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The "Kingdom of Ends": In *Re Cincinnati Radiation* Litigation and the Right to Bodily Integrity

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THE "KINGDOM OF ENDS":1 IN RE CINCINNATI RADIATION LITIGATION AND THE RIGHT TO BODILY INTEGRITY

The voluntary consent of the human subject is absolutely essential. This means that the person involved . . . 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 . . . . [T]here should be made known to him the nature, duration, and purpose of the experiment; the methods and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health and person which may possibly come from his participation in the experiment.2

It is desired that no document be released which refers to experiments with humans and might have adverse effects on public opinion or result in legal suits. Documents covering such work should be classified "secret."3

I. INTRODUCTION

On May 24, 1960, research doctors at the Cincinnati General Hospital subjected J.W., an African-American man with cancer of the left tonsil, to a dose of whole-body radiation.4 So began a

series of human radiation experiments at the hospital stretching almost eleven years, until May 19, 1971. Funded by the Department of Defense, the experiments were undertaken to determine the effects of radiation on the combat-readiness of soldiers. Specifically, the research doctors sought a “reliable, easy test for radiation damage” which would aid the military in determining what amount of radiation exposure would reduce a soldier’s “cognitive” and other central nervous system functions below a minimum level of effectiveness.

The research team, headed by Dr. Eugene Saenger, subjected eighty-eight cancer patients to the experiments. Although these patients suffered from inoperable cancer, all were deemed to be in “reasonably good clinical condition.” For most, the radiation treatments substantially shortened their lives. Ten died within forty days, the median patient died within four-and-one-half months, and the average patient survived six months.

5. Id.
6. The Defense Atomic Support Agency (“DASA”), now known as the Defense Nuclear Agency, allocated $651,000 to the research doctors at Cincinnati General Hospital throughout the eleven-year experiment. Tim Bonfield, Radiation Testing: A Nation Investigates, CINCINNATI ENQUIRER, April 20, 1994, at A1. The 1966 Report prepared for DASA by the researchers stated that “[p]sychological, hematological, metabolic, immunological and chromosomal findings [were] statistically analyzed and some implications concerning reduction in combat effectiveness of military personnel exposed to ionizing radiation [were] drawn.” Plaintiffs’ Second Amended Complaint at 24, In re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995) (Case No. C-1-94-126) [hereinafter Plaintiff’s Second Amended Complaint] (quoting from the 1966 Report). By exposing human subjects to single doses of whole or partial body radiation, the research doctors sought to determine the effect of radiation on the “cognitive or other functions mediated through the central nervous system.” Id.
11. The staff of the federal Advisory Committee on Human Radiation Experiments, which President Clinton appointed to review Cold War experiments, characterized the Cincinnati experiments as “bad science” and determined that the radiation exposures led to quicker deaths “than [the patients] would [have] otherwise realize[d].” Paul Barton, Saenger’s UC Patients Not Told Of Risk, Panel Says, CINCINNATI ENQUIRER, November 15, 1994, at A1. In a presentation before the American Roentgen Ray Society on October 8, 1972, Dr. Saenger himself admitted that the radiation experiments might have caused premature deaths. General Hospital Radiation Experiments: A Chronology, supra note 4, at A4.
12. Plaintiffs’ Second Amended Complaint, at 9-19. One of the class action patients, not included in these calculations, survived the experiments because of a bone marrow transplant from her twin sister. Id. at 18.
Most importantly, the patients were informed of neither the risk of death from the radiation experiments nor the likely side effects resulting from exposure. They were not even told they were participating in an experiment. For the first five years of the experiment, patients were told simply that the treatment would help their sickness. Written consent forms were used after 1965 but the forms stated only that the patient was participating in a "scientific investigation" that would advance medicine and help mankind. Simply put, at no point during the eleven-year experiment did the patients know what was happening to them.

Until February 3, 1994, their families were also kept in the dark about the nature of the experiments and the patients' participation in them. Then, the Cincinnati Enquirer identified one participant in the radiation experiments, John "Joseph" Mitchell. Soon thereafter, the paper identified thirty-four others. Deluged by phone calls, the University of Cincinnati Medical Center eventually confirmed the existence of the experiment and the involvement of thirty-eight patients.

