

## MEDICAL ASSAULT: TWO NINETEENTH CENTURY CASES

By Robert D. Miller, J.D., M.S. Hyg.  
Honorary Fellow  
Medical History and Bioethics Department  
School of Medicine and Public Health  
University of Wisconsin - Madison

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Surgeons are taught that performing unauthorized surgery is an assault. Today the focus of most cases alleging unauthorized surgery is on whether there was adequate authorization or whether the surgery went beyond the scope of the authorization. It is rare for surgery to be performed over the objections of a competent adult patient. It is important to know that this has occurred and when it has occurred there are negative consequences.

In two nineteenth century cases, unauthorized surgery on competent patients resulted in governmental legal investigations and action. In 1835, surgeon Jonathon Monckton dragged James Roberts, a pauper in the Brenchley (England) workhouse, into a room in the workhouse and performed surgery on him against the will of James, his father and the workhouse overseer. Dr. Monckton was criminally prosecuted and found guilty of assault. In 1857, Dr. John Dawson had James Shannon, a prisoner in the Ohio State Penitentiary, dragged into a room and performed surgery on his eye against the will of the patient. An investigation by the Ohio legislature resulted in laws awarding the patient a payment from the state and forbidding surgery on prisoners without their consent.

The two surgical cases discussed here are unusual because active unconditional refusal by a competent patient was disregarded. In each case, public and legal attention was focused on the case resulting in condemnation of the surgeon's conduct, but the direct penalty to the surgeon was minimal.

### THE BRENCHLEY WORKHOUSE CASE

Jonathan Monckton (1796-1853)<sup>1</sup> was a surgeon who practiced in Brenchley in partnership with his uncle Stephen Monckton. Jonathan and

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<sup>1</sup> *Obituary*, LANCET, i:216 (Feb. 26, 1853).

Stephen shared the position of parish surgeon for one district of Brenchley.<sup>2</sup> Jonathan's father had been practicing medicine in the Brenchley area for over forty years. Brenchley is located in the borough of Tunbridge Wells in the county of Kent in southeastern England.

The Rev. Nathaniel Hopper Arthy<sup>3</sup> (1795-1876) was the Brenchley parish clerk. He had studied surgery before becoming ordained and occasionally assisted his professional friend, Jonathon Monckton.<sup>4</sup>

Among his other duties, Jonathan Monckton provided medical services to the Brenchley workhouse. James Roberts was a 16-year-old pauper<sup>5</sup> in Brenchley workhouse. Roberts had been under the medical care of Mr. Monckton<sup>6</sup> for three or four years for stone in the bladder. In March 1834, Mr. Monckton, with the assistance of Rev. Arthy, had operated on Roberts for the stone with the consent of Roberts and his father. The surgery did not extract the stone and did not relieve Roberts' problems. Robert's father objected to Mr. Monckton performing further surgery on his son. The father asked the overseer to arrange for Roberts to be examined by another physician, Mr. Hargraves. Mr. Hargraves was an advocate of lithotrity (breaking down the stones mechanically without cutting) as an alternative to cutting of the stone. Roberts, his father, and the overseer consented to lithotrity by Mr. Hargraves. It was scheduled for Friday, February 13, 1835. Mr. Monckton learned of the planned procedure and the objection to his additional surgery.<sup>7</sup>

On Thursday, February 12, Mr. Monckton came to the workhouse with Rev. Arthy. Mr. Monckton directed the manager of the workhouse to tell Roberts that Rev. Arthy wanted to see him. When Roberts arrived, he spotted the preparations for surgery and drew back. Mr. Monckton ordered the master to force Roberts into the room. When the master refused, Mr. Monckton personally

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<sup>2</sup> *Trial of Mr. Jonathan Monckton for forcibly performing an operation*, LANCET, ii:94-96 (April 18, 1835) [hereinafter cited as LANCET TRIAL REPORT].

<sup>3</sup> Most of the accounts name him as "Nathaniel Harper Arthy" but his legal name was "Nathaniel Hopper Victory Arthy." The National Archives of the UK; Kew, Surrey, England; General Register Office: Foreign Registers and Returns; Class: RG 33; Piece: 41; England, Births and Christenings, 1538-1975. Salt Lake City, Utah: Family Search, 2013.

<sup>4</sup> BRIGHTON GUARDIAN, Mar. 11, 1835, as reprinted in the LANCET, i:864-868 (Mar. 14, 1835)

<sup>5</sup> Some reports say he was 15. However, a James Roberts, son of James and Elizabeth Roberts, was baptized in Brenchley on 13 Sep. 1818 according to ENGLAND, BIRTHS AND CHRISTENINGS 1538-1975 (Salt Lake City: Family Search 2013), FHL Film Number 0992456, 0992457.

<sup>6</sup> In the discussion of the Brenchley case, physicians will be referred to as "Mr.," rather than "Dr.," in accordance with the convention of the time in England.

<sup>7</sup> LANCET TRIAL REPORT, *supra* note 2, at 94-96

dragged Roberts into the room despite his active resistance and shrieks for help. Mr. Monckton and Rev. Arthy guarded the doors while four men were fetched to assist. They had been waiting at Mr. Monckton's office and promptly arrived. When Roberts refused to undress, Rev. Arthy threatened to cut off his clothes. Four men stripped Roberts, forced him on to the table, and held him there despite his continued demands that the operation not occur.<sup>8</sup>

When it became clear that he could not escape, Roberts asked for something to numb him. Mr. Monckton gave him something. Mr. Monckton made the incision and Rev. Arthy inserted his thumb, both attempting to extract the stone. Roberts continued to protest. In an effort to stop the protests, Rev. Arthy threatened to strike, pour water on, and gag Roberts. Rev. Arthy then told a man to take Roberts' pillow away. When the man refused, Rev. Arthy removed the pillow himself. Rev. Arthy eventually sought to bribe Roberts with a half-crown coin, but Roberts persisted in his objections. When the efforts to remove the stone were unsuccessful, Mr. Monckton and Rev. Arthy left Roberts under the guard of the other men and sought other tools. A barber's curling iron was obtained from a neighbor and reshaped by a blacksmith into a tool like forceps. When they returned with the tool, Roberts again protested. After consultation among themselves, they probed with the finger, but did not use the tool. They conveyed Roberts to his bed and left. The surgery was not successful; the stone was not removed.<sup>9</sup>

Roberts' father filed assault charges with magistrates against Mr. Monckton and Rev. Arthy. Due to prominence of the defendants, witnesses would not voluntarily testify, so they were summoned.<sup>10</sup>

The case was first publicly reported in a LANCET article on February 28, 1835.<sup>11</sup> The LANCET was started in 1823 by a surgeon, Thomas Wakley (1795-1862). Wakley advocated radical medical reform creating controversy with the medical and surgical establishment. The LANCET was the first medical periodical to discuss many of the problems of medical practice. Wakley was sued for libel for some of his critiques. The LANCET eventually became a respected part of medical journalism. However, in 1835, the only other medical periodical to report contemporaneously on the Brenchley case, the LONDON MEDICAL GAZETTE, began its coverage by criticizing the LANCET for its coverage and claiming the "story is evidently trumped up for a purpose."<sup>12</sup>

Magistrates Aretas Akers, Robert Willis Blencowe and Arthur Pott heard the charges in a two-day hearing on March 4-5, 1835, in Tunbridge Wells. Mr. Monckton's brother, John Monckton, a solicitor from Maidstone, conducted his

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<sup>8</sup> LANCET TRIAL REPORT, supra note 2, 94-95

<sup>9</sup> Ibid., 95.

