security and public protection.²⁰¹ In addition, it has been held that the state's repression of a prisoner's rights beyond the extent to which these rights are regulated in regard to other citizens, must be in furtherance of a compelling state interest.²⁰²

It is difficult to fathom how the denial of access to psychosurgery would serve a legitimate penal goal. Similarly, it is difficult to comprehend how denial of access to psychosurgery would aid prison security or enhance public protection. Moreover, the fact that the prisoner's first amendment and privacy rights have been zealously protected²⁰³ would militate against a finding of compelling state interest in denying access to psychosurgery to a prisoner as a result of his confinement.

Though the state has the power to regulate medical procedures as safety and public welfare demand, when this regulation is applied to a limited group, the state's action may be in violation of equal protection. To the extent that prisoners alone are denied access to a procedure affecting fundamental rights, psychosurgery, the state must demonstrate that limiting denial of access to prisoners alone is in furtherance of a compelling state interest. In *Aden*, the court found mental patients to be a group in need of special protection based on a common sense notion of their incapacity to adequately consent. The prisoner, however, should not be subject to such common sense notion of incapacity. The expression of statutes, bolstered by the opinion of the Attorney General, is that prisoners are capable of giving informed consent to a medical procedure. A finding that the prisoner was competent to stand trial would also tend to uphold the existence of his capacity to give adequate consent. Absent a showing that the prisoner is in need of special protection, the state would not be able to demonstrate a compelling interest in limiting the denial of access to psychosurgery to prisoners while allowing the general public unfettered access. The inability of the state to demonstrate a compelling interest that would be served by limiting the denial of access to prisoners would necessitate invalidating any such regulation as a violation of equal protection.

200. *In re Foss*, 10 Cal. 3d 910, 924, 519 P.2d 1073, 1086, 112 Cal. Rptr. 649, 663 (1974).

201. CAL. PENAL CODE §§2600, 2601.

202. *See* *Brown v. Peyton*, 437 F.2d 1228, 1231 (4th Cir. 1971).

203. *See* CAL. PENAL CODE §2601 which specifically permits correspondence and access to media; CAL. PENAL CODE §2670 which protects prisoners from enforced interferences with mentation. The courts have similarly protected prisoners rights, *e.g.*, *Brown v. Peyton* 437 F.2d 1228 (4th Cir. 1971); *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972).

CONCLUSION

The subject of prisoner access to psychosurgery has received little judicial or legislative attention to date. In the past, the concern of courts and legislatures with regard to psychosurgery was to protect unconsenting prisoners from having the procedure imposed upon them. When a prisoner voluntarily seeks access to psychosurgery, however, a different set of problems arise.

Initially, it is apparent that psychosurgery, by its very nature, affects mentation. To the extent that mentation is protected by either the right of privacy, or by the first amendment guarantee of free speech, a denial of access to a procedure that may improve mentation would violate these constitutionally protected rights. Though psychosurgery is concededly an innovative procedure, the effects of which are not yet fully understood, the absence of an articulated legislative policy deeming the procedure harmful would prevent the state from claiming a compelling interest in regulating access to the procedure based on the possibility of adverse effects. Similarly, the right of privacy has been found to protect the individual's autonomous choice to undergo a procedure that affects fundamental rights. In order for the state to justify a regulation of the choice to undergo this procedure, the state must again demonstrate that such regulation serves a compelling state interest. As has been seen, however, the absence of an articulated legislative policy finding psychosurgery harmful prevents the state from claiming a compelling interest in denial of access based upon the nature of the procedure. In limiting the denial of access to psychosurgery to the class of prisoners, a second problem arises. The inability of the state to demonstrate why the class of prisoners is in need of special protection with regard to the decision to undergo psychosurgery causes the regulation to deny the prisoner equal protection. In sum, denying a prisoner access to psychosurgery, in the absence of a legislative policy warranting general prohibition of the procedure, would violate first amendment and privacy rights of the prisoner. To the extent that this denial of access is limited to the class of prisoners without a demonstration of a compelling state interest in affording this class special protection, equal protection is also violated.

As a final note, it should be emphasized that the purpose of this comment is neither to compel the state to allow psychosurgery nor to endorse the use of psychosurgery. The state has seen fit to allow psychosurgery to be performed without regulation among the general public. By allowing this procedure to continue without regulating its general use, the state has condoned it. In effect, the absence of legislation demonstrates the People's belief that the effects of psychosurgery may be beneficial. The state may balance the risk-benefit ratio of psychosurgery and outlaw the procedure

entirely—an action that may be fitting. So long as the legislature elects not to regulate general access to the procedure, however, it should not regulate the procedure solely as applies to prisoners, as such regulation violates the prisoners' right to equal protection.

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