

1991

Mengele's Birthmark: The Nuremberg Code in United States Courts

George J. Annas

Follow this and additional works at: <https://scholarship.law.edu/jchlp>

Recommended Citation

George J. Annas, *Mengele's Birthmark: The Nuremberg Code in United States Courts*, 7 J. Contemp. Health L. & Pol'y 17 (1991).

Available at: <https://scholarship.law.edu/jchlp/vol7/iss1/8>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Journal of Contemporary Health Law & Policy (1985-2015) by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

MENGELE'S BIRTHMARK: THE NUREMBERG CODE IN UNITED STATES COURTS*

*George J. Annas***

Experimentation on human beings is so difficult to justify that the attempt is seldom even made. Usually its justification is simply assumed, and vague notions of progress or national emergency are suggested as sufficient rationales. The United States, a society dedicated to both progress and human rights, has been profoundly ambivalent about human experimentation. On the one hand, we have consistently argued in our ethical codes that the rights and welfare of research subjects must be protected; on the other hand, we have consistently used perceived emergencies, both national and medical, as an excuse to jettison individual rights and welfare in human experimentation.

This article explores the ambivalence that is evidenced by the United States judges at Nuremberg who condemned the brutal Nazi concentration camp experiments of World War II, and by the United States judges since Nuremberg who condoned experiments conducted in the United States during the Cold War that cannot be justified under the terms of the Nuremberg Code. Using the metaphor of the birthmark, the article suggests that it may be inherent in man's nature to strive to surpass the boundaries of nature, and to use both that instinct and the instinct for self-preservation as justifications for even brutal experiments. Law and ethics have been no match for these instincts, although our sad history should not deter us from trying to prevent human experiments that betray our humanity and trample on the human rights of subjects.

MEDICAL EXPERIMENTS: FICTIONAL AND REAL RATIONALES

The most famous fictional experimenter of the nineteenth century, Nathaniel Hawthorne's Aylmer, killed his beautiful wife, Georgianna, in an ex-

* Adapted from *The Nuremberg Code in United States Courts: Ethics vs. Expediency*, in *THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION* (Oxford University Press, New York) (G. Annas & M. Grodin eds. 1991) (in press). Copyright © 1991 by George J. Annas.

** Edward Utley Professor of Health Law and Director, Law, Medicine & Ethics Program, Boston University Schools of Medicine and Public Health; B.A., 1967, Harvard College; J.D., 1970, Harvard Law School; M.P.H., 1972, Harvard School of Public Health.

periment designed to eliminate a birthmark from her left cheek. Aylmer describes the birthmark, which is in the shape of a tiny human hand, as “the visible mark of earthly imperfection.”¹ His experiment to remove it, thereby signifying “man’s ultimate control over nature,”² is the subject of Hawthorne’s short story *The Birthmark*. Georgianna submits to his potion even after she discovers that he has been concealing the danger of the experiment to hide “the risk we run.” Aylmer remains overconfident. Handing his wife the goblet, he assures her, “Unless all my science have deceived me, it cannot fail.”³ The potion, in fact, does succeed in removing the birthmark, but only at the cost of his wife’s life. As she dies, she remains his compliant victim: “Do not repent, that, with so high and pure a feeling, you have rejected the best the earth could offer.”⁴ The theme of overreaching man attempting to control nature, with disastrous results, recurs in both American and English literature of the nineteenth and twentieth centuries.⁵

It is not a fictional villain but a flesh-and-blood murderer, Josef Mengele, who sets the modern standard for experimentation atrocities. By almost any measurement, Mengele, the “Angel of Death,” was one of the most notorious of the Nazi physicians. Eyewitness accounts summarize the cold brutality and murder of this M.D.-Ph.D. “man of science.” Some of his most horrifying work involved genetically related experiments performed on children who were twins, many of whom he personally murdered. In an affidavit, one of his prison assistants, Dr. Miklos Nyiszli, describes how Mengele once killed fourteen Gypsy twins himself:

In the work room next to the dissecting room, fourteen Gypsy twins were waiting and crying bitterly. Dr. Mengele didn’t say a single word to us, and prepared a 10 cc and a 5 cc syringe. From a box he took Evipal and from another box he took chloroform, which was in 20 cc glass containers, and put these on the operating table. After that the first twin was brought in . . . a fourteen year old girl. Dr. Mengele ordered me to undress the girl and put her head on the dissecting table. Then he injected the Evipal into her right arm intravenously. After the child had fallen asleep, he felt for the left ventricle of the heart and injected 10 cc of chloroform. After one little twitch the child was dead, whereupon Dr. Mengele

1. N. HAWTHORNE, *The Birth-Mark*, in 10 THE CENTENARY EDITION OF THE WORKS OF NATHANIEL HAWTHORNE 37 (1974).

2. *Id.* at 36.

3. *Id.* at 53.

4. *Id.* at 55. See generally Fetterley, *Women Beware Science: “The Birthmark,”* in LITERARY THEORIES IN PRAXIS 260 (S. Staton ed. 1987).

5. See, e.g., Annas, *Mapping the Human Genome and the Meaning of Monster Mythology*, 39 EMORY L.J. 629, 629-35 (1990).

had her taken into the corpse chamber. In this manner all fourteen twins were killed during the night.⁶

Dr. Nyiszli first observed this method of killing when it was used on four pairs of twins, all under ten years of age. Mengele was interested in them because three of the pairs had different colored eyes. He had them killed, and their eyes and other organs were removed and shipped to the Kaiser Wilhem Institute in Berlin, marked "War Materials-Urgent."⁷

Following the War, the Allies sought to prosecute the major German war criminals at Nuremberg. Mengele escaped to South America where he eventually died a natural death.⁸ His escape was made possible by the absence of a Nazi "birthmark." When Mengele joined the S.S., he, like all of its members, was required to have his blood group tattooed on his chest or arm. Mengele managed to convince the S.S. that such a "birthmark" was unnecessary in his case because any competent surgeon would cross-match blood types before a transfusion, and would never rely solely upon the tattoo. The real reason for Mengele's refusal, as his wife later indicated, had to do with his self-worship, which was on the order of Hawthorne's Aylmer. As Mengele's wife described it, Mengele "had a habit of standing before a full-length mirror and preening himself, admiring the smoothness of his skin . . . that he had not wanted to mark."⁹ When captured after the war and questioned, he succeeded in convincing his captors that he was not an S.S. member because he was not tattooed with his blood type.

Mengele's hidden "birthmark," his belief in racial hygiene, and his ruthless use of "inferior races" for his genetic experiments was much more dangerous and diabolical than Georgianna's visible birthmark. Her natural birthmark caused her to become a victim to "science." Mengele's hidden and unnatural birthmark caused him to victimize others in the name of science; and the absence of an artificial birthmark—the S.S. tattoo—permitted him to escape responsibility for his crimes.

THE NUREMBERG CODE

Following the Doctors' Trial (the "Medical Case"),¹⁰ which included

6. G. POSNER & J. WARE, *MENGELE: THE COMPLETE STORY* 39 (1986) (footnotes omitted) (omission in original); see also P. AZIZ, *2 DOCTORS OF DEATH: JOSEPH MENGELE: THE EVIL DOCTOR* (1976).

7. POSNER & WARE, *supra* note 6, at 39.

8. Curran, *The Forensic Investigation of the Death of Josef Mengele*, 315 *NEW ENG. J. MED.* 1071, 1073 (1986).

9. POSNER & WARE, *supra* note 6, at 63.

10. Twenty of the 23 defendants were doctors, charged chiefly with "crimes against humanity" through the "killing or maiming of vast numbers of persons through medical experi-

charges of conducting lethal studies of the effects of high altitude and extreme cold, the action of poisons, and the response to various induced infections,¹¹ the court issued "The Nuremberg Code" as a summary of the legal requirements for experimentation on humans.¹² The Code requires that the

mentation." J. APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 141 (1954).

11. 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 11-14 (1946-1949) (listing war crimes charged in Count Two of Oct. 25, 1946 Indictment).