<sup>10</sup> Ibid., 95.

<sup>11</sup> *Charge against a surgeon and clergyman*, LANCET, i:787-788 (Feb. 28, 1835).

<sup>12</sup> *Forcible surgery*, LONDON MEDICAL GAZETTE, 15:812 (Mar. 7, 1835).

defense. A local newspaper reported that after a "very strict investigation of the case" the magistrates decided "that every idea of moral guilt on the part of the defendants had been erased from their minds," but "a legal point arising" regarding the assault they sent the case to the superior court for the defendant Mr. Monckton to answer any indictment that might be made for assault.<sup>13</sup>

On March 12, the vestry of Brenchley voted that both Mr. Monckton and Mr. Arthy should be prosecuted at the expense of the parish.<sup>14</sup>

On March 14, the LONDON MEDICAL GAZETTE acknowledged that there had been some foundation to the Lancet's earlier report - "...we have ascertained that the account in the Lancet, though infinitely beyond the truth, was not altogether without foundation; — an acknowledgment which candour induces us to offer even to the most thoroughly dishonest opponent that ever journalist had to deal with."<sup>15</sup>

Mr. Monckton was indicted for assault. On March 18, in Maidstone, there was a trial of the charges before Justice Gaselee, Justice of the Crown Court.

The trial of the case was reported in several newspapers and journals, including the TIMES, the LANCET, the LONDON MEDICAL GAZETTE, the MAIDSTONE GAZETTE, other British newspapers, and at least two American newspapers, the DAILY NATIONAL INTELLIGENCER, published in Washington, D.C., and the NATIONAL GAZETTE, published in Philadelphia.<sup>16</sup>

The defense attorney claimed that Mr. Monckton was justified in "using a little friendly force to overcome the fear and forwardness of the lad."<sup>17</sup>

The MAIDSTONE GAZETTE reported:

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<sup>13</sup> *Tunbridge Wells - Extraordinary assault*, BRIGHTON PATRIOT & LEWES FREE PRESS, Mar. 10, 1835, 3; BRIGHTON GUARDIAN, March 11, 1835 [as reprinted in LANCET, i:864, 865-867 (Mar. 14, 1835)]; *Tunbridge Wells*, MAIDSTONE GAZETTE, March 17, 1835, 3.

<sup>14</sup> LANCET TRIAL REPORT, *supra* note 2, at 95.

<sup>15</sup> *Forcible surgery*, LONDON MEDICAL GAZETTE 15:841-842 (Mar. 14, 1835)

<sup>16</sup> *Home Circuit - The King v. Monckton*, TIMES (London), Mar. 21, 1835, 7; *Crown Court - Singular assault*, MORNING CHRONICLE (London), Mar. 21, 1835; *At the Maidstone Assizes*, COURIER (London), Mar. 21, 1835, 1; *Jonathon Monckton*, MAIDSTONE GAZETTE, March 24, 1835, 2-3; *Kent Spring Assizes*, TRUE SUN (London), Mar. 26, 1835, 3; *Prosecution and conviction for forcible surgery*, LONDON MEDICAL GAZETTE, 15:924-925 (Mar. 28, 1835); LANCET, i:933-934 (Mar. 28, 1835); *Trial of Mr. Jonathan Monckton for forcibly performing an operation*, LANCET, ii:94-96 (April 18, 1835); *Extraordinary assault*, NATIONAL GAZETTE (Philadelphia), Apr. 21, 1835, 2.

<sup>17</sup> LANCET TRIAL REPORT, *supra* note 2, at 96.

The Learned Judge, in charging the Jury observed, that the Jury were not called upon to say whether the defendant had conducted himself with skill and humanity, for if such was the question, no gentleman would go out of the court with his character in that respect less effected than Mr. Monckton. The indictment did not affect his integrity or charge him with neglect of duty, but with assault upon James Roberts. That was the only question they had to try. If Mr. Monckton had persisted in performing the operation upon the lad without the consent of the lad himself, his father, or the overseers; - if he had done so, that amounted, in point of law, to an assault, whether it had been done to benefit the boy or not. He believed that such a case had never before come into a court of justice, and he heartily wished it had not done so now. It was a matter of regret, not only as it respected the gentleman individually, but the whole medical profession; for he was bound to say, that he did not know a profession who were of greater benefit to mankind, and who were more ready to devote their money, their time, and their attention, to the interests of the poor. He believed the boy had spoken the truth, and if he had there was no question about the verdict. If, however, it might be thought, after a consultation with his learned brothers, that his view of the case was not correct, he should most willingly put the matter into a train of investigation.<sup>18</sup> [*emphasis added*]

The Justice added that the surgeon had good character and that his character and honor would not suffer if he had been mistaken on the law. The jury convicted Mr. Monckton. On the part of the parish it was stated that it was not pressing for punishment. The Justice decided that the conviction was sufficient punishment without further penalty and Mr. Monckton was released on his own recognizance.<sup>19</sup>

On March 21, 1835, the LANCET published an editorial statement analyzing when a surgeon might be justified in compelling a competent adult to submit to surgery.

THE communications are very numerous which we have received respecting the " Brenchley case," and the circumstances connected with that transaction have opened a new source of investigation, in which many of our professional brethren appear to take a very deep interest. The question has been twenty times proposed, "To what extent, or under what circumstances, is a surgeon justified in compelling a patient to submit to an operation?"

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<sup>18</sup> *Jonathon Monckton*, MAIDSTONE GAZETTE, March 24, 1835, 3 [Note that it is also reprinted in LANCET TRIAL REPORT supra note 2, at 96.].

<sup>19</sup> *Home Circuit*, TIMES (London), Mar. 21, 1835, 7; LANCET TRIAL REPORT supra note 2, 94-96; MAIDSTONE GAZETTE, March 24, 1835, 2-3.

This interrogatory involves many nice and delicate considerations, because we are without the aid of any statute law whereby to govern our decision, and even the cases at common law are by no means applicable to a thousandth part of the circumstances which may be presented to our view in weighing the importance and applicability of all the conditions which accidents, insanity, and the many ills that flesh is heir to, readily obtrude on the mind in reflecting on the question. Of the Brenchley case, itself, we shall say nothing, because we do not yet know whether the cause has been tried, or whether it has been dismissed, at the assizes. The first point of inquiry, then, which this subject presents to our notice is this, — Are there any circumstances which would justify a surgeon in compelling a patient who is above the age of infancy, and of sane mind, to submit to an operation in surgery?

That the reply must be in the affirmative will be instantly admitted, and the occurrences of almost every week in the great hospitals of this kingdom, furnish ample testimony of the loss of life which would ensue if medical officers had not sufficient vigour of mind to apply their skill in cases of accident, in direct opposition to the entreaties of their patients. Unless, however, the circumstances are most threatening, — unless delay would be attended with speedy (almost instantaneous) peril, no forcible interference on the part of the operator would be justified either by law or by reason. But, for example, in accidents which are accompanied by wounds of large blood vessels, is the surgeon to stand by and quietly gaze on while the current of life is fast ebbing, simply because the fears of the patient induce him to intreat that no operation should be performed? A single case is a sufficient illustration of the propriety of surgical interference under circumstances of pressing emergency, and it is evident that such cases might be multiplied *ad infinitum*.