On February 17, 1994, the first proposed class action suit was filed against the research doctors individually, the University of Cincinnati, and the City of Cincinnati in Federal District Court for the Southern District of Ohio. After three more suits were filed, the plaintiffs consolidated their claims. The class action plaintiffs, on behalf of the eighty-eight patients, asserted

13. Id. at 26-27.
14. Id.
15. Id.
18. Id.
19. Id.
21. Id. at 5.
22. Id.
23. The named plaintiffs are Gregory Shuff on behalf on Irene Shuff, Gloria Nelson on behalf of Amelia Jackson, Katie Cruus on behalf of Louise Richmond, Joyce Slover on behalf of Geneva Snow, Elyse Felrup on behalf of Rose Strehm, Mary Ann Houchins on behalf of John Stillwell, Peggy Carbona on behalf of John Edgar Webster, Lillian Pagano on behalf of Maude Jacobe, Zettie Smith on behalf of Lillie Wright, Otisteen Goodwin on behalf of Estella Goodwin, Clifford Tidwell on behalf of James Tidwell, Joseph Kahr on
that the defendants violated the patients' right to substantive and procedural due process of law, their right to equal protection under the law, their right to privacy, and their right to access to the courts. Additionally, the plaintiffs alleged the violation of 42 U.S.C. § 1985 and 42 U.S.C. § 2011, the violation of an implied right of action arising from a Defense Department directive requiring compliance with the Nuremberg Code, a Bivens claim, and various pendent state claims.

behalf of Margaret Bacon, Catherine O. Hager on behalf of Joseph J. Mitchell, James Nicholas on behalf of Mary Hampton Singleton, Lottie Wallace on behalf on Rosa Hayes, Charles Davis on behalf of Charles Davis, Herbert L. Varin on behalf of Nina Cline, Bertha Jungnickel on behalf of David Jungnickel, Lucien Bernard on behalf of Joseph P. Larkins, Cyida C. Dudley on behalf of Booker T. Law, Doris Baer on behalf of Gertrude Newell, Clarence Bunch on behalf of Franklin Bunch, Gregory Plair on behalf of Beatrice Plair, Roberta Cure on behalf of Minnie Mae Johnson, Audrey Figgs on behalf of Maggie Mitchell, Barbara Ann Mathis on behalf of Lula Tarlton, Willa Woodson on behalf of Willie Williams, Deborah Kramer on behalf of Louis Romine, Donna White Christy, Viola Reid on behalf of Mary Laws, Wanda Mattingly on behalf of Flonnie Wells, James Wilson on behalf of Ncie Wilson, and Robert Conyers on behalf of Elizabeth Conyers. Plaintiffs' Second Amended Complaint, at 1-5.

24. Id.
25. Id. at 41-42.
26. Id. at 42-43.
27. Id. at 52-56. The Nuremberg Code was formulated by the Nuremberg Tribunal after World War II. The Code was articulated in a court opinion judging 23 Nazi physicians guilty of "crimes against humanity" for their experimentation on humans during the war. United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 181 (1949). The first provision in the Code states:

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 them 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.

Id. at 181-82.

On June 2, 1994, the individual defendants moved to dismiss the suit. They claimed that they enjoyed qualified immunity with respect to the § 1983 claims and alleged that the plaintiffs failed to properly assert the necessary elements of a claim under 42 U.S.C. § 1985 or 42 U.S.C. § 2011. After arguments on the motion, District Court Judge Sandra Beckwith denied the motion to dismiss as to the § 1983 and § 1985 claims but dismissed the plaintiffs’ claims under 42 U.S.C. § 2011 and the implied right of action.

This Comment will focus on the asserted substantive due process claim under § 1983—namely, that the defendants violated the patients’ right to bodily integrity by subjecting them to the radiation experiments without obtaining their informed consent. First, not only is the right to bodily integrity of central importance in this case, but it also stands as the paradigmic inquiry by which similar Cold War human experiments must be judged. Second,

Narcotics, 403 U.S. 388, 388 (1971). In In re Cincinnati Radiation Litigation, the plaintiffs brought this claim against Drs. Kessler and Varon, who oversaw the radiation experiments for the Department of Defense. Plaintiffs’ Second Amended Complaint, at 42.

29. Plaintiffs assert claims for relief for abnormally dangerous activity, medical malpractice, negligence, negligent infliction of emotional distress, intentional or reckless infliction of emotional distress, battery, and fraud. Plaintiffs’ Second Amended Complaint, at 44-51.

30. Motion to Dismiss on Behalf Of Defendants Saenger, Silberstein, Aron, Horwitz, Kereiakes, Perry, Friedman, Kunkel, and Gleser, In re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995) [hereinafter Motion to Dismiss on Behalf of Defendants].

31. Id. at 1-2. Arguing that the plaintiffs stated no cognizable federal claims, the defendants also moved to dismiss the supplemental state claims under Rule 12(b)(1) for lack of subject matter jurisdiction. Id. at 1.


