THE RIGHT TO BE TREATED WITH DIGNITY IN THE CONTEXT OF MEDICAL EXPERIMENTATION IS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Defendants argue that this Federal Court is no place for this litigation because no federal or Constitutional issues are at stake. History and an emerging body of law argue otherwise. What is at stake in this litigation is whether individuals have a Constitutional right to human dignity so as not to be the subjects of an unethical human experiment. Such a right, set forth in the Nuremberg Code and in the federal regulations known as the Common Rule, is a fundamental right of all citizens of the world and, thus, must be a right of the citizens of the United States, a Constitutional right.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." This clause "guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Rights are protected under the Due Process Clause of the Fourteenth Amendment if they are "so rooted in the tradition and conscience of our people as to be ranked as fundamental" or if such rights reflect "basic values implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." See *Moore v. City of East Cleveland Ohio*, 431 U.S. 494, 503 (1977) ; *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); . The right to bodily integrity has long been recognized as a fundamental right protected by the Constitution. See *Albright v. Oliver*, 510 U.S. 266 (1994) (due process accorded to matters involving marriage, family, procreation and the right to bodily integrity); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), (Constitutional liberty interest includes right to bodily integrity, a right to control one's person); *Schmerber v. California*, 384 U.S. 757 (1966) (integrity of an individual's person is cherished value of our society); *Union Pacific R. Co. v. Botsford*,

141 U.S. 250 (1891) (no right held more sacred or more carefully guarded than right of every individual to be in possession and control of his own person, free from restraint or interference of others). Courts have particularly recognized such Constitutional autonomy rights in the medical context. See, e.g., *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (Constitution grants competent person right to refuse lifesaving hydration and nutrition); *Roe v Wade*, 410 U.S. 113 (1973) (women have Constitutional right to control decision on whether to obtain an abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (restriction on citizens from receiving contraceptives from their physician an unconstitutional intrusion); *Rochin v. California*, 342 U.S. 165 (1952) (forcible stomach pumping of accused violates due process and is conduct which "shocks the conscience"); *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942) (sterilization performed without consent deprives individual of basic liberty). As Justice Cardoza stated in *Schloendorff v. The Society of New York Hospital*, 211 N..Y. 125, 105 N.E. 92, 93 (1914), a case against a surgeon for performing an operation without consent: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." Id., 211 N.Y. at 129-130.

While this Court could easily find that the right at issue here is within the right to bodily integrity, the right to be free from unethical human experimentation, sometimes called the right to human dignity, should be considered a distinct fundamental right of all human beings not just citizens of the United States. To best understand the nature of this right, it is important to understand both the historical context in which the Nuremberg Code arose and the post-Nuremberg controversies involving human subject protection. That understanding is necessary because an examination of "our Nation's history, legal traditions and practices" is critical in determining the scope of the right to liberty under the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *Cruzan*, supra, at 269-70; *Moore*, supra, at 503.

After the Nazi holocaust, a series of twelve unprecedented war crimes trials took place at the Palace of Justice in Nuremberg, Germany. In the first trial, later the subject of numerous books and movies, the allies designated four judges from the United States, Great Britain, the Soviet Union, and France to sit and render judgement under international law on the leaders of the Third Reich. Thereafter, the United States proceeded with the other prosecutions including with what became known as the "Doctors Trial," whose verdict included what is now known as the "Nuremberg Code." See Jay Katz, "*The Nuremberg Code and the Nuremberg Trial*," JAMA 1996; 276:1662-1666, a copy of which is attached as Exhibit "K."

The Doctors Trial, captioned *United States v. Karl Brandt et al.*, was conducted by three United States judges, one of whom was Johnson Crawford who at the time was a United States District Court Judge for the District of Oklahoma. The trial began on December 9, 1946, under the authority of the United States Military pursuant to United States rules of procedure with United States lawyers as prosecutors. Karl Brandt, Hitler's personal physician, and twenty-two other medical doctors were charged with war crimes, membership in criminal organizations, and crimes against humanity. See "*From the Indictment*," United States Holocaust Memorial Museum archives, reprinted at www.ushmm.org/research/doctors/persons.htm, a copy of which is attached as Exhibit "L." The first two charges concerned acts intended to aid the Third Reich's military aims; the third charged the physicians with acts undertaken under the guise of human experimentation either in the reckless pursuit of scientific knowledge or for sadistic torture. The experiments included studies on the tolerance of human beings to adverse conditions such as high altitudes, freezing temperatures and ingestion of sea water, tests involving the inoculation of prisoners with infectious diseases, pathogens and new vaccines, and gruesome physiological studies involving mutilations and transplants. See "*The Brutalities of Nazi Physicians*," JAMA, 1946; 132: 714-715, Editorial, a copy of which is attached as Exhibit "M."