On such occasions, however, it must be remembered that the professional aid of the surgeon has been regularly and properly solicited, and that thus his attendance has thrown upon him the responsibility of the treatment to which the patient is subjected. But if the accident be a fracture, or a dislocation, and the mind of the patient is entirely unimpaired, it may be a question (and it is one which we feel ourselves quite incapable of determining) whether a jury would justify a surgeon in opposing the will of the patient, by *forcing* him to submit to the means which are necessary to restore to its right position the injured or displaced limb; but if the patient were, in the first instance, to give his consent to the application of splints and bandages for the cure of the fracture, or the application of pulleys for the relief of the dislocation, we believe that the surgeon, having commenced his curative procedure with the consent of the patient, would be held to be warranted in persisting, for a reasonable time, in the attempt to accomplish his object. Thus, it often happens in dislocations at the hip joint, that patients, soon after the process of extension has commenced, beseech the operator to discontinue his efforts; but such entreaties, although not unfeelingly disregarded, do not

induce the operator to desist from his exertions; and no sooner is the object of the surgeon accomplished, no sooner is the dislocated bone reduced, than the grateful patient exclaims, "How " thankful I am, sir, that you did not stop " when I cried out! " These are simple, straight-forward cases, which present but few difficulties to the minds of persons who understand what are the duties of medical practitioners, and what are the responsibilities which are consequent on a failure of executing them.<sup>20</sup> [emphasis added]

After discussing infants and the insane, the editorial returns to comment on consent obtained by improper means:

Thus, it has but too often happened that the surgeons of some of our public institutions have resorted to trick and manoeuvre for the purpose of getting within their reach individuals on whom they might perform some of the "great" operations of surgery. Instances have occurred in which persons have been bribed to render their assistance towards bringing a patient within the reach of the surgeon's knife. In cases of this kind the operator incurs a very awful responsibility; and, certainly, in conjunction with his agents, might render himself liable to the consequences of a conviction for conspiracy. Apart from some of our institutions, where operations are considered the ALL-IN-ALL of surgery, we believe that such instances of professional intrigue and dishonour are rare: but let them occur when and where they may, it is impossible that such acts can be too severely reprehended. The consent of the patient in cases of this kind, although it would obviously tend to lessen, would not, and could not, wholly abstract from the culpability of the practitioner; for that consent would only be one of the first effects of the intrigue of which the operator had himself been the author; and the law does not hold it to be just that a person should derive benefit from his own wrongdoing, whether it contribute the first or the last step in a proceeding which is wholly characterized by under-hand dealing.<sup>21</sup> [emphasis added]

On March 28, 1835, the LONDON MEDICAL GAZETTE reported the trial and included an editorial statement about "operations forcibly performed."

We give, in the present number, a report of the trial which took place last week in the Brenchley case. The facts were clearly made out, and no man on perusing them can possibly say that the result ought to be different from what it has been. The surgeon stands convicted of a misdemeanor, and certainly the circumstances strike us as being of an aggravated character. A lad of 15, a pauper in the Brenchley workhouse, is a martyr to stone: he has been operated on ineffectually a year ago by a

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<sup>20</sup> LANCET, i:897-900, at 897-898. (Mar. 21, 1835).

<sup>21</sup> Ibid., at 899.

particular surgeon; and when now he wishes to be treated by other hands, and has made every arrangement for the purpose, with the concurrence of the overseers of the parish, his former attendant, by stratagem and force, seizes him, and performs the operation of lithotomy upon him. Upon the motive of the surgeon who did this we cast no imputation of a criminal kind: he acted, no doubt, with the greatest zeal and anxiety to save his reputation : he might have even been persuaded that the boy would be safer in his hands than in those of the rival whose interference he dreaded; but we must say that he conducted himself with extreme indiscretion, and with a degree of violence wholly unwarrantable by any law, written or implied. There was novelty in the case, it is true,—force being rendered accessory to the accomplishment of an ostensibly benevolent object ; but there could scarcely be two opinions entertained regarding the propriety of such means being adopted for the attainment of any end, however good. The judge's view of the matter was clear, and such as must have occurred to any reflecting man—namely, that an assault was committed when the surgeon had recourse to & forcible operation.

But the view that ought to be taken of this case rests not here. Let us suppose that the operation had terminated fatally: suppose some unfortunate slip of the knife had led to irremediable mischief; or that any of the accidents which not unfrequently attend lithotomy had occurred; what would then have been the awful situation of the surgeon? Would not the charge of manslaughter, or something more serious, have taken the place of simple assault in the indictment? in short, would not the operator's life have been in jeopardy? How narrow, then, has been his escape!

The truth seems to be (and we have over and over again had occasion to proclaim it in this journal, by way of warning), that there are but too many surgeons who are incautious as to the circumstances under which they undertake certain operations. They forget that their profession, though they may have attained it in the most legitimate and honourable mode, does not render them irresponsible: they even go so far as to fancy that they do certain things by right, which, in reality, they are only allowed to do by sufferance, or the legal penalties for which they perhaps barely escape by connivance. They do not sufficiently consider, that there is no privilege of immunity attached to the practice of surgery or medicine in this country, and that in case of being proceeded against, for any unlucky event that has happened through their means, their good intentions alone are their protection: the law fortunately leaves them this single loop-hole, and, from the highest to the lowest, there is no other general plea available in their behalf.

It is painful to reflect on the catastrophes that have occurred, from time to time, through neglect of these simple considerations. Not so very long ago, we remember that the Caesarian operation was attempted on a living woman, in a parish workhouse, and in circumstances which called forth the strongest expressions of censure and condemnation from a

coroner and his jury, assisted in their judgment by the evidence of respectable professional witnesses. We fear that workhouses generally, in various parts of the country, are the scenes of more unwarrantable experiments than the public or the profession have any adequate idea of. At all events, we more than suspect that the Brenchley case is far from being singular, in any other regard than in its details and its detection...<sup>22</sup> [emphasis added]

This was followed by an account of the trial.<sup>23</sup> In its two subsequent articles on the Brenchley case, the LONDON MEDICAL GAZETTE focused its comments on criticizing the LANCET.<sup>24</sup>

At a meeting of the parishioners of Brenchley on May 1, 1835, they voted to replace Messrs. Monckton and Outterage, as parish surgeons, with Messrs. Gibbons and Kennett.<sup>25</sup> John Outteridge had been parish surgeon for another district of Brenchley and was not involved in the case.

It is not clear what happened to the charges against Rev. Arthy. The report of the magistrates' action states that the charges against Rev. Arthy were discharged, but a later report of the full trial states that "Mr. Arthy traversed till the next Assizes," which appears to indicate the charges against Rev. Arthy were not entirely discharged at that time.<sup>26</sup> "Traversed" meant that Rev. Arthy denied the prosecution's assertions. Although the testimony made it clear that Rev. Arthy should have been as liable as Mr. Monckton, since he was involved in the holding of Roberts and in invading his body, apparently the charges were never pursued. The desire of the public and the legal authorities to make it clear that the conduct was not permitted apparently had been sufficiently vindicated by the conviction of the surgeon.