12. The complete text of the Nuremberg Code is as follows:

1. The voluntary consent of the human subject is absolutely essential.

This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.

The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

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

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

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

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seemed to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probably [sic] cause to believe, in the exercise of the good faith, superior skill and careful judgement required of him that a

informed, voluntary, competent, and understanding consent of the research subject be obtained. Although this principle is placed first in the Code's ten points, the other nine points must be satisfied before it is even appropriate to ask the subject to consent.

The Nuremberg Code is the "most complete and authoritative statement of the law of informed consent to human experimentation."¹³ It is also "part of international common law and may be applied, in both civil and criminal cases, by state, federal and municipal courts in the United States."¹⁴ However, even though courts in the United States *may* use the Nuremberg Code to set criminal and civil standards of conduct, none have used it in a criminal case and only a handful have even cited it in the civil context. Even where the Nuremberg Code has been cited as authoritative, it has usually been in dissent, and no United States court has ever awarded damages to an injured experimental subject, or punished an experimenter, on the basis of a violation of the Nuremberg Code.

There have, however, been very few court decisions involving human experimentation. It is therefore very difficult for a "common law" of human experimentation to develop. This absence of judicial precedent makes codes, especially judicially-crafted codes like the Nuremberg Code, all the more important. Moreover, since World War II, American governmental officials have evidenced a profound ambivalence with regard to human experimentation. On the one hand, Nazi physicians and scientists were punished and their brutality was publicized to deter future violations of human rights in medical experimentation, thus evidencing a sincere and serious desire to protect human rights in human experimentation. On the other hand, at the Tokyo War Crime Trials, our Government made a deal with the Japanese military medical officers who conducted lethal biological warfare experiments on United States prisoners of war in China during World War II. They agreed to disclose the results of their experiments to the United States military in exchange for immunity from prosecution.¹⁵ This action was based upon an expedient, utilitarian ethic that accepted information, regardless of its source, to protect our national security in a world that was viewed

continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 181-82 (1946-1949).

13. G. ANNAS, L. GLANTZ & B. KATZ, INFORMED CONSENT TO HUMAN EXPERIMENTATION: THE SUBJECT'S DILEMMA 21 (1977).

14. *Id.*

15. See generally A. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIME TRIALS (1987); P. WILLIAMS & D. WALLACE, UNIT 731: JAPAN'S SECRET BIOLOGICAL WARFARE IN WORLD WAR II (1989).

as hostile to the United States. This tension between protecting individual rights and protecting the national security has often been decided in favor of the national security during the Cold War.

Any meaningful study of the role of the Nuremberg Code in American law requires an examination of pre-Nuremberg litigation involving human experimentation, reaction to the Nuremberg Code as a legal document, and a discussion of the handful of United States cases that have cited the Nuremberg Code, directly or indirectly, since the War.

PRE-NUREMBERG APPELLATE DECISIONS

Although a distinction between therapeutic and nontherapeutic research is now commonly made, United States courts prior to World War II made no such distinction.¹⁶ Court cases alleging "experimentation" all involved novel treatments for illness. Experimentation was often defined as a "deviation" from standard medical practice that could only be justified by its results.

A Missouri court, for example, describing in 1926 a physician who used an injection for hemorrhoids, held: "A failure to employ the methods followed or approved by his school of practice evidences either ignorance or experimentation on his part. The law tolerates neither."¹⁷ It was not until the Depression that the Supreme Court of Michigan first mentioned the role of consent in experimentation:

We recognize the fact that if the general practice of medicine and surgery is to progress, there must be a certain amount of experimentation carried on; but such experiments must be done with the *knowledge and consent of the patient* or those responsible for him and *must not vary too radically from the accepted method of procedure.*¹⁸

Two cases, decided at the beginning of World War II, demonstrate both a new appreciation for the role of experimentation in medical progress by

16. This is not to say that there were no nontherapeutic experiments conducted in the U.S. prior to the War, only that none of the participants in these experiments brought lawsuits that generated an appellate record. The Tuskegee Syphilis study, for example, began in 1932 and continued until 1972, but no lawsuits were filed until the 1970's. See J. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1981); cf. *Begay v. United States*, 591 F. Supp. 991 (D. Ariz. 1984) (Navajo uranium miners subjected to prospective epidemiological study), *aff'd*, 768 F.2d 1059 (9th Cir. 1985).

17. *Owens v. McCleary*, 313 Mo. 213, 223, 281 S.W. 682, 685 (1926).

18. *Fortner v. Koch*, 272 Mich. 273, 282, 261 N.W. 762, 765 (1935) (emphasis added) (plaintiff suffering in latent stages of syphilis was originally misdiagnosed and treated for cancer). This and other pre-World War II cases on human experimentation in the United States are discussed in more detail in ANNAS, GLANTZ & KATZ, *supra* note 13, at 2-6.

United States courts and a new insistence on the consent of the patient or subject. In the first, a physician's license was suspended for fraud and deceit after using a topical medication for face cancer. The medication had been developed by another patient of the physician and was used only after the physician had tried it on himself to be sure there were no side effects. He had informed the patient that the treatment was experimental, that it might do some good, and could not do any harm. A complete cure was effected. In reversing the licensing board's decision to suspend his license for fraud, a New York court said:

It is not fraud or deceit for one already skilled in the medical art, *with the consent of the patient*, to attempt new methods when all other known methods of treatment had proved futile and least of all when the patient's very life has been despaired of. *Initiative and originality should not be thus effectively stifled*, especially when undertaken with the patient's full knowledge and consent, and as a last resort.¹⁹

The second early World War II case is the only *nontherapeutic* experimentation case decided by a United States court prior to the articulation of the Nuremberg Code. It involved a fifteen-year-old junior high student, John M. Bonner, whose cousin had been severely burned and was in a charity clinic in Washington, D.C.²⁰ After several failed attempts to find a skin graft donor, his aunt persuaded the boy to go to the hospital. A surgeon, Robert Moran, eventually cut a "tube of flesh" from his armpit to his waist, and surgically attached it to his cousin, forming a literal flesh and blood bond between them. The attempt to nurture the skin transplant with the boy's blood was unsuccessful, and the tube itself was severed when young Bonner lost so much blood he required transfusions. He was in the hospital for two months. The trial court found that Bonner was sufficiently mature to consent to the experiment and had in fact consented. The appeals court agreed, stating that there were times when a minor was sufficiently emancipated or mature to consent to beneficial medical treatment, but held that these exceptions to the requirement of informed consent of a parent did not apply in the nontherapeutic context:

Here the operation was entirely for the benefit of another and involved sacrifice on the part of the infant of fully two months of schooling, in addition to serious physical pain and possible results affecting his future life. This immature colored [sic] boy was subjected several times to treatment involving anesthesia, blood let-

19. *Stammer v. Board of Regents*, 262 A.D. 372, 373-74, 29 N.Y.S.2d 38, 39 (1941) (emphasis added), *aff'd*, 287 N.Y. 359, 39 N.E.2d 913 (1942).

20. *Bonner v. Moran*, 126 F.2d 121, 121 (D.C. Cir. 1941).

ting, and the removal of skin from his body, with at least some permanent marks of disfigurement.²¹

Accordingly, this pre-Nuremberg Code case held that if both the mature minor *and* the parent consent to nonbeneficial or nontherapeutic experimentation of this kind, it may be performed legally.

REACTION TO THE NUREMBERG CODE

The first United States court decision to cite the Nuremberg Code was decided in 1973, more than twenty-five years after the Code had been promulgated. This is striking because all of the judges at the Doctors' Trial were Americans, the prosecutors were American, the procedural rules followed were American, and the case itself was brought under the authority of the Military Governor of the American Zone. Why wasn't the Nuremberg Code immediately adopted by United States courts as setting the minimum standard of care for human experimentation?