Telford Taylor's opening statement for the prosecution underscores the point that the wrongs at issue in the Doctors Trial were breaches of the fundamental rights of all human beings under American jurisprudential principles. Mr. Taylor stated:

> The charges against these defendants are brought in the name of the United States of America. They are being tried by a court of American judges. The responsibilities thus imposed upon the representatives of the United States, prosecutors, and judges alike, are grave and unusual. . . The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate people. For them it is far more important that these incredible events be established by clear and public proof so that no one can ever doubt that they were fact and not fable; and that this Court as the agent of the United States and as the voice of humanity, stamp these acts, and the ideas which engendered them, as barbarous and criminal.

Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law, Vol. I, No. 10, (Washington D.C.: G.P.O. 1946-1949), reprinted at www.ushmm.org/research/doctors/telford.htm, a copy of which is attached as Exhibit "N."

A principal defense, as articulated by Dr. Brandt's counsel, the eminent jurist Robert Servatius of Cologne, was that the scientific and medical community at large and particularly in the United States had long been conducting human experiments on prisoners, vulnerable populations and uninformed subjects. Sadly, this charge was quite accurate, though certainly never to the extreme as practiced by the Nazis.

After 139 court sessions, 62 witnesses, and 901 written exhibits, Chief Judge Walter B. Beals, who was the Chief Justice of the Supreme Court of the State of Washington, announced the verdict of the court. Sixteen of the defendants were convicted of war crimes against humanity and seven were condemned to death. Though nothing else was required, the court did far more, perhaps because of the troubling

defense testimony with respect to unethical scientific and medical experiments occurring outside of the Third Reich. The court held:

> The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well defined bounds, conform to the ethics of the medical profession generally. The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other means of study. All agree, however, that certain basic principals must be observed in order to satisfy moral and legal concepts:
>
> 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 interventions of any elements 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.
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> 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 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 . . .

> 4. The experiment should be conducted so as to avoid all unnecessary physical and mental suffering and injury.
>
> 5. No experiment should be conducted where there is a priori reason to believe that death or disabling injury will occur. . .
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> 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 experiments.
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> 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 . . .
>
> 9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end . . .
>
> 10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

Id., reprinted at www.ushmm.org/research/doctors/nuremberg_code.htm, a copy of which is attached as Exhibit "O."

These ten points constitute what is now known as the Nuremberg Code. They were not promulgated as new legislation to be applied retroactively to the defendants then in the dock. They were an articulation of what these United States judges believed "all agree" were the fundamental rights of every human being. See Affidavit prepared for this case of Michael Grodin, M.D., a leading authority on the Nuremberg Code. A copy of his Affidavit and C.V. is attached as Exhibit "P." The Code set forth two equally important requirements of ethical human experimentation, both of which are at issue in this case. The first is the requirement of voluntary consent of the subjects after being informed of all material information about the experiment. The second, often overlooked but no less significant, is that such experiments must comport to certain ethical and

scientific standards even if subjects have given their informed consent to participate. The Code did not just look backward at the events that gave rise to the Doctors Trial but looked forward to postwar research on human beings. As stated by Dr. Leo Alexander, one of the prosecution's key expert witnesses and the man many credit as the author of the Code:

> . . . it is a useful measure by which to prevent in less blatant settings the consequences of more subtle degrees of contempt for the rights and dignity of certain classes of human beings, such as mental defectives, people presumably dying from incurable illnesses, and other people disenfranchised, such as prisoners or other inarticulate public charges whose rights might be easily disregarded for the apparently compelling reason of an urgent purpose.

Michael Grodin, "*Historical Origins of the Nuremberg Code,"* in Annas and Grodin, *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (1992) at p. 139, a copy of which is attached as Exhibit "Q."

The World Medical Association, which includes representatives of the American Medical Association, was founded in 1947 soon after the Doctors Trial. In 1954, the Eighth General Assembly of the World Medical Association adopted a resolution on human experimentation based largely on the Nuremberg Code. The resolution contained the basic principles that "it is the duty of the physician in medical research to protect the life, health, privacy and dignity of the human subject." After several revisions, this document now known as the Declaration of Helsinki was adopted by the 18th World Medical Assembly in Helsinki in 1964. It was revised again in 1975 to include a requirement for ethical review committees, such as Institutional Review Boards and adopted most recently by the 52nd General Assembly of the World Medical Association in Edinburgh Scotland in October 2000.