34. The Department of Energy and its forerunner, the Atomic Energy Commission, alone conducted 154 Cold War radiation experiments on 9000 people. Gary Lee, U.S. Energy Agency Radiation Involved 9,000, Study Says, WASHINGTON POST, February 10, 1995, at A13 (citing Human Radiation Experiments, the Department of Energy Roadmap to the Story and the Records, a Department of Energy study). These included mental patients in San Francisco who were given doses of iodine 131 to determine its effects on their thyroid glands, infants with respiratory problems who were given blood mixed with chromium 50 at Vanderbilt University, and 18 people aged 6 to 50, some completely healthy, who were given milk laced with radioactive iodine at the University of Rochester in 1963. Id. One of the children in this experiment developed thyroid cancer. Id. From 1960 to 1970, prisoners at the Oregon State Prison had their testicles irradiated to determine the effects of radiation on U.S. astronauts. Gary Lee, Prisoner Irradiation Probed; Tesis Were Among Riskiest Of Cold War Era, WASHINGTON POST, November 20, 1994, at
the exploration of this right, in the context of the Cold War experiments, instructs us in the temptations and dangers of willful blindness. In one of history's many paradoxes, this Anglo-American right received its clearest expression, in the military tribunals of Nuremberg, at the same time that its proponents directed its most egregious infringement.

Part II of this Comment will examine in detail the district court's discussion of the right to bodily integrity. Part III will then determine the validity of the court's holding in *In re Cincinnati Radiation Litigation* by looking to: 1) the current judicial decisions regarding the right to bodily integrity, 2) the origins of this right in the Fifth and Fourteenth Amendments and its judicial development through 1972, and, 3) the dictates of the Nuremberg Code. This Comment concludes that the right to bodily integrity, far from being a novel constitutional claim, forms a central component of our substantive due process jurisprudence and that the defendants, by subjecting the plaintiffs to radiation experiments without their consent, clearly violated this right.

II. *In re Cincinnati Radiation Litigation*

In their motion to dismiss, the defendants asserted that they were entitled to qualified immunity from the plaintiffs' § 1983 claims. With respect to the substantive due process claim specifi-
cally, they argued: 1) that the defendants, as "publicly employed physicians," acted within the scope of their discretionary duties in conducting the radiation experiments; 2) that the plaintiffs failed to allege the violation of substantive due process under current law; and, 3) that the contours of the right to bodily integrity were not "clearly established" at the time of the radiation experiments so that the defendants would understand that they were violating the plaintiffs' rights.

In denying the defendants' motion to dismiss, the district court rejected the defendants' assertions and affirmed the Fourteenth Amendment's protection of the right to bodily integrity. The court characterized the substantive due process claim as the right to be free from "nonconsensual invasive medical experimentation by state actors." Under current law, it found a clear expression of this right in a line of cases culminating in Washington v. Harper, which recognized that "the forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Referring to the principles of liberty and autonomy implicit in the Constitution, the judicial development of substantive due process, and the common law informed consent doctrine, the court further held that this right was "clearly established" at the time of the radiation experiments.

was clearly established at the time of conduct. Anderson, 483 U.S. at 640. In order for a right to be "clearly established," the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. A court in the Sixth Circuit relies on decisions of the Supreme Court, courts of its own circuit, and the highest state court in which it sits to determine whether the right is clearly established. Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993).

Id. at 3.

Id. at 8-12.

In re Cincinnati Radiation Litig., 874 F. Supp. at 810.

In support of its assertion, the court also cited Riggins v. Nevada, 504 U.S. 127 (1992) (holding that forced administration of antipsychotic medication during trial violated Fourteenth Amendment); Youngberg v. Romeo, 457 U.S. 307 (1991) (holding that the government has a duty to protect involuntarily committed mental patients from assault); Winston v. Lee, 470 U.S. 753 (1985) (holding that forcible incision into robbery suspect's chest to recover bullet was unreasonable under the Fourth Amendment absent compelling need); Vitek v. Jones, 445 U.S. 480 (1980) (holding that transfer to mental hospital with mandatory behavior modification treatment implicated liberty interests).

In re Cincinnati Radiation Litig., 874 F. Supp. at 814-19. Most surprisingly, the court held that the defendants, in conducting the radiation experiments, exceeded the scope
A. Current Law

In its analysis of currently applicable law, the court relied heavily on a line of prisoners' rights cases culminating in Washington v. Harper. In Washington, the Supreme Court held that state prison officials could administer antipsychotic drugs to a prisoner against his will only if: 1) the prisoner posed a danger to himself and others, 2) the treatments were in his medical interest, and 3) the prisoner received adequate procedural safeguards. Important-ly, the Court in Washington explicitly recognized that the prisoner "possesse[d] a significant liberty interest in avoiding the unwanted administration of [the] drugs under the Due Process Clause of the Fourteenth Amendment."

Analogizing the nonconsensual invasion in Washington to the radiation experiments, the district court held that the plaintiffs in In re Cincinnati Radiation Litigation possessed this same right to bodily integrity against nonconsensual medical invasions by the state. Although the defendants had attempted to characterize the plaintiffs as "voluntary consumers of medical service," who could constitutionally "be forced to choose between leaving the hospital and accepting treatment," the court rejected this contention on two grounds. First, it held that it could not conclude before discovery that the plaintiffs, alleged to have been poor, were voluntary patients. Second, the court held that the plaintiffs "never possessed knowledge sufficient to make [a] choice" between leaving or participating in the radiation experiments. By misleading the plaintiffs as to the true nature of the experiments, the court stated that the defendants accomplished the equivalent of forcible seizure "through canard and deception."