One reason, perhaps, is that there was little opportunity. As remains true today, almost no experiments resulted in lawsuits in the 1940's, 50's, and 60's. A second reason may be that the Nazi experiments were considered so extreme as to be seen as irrelevant to the United States. This may explain why our own use of prisoners, the institutionalized retarded, and the mentally ill to test malaria treatments during World War II was generally hailed as positive, making the war "everyone's war."²² Likewise, in the late 1940's and early 1950's, the testing of new polio vaccines on institutionalized mentally retarded children was considered appropriate.²³ Utilitarianism was the ethic of the day.

Distancing the denial of any link to the Nazi atrocities also characterized the reactions of the medical community to the Nuremberg Code. Noting that the Code applied primarily to the type of outrageous nontherapeutic experiments conducted during the war, physician groups tended to find the Code too "legalistic" and irrelevant to their therapeutic experiments, and set about to develop an alternative code to guide medical researchers. The most successful and influential has been the World Medical Association's (WMA) Declaration of Helsinki, adopted in 1964 and amended three times since. The World Medical Association was formed in 1946 at the headquarters of

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

22. Rothman, *Ethics and Human Experimentation: Henry Beecher Revisited*, 317 *NEW ENG. J. MED.* 1195, 1197 (1987) (quoting *N.Y. Times*, Mar. 5, 1945, at 30, col. 1).

23. See, e.g., R. CARTER, *BREAKTHROUGH: THE SAGA OF JONAS SALK* 123-237 (1966); Koprowski, Jervis, Norton & Nelsen, *Further Studies on Oral Administration of Living Polio-myelitis Virus to Human Subjects*, 82 *PROC. SOC'Y EXPERIMENTAL BIOLOGY & MED.* 277, 277-80 (1953).

the British Medical Association in London, where physicians from Western Europe had been meeting informally during World War II. The hope was that should war ever come again, "the action of the World Medical Association in this field will act as a brake upon medical war crimes."²⁴

In 1954 the WMA's Eighth General Assembly met in Rome and adopted five general *Principles for Those in Research and Experimentation*, including:

3. *Experimentation on Healthy Subjects*. [Subjects should] be fully informed. The paramount factor in experimentation on human beings is the responsibility of the research worker and not the willingness of the person submitting to the experiment.

4. *Experimentation on Sick Subjects*. [O]ne may attempt an operation or a treatment of a rather daring nature. Such exceptions will be rare and require the approval either of the person or his next of kin. In such a situation it is the doctor's conscience which will make the decision.

5. *Necessity of Informing the Person . . .* It should be required that each person who submits to experimentation be informed of the nature of, the reason for and the risk of the proposed experiment. If the patient is irresponsible, consent should be obtained from the individual who is legally responsible for the individual. In both instances, consent should be obtained in writing.²⁵

The differentiation between "healthy subjects" and "sick subjects," and the general approval of proxy consent, depart from Nuremberg's sole emphasis on nontherapeutic experiments. Hugh Clegg, editor of the *British Medical Journal*, was given the task of drafting a new code. In a 1960 article, Clegg reviewed the Nuremberg Code with general approval, but concluded that Hippocrates was the real guide: "So long as the research worker is imbued with the Hippocratic ideal, this and his conscience should be a sufficient guide."²⁶

Perhaps the most important single event that helped push final adoption of the 1964 Declaration of Helsinki was the Food and Drug Administration's (FDA) proposal to standardize research on experimental drugs in the United States following the thalidomide tragedy. The advent of large scale drug trials in the United States and around the world made it necessary to address the issue of human experimentation in a far different context than either the Nazi concentration camp model or the simple Hippocratic doctor-

24. Routley, *Aims and Objects of the World Medical Association*, 1 WORLD MED. A. BULL. 18, 19 (1949).

25. World Medical Association, *Human Experimentation*, 2 WORLD MED. J. 14, 14-15 (1955) (Organizational News).

26. Clegg, *Human Experimentation*, 7 WORLD MED. J. 77, 79 (1960). The Hippocratic Oath has nothing to say about human experimentation.

patient relationship model. Subtitled *Recommendations Guiding Doctors in Clinical Research*, the Helsinki Declaration of 1964 was simply this: Recommendations to physicians by physicians.

By the early 1970's the Helsinki Declaration was widely admired by physicians as an advance over the Nuremberg Code. Perhaps Henry Beecher expressed the physician's view best when he said in 1970:

The Nuremberg Code presents a rigid set of legalistic demands. . . . *The Declaration of Helsinki*, on the other hand, presents a set of guides. It is an ethical as opposed to a legalistic document, and is thus a more broadly useful instrument than the one formulated at Nuremberg. . . . *Until recently, the Western world was threatened with the imposition of the Nuremberg Code as a Western credo.* With the wide adoption of the Declaration of Helsinki, this danger is apparently now past.²⁷

Similarly, the President of the Council for International Organizations of Medical Sciences (CIOMS) argued in 1967 that: "On the whole [the Declaration of Helsinki] corrects what in the Nuremberg Rules was circumstantial, related to Nazi crimes, and places those Rules more correctly in the context of generally accepted medical traditions."²⁸

On the other hand, Jay Katz argued insightfully in 1973 at an international CIOMS conference:

Do not place too much reliance on codes of ethics, such as the Declaration of Helsinki. That would be dangerous. Codes are deceptive documents to which all of us probably could subscribe in principle; but if you study them carefully, you will find that they are painfully vague. They do not inform us well about actual decision [sic] which investigators have to make day after day. The Declaration of Helsinki, analogous to a legal statute, requires opportunities for interpretation; only then could it become a viable document.²⁹

The only authoritative forum for interpretation of a "code" is the court-

27. Refshauge, *The Place for International Standards in Conducting Research on Humans*, 55 BULL. WORLD HEALTH ORG. 133, 137 (2 Supp. 1977) (*Proceedings of the International Conference on the Role of the Individual and the Community in the Research, Development, and Use of Biologicals*) (emphasis added) (quoting H. BEECHER, RESEARCH AND THE INDIVIDUAL: HUMAN STUDIES 279 (1970)).

28. *Id.* at 136. A 1964 physician-observer agreed, saying, "I think we must read the Nuremberg Code in reference to the conditions under which it was written. This is a wonderful document to say why the war crimes were atrocities, but it is not a very good guide to clinical investigation which is done with high motives." Beeson, Bondy, Donnelly & Smith, *Panel Discussion: Moral Issues in Clinical Research*, 36 YALE J. BIOLOGY & MED. 455, 464 (1964).

29. C.I.O.M.S., PROTECTION OF HUMAN RIGHTS IN LIGHT OF SCIENTIFIC AND TECHNOLOGICAL PROGRESS IN BIOLOGY AND MEDICINE 247 (1974).

room. Such interpretation began, coincidentally, the same year Professor Katz called for it: 1973.

THE NUREMBERG CODE IN LOWER U.S. COURTS

Prior to 1973, the Nazi doctors were alluded to only in a dissenting opinion in *Strunk v. Strunk*,³⁰ a Kentucky case decided by a vote of 4 to 3, in which the removal of a kidney from an institutionalized mentally retarded adult was authorized for transplant into his brother, justified on the basis that the "donation" would be "beneficial" to the donor. In dissent, Judge Steinfeld wrote:

Apparently because of my indelible recollection of a government which, to the everlasting shame of its citizens, embarked on a program of genocide and experimentation with human bodies I have been more troubled in reaching a decision in this case than in any other. My sympathies and emotions are torn between a compassion to aid an ailing young man and a duty to fully protect unfortunate members of society.³¹

The lawyer for the widow of the recipient of the world's first artificial heart, Haskell Karp, tried to introduce the Nuremberg Code into evidence in a malpractice case following the 1969 implant. He failed when the United States District Court judge, John V. Singleton, ruled that the Nuremberg Code was irrelevant because the artificial heart was implanted to save Karp's life, and was, therefore, not experimental, but therapeutic.³²

The first United States case to actually make use of the Nuremberg Code was a 1973 Detroit, Michigan case involving psychosurgery.³³ Although not precedent anywhere outside Detroit, the case drew national attention because of the then current political debate surrounding psychosurgery (the destruction of histologically normal brain tissue for the purpose of modifying undesirable behavior). In 1972 two psychiatrists had obtained state funds to study the effects of amygdalotomy (the destruction of a portion of the brain's limbic system) and cyproterone acetate (an antiandrogen) on male aggression in prisons and mental health facilities. The goal was to modify antisocial behavior so that inmates could be safely released to the community. The study protocol was approved by both a scientific review

30. 445 S.W.2d 145 (Ky. Ct. App. 1969).