James Roberts died at the Poor-house of Brenchley on July 17, 1835. Autopsy found a large stone "about three inches in length and three-fourths of inch in its greatest diameter."<sup>27</sup> The published report of the autopsy did not include an opinion on the cause of death.

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<sup>22</sup> *Operations forcibly performed. Responsibility of surgeons*, LONDON MEDICAL GAZETTE 15:920-922 (Mar. 28, 1835).

<sup>23</sup> *Prosecution and conviction for forcible surgery*, LONDON MEDICAL GAZETTE 15:924-925 (Mar. 28, 1835).

<sup>24</sup> *The independent medical press*, LONDON MEDICAL GAZETTE, 16:54-55 (Apr. 5, 1835); *Retraction*, LONDON MEDICAL GAZETTE, 16:119-120 (Apr. 25, 1835).

<sup>25</sup> MAIDSTONE GAZETTE, Apr. 28, 1835, 1 [notice of meeting and request for medical men to tender offers]; MAIDSTONE GAZETTE, May 12, 1835, 4 [report of result].

<sup>26</sup> *Ibid.*; *Jonathan Monckton*, MAIDSTONE GAZETTE, March 24, 1835, 2.

<sup>27</sup> *Sequel of the Brenchley case of forcible lithotomy*, MEDICAL GAZETTE (London), 17:523-524 (Jan. 2, 1836) [autopsy].

It does not appear that the Brenchley case was communicated to subsequent generations. There was a brief mention in the *BOSTON MEDICAL AND SURGICAL JOURNAL* in May 1835.<sup>28</sup> Only one other oblique mention has been found in medical-legal books and articles after the initial articles contemporaneously reporting the case. Thomas Edlyne Tomlins included the following sentence in *A POPULAR LAW- DICTIONARY*, published in London in 1838: "...parish officers compelling a youth to submit to a surgical operation against his will, were lately convicted of an assault, although it was shown that the operation was successful."<sup>29</sup> This is a misstatement. Testimony at trial makes it clear that the operation was unsuccessful in that the stone was not removed.

Mr. Monckton remained in good standing in the medical profession and continued to practice until about 1848.<sup>30</sup> On his death on February 16, 1853, he was praised in medical journals.<sup>31</sup>

## THE OHIO PENITENTIARY CASE

Dr. John Dawson was the Professor of Anatomy and Physiology of the Starling Medical School in Columbus, Ohio. He was one of the seven physicians on that faculty in the late 1850s. Starling later merged into Ohio State University. Dr. Dawson was also editor of the *OHIO MEDICAL AND SURGICAL JOURNAL*. In June 1855, Dr. Dawson was offered appointment as the physician to the Ohio State Penitentiary, but refused to agree until he got permission for medical students to accompany him. This condition was not agreed to until December 1855. He had also been serving as the physician for the state Blind Asylum in Columbus since 1852.<sup>32</sup>

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<sup>28</sup> *A word to the wise*, *BOSTON MEDICAL AND SURGICAL JOURNAL*, 12(15):243 (May 20, 1835).

<sup>29</sup> Thomas Edlyne Tomlins, *A POPULAR LAW- DICTIONARY* (London: Longman, Orme, Brown, Green & Longmans 1838), 46 ["...parish officers compelling a youth to submit to a surgical operation against his will, were lately convicted of an assault, although it was shown that the operation was successful."]

<sup>30</sup> In September 1835 Jonathan and Stephan Monckton participated in a meeting of the Medical General Practitioners residing in and around Tunbridge Wells to address the effects of the Poor-Law Amendment Act on compensation of practitioners. *LANCET*, i:466-468 (Dec. 19, 1835). He is listed as a subscriber to the Berncastle testimonial in 1848. *LANCET*, ii:25 (July 1, 1848).

<sup>31</sup> *Obituary*, *LANCET*, i:216 (Feb. 26, 1853); *Deaths*, *MEDICAL TIMES AND GAZETTE* (London), 27:230 (1853); *MEDICAL DIRECTORY OF SCOTLAND*, 159 (1854).

<sup>32</sup> William T. Martin, *HISTORY OF FRANKLIN COUNTY* (Columbus, Ohio: Follett, Foster & Co. 1858), 401, 363, 419; *Special Report of the Committee on Penitentiary relative to an alleged outrage upon a prisoner in the hospital of the Ohio Penitentiary*, *JOURNAL OF THE HOUSE REPRESENTATIVES OF THE STATE OF*

In 1855, James Shannon (age 24) was a fireman on a Cleveland and Detroit steamer and was attacked by a passenger with a knife. He struck the assailant on the head with a poker and the man died. At trial, Shannon pled guilty to manslaughter and was sentenced to one year in the Ohio State Penitentiary. A Milwaukee Wisconsin newspaper speculated that he probably would have been acquitted had he gone to trial.<sup>33</sup>

On October 29, 1855, Shannon entered the penitentiary. He had poor eyesight. In November 1855, Dr. Dawson evaluated him at the penitentiary at the request of the staff, diagnosed lenticular cataract, and offered to perform surgery on his eyes. Shannon consented to surgery on one eye. On January 30, 1856, Dr. Dawson performed cataract surgery on Shannon's left eye in the presence of medical students and another professor from Starling. The surgery was unsuccessful; Shannon lost the sight of the eye. There was some evidence that Shannon may have contributed to the outcome by rubbing the eye contrary to medical instructions. Dr. Dawson did not release Shannon from the hospital to the general prison. While Shannon was still in the prison hospital, Dr. Dawson proposed to perform surgery on the remaining eye, but Shannon refused. On April 17, 1856, Dr. Dawson, accompanied by a medical student, James Morris, forced Shannon into a chair and proceeded to perform the surgery despite Shannon's protests, struggles and resistance. The second surgery was unsuccessful and Shannon was totally blind.<sup>34</sup>

In June 1856, Dr. J.W. Hamilton, another Starling faculty member, succeeded Dr. Dawson as physician of the penitentiary.<sup>35</sup>

On October 10, 1856, Shannon's term in prison expired due to good conduct. When his fellow prisoners learned that he was to be released with just the statutory five dollars, they took up a collection that totaled over one hundred dollars. A local newspaper, the *Columbus Gazette*, praised them for this "manifestation of charity" to "the blind boy" that was "a beautiful illustration, that

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OHIO, Fifty-second General Assembly (Columbus, Richard Nevins, State Printer 1857), Appendix, p, 47 [hereafter cited as the SPECIAL REPORT]; see Charles C. Dawson, Compiler, A COLLECTION OF FAMILY RECORDS WITH BIOGRAPHICAL SKETCHES AND OTHER MEMORANDA OF VARIOUS FAMILIES AND INDIVIDUALS BEARING THE NAME DAWSON, OR ALLIED FAMILIES OF THAT NAME (Garnier & Company: Charleston, S.C. 1969), at 397-398 for a short biography of Dr. Dawson.

<sup>33</sup> *A distressing case of a physician's malpractice*, WEEKLY WISCONSIN (Milwaukee), Jan. 22, 1857, 4.

