

F A S P E

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

FINAL PROJECT JOURNAL
MEDICAL AND LAW PROGRAMS 2010

UNDER THE AUSPICES OF



A LIVING
MEMORIAL
TO THE
HOLOCAUST

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FASPE

FELLOWSHIPS AT
AUSCHWITZ
FOR THE STUDY OF
PROFESSIONAL ETHICS

WITH SPECIAL THANKS TO

Dr. Thomas Duffy, Amos Friedland, Professor Anthony Kronman, and Dr. Mark Mercurio.

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LETTER OF INTRODUCTION

WHY FASPE? TWO INTERSECTING CONCEPTS:

My generation—and the generations that bracket mine—grew up *feeling* the Holocaust. We saw the pictures. My father was in the group of American soldiers that “liberated” Dachau and he took photographs; the pictures were hidden but my brothers and I saw them soon enough. And, we somehow related, though could not really understand, because of the proximity in time.

Our generations knew survivors. They were family or friends. We heard their descriptions. Family members were victims or we knew those whose family perished. Our generations saw those who experienced, those who did not want to tell, and then those who opened the dialogue across cultures and mediums that sought meanings and explanations. This proximity in time and familiarity with survivors, that ability to *feel* the Holocaust, cannot exist in the same manner in future generations.

Today there are daily reports of embarrassing, horrific, breakdowns among professions. Business frauds. Medical frauds. Lawyers defrauding clients. Journalists who fail to report or report with bias. Clergy who do not speak out. The harm is not just financial; it is human, societal. It speaks to who we are. To increase the difficulty, the ethical issues facing the professions are increasingly blurred with globalization, technology and other 21st century “inventions.”

FASPE seeks to address the current ethical failures of our professionals while establishing a construct for the future study of the Holocaust. It is grounded on the following notions:

Members of the professions—lawyers, doctors, business executives, among others in Nazi Germany—played an instrumental role in the design and implementation of the Holocaust and in failing to halt the complete breakdown of societal mores. Members of the professions continue to play an instrumental role—positive and negative—in all so-called civilized societies. Today’s America is no exception.

Through setting broad agendas and implementing national policies, professionals set the tone for how a country and its citizens deal with “small,” i.e. day to day, issues. In dealing with the day to day issues, the professionals set the tone for broader agendas and set the stage for how larger policies are established and implemented. They interpret contemporary issues in light of cultural norms and historical precedents. Therefore, the behavior of the professions must be viewed in an ethical context as it ultimately defines the ethics of their society.

With this in mind, FASPE Fellows convene to examine contemporary ethical issues in their professions, starting by examining the role of *their* profession in the Holocaust as evidence of the power (positive and negative) of the profession.

In 2010, the first annual classes of Fellows were chosen (through a national competition) for Law and Medicine. In 2011, FASPE expands, offering Fellowships in Law, Medicine, Journalism and the Clergy. Additional professions will be added in the future, including, shortly, Business.

LETTER OF INTRODUCTION (CONTINUED)

The journey that each group of Fellows takes, led by leading scholars, is a journey of time (12 days), geography (New York, Berlin, Auschwitz, Krakow), chronology (design and implementation of the Holocaust to contemporary ethics of the profession), emotion (from the Wannsee House in Berlin where the implementation of the Final Solution was agreed upon to Auschwitz and beyond) and dialogue (daily interactive seminars led by FASPE faculty and “guest” participants).

We believe that the 2010 FASPE Fellows and their journeys last summer verify the core principles that serve as the basis for FASPE. The FASPE program is not only individually transformational for the Fellows, but, we hope, helps to create an ethical grounding for the future leaders of our professions.

We are deeply proud of the 2010 Fellows and are pleased to present a selection of their work.

C. DAVID GOLDMAN
CHAIR
FASPE STEERING COMMITTEE

INTRODUCTION TO THE MEDICAL PROJECTS

GREETINGS FRIENDS:

Several months have passed since we took our journey together. There's a picture in my office from the program's last night in Krakow, with the whole group together. It's a wonderful memory. The trip was, for me, a most extraordinary experience as a teacher and as a person. It was an unforgettable trip for what we saw, heard, and learned, and because of the people with whom we shared it. From what I can tell from the final projects produced by the inaugural FASPE Medical class, it had an equally profound impact on each student.

All of the projects submitted represent remarkable work, and I congratulate every student. Dr. Tom Duffy and I were given the very difficult task of selecting the papers for this journal. Students produced exceptional work, and choosing among them was incredibly challenging. I'd like to thank all the students for the excellent projects, whether chosen or not, and the thought and time they put into them.

I have been lucky enough to see several FASPE Medical Fellows since the program, and have decided to continue on as FASPE Faculty for 2011. It is hard for me to believe that the outstanding experience we shared last year can be replicated, or that I could enjoy another group of students as much, but it is truly an honor for me to be part of this amazing program, and to share such an intense experience with students of this quality. For this wonderful opportunity, I am very grateful to the FASPE Steering Committee.

Please enjoy the enclosed projects; I hope you will be as impressed with the students' work as Dr. Duffy and I were. These projects highlight the passion, insights, and desire to continue learning from the FASPE experience that students brought to the table this summer.

ALL THE BEST,

MARK R. MERCURIO, M.D., M.A.
FASPE FACULTY
DIRECTOR, PROGRAM FOR BIOMEDICAL ETHICS
YALE SCHOOL OF MEDICINE



'23'

*A Visual FASPE
[Re-]Emergence*

-= L. S. Ediriwickrema, YSM IV =-

#1

Children//Hollocaust:
~1.5 million deaths

Birkenau

The first to perish were the children, abandoned orphans,
The world's best, the bleak earth's brightest.
These children from the orphanages might have been our comfort.
From these sad, mute, bleak faces our new dawn might have risen.

Tatus' pracuje w kamieniołomach u "Libana"
Siedy wraca, często dostaje kwotoków z nosa,
to podobno z wyczerpania, bardzo smieszniat.
Brat pracuje w fabryce guzików na Grzegórkach
u Baumingera. Najlepszą pracę ma mamusia, pracuje
przy ul. Agnieszki w fabryce guzików.

"Daddy works at the Liban's quarry. When he returns from work, he often gets a nosebleed, apparently from exhaustion: he's become very haggard. My brother works at the Bauminger's nail factory in Grzegórkach. My mommy has the best job, she works at the button factory on Agnieszki Street."

— Stella Müller (Madej), aged 8

Stella Müller (Madej)



#2

Approximately 9,000-
10,000 children, of whom
75% were Jewish.

Targeted countries:
*Germany, Austria, Czech,
Poland.*

Brought to **Great Britain** in
the wake of Kristallnacht.

INTO THE
ARMS OF STRANGERS

Academy Award® Winner
Best Documentary Feature

STORIES OF THE KINDERTRANSPORT

"An extraordinarily fine film... this moving tribute has the power to summon us to our better selves." — Richard Schickel/Time Magazine

"A stirring documentary with powerful images. I urge you to see *Into the Arms of Strangers* on a theater screen." — Joe Morgenstern/The Wall Street Journal

THE FILM THE STUDY GUIDE THE BOOK THE SOUNDTRACK THE KINDER IN HISTORY

PG PARENTAL GUIDANCE SUGGESTED
SOME MATERIAL MAY NOT BE SUITABLE FOR CHILDREN
for rating reasons, go to www.filmratings.com,
parentalguide.org, and mpaa.org

Buy Now on DVD
and Videocassette

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#3

First German School for Boys in Krakow



Hitler greets the BDM, 1939 (postcard; author's collection)



Hitler greets his youth at an SS installation, 1930s (Bundesarchiv Koblenz)

Jugend dient dem Führer



ALLE ZEHNJÄHRIGEN IN DIE HJ.

Hitler's Children

The Hitler Youth and the SS
by Gerhard Rempel

Hitlerjugend
82% of German boys
and girls by 1939



**HITLER
YOUTH**



"I am beginning with the young," said Adolf Hitler in 1933. "We older ones are used up. . . . We are rotten to the marrow. We have no unrestrained instincts left. We are cowardly and sentimental. We are bearing the burden of a humiliating past, and have in our blood the dull recollection of serfdom and servility. But my magnificent youngsters! Are there finer ones anywhere in the world? Look at these young men and boys! What material! With them I can make a new world."



By April 1944 the alarm of the Nazi authorities had grown considerably. Reich Justice Minister Thierack at a meeting of top level officials warned that the gangs and cliques represented "the most dangerous threat to youth in the entire war." Thierack pointed out that they were not only growing quickly in number, but were also increasingly manifesting "political tendencies." Among the most dangerous of these were the Edelweiss Pirates of Cologne and Düsseldorf which had recently spread to the "far reaches of the Reich" while the Hamburg swing youth were spreading all over North Germany.⁷⁶

German Youth Counter Culture

Youth Resistance in the Third Reich: A Social Portrait, by Daniel Horn

... in so-called "Lotterclubs" and "Gangster-cliques." According to the irate report of Bannführer Knopp of the HJ, they frequented bars and carried "shagpipes and long cigarette-holders." They wore jackets of a "Scottish cut" and affected English manners by always carrying umbrellas, regardless of the weather ... this was a manifestation of "political opposition."



Kiel swingateer, "When you leave Kiel, be as nonchalant as you can; whistling and singing English songs as much as possible; and above all, be sure to keep yourself inebriated, and have plenty of hot-looking chickaroos hanging all over you."

Events in Hamburg after 1933 indicate that this cosmopolitan, patrician and anglophile city did not accept the Nazi state with the same degree of fervor as the rest of Germany.⁵⁴ The youth of that town in particular refused to accommodate itself to the arid cultural offerings of the Nazi state and rather soon began to manifest its opposition by adopting English and American jazz music as a symbol of its rebellion.⁵⁵

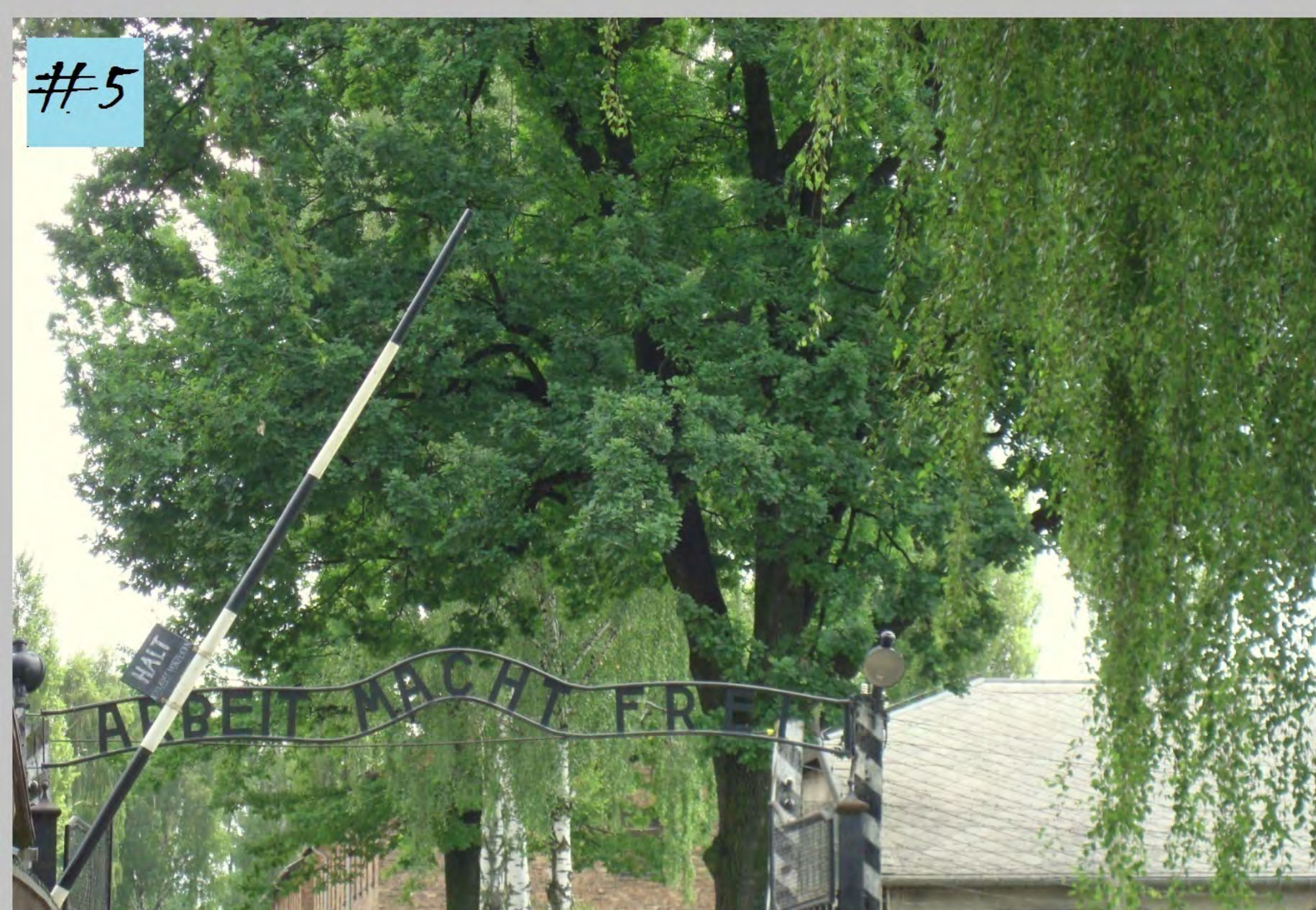
"Organ Grinder's Swing"

"Kurze Haare, große Ohren,
So war die HJ geboren!
Lange Haare, Tangoschritt –
Da kommt die HJ nicht mit! Oho, oho!
Und man hoert's an jeder Eck' --
Die HJ muß wieder weg!"