31. *Id.* at 149 (Steinfeld, J., dissenting).

32. *Karp v. Cooley*, 493 F.2d 408, 423-24 (5th Cir. 1974) (experimentation "measured by traditional malpractice evidentiary standards;" Nuremberg Code not addressed).

33. *Kaimowitz v. Michigan Dep't Mental Health*, No. 73 Civ. 19434-AW (Mich. Cir. Ct., Wayne County, July 10, 1973) (unreported), reprinted in A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902 (1974).

committee and a human rights committee. Twenty-four candidates were sought for the study, but only one, Louis Smith, was considered suitable. He had been confined in a Michigan state hospital as a criminal sexual psychopath for seventeen years, having been charged with (but never tried for) murder and rape. He and his parents had signed a detailed consent form when a lawsuit was commenced by a public interest group to halt the proposed experiment.

In considering the challenge, the panel of three lower court judges focused on whether involuntarily confined individuals could ever legally consent to experimental brain surgery designed to alter aggressive behavior. In deciding how to answer this question the court reprinted the entire text of the Nuremberg Code for "guidance," saying:

In the Nuremberg Judgment, the elements of what must guide us in decision are found. The involuntarily detained mental patient must have legal capacity to give consent. He must be so situated as to be able to exercise free power of choice without any element of force, fraud, deceit, duress, overreaching, or other ulterior form of restraint or coercion. He must have sufficient knowledge and comprehension of the subject matter to enable him to make an understanding decision. The decision must be a totally voluntary one on his part.³⁴

Applying these standards, the court concluded that Smith could not give voluntary, competent, informed, or understanding consent to the procedure; consequently, the experiment could not be performed. The court went further: it determined that given the current state of knowledge *no one* could give an understanding consent to this procedure, effectively outlawing it in Detroit, Michigan. This opinion has been justifiably criticized on a number of grounds, but its use of the Nuremberg Code as a standard for judgment has not been one of them. Shortly after this case, a California appeals court ruled that portions of a statute regulating psychosurgery were unconstitutional because they were "impermissibly vague."³⁵ The Nuremberg Code was not mentioned.

The next United States judge to mention the Nuremberg Code was Judge Pashman of the New Jersey Supreme Court in dissent in a 1980 employment case involving alleged wrongful discharge.³⁶ A physician, Grace Pierce, had been employed as Director of Medical Research/Therapeutics of Ortho

34. *Id.* at 913. For a detailed analysis of the legal regulation of psychosurgery, see ANNAS, GLANTZ & KATZ, *supra* note 13, at 215-55.

35. *Aden v. Younger*, 57 Cal. App. 3d 662, 677, 129 Cal. Rptr. 535, 545 (1976).

36. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 80-82, 417 A.2d 505, 516-18 (1980) (Pashman, J., dissenting).

Pharmaceuticals. Her primary responsibility was to oversee the development of new drugs. In 1975 she was the only physician on a team developing loperamide, a liquid drug for treating diarrhea, which contained saccharin. The team was preparing an Investigational New Drug (IND) application for the Food and Drug Administration (FDA). Pierce objected to continued development of the drug because she believed saccharin was a risk to children and the elderly, and therefore it would violate her interpretation of the Hippocratic Oath to test it on them. She was removed from the loperamide project and subsequently resigned. In her lawsuit against Ortho she alleged that the company had required her to act contrary to the Hippocratic Oath, specifically the part that reads, "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone."³⁷

The New Jersey Supreme Court found her reliance on an ethical code too vague because the FDA had yet to approve the IND application, and until they did so, no one would be given the drug, and no harm could be done. In the court's words: "The case would be far different if Ortho had filed the IND, the FDA had disapproved it, and Ortho insisted on testing the drug on humans. The actual facts are that Dr. Pierce could not have harmed anyone by continuing to work on loperamide."³⁸

The court characterized a disagreement at this point of the IND process as a "difference in medical opinions" at Ortho, and concluded that upholding her claim would lead to chaos in drug development and would harm research:

Dr. Pierce espouses a doctrine that would lead to disorder in drug research. Under her theory, a professional employee could redetermine the propriety of a research project even if the research did not involve a violation of a clear mandate of public policy. *Chaos would result if a single doctor engaged in research were allowed to determine, according to his or her individual conscience, whether a project should continue.*³⁹

In dissent, Judge Pashman argued that codes more specific than the Hippocratic Oath provided Pierce with a "clear public policy" mandate, and that she should at least have the opportunity to present to a jury these "recognized codes of medical ethics that proscribe participation in clinical experimentation when a doctor perceives an unreasonable threat to human health."⁴⁰ Judge Pashman then quoted the Helsinki Declaration, the Ameri-

37. *Id.* at 74, 417 A.2d at 513.

38. *Id.*

39. *Id.* at 75, 417 A.2d at 514 (emphasis added).

40. *Id.* at 77, 417 A.2d at 515 (Pashman, J., dissenting).

can Medical Association ethical guidelines for clinical investigation, and the Nuremberg Code.⁴¹ Of Nuremberg he said, "A final source of ethical guidelines is what is now called the 'Nuremberg Code.' . . . The Judicial Council of the American Medical Association has adopted the Nuremberg Code as one expression of ethical principles governing human experimentation."⁴² He then set forth the text of principles 5, 6, 7, and 10,⁴³ and concluded by noting that the Nuremberg Code "conditions a doctor's participation [in experimentation] on his 'good faith, superior skill and careful judgment' that the experiment is safe."⁴⁴

THE COLD WAR MENTALITY AND HUMAN EXPERIMENTATION

The Michigan psychosurgery case and the New Jersey wrongful discharge dissent both cite and reprint all or part of the text of the Nuremberg Code itself. The next case deals with an "experiment" that might be considered "uncivilized" by any code. It is included because of its relevance to military experiments; however, the "Nuremberg Code" the court refers to is actually the Nuremberg Principles derived from the first war crimes trial.⁴⁵ This case

41. *Id.* at 78-80, 417 A.2d at 515-17.

42. *Id.* at 80, 417 A.2d at 516.

43. *Id.* at 80, 417 A.2d at 516-17.

44. *Id.* at 82, 417 A.2d at 518.

45. See Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, 2 CONN. J. INT'L L. 499, 499-500 (1987). "[T]he International Law Commission formulated the Principles of International Law recognized in the charter of the Nuremberg Tribunal and in the Judgment of the Tribunal[;] [w]hile the instrument . . . does not constitute international law as such, it evidences . . . the continuing effect of the customary law of Nuremberg . . ." *Id.* at 500 (footnote omitted). In 1947 the General Assembly's Committee on the Progressive Development of International Law and Its Codification recommended that the International Law Commission prepare a draft code incorporating the Nuremberg principles as well as a general plan for the codification of offenses against the peace and security of mankind. *Resolutions Adopted by the General Assembly*, in 1 UNITED NATIONS RESOLUTIONS 302 (D. Djonovich ed. 1973). In 1950 the Commission presented its first formal report. The text of that report is the first attempt to codify the Nuremberg principles:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefor and liable for punishment.

Principle II. The fact that international law does not impose a penalty for an act which constitutes crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

is also the first of a series of cases that appear to justify the brutal experimentation needed to fight the Cold War.