<sup>34</sup> SPECIAL REPORT, supra note 21, pp. 21-62.

<sup>35</sup> William T. Martin, HISTORY OF FRANKLIN COUNTY (Columbus, Ohio: Follett, Foster & Co. 1858), 363; SPECIAL REPORT, supra note 21, at 48; *Ohio penitentiary*, COLUMBUS GAZETTE (Ohio), Jan. 9. 1857, 1 [Dr. Hamilton made the July 1, 1856 report as physician]

those whom too many regard as wholly lost to all sensibility, nevertheless possess the true spark of humanity."<sup>36</sup> At the religious services at the penitentiary chapel on October 12, the chaplain, Rev. Mr. Warner, complimented the prisoners on their charity to Shannon.<sup>37</sup> At the "humane invitation" of the Directors of the penitentiary, Shannon was permitted to remain in the prison hospital.

In November 1856, Dr. R.J. Patterson became the physician for the Institution for the Blind, replacing Dr. Dawson.<sup>38</sup>

The second surgery on Shannon came to the attention of an Ohio legislator, Mr. Cyrus Mendenhall of Jefferson. Mr. Mendenhall was a mining entrepreneur associated with the abolitionist movement and other social causes.<sup>39</sup> For example, he was actively involved in the successful effort to oppose removal of the Chippewas from Wisconsin in the early 1850s.<sup>40</sup> During 1856-1857, Cyrus Mendenhall resided in Columbus with his wife Anna, who as part of her Christian philanthropy provided weekly religious instruction at the state penitentiary and regularly visited with prisoners at other times.<sup>41</sup> Thus, it is likely that he was receiving information about events in the penitentiary through official and unofficial channels.

On January 12, 1857, Mr. Mendenhall offered a resolution in the legislature:

WHEREAS, Information has been received that a gross outrage has been perpetrated by the late physician of the Ohio Penitentiary, upon a patient in the hospital of that institution, therefore,  
*Resolved*, That the standing committee on the Penitentiary be instructed to make inquiry into the correctness of said statements, and report thereon to this House; and that to enable them to do so, said committee is hereby

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<sup>36</sup> *Ohio penitentiary*, COLUMBUS GAZETTE (Ohio), Oct. 17, 1856, 1.

<sup>37</sup> *Ohio penitentiary*, COLUMBUS GAZETTE (Ohio), Oct. 17, 1856, 2 [also reprinted in the ATHENS MESSENGER (Ohio), Oct. 31, 1856, 4.

<sup>38</sup> *Appointment of physician for the blind*, COLUMBUS GAZETTE (Ohio), Nov. 14, 1856, 3.

<sup>39</sup> *Rottenness about the Ohio Penitentiary*, COSHOCTON DEMOCRAT (Ohio), Aug. 25, 1857, 1.

<sup>40</sup> James A. Clifton, *Wisconsin death march: Explaining the extremes in Old Northwest Indian removal*, TRANSACTIONS OF THE WISCONSIN SCIENCES, ARTS AND LETTERS, 75:1, 21 (1987); Letter from Cyrus Mendenhall to President Zachary Taylor, 5 Sep. 1850, Wisconsin Historical Society, posted at <http://content.wisconsinhistory.org/cdm/ref/collection/tp/id/62211> [accessed 9 Oct. 2014].

<sup>41</sup> *Anna T. Mendenhall*, THE AMERICAN ANNUAL MONITOR, posted at [http://www.angelfire.com/in2/orchidhill/sof\\_m.html](http://www.angelfire.com/in2/orchidhill/sof_m.html) [accessed on 5 Oct. 2014].

empowered to send for persons and papers, and take testimony under oath or affirmation.

The resolution was amended to replace "information has been received" with "statements have been made to members of this House," and then was agreed to.<sup>42</sup>

The event and the existence of the committee were described in newspaper articles at the time.<sup>43</sup> Some of the articles expressed outrage at the doctor's actions. Some newspapers defended Dr. Dawson.<sup>44</sup>

The standing committee, under the chairmanship of Mr. Mendenhall, conducted seven days of hearings from January 17 to January 27, 1857. The committee concluded that Shannon had been wronged.

There was conflicting testimony. It demonstrated the views of physicians at the time concerning their latitude in dealing with patients, but included some testimony supporting a surprisingly modern view of the rights of patients, even when prisoners. The following summary is derived from the report of the committee and 38-page transcript of the hearings that were published in an appendix to the state House journal.<sup>45</sup>

As to the first surgery, Shannon testified that he consented "because Dr. Dawson told me there would be no danger to it. No danger to my sight, I suppose, from what the doctor said." Dr. Dawson testified that after he had informed Shannon that Dr. Hamilton concurred in the propriety of the first operation, Shannon "became importunate ... for an operation."

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<sup>42</sup> JOURNAL OF THE HOUSE REPRESENTATIVES OF THE STATE OF OHIO, Fifty-second General Assembly (Columbus, Richard Nevins, State Printer 1857), pp. 21-22.

<sup>43</sup> *Columbus Editorial Correspondence*, DAILY HERALD (Cleveland Ohio), Jan. 13, 1857; *The penitentiary case - a committee of inquiry*, INDEPENDENT DEMOCRAT (Elyria Ohio), Jan. 21, 1857, 2; *Columbus editorial correspondence*, DAILY HERALD (Cleveland Ohio), Jan. 21, 1857; *Outrage in the penitentiary*, MARYSVILLE TRIBUNE (Ohio), Jan. 28, 1857, 2 [quoting from CINCINNATI GAZETTE]; *A horrid event*, OHIO REPOSITORY (Ohio), Jan. 28, 1857, 4; *A sad case*, JANESVILLE FREE PRESS (Wis.), Jan. 31, 1857, 2; WEEKLY ARGUS AND DEMOCRAT (Madison Wis.), Feb. 3, 1857, 1; *Columbus editorial correspondence*, DAILY HERALD (Cleveland Ohio), Feb. 6, 1857; *Columbus editorial correspondence*, DAILY HERALD (Cleveland Ohio), Feb. 10, 1857; *The Statesman and the medical students*, OHIO STATE JOURNAL (Columbus), Feb. 11, 1857, 2; *Investigating committee report*, DAILY HERALD (Cleveland Ohio), Feb. 11, 1857.

<sup>44</sup> *Outrage in the penitentiary*, MARYSVILLE TRIBUNE (Ohio), Feb. 4, 1857, 2; *The "gross outrage"*, OHIO STATESMAN (Columbus), Feb. 5, 1857, 2.

<sup>45</sup> SPECIAL REPORT, *supra* note 21, at 21-62.

As to the second operation, Shannon testified as to his verbal and physical efforts to avoid the surgery. Mr. Andrew J. Watts, officer of the penitentiary hospital, testified that he was present during the second operation and that Shannon did not appear voluntarily to submit to the operation and that he appeared to resist the operation. He further stated that when Shannon stated he did not want the operation, Dr. Dawson said that he did not care what Shannon wanted. Seeking to discredit this testimony, Dr. Dawson later presented testimony from a Dr. Arthur B. Williams that Mr. Watts had malignity of feeling to Dr. Dawson.