After establishing the plaintiffs' right to bodily integrity, the
court then balanced this liberty interest against the state's interest in proceeding with the radiation experiments.\textsuperscript{55} Reviewing \textit{Winston v. Lee,}\textsuperscript{56} \textit{Washington,}\textsuperscript{57} and \textit{Schmerber v. California,}\textsuperscript{58} the court determined that state infringements on a person's bodily integrity have been upheld only "on a showing of clear necessity, procedural regularity, and minimal pain."\textsuperscript{59} The court could find none of these justifications in the radiation experiments.\textsuperscript{60} By not obtaining their informed consent before subjecting the plaintiffs to the experiments, the defendants offered the plaintiffs no procedural safeguards such as the prisoner enjoyed in \textit{Washington}.\textsuperscript{61} Additionally, the defendants' invasive radiation experiments subjected the plaintiffs to severe pain and even death with no showing of medical necessity.\textsuperscript{62} Therefore, the court held that, under current law, the plaintiffs had stated a cognizable substantive due process claim.\textsuperscript{63}

\textbf{B. Clearly Established Right}

In rejecting the second prong of the defendants' qualified immunity defense, the court next demonstrated that the right to bodily integrity was clearly established at the time of the radiation experiments.\textsuperscript{64} It grounded the existence of this right in the principles of liberty and autonomy implicit in the Constitution,\textsuperscript{65} the judicial development of substantive due process,\textsuperscript{66} and the common law informed consent doctrine.\textsuperscript{67} The court then delineated the con-

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} at 813-14.
\item \textsuperscript{56} 470 U.S. 753 (1985).
\item \textsuperscript{57} 494 U.S. 210 (1990).
\item \textsuperscript{58} 384 U.S. 757 (1966).
\item \textsuperscript{59} \textit{In re} Cincinnati Radiation Litig., 874 F. Supp. 796, 813 (S.D. Ohio 1995) (Case No. C-1-94-126). In \textit{Winston v. Lee}, 470 U. S. 753, 766 (1985), the Supreme Court held that absent a "compelling need," a state could not perform surgery on a robbery suspect simply to recover a bullet for evidentiary purposes. In \textit{Washington v. Harper}, 494 U.S. 210, 216 (1990), the Supreme Court held that an administrative procedure in which a prisoner was informed of the prison's decision to administer antipsychotic drugs followed by a hearing where the prisoner could attend, bring evidence, and receive the assistance of a lay advisor provided the prisoner with the procedural regularity necessary to protect his liberty interest. Finally, in \textit{Schmerber v. California}, 384 U.S. 757, 771 (1966) the Court upheld the nonconsensual administration of a blood test partly because it involved "virtually no risk, trauma, or pain" and was performed by a physician.
\item \textsuperscript{60} \textit{In re Cincinnati Radiation Litig.}, 874 F. Supp. at 814.
\item \textsuperscript{61} \textit{See supra} note 59 and accompanying text.
\item \textsuperscript{62} \textit{In re Cincinnati Radiation Litig.}, 874 F. Supp. at 814.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} at 814-19.
\item \textsuperscript{65} \textit{Id.} at 814-15.
\item \textsuperscript{66} \textit{Id.} at 816.
\item \textsuperscript{67} \textit{In re} Cincinnati Radiation Litig., 874 F. Supp. 796, 816-17 (S.D. Ohio 1995)
tours of the right to bodily integrity by examining the Supreme Court's treatment of nonconsensual invasive medical procedures in *Jacobson v. Massachusetts*, *Skinner v. Oklahoma*, *Rochin v. California*, and *Schmerber v. California*.

1. Origins

In its constitutional analysis, the court simply stated that "the plain language of the Constitution" prevents government officials from "arbitrarily depriv[ing] unwitting citizens of their liberty and their lives." The court buttressed its assertion by pointing to the primary position that individual autonomy occupied in the ideology of the Framers. The court noted that the American revolutionaries always regarded "the exercise of coercive power by the sovereign [as] suspect" and, with the Bill of Rights, explicitly sought to limit state power. Further, the court relied upon Lockean philosophy which recognizes, as a central principle, "a certain minimum area of personal freedom which must on no account be violated."