A suit was brought by a former United States soldier alleging that in 1953, only five years after the Nuremberg Code was promulgated, he and other members of his unit were ordered to stand in a field without protection from radiation while a nuclear device was exploded in the Nevada desert.⁴⁶ As a result of this exposure, the plaintiff, Stanley Jaffee, died of cancer in November 1977.⁴⁷ The United States Court of Appeals for the Third Circuit decided that Jaffee's claim for compensation for an intentional and unconstitutional tort was barred by the *Feres*⁴⁸ doctrine,⁴⁹ which holds that "soldiers 'injured in the course of activity incident to service' may not sue for

Principle VI. The crimes hereinafter set out are punishable as crimes under international law:

- a. Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
- b. War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
- c. Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII. Complicity in the commission of a crime against peace, a war crime, or crime against humanity as set forth in Principle VI is a crime under international law.

Report of the International Law Commission, 12 U.N. GAOR 11-14 (12 Supp. 1950) (U.N. Doc. A/1316).

In 1954 attempts first began to go beyond the Nuremberg Principles and establish an international criminal code that would be administered both nationally and internationally by an international criminal court. Work on this project stalled almost immediately and was not revived until 1978. Mueller, *supra*, at 500. Currently the attempt is not to simply restate the 1954 aims, but to move beyond the

three basic crime categories, namely crime against peace, war crimes, and crimes against humanity. Rather, it should extend to more recent international crimes such as colonialism, apartheid, serious environmental offenses, economic aggression, mercenarism, hostage taking, violence against persons enjoying diplomatic privileges and immunities, the hijacking of aircraft, international terrorism, and piracy.

Id. at 502.

46. *Jaffee v. United States*, 663 F.2d 1226, 1229 (3rd Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

47. *Id.*

48. *Feres v. United States*, 340 U.S. 135 (1950).

49. *Jaffee*, 663 F.2d at 1227-28.

additional compensation . . . under the Federal Tort Claims Act.”⁵⁰ Responding to an argument by the minority that the actions of the United States military in this case were a violation of many international standards, including the Nuremberg Code, the court said: “The majority neither endorses nor sanctions a concentration camp mentality [W]hat we are called upon to decide is simply whether the plaintiffs are entitled to money damages”⁵¹

The dissenting judges thought that requiring soldiers to stand near the explosion of a nuclear device without protection against radiation was “a violation of human rights on a massive scale.”⁵² They noted that the allegation is that “civilian and military officials of the government, acting without legal authority and with no sufficient legitimate military or other purpose, conducted a human experiment upon soldiers subject to their control, without their knowledge, permission or consent, by exposing them to radiation which those officials knew to be dangerous.”⁵³ The dissent continued, arguing that no law should place the plaintiffs beyond its protection because this conduct went “beyond the bounds of social acceptability.”⁵⁴ In their words:

[T]he complaint alleges conduct which would violate the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Convention, the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Nuremberg Code. *The international consensus against involuntary human experimentation is clear. A fortiori* the conduct charged, if it occurred, was in violation of the Constitution and laws of the United States and of the state where it occurred or where its effects were felt.⁵⁵

The dissenters expressed astonishment that “any judicial tribunal in the world, in the last fifth of this dismal century, would choose to place a class of persons outside the protection against human rights violations provided by the admonitory law of intentional torts.”⁵⁶

The dissenters would have been even more astonished when, three years later, a federal district court judge treated the Nuremberg Code simply as a discussion document without legal force in the United States. That court

50. *Id.* (citation omitted) (referring to *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977)).

51. *Id.* at 1240.

52. *Id.* at 1248 (Gibbons, J., dissenting).

53. *Id.*

54. *Id.* at 1249.

55. *Id.* at 1249 (footnotes omitted) (emphasis added).

56. *Id.* at 1250.

also adopted one of the Nazi defenses as legitimate: In times of national emergency, research rules must take a backseat to national security. Former Navajo uranium miners and their survivors had brought suit against the United States government for compensatory damages suffered as a result of exposure to radiation during uranium mining.⁵⁷ Among the allegations was that the United States Public Health Service (PHS) had conducted a prospective epidemiological study of a cohort of uranium miners from 1949 to 1960 to see if they were at increased risk for cancer, lung disease, and other problems. The miners had an annual physical exam in 1950, 1951, 1953, and every three years thereafter until 1960. They were told that the exam was part of a study of the health of uranium miners, but were not warned of any risks that were suspected in uranium mining or told of the purpose of the study.⁵⁸

The study was discontinued in 1960 and replaced by the more accurate annual sputum cytology studies.⁵⁹ In responding to the suggestion that it was a violation of the rights of the miners in this Tuskegee-like study⁶⁰ to withhold the real aims of the study, the court said simply:

The PHS epidemiological *study protocol and the conduct* of the PHS physicians participating in the study and the limits on the information given to the miners studied *were consistent with the medical ethical and legal standards of the 1940s and 1950s*. It was not until the 1964 and 1965 period that federal guidelines were established for the conduct of federally-funded research projects. This followed discussions in the legal community, the medical community and congressional hearings after the Nuremberg trials of Nazi war criminals engaged in human experimentation in the German concentration camps. The PHS physicians here were not experimenting on human beings. They were gathering data to be used for the establishment of enforceable maximum standards of radiation exposure in uranium mines.⁶¹

Judge Cople's logic for concluding that the decision, not to tell the Navajo miners of the risk of uranium radiation to them, was a "discretionary" one and thus not covered by the Federal Tort Claims Act (FTCA) is dis-

57. *Begay v. United States*, 591 F. Supp. 991, 993 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985).

58. *Id.* at 994-95.

59. *Id.* at 997.

60. In the now infamous Tuskegee study, poor black men with syphilis were followed for decades so that the natural course of syphilis could be studied. The men were told only that they had "bad blood," and were never informed either of their diagnosis, or the purpose of the study, even after penicillin was discovered. The study was not discontinued until 1972. See *supra* note 16.

61. *Begay*, 591 F. Supp. at 997-98 (emphasis added).

turbing. He borrows a hypothetical, used by Judge Jenkins in *Allen v. United States*,⁶² to illustrate the extent of the federal discretionary authority under the FTCA:

Suppose a high level decision maker says, "International pressures make open-air atomic testing highly necessary. Time is of the essence. We cannot tell our own people. We just need to do it and do it fast as we can. We know as a result of such testing some people are going to get hurt. We can't tell them they are going to get hurt. We can't even warn them what to do to minimize or prevent the hurt. *In order to preserve our way of life* some people unknown to them and unknown to us are going to give their all for the good of all."⁶³

Judges Jenkins and Cople both concluded that those injured by such a government policy—one in blatant disregard of human rights and human life—would have no redress because the harm would be the result of a discretionary act.⁶⁴ Judge Cople went further. He concluded that the PHS decision not to inform the research subjects of the risk of continued exposure to uranium was justified "based on considerations of political and national security feasibility factors."⁶⁵

62. 588 F. Supp. 247 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (1987), *cert. denied*, 484 U.S. 1004 (1988).

63. *Begay*, 591 F. Supp. at 1012 (emphasis added) (quoting *Allen*, 588 F. Supp. at 338). President George Bush, using similar language to justify the deployment of American troops to Saudi Arabia in the summer of 1990, wanted to protect "our American way of life." Westlake, *American Way*, Chi. Tribune, Sept. 12, 1990, at 18, col. 5.

64. An earlier case involving the Government's act of selecting a particular strain of bacteria for use in a secret, simulated biological warfare attack on San Francisco in 1950 came to a similar conclusion. The court ruled that the family of a man who died as a result of exposure to the bacteria had no recourse because the selection of the particular strain of bacteria was a discretionary function. *Nevin v. United States*, 696 F.2d 1229, 1231 (9th Cir.), *cert. denied*, 464 U.S. 815 (1983).

