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DEC 1 5 1954

Administration of Truth Serums Without Consent

To Prisons 12/15

Your memorandum of October 5, 1954, addressed to Mr. Warren E. Burger, raised four problems relating to the medical treatment of prisoners. One of those problems concerns "3. Cases where consent has been withheld and which require isolation or special treatment so as not to interfere with the carrying on of the program imposed by Congress involving care, treatment and rehabilitation." Under this item 3, the following explanation is given:

> "It is conceivable that such program would be seriously interfered with or halted altogether if enough prisoners refused to submit to diagnostic and therapeutic procedures which the medical staff considered necessary to determine whether a violation of prison rules was involved or whether treatment was necessary to restore them to the physical or mental status which would enable them to take part in and benefit from the rehabilitation program. In a case of suspected malingering for instance, it is very difficult to tell whether this is the result of a psychosis or is being faked. The truth can sometimes be determined by an interview while the inmate is under the influence of sodium amytal. In one case at Terre Haute the suspected malingerer was given an injection of sodium amytal intravenously and interviewed by the psychiatrist while under the influence of the drug. Malingering was established by this procedure but the inmate was very agitated because he had not given his consent and threatened to sue the doctor for malpractice."

In his reply of November 12, 1954, Mr. Burger reserved opinion on, and referred to this office for consideration, "the problem of whether the questioning of prisoners while under the influence of sodium amytal or other drugs is a violation of their constitutional rights." From that exchange of communications, it is quite clear that the problem presented to me relates only and specifically to the involuntary administration of drugs in order to obtain an admission of truth or falsity of a fact from a prisoner. My reply is limited to that narrow question. It does not concern the administration of sodium amytal or any other drug for medicinal or therapeutic purposes, with or without the subject's consent, or even the employment of such drugs for "truth" or other purposes with the subject's consent. Those matters require separate consideration.

It is well to understand, at the outset, the admonition of the Courts that although a person is in lawful custody, "His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions." Coffin v. Reichard, 143 F. 2d 443 (C.A. 6, 1944). The Court further observed that:

> "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny him his right to personal security against unlawful invasion." (p. 445)

This, we may assume, sufficiently states the principle that conviction for crime does not result in a divesting of Constitutional protection. See also Frank v. Mangum, 237 U.S. 309, 331 (1915), guarantee of due process of law under the Fourteenth Amendment extends to prisoners; United States v. Lefkowitz, 285 U.S. 452, 464 (1932): "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy... Its protection extends to offenders as well as to the law abiding"; Agnello v. United States, 269 U.S. 20, 32 (1925): "The protection of the Fourth Amendment extends to all equally,--to those justly suspected or accused, as well as to the innocent;" and Weeks v. United States, 232 U.S. 383, 391-2 (1914):

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

It is recognized that the treatment and supervision of prisoners is a difficult and exacting process. Undoubtedly, the inherent nature of the custody is such as to provide a continuous challenge to the ability of the prison officials to maintain proper control. When the intense emotional currents of those in custody are guided by hostile, or at least uncooperative, attitudes, resort may be had to every permissible method which is calculated to preserve authority and achieve necessary ends. The Courts are mindful of these and the many other varied problems of prison care and reform. For that reason, as discussed in Mr. Burger's memorandum, the Attorney General, and officials of the Bureau of Prisons under his general supervision, are assumed to have broad authority in the administration of accepted medical treatment and procedures to prisoners committed to their custody.

Such authority, however, is not unlimited. Trespass upon one's person can be equally offensive to the Constitution whether the subject is free or a convict. This was made wholly clear by Justice Brandeis in Olmstead v. United States, 277 U.S. 438 (1928):

> "The makers of our constitution ... conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.
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> "The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw" (dissenting opinion, pp. 478, 484).

And, as stated by Justice Jackson in his concurring opinion in Skinner v. Oklahoma, 316 U.S. 535 (1942):

> "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority--even those who have been guilty of what the majority defines as crimes" (p. 546).

The problem here concerns "a state of mind that can be induced by a variety of drugs," Dr. W. F. Lorenz, Criminal Confessions under Narcosis, 31 Wis. Med. J. 245 (1932). Such drugs "dissolve inhibitions and tend to stimulate unrepressed expressions of external fact, of fancy, and of suggestion," Despres, Legal Aspects of Drug--Induced Statements, 14 U. Chic. L. R. 601 (1947). There is, of course, no "truth serum."/1/ As stated in Kleinfeld, The Detection of Deception--A Resume, 8 Fed. Bar J. 153 (1946):

> "The term 'truth serum,' like 'lie-detector', is a misnomer. There is no specific which will cure or reveal deception--no drug which will infallibly induce truth.

1/ "Scopolamine ('truth serum') is a drug capable of producing a partially suspended unconsciousness in which the subject may correctly relate former experiences," Wigmore, Evidence (3d ed., 1940), Vol. III, p. 283.

"There are, however, certain drugs which will deeply affect one's consciousness. In such a mental state, the subject is not in a position where he can readily determine the type of answer to give to questions put to him. His ability to associate thoughts and express only those which he wishes others to hear is diminished, and as a result it is exceedingly difficult for the subject to attempt deception. Thus 'narcoanalysis' or 'narcosynthesis' does not describe the use and effect of a 'truth serum', but rather the process of inducing a state of mind by the application of a drug whereby an individual's capacity to unite thoughts and choose those to which he desires to give utterance is inhibited. In other words, in the administration of the drug an attempt is made to create a mental condition in which the subject's 'thinking' faculties are so weakened that his answers to questions are responsive but not censored." (p. 167).