In the fifty years after Nuremberg, outrage over a series of public scandals involving human experiments in the United States have reaffirmed this Nation's

commitment to human subject protection. The first two public scandals were revealed in a landmark article by Harvard physician and Medical School Professor Henry Beecher in the New England Journal of Medicine. See H. K. Beecher, "*Ethics and Clinical Research*, New England Journal of Medicine, Vol. 274 (June 16, 1966), pp. 1354-60, a copy of which is attached as Exhibit "R." One occurred at New York's Sloan Kettering Institute for Cancer Research where a researcher working on the immune system's ability to fight cancer convinced the director of the Jewish Chronic Disease Hospital in Brooklyn to allow him to inject unwitting patients with live cancer cells. The second was the Willowbrook Study, in which researchers at an institution for mentally disabled children sought to develop a hepatitis vaccine by studying children whom they had deliberately infected with isolated strains of the virus. In the conclusion of Dr. Beecher's article, he cautioned that no research should be conducted without the informed consent of the subject and that the risks in any experiment must be commensurate with the benefits.

It was the third scandal, with racial overtones all too reminiscent of Nazi atrocities, that generated federal action to regulate human subject research. The infamous Tuskeegee Syphilis Study conducted by physicians of the U.S. Public Health Service was halted in 1972, nearly 40 years after it began while 200 African-American subjects were allowed to remain untreated despite the availability of therapeutic measures. In 1973, the Ad Hoc Advisory Panel issued its Final Report of Tuskeegee Syphilis Study, concluding "society can no longer afford to leave the balancing of individual rights against scientific progress to the scientific community." See Final Report, Department of Health Education and Welfare (Washington, D.C.: G.P.O. 1973), a copy of which is attached as Exhibit "S."

Thereafter, Congress appointed a federal commission to examine the system for protecting human research subjects. The National Commission for the Protection of Research Subjects in Biomedical and Behavioral Research was charged with identifying

the basic ethical principles underlying research on human subjects. In 1979, it issued "*The Belmont Report*," a document all research institutions, including the University of Oklahoma in this case, promise in an Assurance Agreement to uphold in all research studies in order to be eligible for certain grant monies. After acknowledging the influence of the Nuremberg Code, the *Belmont Report* sets forth three principles to guide human subject research: the first is respect for persons, which demands that researchers fully inform their subjects of all material information about the study and only then obtain their voluntary consent; the second is beneficence, which prohibits any experiment where the risks are too great or are outweighed by the benefits; and the third is justice, which requires equitable selection of research subjects. *Belmont Report*, DHEW Pub. No. (05) 78-0012. (Washington D.C.: G.P.O.), a copy of which is attached as Exhibit "T."

Congress passed the National Research Act in 1974 which authorized the implementation of regulations to protect research subjects. In 1991, the regulations were integrated into the Common Rule for 17 departments and agencies, the most familiar of which is the Department of Health and Human Services regulations at 45 C.F.R. Part 46, a copy of which is attached as Exhibit "U." The *Common Rule* is published in the Federal Register at 56 Fed. Reg. 28, 012 (June 18, 1991). These regulations, among other things, detail the conditions required for obtaining informed consent and the information that must be provided under those conditions, restrict experiments to those in which risks are minimized, require the equitable selection of research subjects and establish the requirement for institutional review boards to oversee research at every institution subject to the regulations.

Public concern over the rights of research subjects has increased within the decade subsequent to the Common Rule, and particularly within the last few years, as media reports detailed the tragic consequences of unethical human experiments, including the one at issue here. See, e.g., "*Ethics and Orphans*: The Monster Study," San