65. *Begay*, 591 F. Supp. at 1012. In 1986 Congressman Edward J. Markey (D. Mass.) released records detailing a series of experiments conducted by the Government from 1940 to 1971 to test various aspects of radiation exposure. Many of the experiments had been published in journals. They included the injection of radium, thorium, and plutonium into patients believed to have a limited lifespan; exposure of the testicles of Oregon prisoners to test the effects of radiation on human fertility; and the intentional release of radioactive iodine in Idaho, followed in at least one case by subjects drinking milk from cows that had grazed on land contaminated with radioactivity. Only the Oregon prisoner experiments resulted in any litigation, as a result of which the U.S. Attorney in Portland, Oregon asked state officials to cancel a program of following up released prisoners to examine their health status. For details on the radiation studies, which were conducted at some of the Nation's leading educational institutions and hospitals, see generally STAFF OF HOUSE SUBCOMM. ON ENERGY CONSERVATION AND POWER, 99TH CONG., 2D SESS., AMERICAN NUCLEAR GUINEA PIGS: THREE DECADES OF RADIATION EXPERIMENTS ON U.S. CITIZENS (Comm. Print 1986). The 1986 excuses for the experiments were predictable. Dr. J.W. Thiessen of the U.S. Department of Energy's Office of Health and Environmental Research defended the studies saying:

THE DEEP DIVING EXPERIMENT

The final lower court case citing the Nuremberg Code is a civilian tort action involving a nontherapeutic experiment—a series of simulated deep sea dives conducted at Duke University in 1981.⁶⁶ The experiment, called Atlantis III, involved research into high pressure nervous syndrome. The research subject, Leonard Whitlock, was an experienced diver with a degree in oceanographic technology. He had made approximately 1,500 scuba dives, 200-300 tethered air dives, 200 oxygen surface decompression dives, 50 mixed gas dives, and 6 helium-oxygen saturation dives to between 450 and 680 feet. He had also participated in an earlier experiment called Atlantis I. The Atlantis III plan was to simulate a dive to 2250 feet, a new world record.⁶⁷

Prior to the experiment, Whitlock signed an informed consent form advising him of risks of possible lung collapse, production of fluid, hearing loss, inflammation of the ear, and sinusitis. Decompression risks were described as including death, disability, and joint pain. "Unknown risks" were also possible because "the research was experimental." After the dive Whitlock suffered permanent organic brain damage and brought suit alleging, among other things, fraudulent and negligent failure to warn of the risk of organic brain disease. The defendants moved for summary judgment, which the court granted.⁶⁸

On the issue of informed consent, the court cited the Nuremberg Code as authoritative in the nontherapeutic context, setting forth the entire text of principles 1, 7, and 8. The court continued:

Two important differences to note between the Nuremberg Code and § 90-21.13 [North Carolina's informed consent statute] are that *the subjective consent of the subject is always required under the Nuremberg Code* whereas under § 90-21.13 a health care provider may escape liability if a reasonable person would have consented if the proper disclosure of information had been made; and more importantly for the purposes of this case *the Nuremberg Code requires the researcher to make known to the subject all hazards reasonably to be expected* and the possible effects upon the health and person

You have to put yourself back in those years. They used humans because there was an urgency to find if radiation safety standards were adequate. . . . Actual radiation exposure to those people was extremely low. We wouldn't do it now the way they did it then. But it's hard to say they were wrong even then.

Tye, *Radiation Tests Employed People as Guinea Pigs*, Boston Globe, Oct. 25, 1986, at 3, col. 1.
66. Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986), *aff'd*, 829 F.2d 1340 (4th Cir. 1987).

67. *Id.* at 1465-66.

68. *Id.*

of the subject whereas § 90-21.13 only requires the health care provider to apprise the patient of the "usual and most frequent risks and hazards" of the procedure.⁶⁹

The court thus used the Nuremberg Code as the legal standard for disclosure, properly concluding that "the degree of required disclosure of risks is higher in the nontherapeutic context."⁷⁰ In applying this principle, however, the court found that Whitlock failed to provide any evidence that there was a foreseeable or known risk of organic brain damage associated with the Atlantis III experiment. The physician supervisor knew of no such injury that had ever been seen as a result of deep diving experiments, and none was mentioned in the literature. Therefore, it could not be concluded that organic brain disease was a "reasonably foreseeable risk" that must be disclosed.⁷¹

THE U.S. SUPREME COURT AND THE NUREMBERG CODE

The Supreme Court has mentioned the Nuremberg Code in one opinion, *United States v. Stanley*,⁷² in 1987. A related opinion involving access to Government records of Government-sponsored nontherapeutic experiments, decided two years earlier, helps provide a context for the *Stanley* experiments.

In 1953, only five years after the promulgation of the Nuremberg Code, Allen Dulles, Director of the Central Intelligence Agency (CIA), issued orders for secret experiments to be conducted into the use of biological and chemical agents to alter human behavior under the code name MKULTRA.⁷³ These experiments were in response to "brain washing techniques" used on American soldiers in Korea, and the desperation these techniques caused. CIA officials wanted to know how these techniques worked and whether they could be countered. Almost two-hundred researchers at eighty institutions were eventually hired by the CIA to conduct studies, several of which involved experiments where researchers secretly administered dangerous drugs, such as LSD, to uninformed human subjects. At least two subjects died as a result of the experiments, and many others suffered serious health consequences.⁷⁴ This type of human experimentation was finally expressly forbidden by a presidential executive order in 1982.⁷⁵

69. *Id.* at 1471 (emphasis added).

70. *Id.*

71. *Id.* at 1472.

72. 483 U.S. 669, 710 (1987) (O'Connor, J., concurring).

73. *Central Intelligence Agency v. Sims*, 471 U.S. 159, 161 (1984).

74. *Id.* at 162.

75. *Id.* at 162 n.2 (citing Exec. Order No. 12,333, § 2.10, 3 C.F.R. 213 (1982)).

In 1973 the CIA Director ordered all records pertaining to MKULTRA destroyed. In 1977 the CIA located some 8,000 pages, mostly financial records, that had inadvertently survived the 1973 destruction. Agency Director Stansfield Turner notified the Senate Select Committee of their existence and provided the committee with a confidential list of all MKULTRA researchers and institutions. Shortly thereafter, John Sims and Sidney Wolfe filed a Freedom of Information suit seeking the list of the institutions and researchers.⁷⁶ By the time the case reached the United States Supreme Court, fifty-eight of the institutions had agreed to be identified, but the Agency continued to resist disclosing the names of the other institutions and of the individual researchers on the grounds that they were "intelligence sources" that the CIA Director had a right to protect.⁷⁷ The Supreme Court, in a decision written by Chief Justice Warren Burger, agreed with the CIA and justified almost all of the CIA's information-collecting activities as required by the national defense and the security of the United States. All of the Justices concurred in this result.⁷⁸

Two years later, in 1987, the Supreme Court got its first chance to decide if the Nuremberg Code applied to the United States Army under whose auspices the Nuremberg Medical Trial was held. Technically speaking, the Court decided only that an active duty serviceman could not sue the Government for injuries sustained as a result of experimentation that violated the Nuremberg Code. On the other hand, it is fair to conclude that the Code is almost meaningless in the military context if servicemen are denied money damages for its flagrant violation. To have a right without a remedy is similar to concluding the Nuremberg Code is an ethical code without legal standing.

The Army became interested in mind-altering drugs during the early 1950's, at about the same time as the CIA. The Army's interest stemmed from intelligence information revealing that other countries were purchasing large quantities of hallucinogenic drugs and from concern that these drugs might be used as an alternative to nuclear weapons, rendering our military forces harmless without damage to the environment or buildings. As a result at least thirteen research contracts were funded by the Army, and between 1955 and 1967 the Army conducted numerous in-house studies of psychedelics on military and civilian personnel.⁷⁹

Studies were done to determine how men under the influence of LSD per-

76. *Id.* at 162-63 & n.5.

77. *Id.* at 163 & n.7.

78. *Id.* at 161, 181.