"Crew-cut and big ears,
This way the HJ (Hitler Youth) was born!
Long hair, tango step –
The HJ can't keep pace, Oho, Oho!
You can hear it everywhere --
The HJ has got to go!"



#5



"Work spares us from three evils: boredom, vice,
and need." Voltaire

Work Makes You Free.

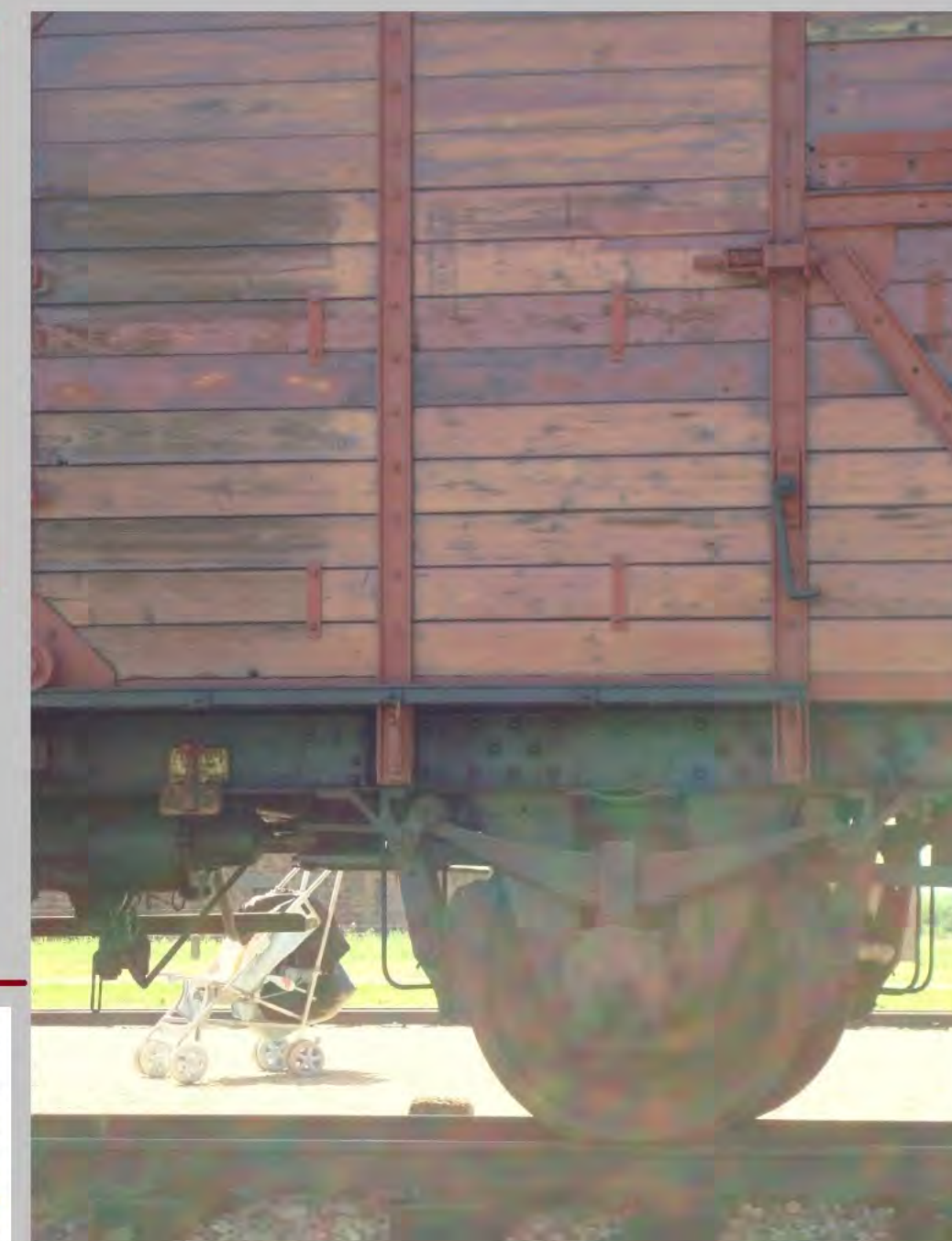
Wannsee Conference's *Vernichtung Durch Arbeit* -- Extermination Through Work





#6

#7



Trophies of War: U.S. Troops and the Mutilation of Japanese War Dead, 1941-1945

JAMES J. WEINGARTNER

This view was reflected in and stimulated by imagery, both pictorial and verbal, propagated by the U.S. mass media. In the wake of the attack on Pearl Harbor, the press applied to the Japanese such terminology as “mad dogs” and “yellow vermin.” An article in the U.S. Army weekly *Yank* referred to Japanese working on the airfield on Guadalcanal as “termites.” The official U.S. Navy film on the capture of Tarawa characterized the Japanese defenders as “living, snarling rats.” Pictorially, Japanese were commonly represented as apes or monkeys, but also as insects, reptiles, and bats. A particularly repugnant caricature appeared on the cover of *Collier's* magazine commemorating the first anniversary of the air raid on Pearl Harbor. A hideous, slant-eyed creature with huge fangs and large, pointed ears, wearing a “samurai sword,” is shown descending on Oahu on bat wings, preparing to loose a bomb on the ships anchored in the harbor beneath.³

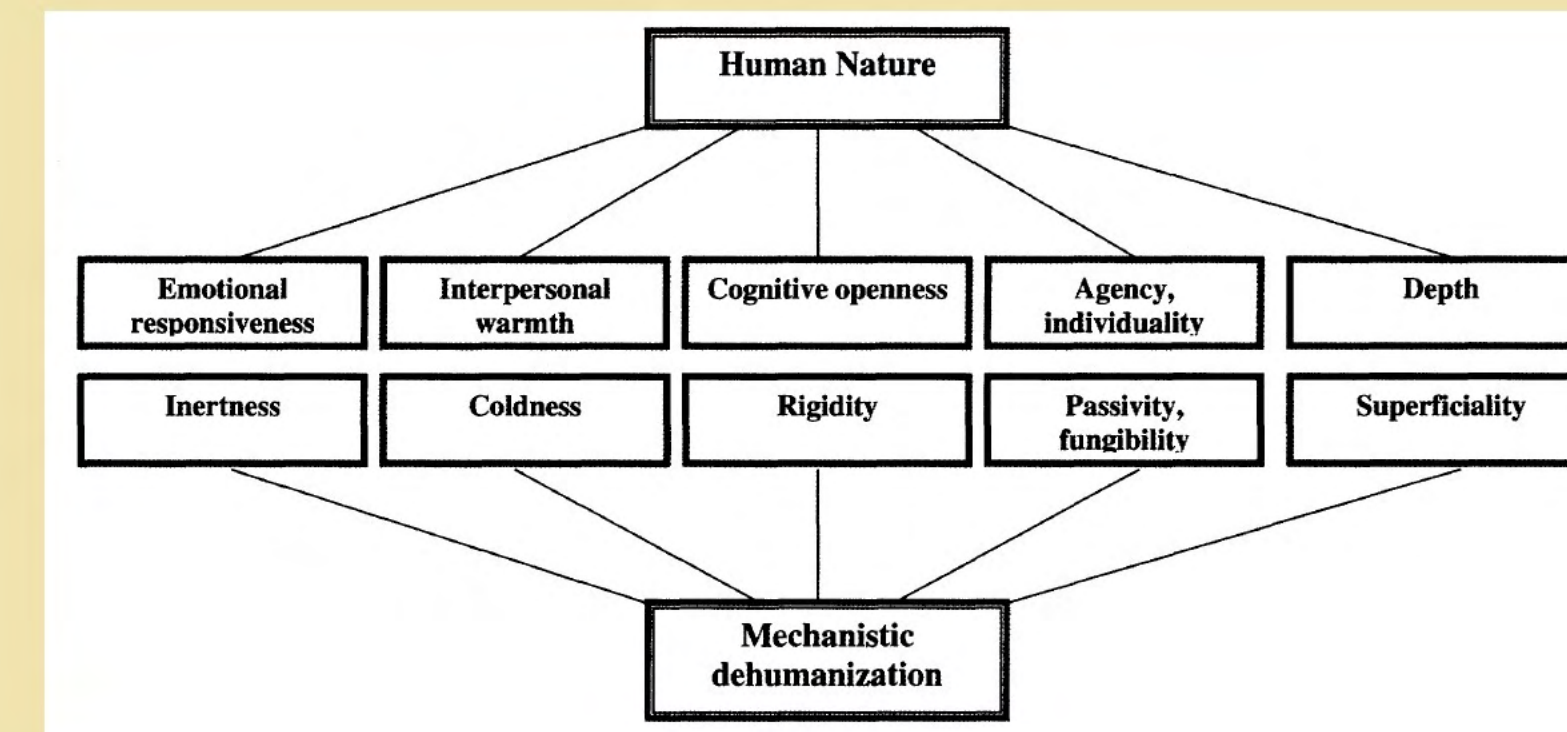
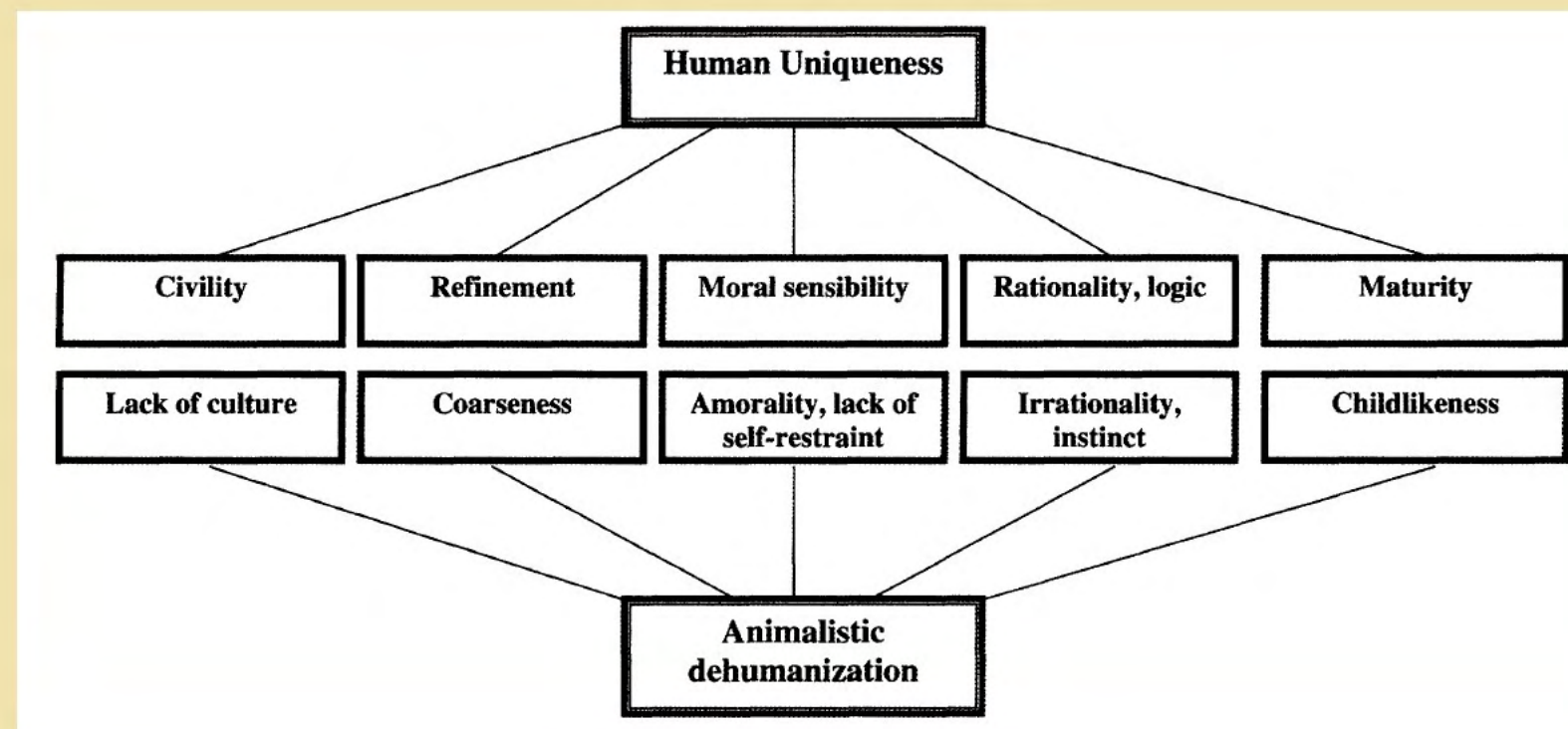




Dehumanization: An Integrative Review

Nick Haslam

Figure 1. Proposed links between conceptions of humanness and corresponding forms of dehumanization.