As a lodestar for its substantive due process analysis, the court placed great emphasis on *Meyer v. Nebraska*'s definition of "liberty" within the due process clause as including the right "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Citing *Ingraham v. Wright*, the court identified one of these "historic liberties" as the "right to be free from unjustified intrusions on personal security." Then, analogizing the right to bodily integrity to the

(Case No. C-1-94-126).
68. *Id.* at 817-19.
69. 197 U.S. 29 (1905).
70. 316 U.S. 535 (1942).
71. 342 U.S. 165 (1952).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
79. 262 U.S. 390 (1923).
80. *Id.* at 399.
82. *Id.* at 673.
recognized right to privacy in matters of procreation,\textsuperscript{83} the court defined both as "constitutionally protected autonomy rights."\textsuperscript{84}

Finally, the court found support for the right to bodily integrity by looking to the common law doctrine of informed consent.\textsuperscript{85} Although acknowledging that the usual remedy for failing to obtain informed consent lay in tort, the court recognized that the basis of the doctrine was the right of ""[e]very human being . . . to determine what shall be done with his own body.""\textsuperscript{86} The court then found that the defendants' intentional violation of the informed consent doctrine infringed upon this right to self-determination and since this violation was achieved through the coercive power of the state, it necessarily implicated the Due Process Clause.\textsuperscript{87}

2. Contours

After establishing the existence of the right to bodily integrity at the time of the radiation experiments, the court delineated the contours of that right by examining the Supreme Court's treatment of nonconsensual invasive medical procedures in four cases stretching from 1905 to 1965.\textsuperscript{88} By comparing the nonconsensual state invasions found permissible in these cases with those found impermissible, the court concluded that, because of the severe consequences of the radiation experiments, the defendants should have known that the experiments violated the plaintiffs right to bodily integrity.\textsuperscript{89}

Through its analysis, the court determined that nonconsensual invasive medical procedures were permissible at the time of the radiation experiments only if the intrusions were ""minor""\textsuperscript{90} and necessary to fulfill a compelling state interest.\textsuperscript{91} The court first looked to \textit{Jacobson v. Massachusetts}\textsuperscript{92} which recognized ""a sphere within which the individual may assert the supremacy of his own

\textsuperscript{84} Id.
\textsuperscript{85} Id. at 816-17.
\textsuperscript{86} Id. at 816 (quoting Schloendorff v. Society of New York Hosp., 105 N.E.2d 92, 93 (N.Y. 1914)).
\textsuperscript{87} Id. at 817.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 819 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).
\textsuperscript{91} Id. at 818 (quoting Jacobson v. Massachusetts, 197 U.S. 29, 33 (1905)).
\textsuperscript{92} 197 U.S. 29 (1905).
will” against the state’s invasion of his bodily integrity but nevertheless upheld a Massachusetts statute mandating the compulsory vaccination of its adult population to prevent the spread of smallpox. The district court was careful to point out that the Jacobson court only allowed this nonconsensual invasion because of the “imminent danger” of a smallpox epidemic. Additionally, it noted that Jacobson expressly declined to decide whether a compulsory vaccination which would “seriously impair [the] health” of an individual would be similarly upheld. The court then noted that Schmerber v. California, decided sixty years later, echoed Jacobson’s ruling that an invasive medical procedure must be “‘minor’” and performed “‘under stringently limited conditions.’”

In contrast, the court determined that the impermissible nonconsensual medical procedures involved “extremely invasive” procedures which “produced lasting side effects.” In establishing these outside boundaries to the right to bodily integrity, the court cited Rochin v. People of California and Skinner v. State of Oklahoma. In so doing, the court placed great emphasis on Rochin’s “shocks the conscience” standard. It held that, similar to the forcible stomach-pumping in Rochin, the defendants’ subjection of unwitting cancer patients to the radiation experiments amounted to an “extremely invasive” procedure. Further, like the sterilization of felons at issue in Skinner, the radiation ex-
periments "produced lasting side effects" such as "bone marrow failure" and premature death. The court concluded that *Rochin* especially "sent an unmistakable message to government officials that needlessly severe intrusions of an individual's body, *even if that individual was a felon and stripped of most of his liberty*, were impermissible under the Due Process Clause.

C. *Nuremberg Code*

Finally the court recognized the dictates of the Nuremberg Code as a cognizable standard of due process protection under the United States Constitution. In its analysis, the court relied on three separate grounds in deciding that the Code incorporated constitutional notions of due process. First, the court reviewed the history of the Nuremberg "Medical Case." Noting that the case was tried by two American lawyers before a panel of American judges, the court suggested that constitutional due process standards must have played an implicit role in the tribunal's development of the standards necessary to ensure justifiable human experimentation. Additionally, the court found the adoption of the guidelines of the Nuremberg Code by the Department of Defense and the National Institutes of Health to be further support of its

required the forced sterilization of repeat felony offenders. *Skinner*, 316 U.S. at 536.


109. Id. at 818.

110. *Supra* note 27.

111. *Supra* note 27.


113. The judges were Harold L. Sebring, justice of the Supreme Court of Florida; Walter B. Beals, justice of the Supreme Court of Washington; and Johnson T. Crawford, former justice of the Oklahoma District Court. *Id.* at 113.