The degree of reliability which can be ascribed to the result of the use of such drugs is open to serious question. It is fair to assume that the courts generally would not accord recognition to such tests 2/. However, aside from any question as to the scientific standing of the technique, and the further circumstance that the rule against involuntary confessions would forbid its use as evidence in a criminal proceeding, other factors must be considered.

First, the prisoner's right of privacy would be invaded through the involuntary administration of the drug. That would be so even if

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2/ State v. Lindemuth (New Mexico), 243 P. 2d 325 (1952), People v. Jones (California), 266 P. 2d 38 (1954), State v. Hudson (Missouri), 289 S.W. 920 (1926), and People v. McNichol (California), 224 P. 21 (1950), where statements made by defendants while under the influence of sodium pentathol were excluded on the ground that the tests lacked scientific recognition. It also appears that no appellate court has upheld the admissibility of lie detector evidence where both parties failed to stipulate. See Frye v. United States (D.C.), 293 F. 1013 (1923); Tyler v. United States (D.C.), 193 F. 2d 24 (1951); State v. Bohner (Wisconsin) 246 N.W. 314 (1933); People v. Forte (New York), 18 N.E. 2d 31 (1938); People v. Becker (Michigan), 2 N.W. 2d 503 (1942); State v. Cole (Missouri), 188 S.W. 2d 43 (1945); State v. Lowry (Kansas), 185 P. 2d 147 (1947); People v. Wochnick (California), 219 P. 2d 70 (1950); Henderson v. State (Oklahoma), 230 P. 2d 495 (1951); Leeks v. State (Oklahoma), 245 P. 2d 764 (1952); State v. Pusch (North Dakota), 46 N.W. 2d 508 (1950); State v. Kolander (Minnesota), 52 N.W. 2d 458 (1952); Peterson v. State (Texas), 247 S.W. 2d 110 (1952); Boeche v. State (Nebraska), 37 N.W. 2d 593 (1949).

his participation were not accompanied by physical force to compel his attendance before the administering officer and there were no penalty, other than return to normal prison routine, attached to a finding of malingering. In this respect, a prisoner's right to privacy is not lessened by his status as a convict. Although the drug application would lack the physical discomfort of the rack and the screw, it nevertheless constitutes a method of third degree which could have lasting consequences beyond physical pain. Indeed, it is likely that many prisoners would prefer physical torture to the forced disclosure of subconscious hostilities and personal secrets affecting their lives and the lives of others. No matter how useful the drug technique may be in aiding prison administration, there can be no legal justification for a process of mental probing.

It is also well to consider the oppressive uses to which the practice of administering drugs to obtain admissions could be put and the potential for great mischief it presents. If the technique were considered acceptable in detecting malingering, would not its use be even more inviting in solving prison crimes or infractions? And aside from any dramatic quality, could it not be argued that continuous insight into the thought processes of all of the prisoners would permit the prison authorities to take greater and more effective precautionary measures against disorder and worse, and to better plan for rehabilitation? Although these ends are pleasant in contemplation, the price in terms of personal degradation is higher than the law allows.

Although no exact or analagous case appears to have come before the courts, enough judicial expression is available for the belief that the described practice would be condemned. Thus, the Supreme Court has sharply stated that the Fifth Amendment prohibits the use of "physical or moral compulsion to extort communications," Holt v. United States, 218 U.S. 245, 252-3 (1910) and the "Fourth Amendment, ensuring freedom from unreasonable searches and seizures, ... one of the primary objectives of the framers of our Constitution was the preservation of liberty of person and that protection of the individual from coerced admission is one of the basic rights afforded under the Constitution ... It is eminently more desirable to safeguard the rights and liberties guaranteed by the Constitution by a religious application of its tenets than to jeopardize these individual rights and liberties by the admission of untrustworthy evidence. The sacrifice is not worth the price" (id., at pp. 493-4). 3/

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3/ See, also, Gorham, Involuntary Admissions Should Not Be Competent Evidence, 19 Temple L. Q. 485 (1945).

While cases like Holt v. United States, supra, have been treated in relation to evidence admissible in a criminal proceeding, the same "fundamental unfairness," Lisenba v. California, 314 U.S. 219, 238 (1941) which characterizes involuntary admissions from prisoners also is at war with traditional and deeply rooted Constitutional concepts of fair treatment. It does not appear significant that the process here is unrelated to a trial. As stated in Boyd v. United States, 116 U.S. 616, 633 (1886), constitutional protection is afforded even though the acts are "not technically a criminal proceeding, and, neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibition of either? We think not; we think they are within the spirit of both." We must be mindful of the admonition that "Constitutional rights may suffer as much from subtle intrusions as from direct disregard," Malinski v. New York, 324 U.S. 401, 410 (1945). And, as further stated in Boyd v. United States, supra:

> "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consists more in sound than in substance" (at p. 635).

The circumstances presented by your memorandum compel the conclusion that statements made by a prisoner while under the influence of a drug administered without his consent deprive him of "his free choice to admit, to deny, or to refuse to answer," Lisenba v. California, 314 U.S. 219, 241 (1941), and, therefore, would constitute an unlawful practice. Although prison administration may thus be made more difficult, the end does not justify the means: "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end," Chambers v. Florida, 309 U.S. 227, 240-1 (1940).