Dr. Hamilton testified that he regularly examined Shannon and had "never heard him allude to anything culpable." He further testified "I heard through the warden about the last of the month of September that there had been efforts made to induce Shannon to prosecute the doctor." He said that before October 20, he had heard one or two individuals speak "rather violently in regard to this matter and thought it was my duty to make some inquiry in regard to it." As a result he questioned his assistant, Jonas, who had been present at the second operation. Jonas refused to say much but Hamilton concluded: "Jones, however, impressed me with the belief that no coercion had been used." He added that he heard outside of coercion, but had not heard of it "inside." "I had supposed, perhaps, that when it came to the point of operation, the patient's courage had failed, anticipating pain, and the doctor had done what we are often obliged to do, proceeded perhaps, even among remonstrances, to the performance of the operation." When later asked to explain how Jones had convinced him that there was no coercion, Dr. Hamilton stated:

I inquired of him as to whether Shannon had held forcibly. He replied, denying that he held him. I understood, for a long time, that to be a denial as regarded all present. He has since said that it was intended to be a denial as far as he was concerned himself. I cannot now say positively whether the latter statement is, or is not correct.

Dr. Hamilton acknowledged that in important operations that the surgeon provided attendants "to restrain the anticipated resistance of the patient during the operation."

Dr. Lorenzo Warner, who was the Chaplain of the Ohio Penitentiary and had practiced medicine in the past, was asked:

Would you, Dr. Warner, look upon yourself or any other physician as justifiable in any operation upon the eye for cataract, where there was resistance made on the part of the patient to the operation being performed?

Dr. Warner replied:

I should feel justified in operating upon a young child who was opposed to the performance of the operation - provided, the parents or guardian desired it and consented to it; but when the patient is of suitable age to choose for himself, I should not feel justified in operating without his consent.

The medical student, James E. Morris, who accompanied Dr. Dawson during the second surgery, testified that Shannon sat himself in the chair with one prisoner steadying his head for the operation. Shannon then threw his head back during the operation and Morris assisted in steadying the head. He stated that he did not hear Shannon express any disinclination to have the operation performed. He recollected Shannon saying that Dawson could proceed if it would cure his eye.

Joshua H. Perry, penitentiary librarian and assistant teacher who assisted in dispensing medicines in the prison hospital, testified that he was present during the second operation and that Shannon had said that he did not wish to have the eye operated upon, unless a cure could be effected. He furthermore had said that he no faith in an operation. He clarified later that Shannon was willing to permit another operation on the eye that had already been operated on. Perry added:

Shannon made some complaints after the doctor commenced to operate, and said he did not want his eye operated upon; doctor Dawson told him that he did not care what he wanted, and that he knew better than he did.

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Question by committee. Did Shannon at that time resist an operation upon his eye with considerable determination, or was he indifferent whether it was operated upon or not?

Answer. It was not the custom of the patients to make such resistance, and the order of the prison physician was regarded as that of an officer, and was usually obeyed; and when an order was not obeyed, it was customary to punish. I could not say really whether the resistance Shannon made to the operation commenced was caused by pain or not. He did resist the operation with considerable determination.

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Question by committee. Did doctor Dawson request Shannon's consent at that time to operate upon his eye?

Answer. Not that I know if.

Question by committee. Did you hear Shannon at any time give his consent that the right eye should be operated upon?

Answer. I did not.

Under additional questioning, Perry stated that he was not aware of any case where Dr. Dawson had called for punishing a convict for disobeying him, but he did state that the prisoners would expect to be punished if Dr. Dawson reported them. Deputy warden John Huffman confirmed that prisoners had been punished when a doctor had reported they were refusing medicines, but that Dr. Dawson had never requested such punishment.

Dr. Dawson testified that during his many visits with Shannon between the two operations:

I heard no complaint from him, and understood him as wishing, when the proper time arrived, that I should institute whatever treatment of his eyes that I thought advisable. Accordingly, the day before the 17th of April,... I advised him that on the next day I would come over to the hospital, prepared to operate. The patient expressed at this time no disapprobation, but seemed willing and desirous that I should do for his relief what I thought proper.

He added that on the day of the operation after Shannon sat in the chair:

This was done and without my hearing from the patient a syllable [sic], that I now recollect, *pro* or *con*, in regard to what I was about to do.... while the instrument was in the eye, the patient commenced complaining of pain, and jerked his head in several directions violently. I spoke to him to hold still, or he would ruin his eye...  
After the operation I was mortified, and I shamed the patient for his weakness - his want of moral nerve - just at the time for his own good.

Dr. William Trevitt, a former physician for the Ohio penitentiary, testified about the unreliability of prisoner testimony. His testimony also included:

Question by Dr. Dawson. If you were engaged in an operation for cataract, and had entered the needle into the eye, would you stop the operation because of a refusal on the part of the patient to have you complete it?

Answer. Surely not; the operation is rarely performed without more or less of a struggle on the part of the patient, in consequence of pain, or from the feelings of horror at the operation.

Dr. Dawson presented the testimony of one prisoner, William McCreary, who had spoken briefly with Shannon each day, to the effect that Shannon had never expressed any unwillingness to have the second operation.

Dr. Starling Loving, Professor of Materia Medica at Starling,<sup>46</sup> testified. Question by com. Is it proper that surgeon should be much influenced by the desire of patient to be operated upon?

Answer. It is not proper under all circumstances, but it might be proper, provided the operation did not involve a risk of life.

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Question by Dr. Hill for Dr. Dawson. Why would you be unwilling to operate unless asked, in the case of the shoemaker above named?

Answer. I should be unwilling to perform any operation without being asked; or without the consent, from the risk attending all surgical operations, those upon the eye included.

The resulting report of the committee recommended that Shannon be admitted to the Asylum for the Blind and the Attorney General be directed to institute criminal proceedings against Dr. Dawson and those who assisted him and civil proceedings against Dr. Dawson on behalf of Shannon. On February 4, 1857, the Ohio House received the committee report,<sup>47</sup> and the report was published in the state House journal.<sup>48</sup>

On March 1, 1857, Dr. Dawson published criticism of the committee and a defense of himself in the *Ohio Medical and Surgical Journal*, a journal that he edited.<sup>49</sup> In this article Dr. Dawson referred to a "by-law" of the penitentiary that prevented surgical operations from being performed without patient consent or institutional approval. He demonstrated his opposition to the need for consent in his criticism of this bylaw:

The "by-law" of the Penitentiary which prevents surgical operations from being "performed without the consent of the prisoner, or the consent

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<sup>46</sup> Dr. Starling Loving (1827-1911) was the Dean of the medical school of Starling Medical College (1880-1905), which became affiliated with Ohio State University in 1914. He was named for his mother whose maiden name was Susannah Starling. His mother was the niece of Lyne Starling for whom Starling Medical College was named after he donated the money in 1848 to build a hospital.

<sup>47</sup> SPECIAL REPORT, supra note 21, at 118-119; *Ohio legislature*, ATHENS MESSENGER (Ohio), Feb. 13, 1857, 1.

<sup>48</sup> SPECIAL REPORT, supra note 21, at 21-62.