#9

Birkenau



In his book, *Teaching about the Holocaust in the 21st Century*,¹ Jean-Michel Lecomte makes the compelling claim that the process undertaken for the dehumanization of the Jews during the Holocaust can be broken down into seven different stages. These stages are: (i) definition of the target group; (ii) registration of the victims; (iii) designation of the victims; (iv) restrictions and confiscations of goods; (v) exclusion; (vi) systematic isolation; (vii) mass extermination.²

The Seven Stages of the Rwandan Genocide

Jean Mukimbiri*

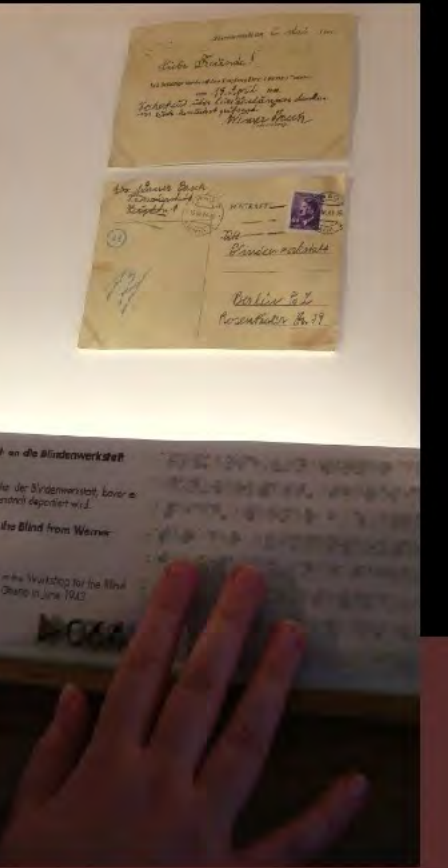
7. Systematic Isolation

In the context of Rwanda, no similar systematic isolation of the Rwandese Tutsi occurred. The isolation of the Jews had spanned over several years: in Rwanda, the systematic isolation of the Tutsi was remarkably swift, despite the existence of the policy of discrimination from 1959 to 1994. The main reason for the swiftness of the genocide in Rwanda may be due to the fact that the Hutu regime could not afford the infrastructures and the technology that Germany and its satellite states had at their disposal.

As revealed by the work, *Leave None to Tell the Story: Genocide in Rwanda*,⁵² the speed of the isolation stage before the massacre served a different goal in Rwanda. Arguably, the regime chose to isolate the Tutsi at the last possible moment 'to mislead the foreigners in order to avoid any type of criticism and even possibly receive support, lure the Tutsi in order to kill them more easily and manipulate the Hutu so that they would energetically participate in the carefully planned genocide'.⁵³ Indeed, several Hutu officials even encouraged the Tutsi to gather in public places, like churches, which had always, in the past, served as shelters. This time, churches served to isolate Tutsis systematically, with the goal of accelerating their extermination. Systematic isolation also took the form of trapping people with barriers, roadblocks, with nightly razzias or by surrounding them at the swamps, infested in April due to the season's tropical rains.



#10



"A "high number," that is, a new arrival, only recently but sufficiently besotted by hunger and by the extreme tension of life in the camp, is noticed by a "low number" for the number of his gold teeth; the "low" offers the "high" three or four rations of bread to be paid in return for extraction." *If This is a Man*, Primo Levi



The one who does not remember history
is bound to live through it again.

George Santayana
Auschwitz





In Flanders Fields

In Flanders fields the poppies blow
Between the crosses, row on row,
That mark our place; and in the sky
The larks, still bravely singing, fly
Scarce heard amid the guns below.

We are the Dead. Short days ago
We lived, felt dawn, saw sunset glow,
Loved, and were loved, and now we lie
In Flanders fields.

Take up our quarrel with the foe:
To you from failing hands we throw
The torch; be yours to hold it high.
If ye break faith with us who die
We shall not sleep, though poppies grow
In Flanders fields

Punch
Dec 8, 1915

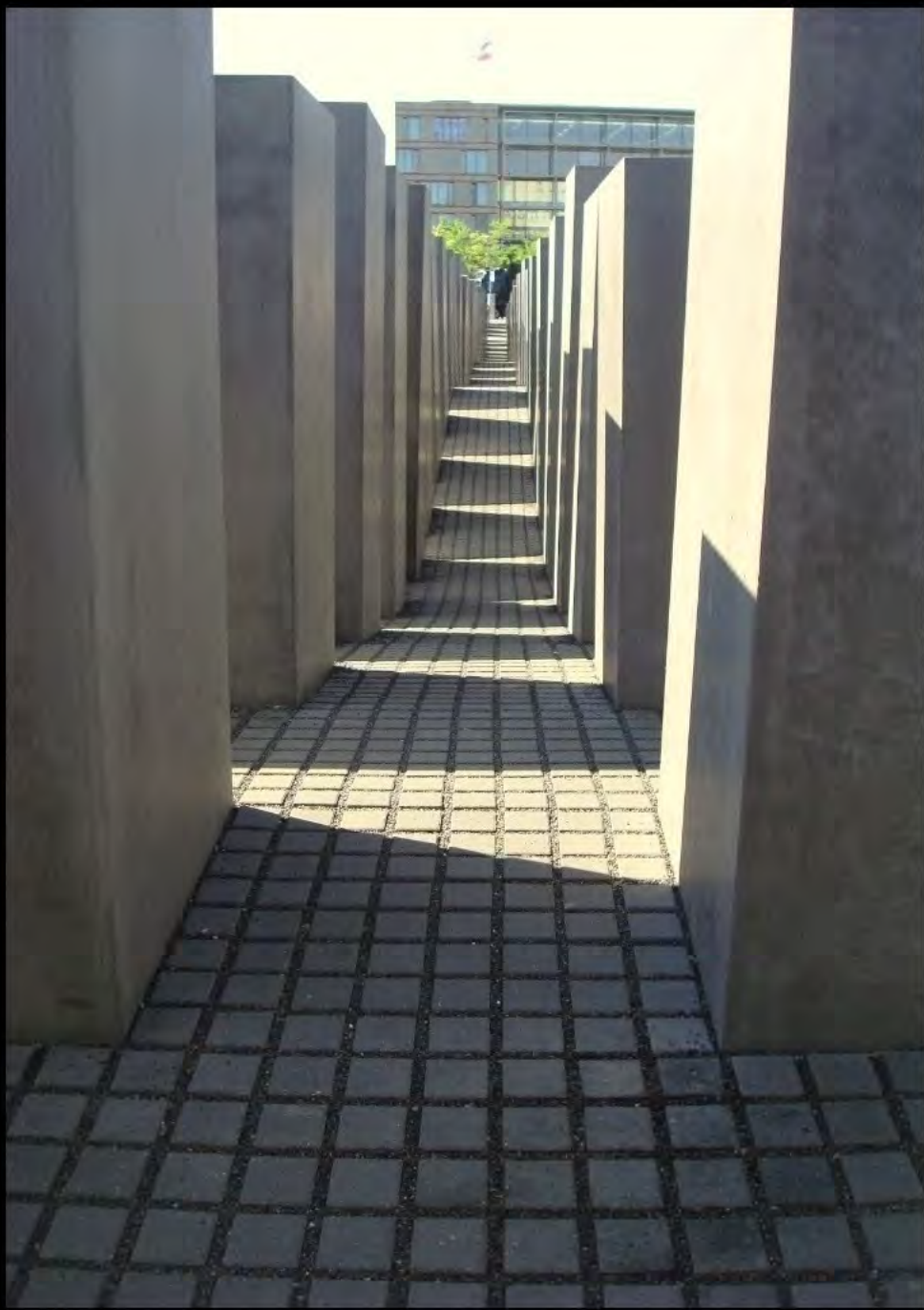
John McCrae











#16

Ethically certain of their duty to remember, but aesthetically skeptical of the assumptions underpinning traditional memorial forms, a new generation of contemporary artists and monument makers in Germany is probing the limits of both their artistic media and the very notion of a memorial. They are heirs to a double-edged postwar legacy: a deep distrust of monumental forms in light of their systematic exploitation by the Nazis and a profound desire to distinguish their generation from that of the killers through memory.⁵ At home in an era of earthworks, conceptual and self-destructive art, these young artists explore both the necessity of memory and their incapacity to recall events they never experienced directly. To their minds, neither literal nor figurative references suggesting anything more than their own abstract link to the Holocaust will suffice. Instead of seeking to capture the memory of events, therefore, they remember only their own relationship to events: the great gulf of time between themselves and the Holocaust.

James E. Young *The German Counter-Monument*

By negating its form, however, the counter-monument need not so negate memory. And by challenging its premises for being, neither does it challenge the call for memory itself. Rather, it negates only the illusion of permanence traditionally fostered in the monument. For in calling attention to its own fleeting presence, the counter-monument mocks the traditional monument's certainty of history: it scorns what Nietzsche has called "monumental history," his epithet for the petrified versions of history that bury the living.²³ In effect, it might even be said that the counter-monument negates the very basis for this epithet's central trope: after the counter-monument, the "monumental" need no longer be conceived merely as a figure for the stone dead. By resisting its own reason for being, the counter-monument paradoxically reinvigorates the very idea of the monument itself.

How Did Medicine
Go So Wrong?
Arthur L. Caplan
Is Moral Inquiry
into Nazi Medical Crimes Immoral?

Analysis of the ethical issues raised by "experimentation" or medical "treatments" carried out by German physicians and scientists during the time of the Third Reich must be approached with great caution. Talk of ethics seems, at the least, incongruous when the conduct being discussed involves the mass murder of innocent persons. Even to talk of ethics is to risk conferring legitimacy on the patently illegitimate. The myriad crimes carried out under medical supervision in Germany prior to and during World War II were so heartless, cruel, and inhumane that it is not at all evident why it is necessary to subject them to moral analysis. Is there any reason to conduct an ethical analysis of Nazi medical crimes? The conduct of German biomedicine during the Nazi era was *prima facie* abhorrent and indisputably immoral. There is no need for an argument to prove that what happened was evil.

Despite the obvious immorality of biomedicine's role in the Holocaust, there is, nevertheless, a need for moral inquiry; it is necessary to understand how those who committed horrific crimes on a massive scale were able to persuade themselves that what they were doing was ethically correct. As difficult as it is to accept, some physicians, public health officials, nurses, and government agencies killed, maimed, tortured, or did not protest these activities because they believed it was morally correct to perform them.



"Medspeak" for Murder

The Groningen Protocol — Euthanasia in Severely Ill Newborns

Eduard Verhagen, M.D., J.D., and Pieter J.J. Sauer, M.D., Ph.D.

Dr. Pou and the Hurricane —
Implications for Patient Care during Disasters

Susan Okie, M.D.

HUMAN RIGHTS

Doctors and Torture

Robert Jay Lifton, M.D.

1896 *Grundlinien einer Rassenhygiene* ("racial hygiene") published.

1920 *Permission for the Extermination of Lives Not Worth Living* published.

1933 *Law for the Prevention of Genetically Diseased Offspring* passed.

1939 Hitler issues *gnadentod*: Physicians able to pass judgment and conduct mercy killings of "incurably ill."

1941 Zyklon B (Hydrocyanic acid) experiments, Auschwitz.

1942 Battle scenario experiments on women, Ravensbruck.

1942 Hypothermia experiments, Dachau.

1944 Hallervorden collection of 697 dissected brains.

1945 About 15% of hospitalized mentally ill patients have survived the war.

Approximately fifty percent of physicians have joined the Nazi party in Germany.

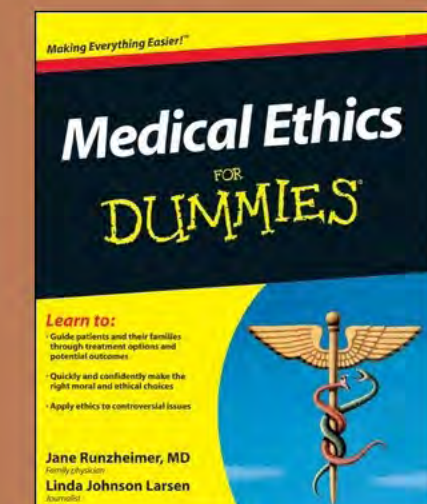
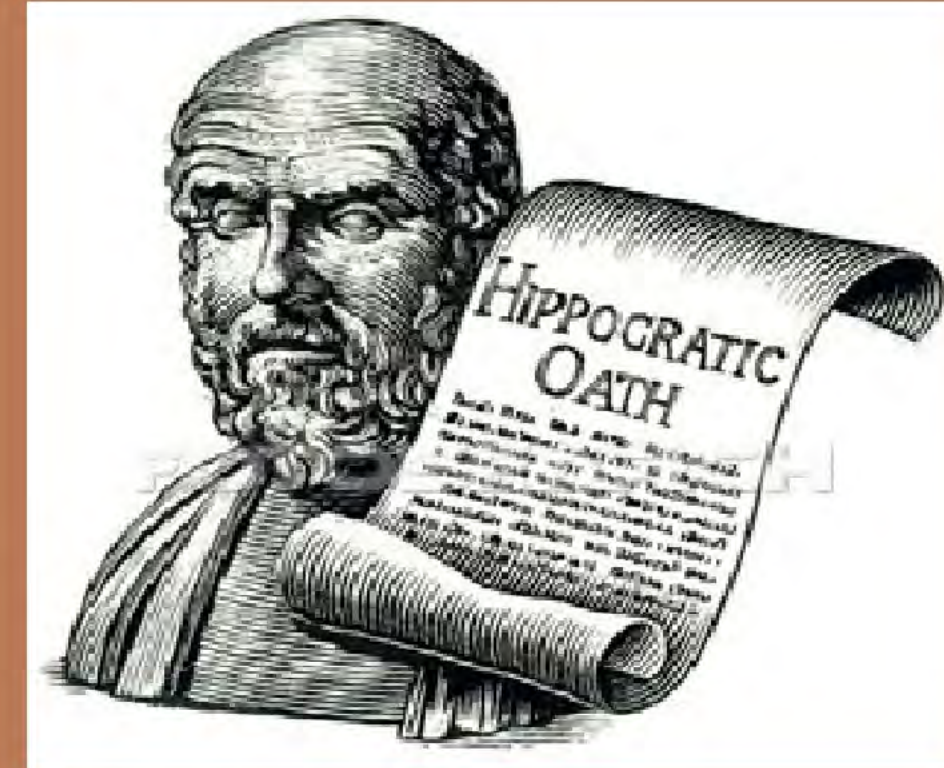
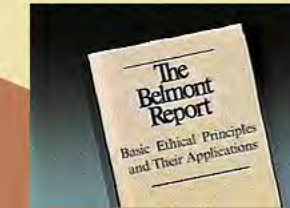
1990 German medical schools bury tissue sample collections.