Lastly, the court cited Justice O'Connor's dissent in *United States v. Stanley* as persuasive authority in this case. In *Stanley*, a former serviceman brought suit against the Army because, while in the service, he was secretly given dosages of LSD. The Supreme Court held that Stanley could not obtain money damages from the Army on the grounds that his injuries "arose out of or were in the course of activity incident to service." In dissent, O'Connor posited that "our Constitution's promise of due process of law guarantees" that individual's receive the protections elucidated in the Nuremberg Code. The district court, noting that the plaintiffs in *In re Cincinnati Radiation Litigation* were citizens rather than soldiers, was convinced that O'Connor's dissent should control.

III. ANALYSIS

A. Current Law

The *In re Cincinnati Radiation Litigation* decision is solidly grounded in current law. *Washington v. Harper* and its predecessors clearly recognize an individual's liberty interest in avoiding nonconsensual invasive medical procedures such as the radiation experiments performed upon the plaintiffs in this case. Given the absence of any procedural safeguards to protect the plaintiffs and the severe injuries they suffered for no necessary medical reason, it also seems clear that the defendants can offer no compelling justification for their conduct.

Additionally, although the *Washington* line of cases all involve incarcerated or involuntarily committed individuals, the defendants' attempt to distinguish *In re Cincinnati Radiation Litigation* because of the supposed voluntary presence of the plaintiffs

117. Id. at 671.
118. Id. at 684.
119. Id. at 710 (O'Connor, J., dissenting).
122. See supra notes 47-54 and accompanying text.
123. See supra notes 55-63 and accompanying text.
124. See supra notes 47-49 and accompanying text.
in Cincinnati General Hospital simply ignores the fundamental requisites of informed consent. As an exercise of individual autonomy, informed consent requires that a person act: 1) intentionally;\textsuperscript{125} 2) with an understanding of his or her action,\textsuperscript{126} and; 3) free from controls that "rob the person of self-directedness."\textsuperscript{127} Viewed from this perspective, the defendants in In re Cincinnati Radiation Litigation simply replaced the control restraints imposed by incarceration with control restraints effected through an intentional concealment of the risks associated with the radiation experiments. To the extent that this concealment deprived the plaintiffs of any true understanding of their situation, the defendants’ conduct constituted an even more severe state invasion than that at issue in Washington.\textsuperscript{128}

**B. Clearly Established Law**

However, the crucial issue in In re Cincinnati Radiation Litigation is whether the right to be free from nonconsensual invasive medical procedures was clearly established at the time of the radiation experiments. To determine this, this Comment will examine the origins of the right to bodily integrity\textsuperscript{129} and the contours of this right at the time of the experiments.\textsuperscript{130}

1. Origins

An examination of the Framers’ intent in adopting the Fifth Amendment reveals the validity of the court’s assertion that the plain language of the Due Process clause and the principles of liberty and autonomy implicit in the Constitution establish the substantive right to bodily integrity. For the drafters of the Constitution, the Bill of Rights was the “repository” of values traditionally granted Englishmen by the principles of the Magna Carta and “the Petition of Right.”\textsuperscript{131}

\textsuperscript{125} RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 238 (1986) (defining an intentional act as one of which the actor is the “author or agent”).

\textsuperscript{126} Id. at 248.

\textsuperscript{127} Id. at 256.

\textsuperscript{128} In Washington, the prisoner at least was notified of the prison’s intention to administer antipsychotic drugs. 494 U.S. 210, 216 (1990).

\textsuperscript{129} See infra notes 131-144 and accompanying text.

\textsuperscript{130} See infra notes 145-154 and accompanying text.

\textsuperscript{131} See A.E. Dick Howard, Rights In Passage: English Liberties In Early America, in THE BILL OF RIGHTS AND THE STATES, 3, 11 (Patrick P. Conley & John P. Kaminski eds., 1992.)
Fundamental among these was the right to personal security. In his *Commentaries*, Blackstone recognized this right, which he characterized as the protection of "a person's . . . enjoyment of his life, his limbs, his body, [and] his health . . . from such practices as may prejudice or annoy it," as part of "that residuum of natural liberty" upon which the government may not intrude.\(^{122}\) Sir Edward Coke, as well, recognized the substantive protections arising from the Magna Carta's guarantee of "lawful judgment . . . [by] the law of the land."\(^{133}\)

An examination of the debates leading up to the ratification of the Bill of Rights demonstrates the Framers' reliance on Blackstone's and Coke's formulation of due process rights and their enshrinement in the Fifth Amendment. Throughout the debates, echoes of Blackstone abound.\(^{134}\) Richard Henry Lee argued for ratification in order to "secure . . . that residuum of human rights, which is not intended to be given up to society."\(^{135}\) Another commentator stated that a Bill of Rights was essential to guard "against the invasion of those liberties which it is essential for us to retain."\(^{136}\) Most tellingly, the language of the Fifth Amendment, itself, with its protection of "life, liberty, and property" mirrors Blackstone's formulation of natural rights.\(^{137}\) Given this evidence, the court's argument that the right to bodily integrity received constitutional protection from the creation of the Fifth Amendment is compelling.\(^{138}\)