79. The issue of experimentation in the U.S. Military is discussed in more detail in ANNAS, GLANTZ & KATZ, *supra* note 13, at 305-11.

formed their military duties, and also to determine if the administration of LSD could be used as a method to obtain information during interrogation. Many subjects were neither informed of the experiment's nature nor the substance used. The problem does not appear to have been lack of guidelines, but lack of compliance. By 1953 the Secretary of Defense had essentially adopted the Nuremberg Code for protection of experimental volunteers in research, but the guidelines were classified "Top Secret" until 1974 (when new standards were adopted by the Army, Navy, and Air Force). It is unclear how seriously they were taken.⁸⁰

James Stanley, an Army serviceman, volunteered to test the effectiveness of protective clothing and equipment against chemical warfare in February 1958.⁸¹ Unknown to him, and without his consent, LSD was secretly administered to him pursuant to an Army plan to study the effects of the drug on humans. As a result of his exposure to LSD, Stanley suffered from hallucinations and periods of incoherence and memory loss. This impaired his military performance, and he also on occasion woke in the middle of the night and "without reason, violently beat his wife and children, later being unable to recall the entire incident."⁸² He was discharged from the military in 1969, and one year later his marriage ended because of the personality changes allegedly induced by LSD. In 1975 Stanley received a letter from the Army soliciting his cooperation in a follow-up study of the "volunteers who participated" in the 1958 LSD studies.⁸³ This was the Government's first notification to Stanley that he had been given LSD in 1958. Having been denied compensation for injury by the Army, Stanley filed suit under the Federal Tort Claims Act alleging negligence in the administration, supervision, and follow-up monitoring of the drug research program.⁸⁴

In an extraordinarily technical and abstract decision, Justice Scalia wrote the opinion for a Court split five to four.⁸⁵ Without in any way characterizing the actions of the Army as unusual, Justice Scalia concluded that permitting Stanley to sue the Army would be a judicial intrusion upon military matters that would disrupt the Army itself and "would call into question military discipline and decision-making."⁸⁶ The Court *would* permit a suit in a civilian court "to halt or prevent the constitutional violation" of a serviceman's rights; but the Court held that such a violation provides no justifi-

80. *Id.* at 308.

81. *United States v. Stanley*, 483 U.S. 669, 671 (1987).

82. *Id.*

83. *Id.* at 671-72.

84. *Id.* at 672.

85. *Id.* at 671.

86. *Id.* at 682.

cation for departing from the general rule that injuries that "arise out of or are in the course of activity incident to service" shall not give rise to a cause of action for money damages.⁸⁷ Even though this conclusion has the effect of granting military officials unqualified immunity for intentionally injuring individual servicemen, the Court refused to recognize the possible consequences of this effect.

Doesn't the experiment performed on Stanley so offend not only constitutional rights, but also basic human decency and civilized standards of conduct, such that a remedy is required in a civilized country? The four dissenting judges thought so, and based this conclusion firmly and squarely upon the Nuremberg Code. Justice O'Connor, writing for herself, would have found that the conduct at issue in *Stanley* could not "arise out of or in the course of activity incident to service" because the conduct "is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission."⁸⁸ In her words, the *Feres* doctrine

surely cannot insulate defendants from liability for deliberate and calculated exposure of otherwise healthy military personnel to medical experimentation without their consent, outside of any combat, combat training, or military exigency, and for no other reason than to gather information on the effect of lysergic acid diethylamide on human beings. *No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case.*⁸⁹

Justice O'Connor then went on to directly quote the Nuremberg Code and Justice Brennan's dissent:

[T]he United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human beings during the Second World War[,] . . . and the standards that the Nuremberg Military Tribunals developed to judge the behavior of the defendants stated that the "voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts. . . ." If this principle is violated the very least that society can do is to see that the victims are compensated, as best they can be, by the perpetrators. I am prepared to say that our Constitution's promise of due process of law guarantees this much.⁹⁰

Justice Brennan wrote the other dissent, which was joined by Justices

87. *Id.* at 683-84.

88. *Id.* at 709 (O'Connor, J., concurring in part and dissenting in part).

89. *Id.* (emphasis added).

90. *Id.* at 710 (citations omitted).

Marshall and Stevens. Justice Brennan began by characterizing the case as one in which “the Government of the United States treated thousands of its citizens as though they were laboratory animals.”⁹¹ He argued that if the majority is correct that our Constitution bars Stanley from recovery, then “the Court’s decision, though legally necessary, would expose a tragic flaw in that document.”⁹² Justice Brennan, however, argued that the majority abdicated its responsibility to protect constitutional rights and that the Constitution required a remedy for his injuries. Brennan framed his argument with the Nuremberg Code, and specifically cited its first principle, “The voluntary consent of the human subject is absolutely essential.” After quoting the text of the last two lines of the first principle, he stated, “[T]he United States military developed the Code, which applies to all citizens—soldiers as well as civilians.”⁹³

A 1959 Army Staff Study, quoted by Brennan, noted that “in intelligence, the stakes involved and the interests of national security may permit a more tolerant interpretation of moral-ethical values, but not legal limits, through necessity.”⁹⁴ It concluded, nonetheless, that legal liability for the LSD experiments could only be avoided by covering them up. A Senate Report later concurred with the Army’s assessment. Brennan argued, “Serious violations of the constitutional rights of soldiers must be exposed and punished.”⁹⁵ He agreed with the majority that an injunction could be obtained: “An injunction, however, comes too late for those already injured; for these victims, ‘it is damages or nothing.’”⁹⁶

Justice Brennan went on to demonstrate that the cases granting absolute immunity are relevant to the analysis. Such cases, he stated, demonstrate that only qualified immunity is necessary to support the public policy and military discipline objectives relied on by the majority. Moreover, as he properly noted, the people who performed the experiment on Stanley were likely civilians in any event, so that military discipline was not even implicated in this case. Brennan concluded his opinion by quoting Hans Jonas:

The soldier’s case is instructive: Subject to the most unilateral discipline, forced to risk mutilation and death, conscripted without, perhaps against, his will—he is still conscripted with his capacities to act, to hold his own or fail in situations, to meet real challenges for real stakes. Though a mere ‘number’ to the High Command,

91. *Id.* at 686 (Brennan, J., dissenting).

92. *Id.*

93. *Id.* at 687.

94. *Id.* at 688.

95. *Id.* at 690.

96. *Id.*

he is not a token and not a thing. (Imagine what he would say if it turned out that the war was a game staged to sample observations on his endurance, courage, or cowardice.)⁹⁷

Justice Brennan then continued in his own words:

The subject of experimentation who has not volunteered is treated as an object, a sample. James Stanley will receive no compensation for this indignity. A test providing absolute immunity for intentional constitutional torts *only* when such immunity was essential to maintenance of military discipline would "take into account the special importance of defending our Nation without completely abandoning the freedoms that make it worth defending. . . ." Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity.⁹⁸

DESERT SHIELD

As a final example, in late December 1990, the FDA granted the Department of Defense a waiver from the informed consent requirements of the Nuremberg Code and existing federal law and regulations to use unapproved drugs and vaccines on the soldiers involved in Desert Shield.⁹⁹ The basis of this waiver was military expediency. In the words of the Department of Defense: "In all peace time applications, we believe strongly in informed consent and ethical foundations. . . . But military combat is different."¹⁰⁰ The rationale was that informed consent under combat conditions was "not feasible" because some troops might object and refuse to consent, and the military could not tolerate such refusals because of "military combat exigencies."¹⁰¹ It is perhaps not remarkable that the FDA granted the request waiver and soon thereafter approved a number of unapproved drugs as well as a vaccine for botulism to be administered to the troops.¹⁰² It did not escape everyone's attention, however, that this was the first time since World War II that any official government agency had politically sanctioned the direct violation of the Nuremberg Code (which makes no exception either for members of the military or for wartime expediencies).¹⁰³ The United

97. *Id.* at 707-08 (quoting Jonas, *Philosophical Reflections on Experimentation with Human Subjects*, 98 DAEDALUS 219, 235-36 (1969)).

98. *Id.* at 708 (emphasis in original) (citation omitted).

99. Informed Consent for Human Drugs and Biologics; Determination That Informed Consent Is Not Feasible, 55 Fed. Reg. 52,814 (1990).

100. *Id.* at 52,815.