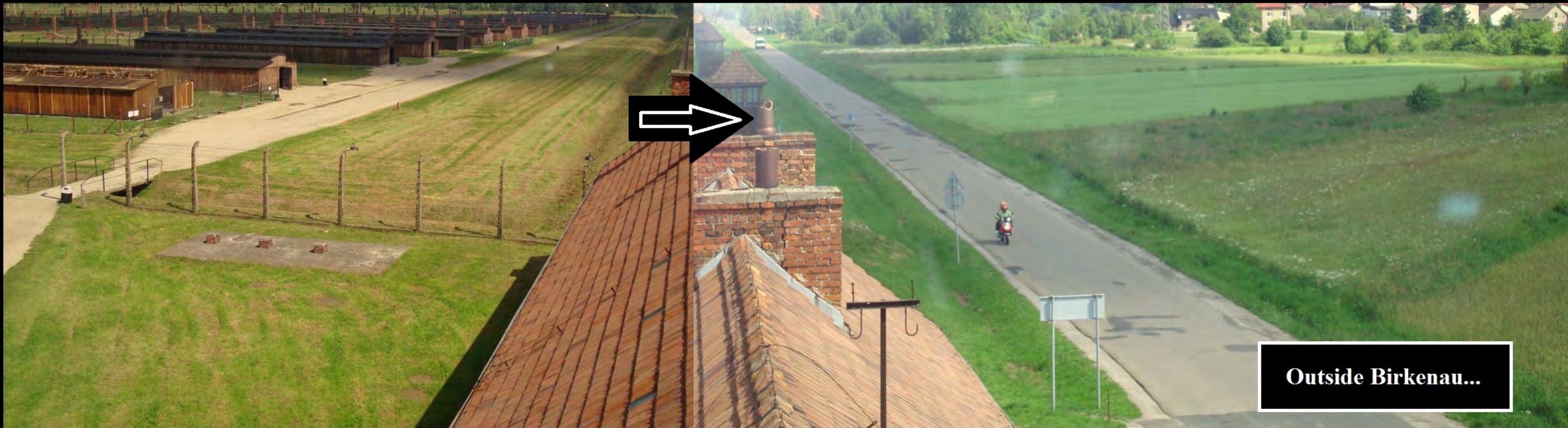


1943 University of Munich medical student group ("White Rose" resistance) arrested and executed.



Adab al-Tabib
(Conduct of a Physician)
by Ishaq bin Ali Rahawi





Outside Birkenau...

...Behind Wannasee



#18



Doctors Question Use Of Nazi's Medical Atlas

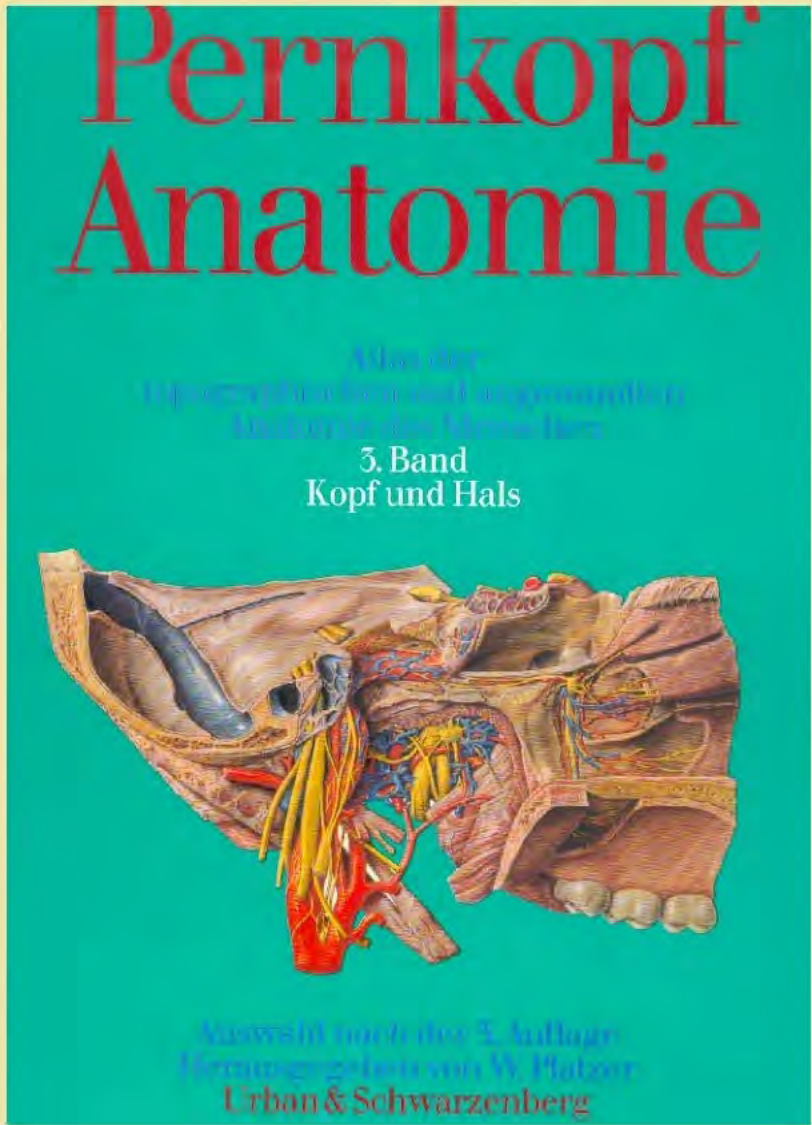
By NICHOLAS WADE

The New York Times

A CLASSIC anatomy atlas, famed for the beauty and fine detail of its paintings, has come under attack because of some none too metaphorical skeletons in its past. A letter appearing in tomorrow's issue of The Journal of the American Medical Association says that the author of the atlas was a leading Nazi who purged the University of Vienna medical faculty of Jews and that the cadavers portrayed in the paintings "may have been victims of political terror."

The book is known as the "Pernkopf Anatomy," and it is still in use among specialists. Although there have long been rumors of its dubious origins, the evidence now emerging seems not to be widely known to anatomists, despite their general admiration for the book.

An effort to publicize the background of the atlas is being led by Dr. Howard A. Israel, an oral surgeon at Columbia University, and Dr. William E. Seidelman, director of an AIDS unit at the University of Toronto, who wrote the letter to the journal. They want the University of Vienna to inquire into the identity of the cadavers portrayed in the atlas and for the publisher to include in the next edition a historical account of the atlas so readers can then decide whether it is ethical to make use of the material.



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Origins of Exhibited Cadavers Questioned

by NEDA ULABY

August 11, 2006



Courtesy of BODIES... The Exhibition
A skeletal muscle display from BODIES... The Exhibition, in a running pose

Part One of This Report

Cadaver Exhibits Are Part Science, Part Sideshow
Aug. 10, 2006

For two years now, exhibitions of human cadavers have been traveling the country, shown in science museums and other spaces. The shows, featuring corpses that have been preserved and solidified through a process called plastination, have been wildly successful. But they also have been dogged by criticism.

One delicate ethical concern stands out above all the others: whether the bodies were legitimately obtained. Dr. Gunther von Hagens, the inventor of plastination and the impresario behind the *Body Worlds* exhibitions, says that every whole body exhibited in North America comes from fully informed European and American donors, who gave permission, in writing, for their bodies to be displayed. The science museums that have hosted *Body Worlds* also make this assurance.

"What I certainly never use for public exhibitions are unclaimed bodies, prisoners, bodies from mental institutions and executed prisoners," von Hagens says.

Chinese medical schools supply von Hagens with unclaimed bodies, which he plastinates and sells to universities. Von Hagens used to take cadavers from the former Soviet Union, but he stopped after body-trafficking scandals in Russia and the Kyrgyz Republic.

Five years ago, customs officers intercepted 56 bodies and hundreds of brain samples sent from the Novosibirsk Medical Academy to von Hagens' lab in Heidelberg, Germany. The cadavers were traced to a Russian medical examiner who was convicted last year of illegally selling the bodies of homeless people, prisoners and indigent hospital patients.

Von Hagens was not charged with any wrongdoing, and says his cadavers are obtained only through proper legal and ethical channels.



LAPLAND



HINDU



CELT



BALI

power.

life.

motion. evolution.

justice.

hammer.

grounded.

geometry.



CEYLON



CHINA



JAPAN



ISLAMIC

Übung der Berliner Schutzpolizei für die 9. Halbespacht
am 17. März 1933 in Berlin-Spandau

Blaue Nacht mit lauen Wellen!

Blue night with mild waves!

Am Geländ' die Juchzer gellen,

In the open country, the cry of the delighted rings,

Wo noch Hollas Büsche blühn.

Where still Holle's bushes bloom.

Feuer leuchten durch die Tale,

Fire shines through the valleys,

Wie Balders Grabesmale,

Like Balder's monuments,

Und des Rades Funken glühn.

And from the wheel sparks glow.

Laßt die Sonnenrune funkeln,

Let the sun-rune spark,

Hakenkreuz erstrahl' im Dunkeln,

Swastika radiant in the dark,

Sei begrüßt, erhabner Phol!

Be welcome, exalted Phol!

Tausend Bauta-Steine reden,

A thousand Bauta-stones counsel,

Druiden-Weisheit, Edda, Veden,

Druidic wisdom, Edda, Vedas,

Von dir, ewigem 'Symbol'!

From you, eternal 'symbol'

Solstice (Sonnenwende)

1899 Heimdall, Germany



luck. hope. fire.

healing. light.

victory. eternity.



HOPI



CHRISTIAN



MALTA



TIBET



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AZTEC



JAIN



GREEK



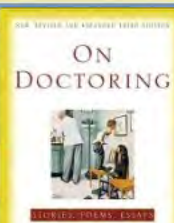
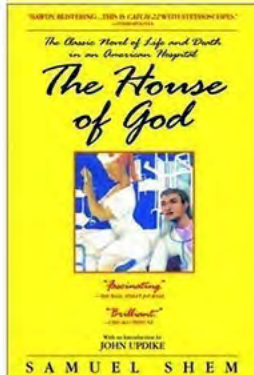
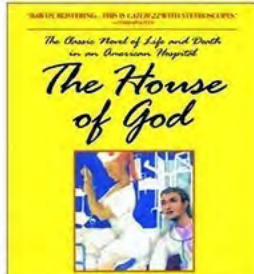
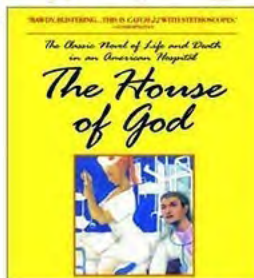
JEWISH

Laws of the House of God:

1. GOMERS DON'T DIE.
2. GOMERS GO TO GROUND.
3. AT A CARDIAC ARREST, THE FIRST PROCEDURE IS TO TAKE YOUR OWN PULSE.
4. THE PATIENT IS THE ONE WITH THE DISEASE.
5. PLACEMENT COMES FIRST.
6. THERE IS NO BODY CAVITY THAT CANNOT BE REACHED WITH A #14 NEEDLE AND A GOOD STRONG ARM.
7. AGE + BUN = LASIX DOSE.
(BUN = Blood Urea Nitrogen)
8. THEY CAN ALWAYS HURT YOU MORE.
9. THE ONLY GOOD ADMISSION IS A DEAD ADMISSION.
10. IF YOU DON'T TAKE A TEMPERATURE, YOU CAN'T FIND A FEVER.
11. SHOW ME A BMS WHO ONLY TRIPLES MY WORK AND I WILL KISS HIS FEET.
12. IF THE RADIOLOGY RESIDENT AND THE MEDICAL STUDENT BOTH SEE A LESION ON THE CHEST X-RAY, THERE CAN BE NO LESION THERE.
13. THE DELIVERY OF GOOD MEDICAL CARE IS TO DO AS MUCH NOTHING AS POSSIBLE.