The Supreme Court's longstanding recognition of autonomy rights and the common law informed consent doctrine both evi-

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134. *Id.* at 971 (citing evidence showing that Blackstone ranks second only to Montesquieu in "frequency of citation in American political writings published between 1760 and 1805").
138. In *Ingraham v. Wright*, the Supreme Court acknowledged that the Due Process Clause "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown." 430 U.S. 651, 672-73 (1977).
dence this substantive component in the Due Process Clause. From *Union Pacific Railway Co. v. Botsford*139 to *Eisenstadt v. Baird*,140 the Court has regarded "the right of every individual to the possession and control of his own person"141 as one of those rights "essential to the orderly pursuit of happiness by free men."142 The informed consent doctrine was developed to protect this same "premise of thorough-going self-determination"143 stemming from the right to bodily integrity. Although the defendants attempted to attack this part of the court's holding on the grounds that the usual remedy for the violation of informed consent lies in tort, the court correctly points out that the presence of state action necessarily implicates the Constitution.144 It is axiomatic that intentional state deprivation of the right to bodily integrity is one of the very things the Framers sought to prevent by incorporating the Fifth Amendment, and then the Fourteenth Amendment, into the Bill of Rights.

2. Contours

In determining whether the court in *In re Cincinnati Radiation Litigation* established the contours of the right to bodily integrity with sufficient particularity to defeat the defendants' qualified immunity defense, this Comment will examine: 1) the purpose of the qualified immunity doctrine, and 2) the history of the right to bodily integrity.

As an initial matter, it must be remembered that the qualified immunity doctrine is not a creation of statute or a constitutional guarantee; it is simply a pragmatic judicially-created compromise balancing the conflicting goals of protecting individual rights and ensuring governmental effectiveness.145 The qualified immunity doctrine seeks to encourage officials to exercise freely their discretionary functions without fear of suit for every mistake in judg-

139. 141 U.S. 250 (1891).
140. 405 U.S. 438, 453 (1972) (stating that "if the right or privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child").
141. *Union Pacific Railway*, 141 U.S. at 251.
144. *See supra* notes 85-87 and accompanying text.
ment. Additionally, it aims to avoid needless litigation expenses and ensure that competent, qualified people enter government. Only to the extent that these goals are fostered does the qualified immunity doctrine retain its validity.

In *In re Cincinnati Radiation Litigation*, none of these policies would be served by shielding the defendants from liability. First, finding the defendants liable for their violation of the plaintiffs' bodily integrity would not discourage officials from exercising their discretionary functions. Informed consent is now required from all human subjects in clinical studies. Unlike Fourth Amendment decisions which have the potential to alter the behavior of the nation's law enforcement officers, a finding of liability in this case would not place upon present officials any more duties than they already have. For the same reason, denying the defendants qualified immunity would also do little to increase the costs of litigation in this area nor would it divert "official energy from pressing public issues" since the alleged conduct ended twenty-three years ago.

Second, the nature of the right to bodily integrity militates against an overly "fact-specific" approach to determining whether the defendants violated a clearly established right. The Anglo-American legal tradition recognized the fundamentality of the right to bodily integrity long before the state acquired either the means or the motivation to infringe upon it through invasive medical procedures. Only with the growth of industrial urban areas and the development of modern medicine did the "health and physical well-being of the population [become] ... one of the essential objectives of political power." Before this time, the state simply did not concern itself with imposing the structures of medicine upon its people. This does not mean that the right to bodily integrity did not exist but only that, in the context of invasive medical procedures, its intersection with state power did not occur until the late nineteenth and early twentieth century.

147. *Id.*
148. *Id.* at 813.
149. Anderson v. Creighton, 483 U.S. 635, 641 (1987) (holding that qualified immunity requires an "objective (albeit fact-specific)" inquiry whether a reasonable official would know, "in light of clearly established law," that his conduct was unlawful).
150. See *supra* notes 131-138 and accompanying text.
152. *Id.* at 166-82.
Consequently, requiring the plaintiffs to show that the right to bodily integrity at the time of the radiation experiments was as particularized as, for example, the Fourth Amendment right to be free from "unreasonable searches and seizures" would simply place an undue burden upon them. From this historical perspective, then, the recognition of an individual's right to bodily integrity against invasive state medical procedures in Jacobson v. Massachusetts and the boundaries on this right developed in Skinner, Rochin, and Schmerber sufficiently particularize the right to bodily integrity for the purposes of defeating the defendants' qualified immunity defense.