101. *Id.*

102. Kolata, *Troops May Get Unlicensed Drug*, N.Y. Times, Jan. 4, 1991, at A10, col. 6.

103. Annas & Grodin, *Our Guinea Pigs in the Gulf*, N.Y. Times, Jan. 8, 1991, at A21, col. 1.

States District Court for the District of Columbia refused to enjoin the regulation without even mentioning the Nuremberg Code.¹⁰⁴ In the court's view this was a military command decision not to be questioned by the judiciary: "The primary purpose of administering the drugs is military not scientific."¹⁰⁵ *The New York Times* agreed, saying that "the military is acting more like Florence Nightingale than Joseph Mengele."¹⁰⁶

CONCLUSION

Prior to World War II, human experimentation in the United States was generally viewed by the courts as an extreme and illegitimate activity that amounted to a "deviation" from medical practice. Courts frequently insisted that such deviation was itself evidence of malpractice. Hawthorne's Aylmer, for example, was surely guilty of malpractice under these standards, and probably of manslaughter. By World War II, deviation that was not too extreme, and that was done with the patient's informed consent, was seen as legitimate. No "nontherapeutic" experiment was reviewed in American courts prior to World War II.

After World War II, the brutal Nazi "experiments" were seldom referred to at all in United States courts. Human experimentation became a mainstream, legitimate, and valued activity. Although it continued to deviate from "standard medical practice," the goal was usually to test a hypothesis. In short, human experimentation moved from the realm of quackery and alchemy to the realm of science.

In this context it is perhaps not surprising that a deep theoretical division developed between therapeutic and nontherapeutic experimentation. The former (the exclusive type reviewed by the courts before the War) was rehabilitated, with almost exclusive concern focusing on informed consent. In this regard, principle one of the Nuremberg Code, although rarely cited, became the primary justification for therapeutic experimentation. Much less attention was paid to the other nine principles.

On the other hand, just as "therapeutic experimentation" tended to be viewed as just another type of therapy; "nontherapeutic experimentation" tended to be viewed as the *only* kind of true "experimentation" and thus the only kind of research activity to which the Nuremberg Code—a document fundamentally about nontherapeutic experimentation—applied. This is re-

104. *Doe & Doe v. Sullivan & Cheney*, 756 F. Supp. 12 (D.D.C. 1991), 1991 U.S. Dist. LEXIS 1702, *appeal filed*, No. 91-5019 (D.C. Cir. Feb. 11, 1991).

105. *Id.*, 1991 U.S. Dist. LEXIS at *10.

106. *The Ethics of Troop Vaccination*, N.Y. Times, Jan. 16, 1991, at A22, col. 1 (editorial). For the argument against the regulation, see Annas & Grodin, *Treating the Troops: Commentary*, 21 HASTINGS CENTER REP. 23 (Mar./Apr. 1991).

flected in the case law. The types of experiments in which American judges have found the Nuremberg Code to be a useful guide for setting standards have involved nontherapeutic experiments often conducted without consent: psychosurgery on an involuntarily confined mental patient; secretly administering mind-altering drugs to unsuspecting members of the military and civilians; testing the effects of radiation on members of the military; and monitoring the physical effects of radiation on unsuspecting uranium miners. Many, though certainly not all, of these experiments were justified by national security considerations and the Cold War. The wartime mentality expressed by the CIA and the Army to justify its LSD experiments, and the Army to justify its atomic bomb exposure experiments, is substantially identical to one of the major defenses presented by the Nazi physicians at Nuremberg. Remarkably, the Nuremberg Code appears to have had no effect on medical researchers even in the 1950's.

Given our belief that the Nazis like Mengele were "others" and not like us, it is probably not surprising that so little attention has actually been paid to the Nuremberg Code in United States courts. However, since American judges promulgated the Code under both natural and international law standards, it is disturbing that we have not taken it more seriously in areas where there is no question that it has direct application. The most disturbing failure to apply it for the protection of research subjects is in the United States military. Treating members of the military as property without basic human rights should be offensive to both us and them, and should be seen as an unacceptable and unconstitutional violation of their rights. That the Supreme Court indirectly approves of such conduct, even in the experimental context, and directly rejects the Nuremberg Code as anything more than a statement of ethics, is discouraging. It is very disappointing that the Supreme Court was unable to distinguish between the military mission and taking advantage of defenseless soldiers.¹⁰⁷

In an age that has come to see research as necessary for "progress," and progress as the new goal for humankind, it is not surprising that therapeutic research has been reinvented as simply therapy, and that many sick people actually demand it as their "right."¹⁰⁸ It should probably not even be surprising that traditional "nontherapeutic research," such as phase I cancer drug research and early research on AIDS drugs, as well as the first-of-their-kind transplants and implants have been redefined as simply "therapy," or

107. And even if money damages could not be awarded, the criminal penalties provided at Nuremberg should continue to apply.

108. See Annas, *Faith (Healing), Hope and Charity at the FDA: The Politics of AIDS Drug Trials*, 34 VILL. L. REV. 771, 772, 773-78 (1989).

sometimes "innovative therapy."¹⁰⁹ What is surprising, however, is that even in those instances of nontherapeutic experimentation in which the Nuremberg Code applies directly, we have never taken it seriously ourselves, and have been content to say that the rights of the individual are outweighed by national security concerns. This has been true even where those concerns are unclear or unarticulated, and where the experiments are carried out in secret and produce death and permanent disability.

The promise of the Nuremberg Code has not been fulfilled in the United States. When national security is invoked, human rights continue to take second place to the demands of state officials, and when "medical progress" is invoked, ethics continues to take a backseat to expediency. We have yet to succeed in eradicating our birthmark that impels us to trample human rights and welfare when either society's welfare seems in jeopardy, or the promise of "progress" is dangled before us. We also continue to accept this aspect of "original sin" as part of our human nature, much the way Georgianna accepted her husband's characterization of her birthmark as hideous. This acceptance led her to agree to his lethal experiment. But her birthmark was hideous only to the eye of one who insisted that perfection was attainable on earth, and that immortality was a proper goal for mankind. Neither Alymer nor Mengele will be called to account in a world that puts expediency over ethics, and exalts progress over human rights.

Although this conclusion regards human moral progress pessimistically, there remains at least some cause of optimism. The judges at Nuremberg postulated the Nuremberg Code on a natural law basis, saying that "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience" must be followed.¹¹⁰ Thus, although some humans will pursue their own ends brutally and in secret, human "nature's" perception of right and wrong condemns experiments not consistent with the Nuremberg Code. Moreover, prior public disclosure could significantly affect behavior for the better. Mengele and Hawthorne again provide useful metaphors. Mengele reportedly often said, "I am a laboratory mole. The laboratory is my secret garden."¹¹¹ And another story of Hawthorne's, *Rappaccini's Daughter*, centers on the walled garden in which a physician-scientist

109. The world's first artificial heart was described as "therapy," *Karp v. Cooley*, 349 F. Supp. 827, 834 (S.D. Tex. 1972), *aff'd*, 493 F.2d 408 (5th Cir. 1974), as was the world's first permanent artificial heart implant. See Annas, *Death and the Magic Machine: Informed Consent to the Artificial Heart*, 9 W. NEW ENG. L. REV. 89, 99-100 (1987).

110. 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 183 (1946-1949).

111. AZIZ, *supra* note 6, at 117.

tist experimented with deadly plants, as well as with his daughter and her lover. Of Rappaccini, Hawthorne tells us, "he cares infinitely more for science than for mankind. . . . He would sacrifice human life, his own among the rest, or whatever else was dearest to him, for the sake of adding so much as a grain of mustard-seed to the great heap of his accumulated knowledge."¹¹² Measures that effectively keep the "moles" above ground, open the "secret gardens" to public inspection, and require public review of the proposals of scientists who would sacrifice even themselves for knowledge, are all measures that can help to protect the rights and welfare of research subjects and help us preserve our humanity.

112. HAWTHORNE, *supra* note 1, at 91, 99-100.