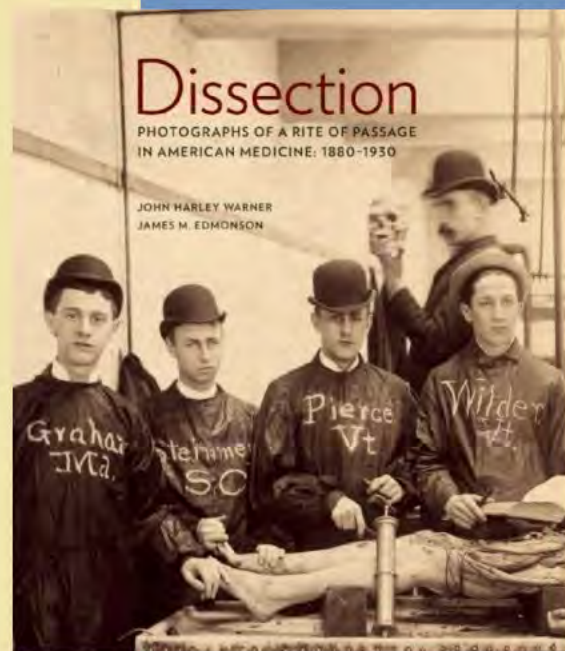
*GOMER = Get Out of My Emergency Room

The House of God, by Samuel Shem, 1978



From Grave Robbing to Gifting: Cadaver Supply in the United States

Aaron D. Tward, MA, and Hugh A. Patterson, PhD, University of California, San Francisco



IN THE 1951 FILM *PEOPLE WILL TALK*, DR NOAH PRAETORIUS, A PHYSICIAN played by Cary Grant, is followed everywhere by a large, silent man. The man is with him as he addresses an anatomy class, as he conducts the student orchestra, as he stands over a patient in the operating room. The man speaks only at rare moments, each crucial, coming to Noah's aid as the voice of wisdom, of conscience, or of the past. When Noah is finally challenged by a university tribunal to defend his relationship with the odd man he calls "my friend," the story comes out: the man is a convicted murderer, executed by hanging and sent 20 years earlier to Noah, a medical student who needed "a cadaver of my own." The "cadaver" awakened as soon as Noah stuck a gloved finger in his mouth, and has never since left his side.

BOOKS

Snapshots From the Days of Bare-Hands Anatomy

#21



Cushing/Whitney Medical Library, Yale University, from "Dissection"

PEERING IN *Dissection* at the Yale School of Medicine around 1910. Such photos were popular in the 1910s and '20s.

By ABIGAIL ZUGER, M.D.

Published: April 27, 2009

Dissecting Gross Anatomy

Teri A. Reynolds, PhD

MSJAMA
MEDICAL STUDENT JAMA

60000 RM

koftet dieser Erbkrankte
die Volksgemeinschaft
auf Lebenszeit

*Volksgenosse
das ist auch
Dein Geld*

Lesen Sie
**neues
Volk**

Die Monatshefte des Rassenpolitischen Amtes der NSDAP

Involuntary Euthanasia of Defective
Newborns: A Legal Analysis*

John A. Robertson†

The Baby Doe Rules

Marcia Angell, M.D.
N Engl J Med 1986; 314:642-644 | March 6, 1986

(109 Ind. 522)
WILLIAMS et al. v. SMITH. (No. 23700.)
(Supreme Court of Indiana. May 11, 1921.)
Constitutional law ~~§318~~—Statute authorizing
operation on prisoner without public hearing
denies due process.

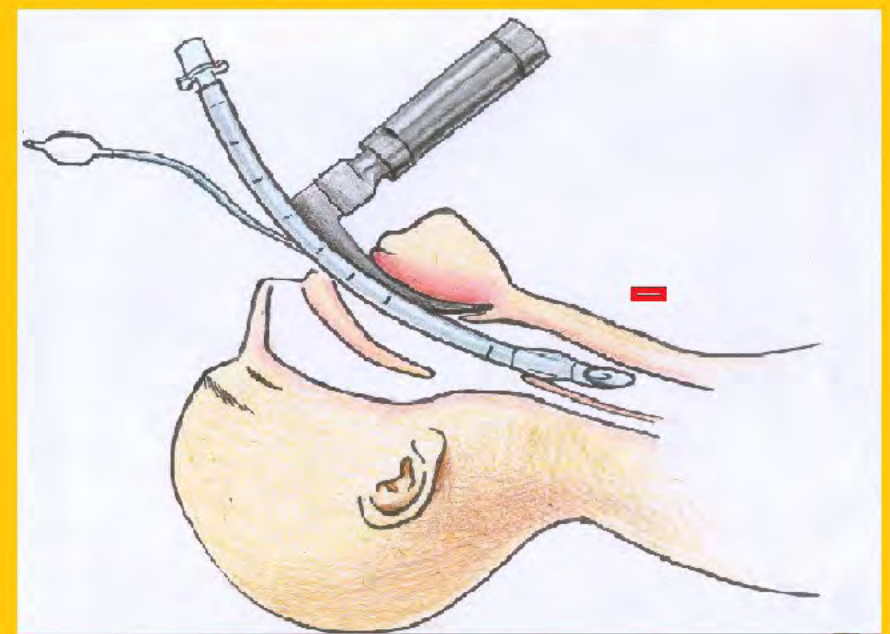
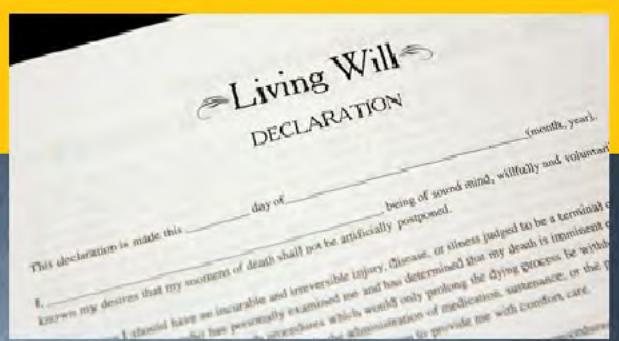
435 U.S. 349, 55 L.Ed.2d 331
Harold D. STUMP et al., Petitioners,
v.
**Linda Kay SPARKMAN and
Leo Sparkman.**
No. 76-1750.

IN RE QUINLAN, 70 N.J. 10 (1976)
355 A.2d 647
IN THE MATTER OF KAREN QUINLAN, AN ALLEGED INCOMPETENT.
Supreme Court of New Jersey.
Argued January 26, 1976 —
Decided March 31, 1976.

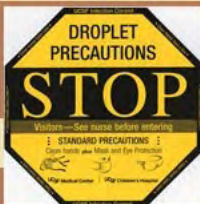
(274 U. S. 200)
BUCK v. BELL, Superintendent of State Col-
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Argued April 22, 1927. Decided May 2, 1927.
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Constitutional law ~~§212, 253~~—Insane persons
~~§47~~—State sterilization law held not uncon-
stitutional, as denying due process and equal
protection (Const. Amend. 14).

Futility ?

"60,000 Reichmark is
what this person
suffering from
hereditary defect costs
the people's community
during his lifetime.
Fellow German, this is
your money too."
Publicity Poster, 1938

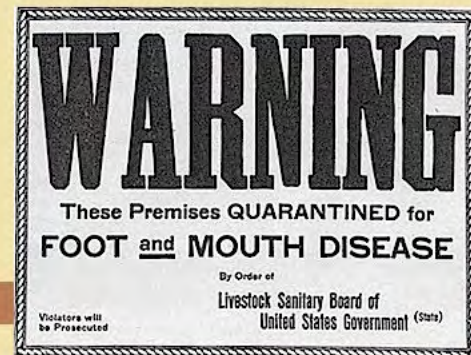


These healthy children were born of healthy, normal parents.
Weak, diseased parents produce weak, diseased children.



SCARLET FEVER

THESE PREMISES ARE UNDER TOWNSHIP QUARANTINE



23

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*All photography, unless otherwise stated, were taken by the author on the inaugural 2010 FASPE trip.

Excerpt from
LIVES REMEMBERED, LESSONS LEARNED

Benjamin Abelson
Cleveland Clinic Lerner College of Medicine, Class of 2014

Where were we?

Where were doctors when the T4 project began mutilating the professional role of medicine by killing mentally ill and disabled Germans? Where were we when the Nazi regime decided that since kids were being relieved of life by a merciful death, older children and adults could be euthanized as well? Where were we when our knowledge of human physiology was hijacked to perfecting the killing methods employed by Nazis. Where were we when racial hygiene became the science of the times and the Final Solution rampaged across Europe, leaving only the stink of death and the pain of lost histories?

We were there. Physicians were at the hospitals, the concentration camps, the killing centers, the community clinics, the conference tables, the board rooms, the selection lines, the labs, the crematorium, the dissection tables and the barracks.

On Sunday, June 27th, 2010, 15 medical students and 15 law students walked through the rubble of Birkenau, falling into each other's arms and passing around rolls of tissue to wipe our tearful eyes and runny noses. Although we were strangers only 7 days earlier, our loved ones were thousands of miles away, so we established trust in those around us: peers whom we had already come to respect for their thoughtfulness, insight, kindness and compassion. That afternoon we deliberately shifted from the heart to the intellect and began our workshops by discussing professional responsibility and the foundations of biomedical ethics. Given our tragic experience during the morning, our facilitator, Dr. Mark Mercurio, began the discussion with a provocative comment about who perpetrated the Holocaust. "We did it," he said, emphatically.

We had spent the morning witnessing the horrors of the Holocaust, and within the first ten minutes of our session, our facilitator had pinned the blame on a collective "we." A moment of disbelief and defensiveness quickly gave way to understanding that the Holocaust provides the perfect context to study professional ethics. By considering how *we* were responsible for the Holocaust, we began a process of growth and education that will help us uphold our professional responsibilities throughout our careers.

Since returning from Europe, I have attempted to recount the experience to many people—from my wife to a stranger in the waiting room at a doctor's office. Somewhere between the fifth and fiftieth repetition I established my spiel—the five minute-long discussion that answered the basic questions about where I went and what I did. Whatever the setting, I did my

best to convey the intellectual engagement, the raw emotion, the historical lessons, and the exhilarating fun that we experienced for ten days together.

It helped to have my computer close-by so that I could show a slideshow of my photographs while talking through my experiences. But the four hundred images did little to convey the meaning of the Fellowships at Auschwitz for the Study of Professional Ethics (FASPE). There is no doubt that showing the photo of friends cheering for the United States soccer team immediately after an image of the gate at Auschwitz helped suggest the intensity of my experience. Nevertheless, showing the countless images was like carrying on a phone conversation tainted by static, when only every other word can be heard, leaving a mess of gibberish and incomprehensible ideas.

I consider myself incredibly lucky to have had the privilege of participating in FASPE, and that sense of fulfillment is the one thing that I have easily managed to express since returning. In the following pages, I try my best to communicate—through words and images—what FASPE was for me. I will also attempt to convey why it was so important for us to begin the process of learning through the Holocaust by understanding how physicians enabled so many aspects of the horror. Why did our professor begin the lesson by making the claim that “we did it”? Why was it necessary to use such a terribly extreme example—the Holocaust—to inform our own perspectives on biomedical ethics? How can this experience inform my own future career and practice, and how can I apply my lessons to my medical education?

We Feel and We Remember

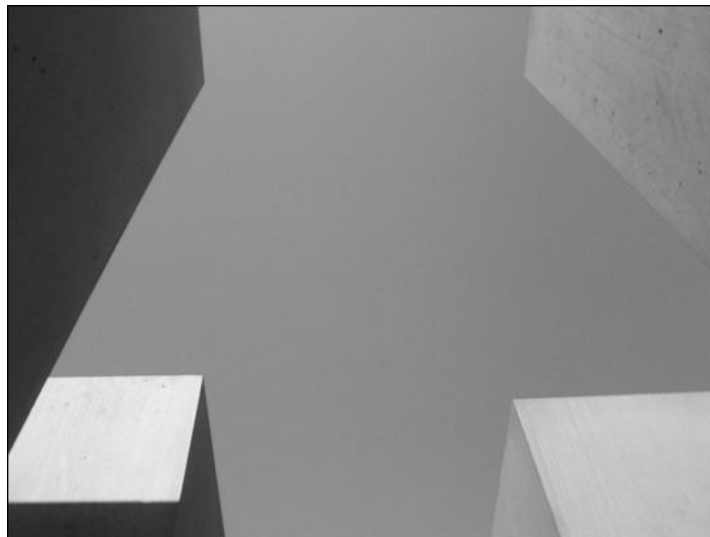


Image 1: June 24, 2010 (9:34 am) – Berlin, Germany



Image 4: June 24, 2010 (9:41 am) – Berlin, Germany

Germany had beaten Ghana to move into the elimination rounds of the 2010 FIFA World Cup! Thousands of soccer fans left their homes, restaurants, and bars and took to the streets, and the air filled with red smoke, fireworks, car horns, air horns, yells, chants, whistles, and songs—the sights and sounds of European soccer victory. A friend and I found ourselves walking through downtown Berlin, absorbing the energy of experiencing a foreign culture on such a thrilling evening. We happened to find ourselves on the corner of Eberstraße and Hanna-Arendt Straße, the site of the Memorial the Murdered Jews of Europe, which we would formally visit the next morning. The thousands of coffin-sized cement blocks stood in rows across an entire city block, some tall, some short, some angled slightly, some perfectly straight. We entered the maze of cement and immediately felt trapped by emotion and chaos. We sought a quiet and calm environment for memorializing the dead while instead we were confronted with drunken soccer chants. We walked further into the organized rows and columns as the blocks became taller and towered over our heads, shielding us somewhat from the tumultuous scene on the streets. We sat on the ground against one of the tallest cement blocks, in search of peace, until a group of young revelers leapt from the top of one block above us to the next, laughing and trying to avoid losing their footing.