Jose Mercury News, June 7, 2001 (revealing 1939 experiment inducing orphans to stutter); "*Research Volunteer Dies in Hopkins Asthma Study*," Baltimore Sun, June 14, 2001 (27-year-old volunteer killed in nontherapeutic experiment); "*Uninformed Consent*," The Seattle Times, March 11-15, 2001 (death of subjects in blood cancer trial at Fred Hutchinson Cancer Research Center); "*Federal Rules for Research on People Often Fail*," USA Today, Feb. 26, 2001 (corneal transplant experiment conducted without full disclosure); "*Uninformed Consent*," Salon Magazine, March 27, 2000 (survey article on student research subjects at risk); "*U.S. Halts Cancer Tests in Oklahoma*," Washington Post, July 11, 2000 (melanoma vaccine trial at University Oklahoma shut down for numerous violations); "*Regulating Dr. Frankenstein: Money, Lax Ethics & Clinical Trials*," Legal Times, October 16, 2000 (call for stricter standards to protect research subjects); "*The Ethics of Drug Testing: Kids as Guinea Pigs,"* Salon Magazine, May 31, 2000 (nine-month-old killed in propulsid drug trial at Pittsburgh Children's Hospital); "*The Biotech Death of Jesse Gelsinger*," New York Times Magazine, Nov. 28, 1999 (18-year-old volunteer killed in gene therapy experiment at University of Pennsylvania); "*Research Volunteers Unwittingly at Risk*," Washington Post, August 1, 1998 (survey article on research subjects at risk); "*Student Dies at Rochester in MIT Based Study*," MIT Tech Talk, April 10, 1996 (19-year-old university student volunteer killed in nontherapeutic experiment); "*For the Sake of Science*," Los Angeles Times Magazine, September 11, 1994 (suicide of 23-year-old UCLA student in schizophrenia experiment). Copies of these articles are attached collectively as Exhibit "V."

One question for this Court is, in light of this history, whether the principles of the Nuremberg Code have any present day applicability to American law and the rights of American citizens or whether they are simply wartime relics applicable only to understanding the Nazi horrors. Given that the Code emerged from the judgment of United States judges in a United States military tribunal, if any country is bound by the

legal precepts of the Nuremberg Code, it is the United States. As George Annas, one of the leading authorities on the Nuremberg Code, has opined,

> The most complete and authoritative statement of the law of informed consent to human experimentation is the Nuremberg Code...This Code is part of international common law and may be applied in both civil and criminal cases covered by state, federal and municipal courts in the United States.

George J. Annas, et al., *Informed Consent to Human Experimentation: The Subject's Dilemma* 21 at 1 (1997). A number of evolving opinions support this view; none has rejected it.

The first opinion to suggest that the Nuremberg Code has a place in American jurisprudence is the dissent in the Kentucky case of *Strunk v. Strunk*, 445 S.W. 2D 145 (Court of Appeals of Kentucky, 1969), in which the court by a vote of four to three authorized the removal of a kidney from a mentally retarded institutionalized adult for transplantation into his ailing mentally sound brother. In an eloquent dissent, Justice Samuel Steinfield 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.... Regretfully, I must say, no."

445 S.W.2d at 149.

In *Whitlock v. Duke University*, 637 F. Supp. 1463 (M.D.N.C., 1986), aff'd, 829 F. 2d 1340 (4th Cir. 1987), a subject in a nontherapeutic, deep-diving experiment sustained severe brain damage. In dismissing the action because of a finding that the plaintiff had consented to participate in the experiment with full knowledge of the risks, the court stated that the Nuremberg Code provided persuasive guidance on the standard of care in the context of human experimentation. The court stated:

> The United States Military Tribunal at Nuremberg adopted the Nuremberg Code as a proper statement of the law of informed consent in connection with the trials of German scientists for human experimentation after World War II.

Id. at 1471.

One year later, the United States Supreme Court considered the case of James B. Stanley, a Master Sergeant who had been surreptitiously dosed with LSD as part of a mind control experiment conducted by the United States Army. *United States v. Stanley*, 483 U.S. 669 (1987). Mr. Stanley became aware that he had been a guinea pig in such an experiment when he received a letter almost 20 years later soliciting his cooperation in a study of the long-term effects on such "volunteers." The Supreme Court in a narrow five to four ruling reaffirmed the decision dismissing the plaintiff's complaint under the Feres Doctrine which holds that a serviceman cannot sue the government for putting him in harm's way. In so holding, the Court impliedly acknowledged that Stanley would have had a constitutional claim, if not for the Feres Doctrine and Stanley's status as a serviceman during the experiment.

In dissent, Justice Brennan noted the importance of placing the government's conduct in historical context:

> The medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable. The United States Military Tribunal established the Nuremberg Code as a standard against which to judge German scientists who experimented with human subjects. Its first principle was: the voluntary consent of the human subject is absolutely essential.

Id. at 687. Justice Brennan then concluded that "the United States Military developed the Code which applies to all citizens--soldiers as well as civilians." Id.

