

OFFICE OF SCIENTIFIC RESEARCH AND DEVELOPMENT

1530 P. Street, N. W.

INTER-OFFICE MEMORANDUM

TO: The Files

FROM: J. B. Donovan

SUBJECT: Human Experimentation in Gonorrhoea

On January 22, 1943, I attended a conference on the above matter at the offices of the Commissioner of Health of the City of New York, 125 Worth Street, New York City. Among those attending were the Chairman of CMR (Dr. Richards), the Chairman of the Subcommittee on Venereal Diseases of the Committee on Medicine, National Research Council (Dr. Moore), the New York Commissioner of Health (Dr. Stebbins), a representative of the Attorney General of New York State (Mr. Caddy), a representative of the Corporation Counsel of New York City (Mr. Bayard), Dr. Cohn of the New York City Health Department, Dr. Sweet of Sing Sing Prison and Dr. Carpenter representing the State of Georgia.

Messrs. Caddy and Bayard were requested by Commissioner Stebbins to discuss the legality of the proposed experimentation in New York State. They declared that they had considered the problem together and Mr. Bayard stated the following conclusions (in which Mr. Caddy concurred):

- (1) Assuming some injury to a subject, the experiments would probably violate Section 1400 of the New York Penal Law (a statute on "maiming"), since the physician conducting the experiment would (in the language of the statute) wilfully, with intent to injure or disable, inflict upon the subject an injury which would disable a member or organ of his body, thus seriously diminishing his physical vigor;
- (2) The defense of consent probably would not be available in either a criminal or a civil action based upon the statute, because (a) "the state of the law is doubtful" as to the validity of such a defense and (b) assuming its validity, the prisoners doubtless would swear that their consent was obtained under duress.
- (3) The closest analogy to the situation is in abortion cases, in which the consent of the patient is no defense to a criminal prosecution of the physician;
- (4) Under the New York City Charter, the Department of Health probably has not the power to enter into such contracts for scientific research;

(5) The experiments probably would violate certain general sections of the Sanitary Code of New York City (an amendable set of local ordinances) which provide that no person shall do "any act detrimental to the health of any human being."

Both men emphasized, however, that these were only tentative conclusions and that additional legal research would have to be done on the subject; they volunteered to present a complete legal memorandum after they had continued their studies.

Following a discussion of these matters, the principal points in which are set forth later in this memorandum, I volunteered the following legal considerations:

(1) Whether the City of New York has the power to enter into a contract with the OSRD is a matter for exclusive determination by its counsel, although the provisions of the Charter cited by Mr. Bayard would appear to be sufficiently broad;

(2) Since the Sanitary Code is merely a set of regulations promulgated by the Department of Health and changeable by that body within an hour, any barriers therein provided present no real difficulty;

(3) Section 1400 of the Penal Code should be held to be inapplicable because (a) the statute was never intended to embrace such a set of facts and can do so only by a strained interpretation, (b) the statute requires a specific criminal intent (to inflict a serious and permanent injury), whereas the scientists would have no criminal intent and the very object of the experiments is, after preliminary infection, to effectively rid all subjects of the disease, (c) the statute is based upon the common law crime of mayhem, which was primarily designed to protect citizens of the state from being so maimed that thereafter they could not perform military service for the country and it would be anomalous now to so interpret the statute as to make it criminal for men to contribute their best military use to the nation in time of war;

(4) The complete defense of consent, (after full disclosure of all facts), should be upheld since (a) the fundamental legal maxim "volenti non fit injuria" (no injury can be done in the eyes of the law to a person who is willing to suffer it) is applicable, (b) such consent normally is upheld as a defense where there is no violence or breach of the peace and has been upheld in New York in the case of criminal assault, (c) the written waiver by the subject could recite the complete disclosure of all risks, the willingness of the subject to voluntarily assume all risks for patriotic and other reasons, and the military necessity for the experiments;

(5) Whether the statute would be so interpreted as to cover these experiments and whether the defense of consent would be upheld, depends on a question of "public policy" - whether the public welfare favors it - which should be resolved in favor of the validity of the experiments because (a) our present law is such that fifteen

years ago the U. S. Supreme Court (Mr. Justice Holmes) upheld compulsory state sterilization of the feeble-minded; (b) when the country is at war and the disease is taking a terrific toll of the Armed Services which can only be combatted by these measures, the nation should be allowed to freely accept such voluntary sacrifices by its citizens; (c) those who have rendered such services in the past have been regarded by the government and its citizens as heroes (yellow fever, blood donors, Gov. Saltonstall's case in Massachusetts) and not as criminals; (d) the law favors those who risk their health to aid in preserving the lives and health of others, viz., in New York one going to the rescue of another is given preferential treatment in any later law suit for injuries to him based upon his rescue, and a man who commits what normally would be a trespass (as on railroad property) to save another is not regarded as a trespasser.

While I stated that these conclusions represented what we believed to be sound law, I warned that a judge guided by political considerations (including the social, ethical and religious tenets of his constituents) could rule otherwise.

Other matters discussed at the conference included the following:

- (1) As to insurance, it was agreed that probably such coverage would be unobtainable; however, (a) this precise problem has not yet been presented to Lloyds of London and (b) the standard OSRD contract would provide the ordinary indemnity clause "out of funds to be hereafter appropriated by Congress";
- (2) Public reaction in the press is difficult to gauge, although past precedents on the whole have been favorable;
- (3) Since the matter could be classified as "Restricted" or higher, court action or public dissemination of the material could be suppressed;
- (4) Experiments on mice at Johns Hopkins are progressing favorably and may obviate all difficulties attendant upon the human experimentation;
- (5) Possible solutions include (a) the use of Federal prisoners, (b) the use of Army prisoners or conscientious objectors, (c) introducing special legislation in State Legislatures;
- (6) It was agreed that as many states as possible should participate in the program, so that the public reaction and risk of disapproval could be spread;