I recall a stage of my childhood when I became interested in reading books about the Holocaust. I read *Number the Stars*, by Louis Lowry, and *Daniel's Story*, by Carol Matas, and I was fascinated by the courage demonstrated by these young children during World War II. A few years later I would read *The Diary of Anne Frank*, followed by Elie Wiesel's *Night*. As I grew emotionally and intellectually I was better able to comprehend the scope and horror of the Holocaust, a process aided by trips to Yad Vashem in Jerusalem and the United States Holocaust Museum in Washington, D.C. I had the privilege of meeting Elie Wiesel during a trip to D.C. with my synagogue, and I felt that I was slowly getting closer to truly bearing witness to the Holocaust. The first patient I examined and interviewed on my own as a medical student was a survivor, his numbers from Auschwitz tattooed on his left forearm, barely legible between

his aged and wrinkled skin. He carried me closer to Auschwitz by describing the nightmares that still plagued his sleep, and the pounding headaches that always followed.

I found myself closer still to being able to memorialize the victims of the Holocaust by being *in* Europe at the Memorial to the Murdered Jews of Europe. The morning after my experience at the memorial, we congregated on a street corner near the cement pillars to hear an introduction to the museum. We then dispersed into the maze of concrete; the large group of 30 students absorbed by the thousands of possible paths through the memorial.

The symbolism of the 2,711 concrete pillars is debated—in fact, some claim that the designer sought to create a memorial devoid of symbolism, leaving the meaning up for interpretation by the visitors. There is no question that the concrete blocks are the length and width of a coffin, despite the varying heights. When the same rectangular shape is continued below the memorial in a museum under ground, individual blocks represent individual families, or individual people whose names and hand-written letters are projected in the shadow of the “coffin.” The vastness of the thousands of concrete blocks that fill an entire city block conveys the scope of the Holocaust atrocities. However, more important than any symbolism that one can draw from the memorial is the incredible variety of emotional responses that the site can elicit from visitors as they enter the stone garden.

The pillars are a child’s “hide-and-go-seek” heaven, with endless corners to hide behind and open rows to run through searching for their hidden friends. As easy as it is for children to lose themselves amidst the pillars, it is as easy for adults to *feel* lost, having no idea where to turn right and where to turn left. Despite the heat of the day, the concrete feels cold to the touch—sometimes soothing, and sometimes heartless. The sea of pillars seems to swallow up people as they enter the rows, and as the pillars grow to six, then seven, then eight feet tall, they make you feel powerless. Then again, they can make you feel like the king of a small world by lifting yourself on top of a pillar and bouncing effortlessly from one to another, imagining mini-streets and mini-people in the streets below. Or the memorial is empty: empty of color, empty of texture, and empty of life.

Sitting with my back against the cool concrete, my left hand sifting through the coarse gravel, I considered why 30 medical and law students should travel two thousand miles to Germany and Poland to discuss professional ethics, instead of meeting for two weeks at the Museum of Jewish Heritage in New York City. At that moment, I appreciated the immense power of memorializing the victims of the Holocaust *in* the cities of Europe. Until that moment I had created a web of connections between past experiences, individuals whom I had met, and stories that I had read—a web that came to a focal point in eastern Europe. My patient’s family

was represented in the sea of cement pillars; Elie Wiesel's words in *Night* described a scene at a camp I would visit a few days later; fourteen year old Daniel's story described a journey across train tracks that my own feet would touch.

Our intellectual journey into the psychology and culture of Nazi doctors was guided by learning the history. Memorializing the victims facilitated the emotional experience of *feeling* the scope of the Holocaust, so that we would never forget the lessons learned in Europe.

Contrasts: In Search of Hope and Happiness



Image 7: June 26, 2010 (11:12 am) – Auschwitz 1, Poland



Image 8: June 26, 2010 (4:15pm) – Oświęcim, Poland

We spent the day bearing witness to the horrors that took place at Auschwitz I. Although the next day we would have to confront a different scope of terror at Birkenau, we

were strongly impacted by what we had seen. We saw the gate that told the prisoners, "ARBEIT MACHT FREI" (work makes you free). We saw the building where the prisoner orchestra played to provide entertainment for the guards or a beat for the marching prisoners. We saw the straw mattresses where the prisoners slept. We saw the prison cells where 30 prisoners were slowly suffocated to death. We saw the standing chamber where four prisoners were forced to stand in a tiny cell until they collapsed. We saw the chamber where Zyklon B gas was tried for the first time. We saw the wall against which prisoners were lined-up and shot. We saw the rooms where sterilization experiments were carried out. We saw tourists from around the world. We saw the crematorium. We saw the gallows where the commandant was executed after the war. We saw the sunshine. We saw perfectly trimmed green grass. We saw each others' tear-swelled eyes. We took the bus back to the town and were dropped off in front of a church. We saw a bride. We saw a groom. We saw a family on the happiest day of their lives. We saw love and felt lucky.

When David Goldman spoke to the group for the first time in New York, he told us that the trip was not meant to be a somber two weeks. Although we would be challenged emotionally almost every day, he emphasized the importance of enjoying each other, enjoying the cities we would visit, and feeling free to smile and laugh. The transitions between tears and laughter were terribly difficult, but they were crucial to our experience as a group. Stepping off the bus to the sight of a wedding party taking photos was one of the most extreme and shocking transitions I experienced. At the same time, it was one of the most inspirational moments of the trip.

We had witnessed some of the most despicable behavior ever displayed by mankind, and we were then confronted with the happiness of marriage. The bride stood in her gleaming white dress as the essence of purity, the antithesis to Nazi horror. A young boy in a tiny suit—perhaps the ring bearer—ran around the wedding party giggling. He would eventually learn that he lived in a town known around the world not as Oswiecim but Auschwitz, and that the millions of visitors who passed through his town came not for a walk along the river but for the historical landmarks that stood on the river's shores.

The academic discussions that took place on the trip occurred somewhere on the margin between the dichotomous emotions that we experienced. While discussing the ethical dilemmas confronted by the physicians in New Orleans during Hurricane Katrina, we were guided by the terror inflicted by Nazi physicians, and motivated by the stories of unlikely survival and embracing life in the concentration camps. While navigating the difficult role of physicians in neonatal care, we rejected any justification of killing infants by considering the Nazi euthanasia programs. On the other hand, we reflected on the reality that physicians make decisions every day regarding whether a life is worth living: i.e. the Groningen Protocol empowers physicians in the Netherlands to carry out child euthanasia in cases of "hopeless and unbearable suffering,"

without the threat of legal persecution.¹ The terror that we witnessed through memorials and museums shaped our discussion about end of life care, while the story of weddings taking place within the concentration camp walls encouraged us to re-evaluate our own concepts of quality of life. Emotional extremes that seemed so difficult to reconcile became the framework for our intellectual conversation, motivating us to deeply evaluate the bioethical questions of modern medicine.

The final three days in Krakow were spent engaging in intense dialogue about the history we had learned, the complexity of bioethics confronted during the Holocaust, and the shocking similarity of those issues to current bioethical issues. Our days in Krakow were spent providing perspective—a perspective I have hoped to convey throughout this reflection. However, there is one discussion that provided the most powerful lesson of my FASPE experience.

The conversation began like a typical bioethics discussion, with a simple hypothetical situation that reveals multiple, complex layers of ethical issues. We imagined being stranded on an island after a plane crash with one other person, the other survivor having only barely survived and currently burning to death slowly with mortal wounds. The gun that I carried was still strapped to my waist, and my dying friend pleaded for me to turn the gun on him and end his misery.

Considering the history that we had witnessed the days before this discussion, it was not terribly difficult to imagine such a horrific hypothetical situation. We discussed a variety of similarly hypothetical questions: Does my friend have the right to demand that I kill him? Does he have the right to determine how he dies? Do I have the right to comply with his request? Do I have the responsibility to comply with the request? Would I be justified to hand him the gun and let him pull the trigger himself? Can I be sure he will die if I do not kill him?

The conversation slowly morphed into the situation of a physician sitting at the bedside of a terminally ill patient, a lethal bolus of morphine resting a few steps away, the patient and his family demanding that I provide him the privilege of a painless death. We reflected on the same set of questions posed by the discussion of the plane crash: Does the patient have the right to choose his path to death? Do I, as his physician, have the right to provide him with the means to achieve that path? Do I have an obligation to provide the morphine? If I were in a hospital without electricity, and flood waters from a massive hurricane crept up the hospital floors like

1. Lindemann, Hilde, and Marian Verkerk, "Ending the Life of a Newborn: The Groningen Protocol," *Hastings Center Report* 38, no. 1 (2008): 42-51.

flames devouring my burning plane crash survivor, could the morphine become my gun? Does my obligation to heal translate into an obligation to relieve suffering—using any means possible?

David Goldman, our leader, guide, and teacher, was, during that discussion, the lone “outsider” in the room. He was a lawyer among a group of fifteen medical students and one physician. He waited until there was a slight break in the conversation, and he inquisitively asked us all, “When during medical school did you get the right to end someone’s life?” He spoke slowly and thoughtfully, allowing us to consider each word as it left his mouth so that we could deeply absorb the meaning of his question. I felt defensive, then overcome, almost ready to voice my rebuttal until I swallowed my response in defeat. We had spent an hour discussing the situations in which a physician may have the right to mercifully end someone’s life without beginning the discussion with a more basic question: What gives us, as medical students and future physicians, the right to even contemplate ending a life?

Two answers came to my mind immediately. First of all, I considered that physicians have not sought out the role as arbiters of life and death—other than, perhaps, the Nazi physicians who literally decided who would die and who would live. Cultures from across the span of history and the globe have granted exceptional power to those deemed “healers”, simultaneously granting power to harm while granting the power to heal. The responsibility to respect such power has come with the honor of being given doctor status, and part of that responsibility is related to the reality that physicians often work on the margin of life and death. Although this by no means translates into the ultimate power to end a life, it helps explain why physicians find themselves discussing this issue. Secondly, I considered that although we have the right to prolong life—in fact, we often have the responsibility to prolong life—we do not have the right or the capacity to prolong a life by all means necessary. Of course, both of these issues have sparked endless discussion themselves.

More important than possible answers to David’s question is the shocking irony of the situation we found ourselves in. We were 15 well-educated, and highly motivated individuals who had spent the afternoon discussing the situations in which it may be ethically justifiable to end a life and how we might be able to do so. Images of the House of the Wannsee Conference flashed through my mind, along with scenes of Nazi physicians discussing the infant euthanasia program and Dr. Josef Mengele leading the selections at Auschwitz. The trip had succeeded in making the Holocaust victims real, turning 1939’s sociocultural setting into something we could see and feel, and converting the perpetrators into the prototypical “bad examples” from whom we could learn how to carry out ethical professional lives. At the same time, those “bad

examples” had been transformed from lunatics into our own professional colleagues—making their lesson all the more powerful.

THE HOLOCAUST HISTORY AND BIOETHICS FOR PHYSICIANS

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The Holocaust is remarkable for the active role of medicine and science in genocide; this distinguishes it from any other instance of mass extermination in history. Physicians and scientific researchers made crucial advances in fostering Nazi ideology and in implementing the Final Solution. Physician perpetrators during Nazi Germany believed their efforts to sterilize and murder persons were ethical and healing acts. Bioethicist Arthur Caplan and others disproved the common myth that such justifications were merely offered by the few incompetent, mad, or coerced individuals of the profession¹. Rather, the perpetrators were knowledgeable, reputable and competent persons, trained in world-renowned medical institutions, who willingly committed barbarous acts that directly countered the principle of *primum non nocere* (first, do no harm)².

There are a host of explanations that, while not denying the evil committed, explain the psychological strategies and irrational justifications that physicians invoked in order to support their acts^{2,3}. While these factors certainly played a functional role, one can deduce that fundamentally there is at least one ethical principle that Nazi physicians collectively violated: *a physician's primary responsibility must be to treat the individual patient rather than society; and every human being is an individual, regardless of the groups to which he or she belongs.*

The ideology behind the Holocaust did not suddenly appear with the onset of Chancellor Adolf Hitler's reign in 1933, but rather was the culmination of over fifty years of scientific opposition to the equality of man⁴. Charles Darwin's 1859 work *The Origin of Species* postulates that populations evolve over the generations by means of natural selection, in which "fit" organisms with heritable traits better suited for the environment survive to have offspring and thus pass on their traits, while "unfit" organisms possessing inferior traits are less likely to pass them on⁵. The concept of Social Darwinism stemmed from Darwin's work. This philosophy holds that sociocultural advance is the product of intergroup conflict and competition and that those members of the socially elite classes therefore possess biological superiority in the struggle for existence⁶. Social Darwinists argue against policies that aid persons faring poorly in this struggle, as such actions would hinder the selection of the fittest members of society and thus the progress of society as a whole.

In 1881, Charles Darwin's cousin, English polymath Sir Francis Galton, proposed the term eugenics (*Gk.* eu- good; *Gk.* gen- genesis), later described by leading American eugenicist

Charles Davenport as “the science of the improvement of the human race by better breeding.” In early 20th century Europe and the United States, eugenics researchers attempted to investigate the transmission of undesirable social traits, and classify people on a scale of human worth. By the mid-1930s, more than half of U.S. states had passed laws for the compulsory sterilization of inmates of mental institutions, persons convicted of more than one sex crime, those deemed to be feeble-minded by IQ tests, “moral degenerates,” and epileptics. However, eugenics in the U.S. eventually lost scientific acceptance and public support as new research findings rejected eugenic research results and events in Nazi Germany tarnished the movement’s reputation⁴.