Justice Brennan characterized the government's experimentation on an unknown human subject as "an intentional Constitutional tort" and ended his opinion with a phrase that would thereafter be associated with the right to be free from unethical

experimentation: "Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity." Id.

Justice O'Connor, also dissenting, stated: "No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case." Id. at 709-10. Justice O'Connor noted that the United States Military played an instrumental role "in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War...and the standards of the Nuremberg Military Tribunal used to judge the behavior of the defendants stated that the 'voluntary consent of a human subject is absolutely essential...to satisfy moral, ethical and legal concepts'". Accordingly, Justice O'Connor reasoned:

> 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.

Id. at 711.

In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995), is the first case to expressly hold that the Nuremberg Code may be applied in the courts of the United States. Plaintiffs who had been the unknowing subjects in experiments on radiation exposure brought suit against investigators and institutions involved in the study. In rejecting a motion for summary judgment, the court held that such claims were cognizable under the Due Process Clause of the United States Constitution.

In a section titled, "The Nuremberg Code," the court examined the history of the Doctors Trial, stating:

> The judges appointed by President Truman to hear the medical case were all American judges and lawyers...The Nuremberg tribunal was asked to determine culpability . . . under "the principles of the laws of nations as a result from the usages established among civilized people, from the laws of humanity, and from the dictates of public conscience. . . Throughout the trial, the question of what were or should be the universal standards for justifying human experimentation recurred. "The lack of a

> universal principle for carrying out human experimentation was the central issue pressed by the defendant physicians throughout their testimony".

Id. , quoting, *United States of America v. Karl Brandt, et al.*, *I Trials of War Criminals*, Vo., II at 181 (1947).

After quoting the first principle of the Nuremberg Code, the court concluded: "The Nuremberg Code is part of the law of humanity. It may be applied in both civil and criminal cases by the federal courts in the United States." The courtthus held:

> If the Constitution has not clearly established a right under which these clients may attempt to prove their case, then a gaping hole in that document has been exposed. The subject of experimentation who has not volunteered is merely an object. The plaintiffs in this case must be afforded at least the opportunity to present their case. Id.

The next case to invoke Nuremberg was *Stadt v. University of Rochester*, 921 F.Supp. 1023 (W.D.N.Y. 1996). In this case, plaintiff brought an action under the Federal Tort Claims Act claiming she had been the subject of testing by physicians who had injected her with plutonium without her informed consent. In rejecting a motion that the Constitutional claims should be dismissed, the court stated: "This case does not involve the right to refuse medical treatment, but instead the right to be free from non-consensual experimentation on one's body...the right to bodily integrity...a right which has been recognized throughout this nation's history." Id. In support, the court reviewed the long line of cases holding that the right to bodily integrity, which would include the right to be free from unethical human experimentation, was a fundamental right under the United States Constitution. Id., citing *Albright v. Oliver*, 510 U.S. 266 (1994); *Schmerber v. California*, 384 U.S. 757 (1966); *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250 (1891). The court thus held:

"The Constitution and, more specifically, the due process clause of the Fifth Amendment, clearly established the right to be free from non-consensual government experimentation on one's body." Id.

The last case and the one most similar to the factual issues here is *Heinrich v. Sweet*, 62 F. Supp. 2d 282 (D. Mass., 1999), where family members brought an action based on allegations that various government doctors conspired to conduct extensive, unproven, and dangerous medical experimentation on 140 terminally ill patients without their informed consent. The court stated that the issues presented must be understood in their historical context and then proceeded to describe the background of the Doctors Trial and the Nuremberg Code. The court then adopted the reasoning and holding of *In re Cincinnati Radiation Litigation* that a breach of the principles of the Nuremberg Code by a government actor would violate the Due Process Clause of the United States Constitution. In language particularly relevant here, the court stated: "Similar conduct that "shocks the conscience" includes the use of false promises of therapeutic hope to terminally ill patients in order to lure them into becoming human subjects...for the benefit of curious scientists rather than the health of test subjects." 62 F. Supp. 2d at 287.

As these cases and history make clear, and as "all agree" in the words of the Nuremberg judges, the right to essential human dignity in the context of medical experimentation as expressed in the Nuremberg Code is a fundamental right rooted in the conscience and history of the people of the world, in general, and of the United States, in particular. It is a right reflecting basic human values essential to any "concept of ordered liberty" and, if it is sacrificed, neither liberty nor justice can exist. It is, thus, a right guaranteed by the Fourteenth Amendment to the United States Constitution and its violation will give rise to liability under 42 §U.S.C. 1983.