C. Nuremberg Code

The court's recognition of the Nuremberg Code as a cognizable standard for due process protection logically follows from the natural law origins of the right to bodily integrity. Faced squarely with the issue of what standards were applicable, the Nuremberg Court looked to "the principles of the law of nations as they result from the usages established among civilized peoples [and] from the laws of humanity." Like Blackstone, the justices found the right of bodily integrity to be one of those rights essential to the concepts

153. U.S. CONST. amend. IV.
154. Pervasive state control of the health of its citizens through legally imposed medical policies and programs has only developed since the turn of the century. In contrast, the police function has, from the inception of Anglo-American society, been performed by the state. FOUCAULT, supra note 151, at 170 (stating "that from the heart of the Middle Ages [the state has] traditionally exercised two great functions: that of war and peace . . . and that of the arbitration of lawsuits and punishments of crimes, which it ensured through its control of judicial functions."). In addition, the defendants in In re Cincinnati Radiation Litigation simply were not faced with the sort of decision at issue in Anderson v. Creighton. Anderson concerned the reasonableness of a police search under the Fourth Amendment. 483 U.S. 635, 637 (1987). Police officers must determine in a matter of moments whether a specific situation justifiably triggers probable cause. Therefore, to ensure sufficient discretionary freedom, it is arguably necessary to use a more fact-specific approach to determine whether their actions violate clearly established law. Id. at 641. In contrast, the defendants in this case carefully planned and executed a research protocol in an atmosphere informed by Jacobson v. Massachusetts, Rochin v. California, and the Nuremberg Code. In re Cincinnati Radiation Litig., 874 F. Supp. 796, 817-22 (S.D. Ohio 1995) (Case No. C-1-94-126).
155. 197 U.S. 29 (1905).
156. 316 U.S. 535 (1942).
of free government, a right that humans inherently possess. To protect that right, the court decreed that “the voluntary consent of the human subject [in human experimentation] is absolutely essential.” 160

More importantly for the purposes of In re Cincinnati Radiation Litigation, the Nuremberg Code served notice to the world that informed consent was an essential legal requirement of human experimentation. Given the infamy of the trials, no doctor conducting human experimentation could have been unaware of the requirement of informed consent. The defendants in this case, especially, had to be aware of its requirement. After the Nuremberg judgment, the Secretary of Defense issued a directive requiring that human experimentation under the Department's auspices proceed only under the dictates of the Code. 161 In the years thereafter, the World Medical Association and the National Institutes of Health ("NIH") issued similar guidelines. 162 In fact, toward the end of the radiation experiments, the NIH refused to fund them because of ethical concerns 163 and the defendants sought funding elsewhere. An internal memorandum drafted by a medical ethicist at Cincinnati General Hospital which raised similar ethical concerns 164 was also ignored. This evidence clearly demonstrates that the defendants conducted the experiments in an atmosphere of willful blindness, if not conscious repudiation, of the dictates of the Nuremberg Code.

160. Id.
162. In re Cincinnati Radiation Litig., 874 F. Supp. 796, 821 (S.D. Ohio 1995) (Case No. C-1-94-126) (quoting Handbook On The Utilization of Normal Volunteers In The Clinical Center, Section 3.06, p. 10 (1961)). The NIH guidelines state that their "rigid safeguards . . . are based on the so-called 'ten commandments' of human medical research which were adopted at the Nuremberg War Crimes Trials." Id.
163. Bonfield, supra note 6, at A1. An internal memo written by the chairman of the University of Cincinnati's faculty committee on research stated that the NIH rejected funding for the radiation experiments in 1969 because it "questioned the acceptability of the consent form." Id.
164. In 1967, a member of the University of Cincinnati faculty medical ethics committee recommended in a confidential memo that the radiation experiments end. General Hospital Radiation Experiments: A Chronology, supra note 4, at A4.
IV. CONCLUSION

The specter of Nuremberg, of Nazism, should never be carelessly raised and, in this case, it would be unjust to equate the motives of the defendants in this case with those of the Nazi doctors. The defendants most likely believed that, at the same time they were furthering the purposes of the state, they were offering the plaintiffs a last, risky chance at survival that they otherwise could not afford. However, the defendants’ bodies were not irradiated so their motivations were not at issue; only the plaintiffs should have determined whether that last, risky chance was worth taking. By concealing the nature of the radiation experiments from the plaintiffs, the defendants denied them that right.

In In re Cincinnati Radiation Litigation, Judge Beckwith has correctly determined that this conduct violated the most basic of our natural rights and the most fundamental of our constitutional liberties, the right to bodily integrity. She also has correctly concluded that the judicially-created doctrine of qualified immunity cannot be used to shield the defendants from liability.

However, In re Cincinnati Radiation Litigation has significance beyond simply redressing the wrongs perpetrated upon the class action plaintiffs from 1960 to 1972. It represents the first step in acknowledging the wrongs done to thousands of American citizens throughout the course of the Cold War. With the initiation of this case and the opening of the government’s files concerning human experimentation, one hopes that the nation will face the hypocrisy that could brand an enemy’s conduct a barbarity yet view its own as a necessary expediency—that this will be a lesson learned. One cannot help but notice, however, that when the files were finally opened, the Cold War was over.

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