In Germany, eugenics developed differently than in America. While in the U.S. it was psychologists who were heavily involved in the eugenics movement, in Germany it was academic psychiatrists. These psychiatrists, who staffed hospitals and university clinics, transformed the term “degeneracy” into a diagnostic concept, applying it to conditions such as alcoholism, homosexuality, and hysteria⁴. Early 20th century German eugenicists focused on positive eugenics, promoting the reproduction of fit individuals, as they did not think they could garner strong public support for negative policies to decrease the number of unfit persons⁷.

World War I (1914-1918) was a turning point, leaving Germany defeated, humiliated, in debt, and with two million dead on the battlefield⁷. German society placed substantial blame on the Jews for Germany’s defeat in WWI and for its subsequent economic hardships⁸. During the Weimar Republic (1919-1933), eugenic reformers pointed with urgency to the artificial sustenance of the weak through medical, charitable, and welfare interventions, which they considered wasteful of Germany’s resources and harmful to the fitness of its society⁷. Losing the war caused radicalization and increased support of extreme nationalism⁹. This nationalistic drive to restore Germany to its former strength through making it a more fit nation increased support for eugenic action among government officials, biomedical academics, and others⁷.

By 1920, surgical sterilization procedures for both men and women were available in Germany, and for most citizens sterilization was a much more agreeable option than euthanasia. Still, political and religious opposition prevented any action from being taken to force sterilizations. The Great Depression of 1929 led to a greater push for sterilization of the costly and degenerate unfit population. Racial hygienists and government officials were desperate for alternatives to spending so much money on asylums and prisons, and they began to formulate ways to determine who should receive healthcare and assistance by distinguishing between the chronically useless and those capable of productivity⁷. Determining whether an individual deserves state aid based on his worth to society puts the society’s needs above the individual’s, and thus has the potential to put any citizen in jeopardy of being denied the aid or care he needs.

In 1920, psychiatrist Alfred Hoche and legal scholar Karl Binding published Permission for the Extermination of Lives Not Worth Living, which was widely discussed in professional circles. The basic tenets of the book held that the right to life must be earned and justified, not assumed^{1,7}. It concerned the lives of individuals “unworthy of life,” a phrase describing both persons whose lives were no longer worth living due to pain and incapacity and individuals who were considered so inferior that their lives could be labeled unworthy. This argument and its subsequent proponents confused the eugenics discourse by basing support for the destruction of the “unworthy life” of healthy “degenerate” individuals on the suicide rights of terminal cancer patients facing certain and painful death. Hoche also posited that killing the mentally ill would expand research opportunities, especially in the field of brain research.

The nascent Nazi party absorbed eugenics ideas into its ideology and platform during the 1920s. In 1921, Munich publisher Julius Lehmann published the Outline of Human Genetics and Racial Hygiene, which later became the classic text of the science of race. In 1923, Lehmann gave a copy to Adolf Hitler who read it while he was in prison, and soon after Hitler used its ideas in *Mein Kampf*. Later, Nazi race law propaganda quoted the work as their scientific basis⁴.

When the Nazis took power in 1933, the German eugenics community embraced the Nazi's anti-Semitic views and expelled all Jewish members from Germany's central eugenics society⁴. From then on, they referred to eugenics as “racial hygiene.” Before the Nazi party took control in 1933, racial hygiene theories were sometimes but not characteristically anti-Semitic; after 1933, many anti-Semitic academicians removed Jews from academia and incorporated anti-Semitism into racial hygiene teachings. These world-renowned scientific experts believed that through cooperation with the Nazis, they would be in position to make decisions regarding race policy. They validated Nazi race theory and worked to implement related policies such as the Nuremberg Laws, which included the prohibition of marriage between Jews and non-Jews⁷.

Nazi leaders considered their political philosophy to be “applied biology” and adopted many public health policies in addition to those guided by Social Darwinism. They medicalized the goals of their movement and referred to Hitler as the “great doctor of the German people.” Physicians joined National Socialism en masse¹⁰. There was interdependence between the medical community and the Nazi movement. During Nazi reign, half of all German doctors voluntarily joined the Nazi party. Over 7% of physicians became members of the SS, compared with less than 0.5% of the general population⁴. Physicians also came to comprise an increased percentage of university presidents and saw a rise in their salaries under Nazi power.

In 1933, the German National Socialist government passed the Law for the Prevention of Genetically Diseased Offspring, which mandated forced sterilization of those in the general

population with any of nine categories of disease, all assumed to be hereditary in nature: feeble-mindedness, schizophrenia, bipolar disorder, epilepsy, Huntington's chorea, blindness, deafness, malformation, or severe alcoholism. These were umbrella categories for other and lesser-known mental or emotional problems⁷. All doctors were required to undergo training in genetic pathology at racial institutes and to report all genetic defectives under penalty of fine for noncompliance. From 1935-1936, 388,400 denunciations of patients under these disease categories were registered with the hereditary courts set up by the Nazis. Approximately 75% of the denunciations were lodged by physicians, the majority of whom were private doctors¹. The hereditary health courts and appellate courts set up to decide the cases were three-member bodies comprised of two physicians and one judge each. Thus the selection of sterilization victims was a medical procedure disguised as a legal proceeding⁴. With these acts, physicians entered their new role as guardian of the racial hygiene of the German future, placing their treatment of the *Reich* above their treatment of the individual by breeching patient confidentiality, violating *primum non nocere*, and perverting the medical ethics of autonomy, beneficence, non-maleficence, and justice. Now physicians chose to improve society at the expense of the individual.

World War I (1914-1918) and World War II (1939-1945) together created the environment necessary for the Nazis to be able to carry out their racial hygiene and, in particular, euthanasia plans⁷. The war created the pretext that Hitler and the perpetrating physicians needed in order to give subordinates a greater sense of duty to obey orders that would otherwise have been morally offensive. Hitler understood this; and as early as 1935, Hitler told the Reich physician leader that once the next war began he would implement a "euthanasia" program to kill degenerates. A group's national, social, and political ethics change when its members fear for the survival of their country. Placing German citizens and, in particular, physicians under the rule of a national socialist regime with the supposed duty of protecting the German race created a dangerous environment that later enabled these people to commit atrocious ethical violations.

Physicians continued to accept the role of treating society rather than the individual. In the summer of 1939, the Reich Ministry of Interior circulated a decree entitled "Requirement to Report Deformed etc. Newborn [sic]," which ordered midwives and physicians to report all infants and children up to age 3 born with certain medical conditions⁴. Physicians could also report older children. This was the Nazis' first "euthanasia" program, in which they planned and executed the murder of nearly all "degenerate" handicapped newborns. The disabilities that had to be reported were considered incurable and hereditary by medical knowledge at that time.

This was different than the sterilization laws in that here most reporting physicians did not know the true purpose for which their reports would be used, as the ministry intentionally disguised its plans by impressing upon the physicians that the information would be used as part of a scientific investigation to aid children with serious medical conditions. The ministry informed public health offices that “therapeutic interventions” would be available for these children at no less than twenty-two killing wards. Parents were then pressured to institutionalize their child at one of these wards where physicians murdered handicapped children by means of starvation, injections of morphine, or drugs that precipitated fatal medical complications. Over 5,000 children up to 16 years of age were killed in this first euthanasia program⁴.

Although most German physicians chose to join the National Socialist party, not all of the physician perpetrators were Nazis; in fact, many were civilians and non-party members from Germany or elsewhere. The only physicians who were forced to participate in problematic or atrocious activities were those who were themselves prisoners in the concentration camps to follow³. All other physicians were permitted to refuse involvement without penalty, but very few did; rather, the physicians chose to participate in mass medical murder. This means that with societal and governmental encouragement, they were able to justify their actions, as they were not being forced. Therefore, in the event society or government should again deteriorate, physicians as a group must have their own objective ethical standards, including the directive to care for the individual with priority over society and not the other way around.

In October 1939 Hitler gave written authorization for adult euthanasia; the criteria were virtually the same as for sterilization. He predated the order to September 1 (the start of WW II) to emphasize its role in the struggle of Germany to survive as well as its attempt for domestic purification. Physicians complied with the order and now killed handicapped adults. But as early as March of 1938 the killing of patients through hunger and untreated illness had already become established policy at the mental hospitals at Herborn ^{1,4}. This demonstrates support for euthanasia of mental patients in National Socialist Germany even before the legislation mandated it.

Killing centers had to be constructed to carry out the adult euthanasia. Forensic chemists suggested carbon monoxide poisoning as an efficient mode of mass killing, and six gassing facilities were established. From 1940-1941, adult inpatients were killed after being selected from their private, state, and church-run institutions and sent by train to the killing facilities⁷. Medical officials who may have already been eugenic enthusiasts became even more excited by

their power heading these centers. They used their prestige and influence upon their former students who also became killers and converted almost en masse to Nazism.

The killings took place in six state hospitals and nursing homes with specially equipped gas chambers. Due to growing public knowledge and dislike for the program, Hitler officially ended these gassings in 1941. Instead, under the “wild” euthanasia program, many hospitalized patients throughout Austria and Germany died by means of starvation and lethal medications. Heinrich Himmler, a leading party member, ordered that concentration camp prisoners who could not work be taken to and killed at the six gassing centers^{4,7}. The physicians used their medical skills and training in order to kill efficiently and to make efficient use of their victims.

But according to their Nuremberg testimony, perpetrating physicians did not consider themselves responsible for the murders of their victims, instead arguing that what they did was legal procedure and thus ethical. They maintained that they were doing euthanasia, mercy killings, for the handicapped adults and children. The National Socialist government highlighted the therapeutic value of their programs, claiming that destroying the unworthy was “purely a healing treatment.” Here we glimpse a common pattern of people doing what is good for themselves while claiming it is for others, in this case for the victims themselves. Physicians need to be aware that legal and ethical are not one and the same and that an individual is always responsible for his own actions; thus he cannot trust the government to make ethical decisions on his behalf.

In January of 1940, physicians at Brandenburg Hospital began conducting experiments to find the optimal gas for mass killing. And in September of 1941, they successfully tested the lethal gas Zyklon B (hydrocyanic acid) on Russian prisoners at the Auschwitz concentration camp. This was the substance later used at extermination and concentration camps to kill millions of Jews, Gypsies, political prisoners, homosexuals, and others¹.

The connections between the euthanasia program and the Final Solution, i.e., the systematic genocide of European Jews, are clearly evident. The National Socialist Government began killing all hospitalized Jews in Germany and Austria in the early summer of 1940. This means that the Nazis decided to kill Jewish patients as a group, regardless of whether or not they met the more narrow criteria for the euthanasia program, before they began the systemic genocide of Jews in Nazi occupied Europe in 1941, and before Hitler, Eichmann, and others outlined the “Final Solution” at the infamous Wannsee conference of 1942. Furthermore, the euthanasia programs demonstrated the feasibility of killing large numbers of people to the Nazi regime, because ordinary women and men willingly acted as executioners. Also, the Nazis had learned their limitations and in order to avoid domestic criticisms transferred the mass killings

from Germany to sites in the East, primarily in Poland. The Nazis had also developed their killing techniques through the euthanasia program, and had tested it again and again. Hence, more than ninety of the euthanasia center perpetrators, many of whom were physicians, were eventually transferred from the six killing centers to camps in the East to carry out the Nazi plans for extermination of innocent peoples at the killing centers of Belzec, Sobibor, and Treblinka^{4,7}.

The most well-known aspect of physician involvement in the Holocaust is the experiments conducted by physicians on unwilling concentration camp prisoners in the name of scientific research. Most research done in the camps was conducted in response to the needs of the ongoing war effort, carried out by private physicians looking to advance their own reputations, or done to advance Nazi ideology. The German Air Force, for instance, conducted high altitude experiments at the Dachau concentration camp to duplicate pilot conditions by placing prisoners in extreme hypothermia or in low pressure chambers⁴, killing approximately 90 subjects and exposing hundreds to excruciating pain. In 1942, at least one physician pointed out that there was no reason these same findings couldn't have been deduced in a nonlethal manner¹.

The military deliberately wounded women prisoners at the Ravensbruck concentration camp and conducted experiments there to test methods of bone, muscle, and nerve regeneration and bone transplants. Prisoners were also killed to study their organs for the effects of hunger. Himmler ordered research be done to design a method by which mass sterilization could be conducted rapidly and if possible without subject knowledge. Physicians used injections, x-rays, and other procedures to sterilize prisoners⁴. The shocking display of inhumanity in the concentration camp experiments shows the tragic results of physicians placing societal goals ahead of the individual's well-being. Scientific progress is to serve humanity, and never the other way around.

The infamous Dr. Mengele conducted extensive research on twins and how to get women pregnant with twins. He executed twin children and compared their internal organs². Throughout 1944, Mengele sent "scientific" material to the Institute of Anthropology in Berlin, including eyes and internal organs from murdered children, and sera from twins deliberately infected with typhoid¹. Researchers outside of the camp participated in and were aware of Mengele's work.

The Nazi physicians who perpetrated such atrocious crimes against humanity saw themselves as ethical physicians treating society. Nazi Doctor Fritz Klein reconciled his acts with the Hippocratic Oath by explaining, "Of course I am a doctor and I want to preserve life. And out

of respect for human life, I would remove a gangrenous appendix from a diseased body. The Jew is the gangrenous appendix in the body of mankind².” Accordingly he considered himself not responsible for the individual, here the Jewish person, but rather for Germany society. This epitomizes the physicians’ justification for their role in the Holocaust. Likewise, physicians at Nuremberg justified their betrayal of physicians’ ethics with the good of the *Reich*, and placed National Socialism and national survival ahead of the obligation to sick, innocent, and vulnerable individuals.