<sup>49</sup> *The "gross outrage,"* OHIO MEDICAL AND SURGICAL JOURNAL, 9:333-334 (Mar. 1, 1857).

of two of the Inspectors," has not been framed by any one acquainted with the circumstances usually present in surgical operations. Not one operation in fifty is performed with the *consent* of the patient. The operation may be *commenced* with his consent but the progress and completion of it, is usually, in the midst of remonstrances from the patient, and not unfrequently from the friends standing around. Will any surgeon, after having commenced, cease the "*performance*" of an operation because of remonstrances on the part of patient? Unless he does, he violates the above rule—if he does, he shows himself incompetent to discharge rightly the duties of his profession. The rule, therefore, is violated from the necessity of things, and should be expunged.

"No surgical operation shall be performed unless with the consent of the prisoner, or two of the "Inspectors." Who are these "Inspectors?" the judgment of whom is here set above that of the Surgeon? They are a part of the *trustees* of the institution—men selected from society, because of their *business* qualifications. Agreeing with the patient, they form a quorum against the physician, and can, by the rule in question, thwart him at any stage of a surgical operation. They are recognized as having judgment in regard to the propriety of surgical operations—certainly something very ridiculous [sic] to the men themselves—and, we presume, very unacceptable to them, if it is understood that they, as a consequence, must share in the responsibilities of the surgeon's department. Why not call these Inspectors in and take their opinions with reference also to the *medical* treatment of the most complicated cases? Life is as much at stake here as in surgical operations.

The proper course, with reference to this; as well as to other institutions where medical or surgical service is required, is to commit the department to a capable man, with full authority to do what his judgment dictates to be proper, untrammelled by the interference of those who are unacquainted with such duties. With any other understanding than this, no man of spirit or competency, will have anything to do with a public institution.<sup>50</sup>

No other reference to this bylaw has been located. It is not mentioned in the legislative committee report.

On March 23, 1857, the House debated the report, but no formal action was ever taken on the report.<sup>51</sup>

The Ohio legislature included a line item in an 1857 general appropriation bill:

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<sup>50</sup> Ibid., at 334.

<sup>51</sup> *Columbus editorial correspondence*, DAILY HERALD (Cleveland Ohio), Mar. 24, 1857.

To James Shannon, who became blind in the Ohio Penitentiary, five hundred dollars; ...<sup>52</sup>

Executive documents of Ohio describe this appropriation as:

Amount appropriated to him as compensation for the loss of his eye-sight, while in the Ohio Penitentiary, by the mal-practice of Dr. Dawson, Prison Physician.<sup>53</sup>

Inflation calculators generally say that this would be equivalent to \$13,000 to \$14,000 in 2015 dollars, but this may be misleading. To put the amount in perspective, other items in the annual appropriation bill included:

For salary of the secretary of commissioner of common schools, three hundred dollars;

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For janitor of the state house, three hundred dollars...

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For payment of the chief firemen of heating apparatus, four hundred and eighty dollars, at a rate of forty dollars per month, for the time actually employed;

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Thus, the five hundred dollars exceeded the annual salary for many state workers.

The five hundred dollars is in the range of what Shannon would have received in court at that time. A patient who was blinded by an oculist's treatment was awarded \$500 in a New York court in 1856.<sup>54</sup>

On April 3, 1857, the Ohio legislature passed a special appropriation bill that included fifty dollars and twenty cents to pay the "cost and witness fees

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<sup>52</sup> Act No. 163, An Act making appropriations for the year one thousand eight hundred and fifty-seven, ACTS OF A GENERAL NATURE AND LOCAL LAWS AND JOINT RESOLUTIONS PASSED BY THE FIFTY-SECOND GENERAL ASSEMBLY OF THE STATE OF OHIO (Columbus: Richard News, State Printer 1857), p. 212; DEFIANCE DEMOCRAT (Ohio), June 27, 1857, 2; *James Shannon*, COLUMBUS GAZETTE (Ohio), Apr. 24, 1857, 4.

<sup>53</sup> Auditor of the State, *Detailed statement of the receipts and disbursements of the public money in the state treasury during the fiscal year, 1857*, INAUGURAL ADDRESS AND REPORTS MADE TO THE GENERAL ASSEMBLY AND GOVERNOR OF THE STATE OF OHIO FOR THE YEAR 1857 (Columbus: Richard Nevins, State printer 1858), Part II, Public Document No. 7, p. 449.

<sup>54</sup> *Suit for malpractice*, PENINSULAR JOURNAL OF MEDICINE AND THE COLLATERAL SCIENCES (Detroit, Mich.), 4(5):276-277 (Nov. 1856).

incurred by the committee on the penitentiary in investigating the complaint against Dr. J. B. Dawson, under the resolution of the House."<sup>55</sup>

On April 20, 1857, Shannon left the prison with Mr. Mendenhall, Chairman of the Committee on the Penitentiary, who had agreed to accompany Shannon to his home in Canada where his relatives resided.<sup>56</sup>

On May 1, 1857, Dawson published a medical report of the Shannon case in his journal.<sup>57</sup> He reviewed several reports of success rates for cataract surgery that varied from 25% to 80%. He could not have expected a success rate of much more than 50%. He blamed the lack of success in Shannon's case on actions of Shannon - rubbing his eye after the first surgery and moving during the second surgery.

In 1858, the legislature amended the law concerning the penitentiary to forbid surgery on prisoners without their permission:

The hospital of the penitentiary shall, under such conditions as the directors, warden and physician may provide, be accessible to the professors and students of Starling Medical College, and other physicians of Columbus, once a week, during the annual college terms, for clinical instruction; provided, that no convict shall be subjected by such professors to any involuntary examination or surgical operation.<sup>58</sup>

Dr. Dawson remained in good standing as a faculty member and active physician. He continued to edit the medical journal and published articles in other journals. In 1857, Dr. Dawson was chairman of the Committee on Surgery of the Ohio Medical Society. In June 1857, he submitted a committee report on opinions of surgeons on anesthesia.<sup>59</sup>

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<sup>55</sup> Act 78, *An act making special appropriations for the year 1857*, reprinted in the DEFIANCER DEMOCRAT (Ohio), May 16, 1857, 1.

<sup>56</sup> *James Shannon*, COLUMBUS GAZETTE (Ohio), Apr. 24, 1857, 4.

<sup>57</sup> John Dawson, *Lenticular Cataract— Operation on both Eyes— Unsuccessful Result*, OHIO MEDICAL AND SURGICAL JOURNAL, 9:406-414 (May 1857).

<sup>58</sup> Act No. 53, An Act providing for the appointment and more thorough system of accountability of officers of the Ohio Penitentiary..., section 23, ACTS OF A GENERAL NATURE AND LOCAL LAWS AND JOINT RESOLUTIONS PASSED BY THE FIFTY-THIRD GENERAL ASSEMBLY OF THE STATE OF OHIO (Columbus: Richard News, State Printer 1858), p. 143; *Laws of Ohio*, WEEKLY HAMILTON TELEGRAPH (Ohio), May 27, 1858, 1; *Laws of Ohio*, COSHOCTON DEMOCRAT (Ohio), June 9, 1858, 1; *Laws of Ohio*, PROGRESSIVE AGE (Coshocton, Ohio), June 9, 1858, 1. This section was preserved as section 25 in the penitentiary law passed in 1860, *Laws of Ohio*, COSHOCTON COUNTY DEMOCRAT (Ohio), May 2, 1860.

<sup>59</sup> Howard Dittrick, *The introduction of anesthesia into Ohio*, OHIO HISTORY, 50:338, 350.



[sic] operation on a convict in the removal of a cancer. The investigation was without result.<sup>64</sup>

Only one mention of the event has been found in medical-legal books and articles after 1857. It is mentioned in one sentence in an Appendix to the 1982 report of the Presidents Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research entitled MAKING HEALTH CARE DECISIONS. It is described as an example of forced use of anesthesia for unwanted surgery.

Virtually all such uses of anesthesia were justified by reference to the patient's supposed medical best interests as well as mental incompetence. In one extreme example, an Ohio prison surgeon accused of using anesthesia to perform unwanted operations argued that only a doctor could judge what was in the best interests of a prisoner.<sup>65</sup>

There is no mention of the legislative investigation or actions. The short account is inaccurate in that there was no use of anesthesia in the actual case; Dr. Dawson wrote that the patient complained of pain during the operation.<sup>66</sup> The only source cited in the 1982 Appendix for this case is Dr. Dawson's March 1, 1857 article defending his actions.

It is curious how little medico-legal attention these cases received. Perhaps, the actions were viewed as so extreme as not to require being brought to the attention of practitioners. Perhaps, the absence of significant penalties was viewed as an historical anomaly that would teach the wrong lesson. Perhaps, the fact that they did not involve court decisions put them outside the scope of attention of later writers. To the extent they were aware of the cases, it is possible that these cases were viewed as unimportant due to the shift in mid-nineteenth century toward addressing medical consent issues through institutional investigations<sup>67</sup> and civil court cases seeking payment of damages.<sup>68</sup>

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<sup>64</sup> William A. Taylor, *Ohio Statesmen and Annals of progress, From the Year 1788 to the Year 1900* (Columbus: Westbote Co., State Printers 1899), Part I, Vol. II, 33].

<sup>65</sup> Martin S. Pernick, *The patient's role in medical decisionmaking: A social history of informed consent in medical therapy*, in President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP* (Oct. 1982), Vol. Three, Appendix E, 1-35, at 24.

<sup>66</sup> John Dawson, *Lenticular Cataract— Operation on both Eyes— Unsuccessful Result*, *OHIO MEDICAL AND SURGICAL JOURNAL*, 9:406-414, at 408 (May 1857).

<sup>67</sup> E.g., *The Assizes*, *TIMES* (London), Aug. 9, 1886, 7; *Action against a Liverpool doctor: Casey v. Imlach*, *LANCET*, ii:298-303 (Aug. 14, 1886); *Hospital for Women Liverpool*, *BRITISH MEDICAL JOURNAL*, 1195-1196 (Dec. 11, 1886) (report of inquiry committee); *Report of the inquiry committee appointed by the Liverpool medical*

Criminal prosecutions and other government investigations<sup>69</sup> involving consent in the medical context were almost entirely focused on deaths<sup>70</sup> and sexual assaults.<sup>71</sup>

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*institution*, LANCET, ii:1147-1149 (Dec. 11, 1886) [After a jury decide in favor of Dr. Imlach in a suit by Mrs. Casey alleging that her ovaries and Fallopian tubes were removed without her consent, an Inquiry Committee at the Liverpool Medical Institution issued a report stated “the medical staff should use more care fully to apprise the patients of the nature of the operations about to be performed, and their possible results.”]; *Medical inquiry*, TIMES (London), Sep. 16, 1880, 7; Sep. 20, 1880, 6; *Extraordinary charge against a physician*, MEDICAL TIMES AND GAZETTE, 2:354 (Sep. 18, 1880); 2:377-378 (Sep. 26, 1880) [Dr. Jones was accused administering a novel and dangerous drug without consent or consultation, resulting in a boy’s death. A hospital committee of inquiry in the Cork Fever Hospital exonerated the doctor. It found it unnecessary to provide an explanation to the father or obtain his consent.].

<sup>68</sup> E.g., *An oculist sued for malpractice*, CHICAGO TRIBUNE, Oct. 11, 1861, 4; *Malpractice case*, CHICAGO TRIBUNE, Oct. 18, 1861, 4; *Cadwell v. Farrell*, 28 Ill. 438 (Apr. 1862) [affirming verdict awarding plaintiff \$10,000 for exceeding the scope of consent in an operation]; *Absolon v. Statham*, TIMES (London), Nov. 13, 1866, 11, Nov. 14, 1866, 9; Nov. 15, 1866, 11; BRITISH MEDICAL JOURNAL, Nov. 17, 1866, 558; Nov. 24, 1866, 583; TIMES (London), Nov. 29, 1867, 9; *Letter to the editor*, TIMES (London), Dec. 2, 1867, 11; BRITISH MEDICAL JOURNAL, Nov. 30, 1867, 509; Dec. 7, 1867, 531 [dentist Stratham was sued for allegedly extracting teeth without consent while Absolon under involuntary chloroform. The jury in the first trial could not reach a verdict. In the second trial, the jury ruled for the defendant.]; LANCET, i:752 (May 29, 1869) [Joyner v. Young and Shillitoe; jury awarded damages against a police inspector and a doctor for placing undue pressure on a woman to submit to medical examination to determine if she had given birth, as part of investigation of abandoned baby].

<sup>69</sup> E.g., *Another death from chloroform*, TIMES (London), Sep. 9, 1861, 10 [coroner’s inquest found no blame on doctors for death from chloroform administered with consent].

<sup>70</sup> E.g., *Alleged malpractice - Dr. A.F. Shannon arrested - particulars of the case*, CHICAGO TRIBUNE, Aug. 12, 1869, 2; JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF MICHIGAN - 1873 (Lansing Mich.: W.S. George & Co. 1873), 95 [doctor convicted of manslaughter for death during an abortion forced on woman by doctor and husband]; *Commonwealth v. Pierce*, 138 Mass. 165 (Nov. 26, 1884); *On trial for manslaughter*, N.Y. TIMES, May 27, 1884, 5; *Guilty of manslaughter*, N.Y. TIMES, May 29, 1884, 1; *Light punishment for malpractice*, N.Y. TIMES, Jan. 27, 1885, 1 [doctor convicted of homicide; the patient’s consent was no defense for death resulting from treatment with flannel soaked in kerosene.].

<sup>71</sup> E.g., *Serious charge*, GALVESTON DAILY NEWS (Tex), Aug. 16, 1868, 3; *Criminal court*, GALVESTON DAILY NEWS (Tex), Oct. 9, 1868, 6 [dentist found not guilty of alleged indecent liberties with female patient under chloroform she had

The Brenchley and Ohio Penitentiary cases are the only two cases in the nineteenth century that have been located where there were government investigations into surgery by recognized surgeons on competent patients against their will who did not die during the surgery.

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consented to for dental procedure]; *The perils of practice*, BRITISH MEDICAL JOURNAL, ii:311 (Sept. 5, 1874) [magistrate dismissed charge against doctor for allegedly criminally assaulting female patient]; *Queen v. Flattery*, 2 QB D 410 (Feb. 3, 1877) [affirming conviction of physician for rape where her consent was due to belief it was medical treatment]; but see *Forcible vaccination*, BRITISH MEDICAL JOURNAL, ii:255 (Sept. 3, 1865) [public vaccinator charged with assault for vaccinating child without parental consent].