The Nazis were proponents of the belief that Jews were less than human and were the enemy. Hans Frank, jurist and General Governor of Poland during the Nazi occupation, said “the Jews were a lower species of life, a kind of vermin, which upon contact infected the German people with deadly diseases”². In concentration camps, researchers used human flesh to make bacteriological culture media¹, as to them the prisoner flesh was simply cheaper than animal tissue. The prisoners were considered laboratory animals at best, and, more commonly, thought of as “life unworthy of life.” In the camps, the Nazis shaved prisoners’ heads, provided them with one outfit of used shoes and tattered clothing, tattooed them with numbers to be used in place of their names, and systematically starved them. In this way, they denied the prisoners their right to an identity, thus they dehumanized the prisoners. This allowed the perpetrators to more readily carry out their crimes against humanity, as they could now tell themselves they were not harming humans but some lower life form. The physician must recognize for himself that every human being is an individual, regardless of appearance or the groups to which he or she belongs.

Applying ethical concepts to one’s daily practice of medicine is as important now as it was in Nazi Germany. There is an increased ability to dehumanize others today owing to the role of technology in society and in interpersonal communication. Patients become isolated, objectified, anonymous, and impersonalized in a system of electronic communications³. Thus the physician must make an effort to respect the dignity of all human beings, without regard to their background or group affiliation.

The ideological underpinnings of the annihilation of the handicapped, Jews and Gypsies and the mass killing of Slavs in occupied territories were based on widely accepted theories of the inequality of population groups deemed racially and socially inferior. The Nazi regime profited from the annihilation of these peoples by stealing their possessions and land, withdrawing resources, and simultaneously purifying and strengthening the racial hygiene of the German race. From 1934 to 1945, German and Austrian physicians forcefully sterilized 375,000 persons due to alleged hereditary disease⁴. Next came the lethal measures taken against

the so-called “life unworthy of life,” handicapped children and adults. The euthanasia centers were then copied on a larger scale at mass extermination camps for the purpose of genocide. With the crucial help of the medical establishment, German authorities succeeded in murdering people based on perceived “racial inferiority,” as the existence of these people was incompatible with the goal of racial purity for the German people; these groups included Jews, Gypsies (chiefly Roma), the disabled, some Slavic peoples (Poles and Russians) and groups persecuted on political, ideological, and behavioral grounds, including Communists, Socialists, Jehovah’s Witnesses, and homosexuals¹¹, resulting in the extinguishing of up to 17 million lives, many through the cruelest and most inhumane of treatment and circumstances⁹⁰.

Sora Seiler Vigorito, a survivor of Mengele’s experiments, exhorts physicians to have the proper attitude in their practice of medicine. From her almost daily contact with Mengele, she recognized that each of us hides within us the potential to become a Nazi doctor. The potential is indulged by confused priorities, self-interest, and apathy. The Hippocratic Oath did not prevent physicians from ethically justifying their atrocious endeavors. In fact, not only did German physicians know the oath, but they were taught medical history more extensively than physicians in most other countries. One Nuremberg trial physician defendant authored a popular book on medical ethics. And even today, we learn of physicians who set out to kill innocent and unwilling victims, as was the case in 2007 when seven Muslim physicians, all National Health Service employees, attempted simultaneous terrorist bombings in Britain and Scotland. An Al Qaeda leader in Baghdad later commented, “Those who cure you will kill you”³. Also, psychiatrist Nidal Malik Hasan attended an American medical school that includes the Hippocratic Oath at graduation¹²; this did not prevent him from opening fire on and killing thirteen innocent victims and wounding thirty others in November 2009¹³. Existent physician oaths, such as the Oath of a Muslim Physician or the Hippocratic Oath, did not prevent these physicians from attempting to kill many innocent people. Accordingly, the Hippocratic Oath is a beginning and not an end point for medical ethics. But the maxim to “first, do no harm” to the individual is of the utmost importance, especially in light of the medical atrocities committed during the Holocaust.

The rejection or distortion of the physician’s oath reveals that in a world in which naked power prevails, the oath counts for little. Edmund Pellegrino, Professor Emeritus of Medicine and Medical Ethics at Georgetown University Medical Center, says that today “the Hippocratic corpus has been made even more fragile than it was when devastated by the ethics of National Socialism”³. The fragility of the oath imposes on bioethics the task of providing physicians with a firm grounding in ethical principles. Analysis of the Nazi physicians’ glaring ethical violations in

the Holocaust provides such grounding principles. From the resulting atrocities, we learn that the physician's primary responsibility is to treat the individual and not society and that every human being is an individual, regardless of the groups to which he or she belongs. Thus the physician must consider the principles of autonomy, beneficence, non-maleficence, and justice, as well as the principle of *primum non nocere* and "do unto others as you would have others do unto you" in light of this point. To be effective in the real world, these principles require that the physician understands and stands up for them, even when the physician must stand up alone.

It is our obligation as physicians and medical students to study the role of physicians in the Holocaust and study the ethical principles we can derive from it. Upholding these principles is the means by which physicians can prevent a repeat of history, in which physicians were the perpetrators, perverting ethics, forcibly sterilizing patients, and torturing and murdering millions of innocent victims. In the decades before the Holocaust, it is unlikely that anyone would have predicted the atrocities that were to come. Likewise, in our time, we do not know exactly when and where the next genocide or other terror waits. It is our duty as physicians and medical students to adhere to our ethical principles so that if society demoralizes and its standards degrade, we as a community will defend and promote what is just and ethical. The role of the physician is the preservation of human life and the alleviation of suffering, and it is his fiduciary responsibility to serve the patient before his own interests; in order to do this, he must make the individual patient his priority even while keeping government regulations and society in mind.

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MORAL RELATIVISM VERSUS UNIVERSAL TRUTH: REFLECTIONS THROUGH THE LENS OF THE HOLOCAUST

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There is an age-old and fundamental question in ethics that asks whether or not there is an overriding or underlying “right” ethic on which to base our ethical decision-making. This question aims to address not only if such an ethic exists, but also, if it does, who defines it and how and why do they have the authority to do so? The search for a universal ethical foundation has proven difficult, if not impossible, yet necessary. How can we expect to discuss and evaluate our ideas and actions without a mutual understanding of the common, ethical framework from which we are working? However, equally important, how can we find an ethical framework that everyone can reasonably be expected to agree with and follow?

A discussion of this theme can, and has been framed within an exploration of moral relativism versus normative ethics, or the idea of a universal truth. While normative ethics is concerned with the criteria of what is morally right and wrong, moral relativism can be generally understood to support the idea that there are deep and wide spread moral disagreements, truth is not absolute and we should tolerate those with whom we morally disagree. Both of these frameworks have been championed at different times, making sound arguments either in favor of themselves or against the other. For instance, there are obviously many different ethical viewpoints that employ different ethical frameworks and claims with which to espouse their arguments, both intercultural and within cultures. We have generally recognized this discourse and exchange of ideas as valuable and desired insofar as it has contributed to and furthered our understanding of our actions and use of ethics. Fittingly, the field of comparative ethics has blossomed with the direct purpose of elaborating differences in beliefs and practices without evaluating their foundations or outcomes. However, we have also at times attempted to develop overarching principles, values and doctrines to define and implement the basic ethics we believe everyone should follow. For example, the formulation of the Universal Declaration of Human Rights is meant to apply to “all people and all nations.” In this endeavor we hoped to find an agreeable common ground of the fundamental, non-negotiable human rights, but were left with no way to enforce them.

The current analysis does not aim to examine the validity of past arguments that have been made by proponents on each side of the debate. This has been done before, and more completely than could hope to be accomplished here. Rather, this discussion hopes to add a new voice, with additional considerations, by examining this theme through the unique lens of Nazi

Germany and the Holocaust. One of the most disturbing truths about the Holocaust, and the actions that led up to it, was the strong belief by the perpetrators that their actions were not only permissible, but also necessary. In other words, the reasoning and arguments behind their actions were not simply justifications, but rather true convictions. Nazi Germany at times even used the language of ethics and employed moral reasoning in favor of its doctrine. Although no one would now argue that these actions were in fact moral, it is disturbing that the point was ever attempted, and gets at the question: If ethics are relative, how do we prevent and sanction others for decisions and actions that we define as unethical, but they do not? The framework from which Nazi Germany was working was so vastly different in its beliefs that it resulted in calculated mass murder, and only stopped when others won the war and intervened.

Further complicating the search for a universal ethic is the fact that the “right” answer is not always as glaringly obvious as in the case of the Holocaust. For example, the Groningen Protocol, a Dutch protocol detailing the appropriate times for a doctor to end the life of a newborn, also addresses taking another human life. Although, here there is no clear agreement on when, if ever, this action is permissible. Euthanasia is an acceptable practice to some, however this protocol also encounters some strong positions of ethical contention, including whether or not this action can truly be classified as euthanasia as the newborn cannot make the request. Furthermore, these disagreements are often discussed in the context of differing cultures. Thus, by employing a few useful examples and a reflection on Nazi Germany, this analysis aims to consider the questions: If ethics are used to evaluate actions and decisions, with what are ethics evaluated? Is there, at least to some degree, a universal truth, or will ethics always be relative? Who has the right to make these decisions, and who will be obligated to see that they will be adhered to?

The Holocaust and Principle Based Ethics

One past endeavor to define a universal ethic for medicine resulted in the formulation of principle based ethics. This conception of normative ethics, which is still commonly employed today, is generally understood to include the principles of autonomy, beneficence, non-maleficence and justice. Autonomy is defined as the capacity of a rational individual to make an informed, un-coerced decision. It aims to recognize the right of individuals to make choices and determine what is personally important to them when making decisions. The term beneficence refers to the doctors’ responsibility to act in the best interest of the patient, while non-maleficence instructs physicians to first do no harm, and is often balanced against the principle of beneficence. Lastly, justice, in the context of medical ethics, concerns fairness and equality in the distribution of scarce healthcare and resources.

While the Holocaust and the actions that led up to it were severely immoral, Nazi Germany did not ignore ethics. On the contrary, it redefined and applied the principles of principle based ethics, based on its beliefs and what it was trying to accomplish. The doctors of the Third Reich interpreted these ethical principles in a way that drastically differed from any way that they had previously been understood, but did not necessarily violate their fundamental meaning. By characterizing the health of Volk as the primary responsibility of German physicians, over the needs and rights of the individual, Nazi Germany changed the outcome of applying these principles, but did not directly change the principles themselves, or work outside of their premise.

Nazi genocide began as a “euthanasia” program that first took the lives of handicapped and disabled children, and later progressed to murdering handicapped adults and persons categorized as antisocial. One of the ways in which this was accomplished within the language of ethics was by redefining the group of individuals that were competent and able to make rational decisions. By expanding the group of individuals who were defined as not competent on the basis of their impairment, Nazi Germany was able to claim that these persons did not have the ability to make an autonomous decision, including regarding whether or not death was in their best interest. It was further argued that any competent human being in their position would want to be “euthanized” for benefit of the Volk, because they would recognize the burden that they were causing and the worthlessness of their life. Therefore, it was said, any individual who did not willingly make this decision was clearly not competent. It became a catch 22 in which a person either volunteered to be euthanized or was labeled as not competent to make such a decision, and euthanized regardless. In this way, without changing the definition of the principle of autonomy, Nazi Germany was able to present its actions to end the lives of others as within the confines of principle based ethics. These arguments were further bolstered by the fact that commonly accepted scientific theories of the time, collectively referred to as eugenics, were believed to give scientific proof that these individuals were inferior to Aryans. Additionally, euthanasia in the interest of the individual was an accepted practice in Germany at the time. By accomplishing this redefinition, using it for propaganda, and then continuously increasing its scope, Nazi Germany was able to undertake its “euthanasia” program without violating the premise of the principle of autonomy.

The doctrine of Nazi Germany was similarly applied to the principles of beneficence and non-maleficence. Instead of considering the individual to be of the utmost importance to the physician, the primary “patient” in Nazi Germany was redefined as German society. In this way, acting in the best interest of the patient could now interpreted to mean to act in the best interest

of the Volk. Likewise, doing no harm could be understood as taking no actions that would threaten the fitness of the Aryan race. Therefore, it was supposedly no longer unethical, or at least not in contradiction with principle based ethics, to murder others (do harm) when it was balanced against doing what was in the best interest of the German Volk (the patient). It was further argued as necessary because not doing so would be a direct threat to the fitness of the Aryan race.

Lastly, the principle of justice was also employed, particularly through the heavy use of propaganda. The conditions of wartime gave Nazi Germany an angle with which to garner public support in favor of its programs, specifically by pointing to the “injustice” of healthy, young Aryan men dying on the battle field while a vast amount of money and resources were being spent on sustaining “life unworthy of life.” These individuals were classified not only as non-productive members of society, but as having a negative value by draining valuable resources. Therefore it was pertinent for the health of the Volk to terminate the lives of these individuals. As the reign of Nazi Germany wore on, those lives unworthy of life were extended to include Jews, Gypsies and others who were classified as antisocial. Conveniently these groups had already been redefined as not competent and had therefore lost their capacity to make autonomous decisions about their right to life.

Importantly, claiming that Nazi Germany believed in its doctrine is not to say that it did not also employ deception. In fact it did all the time and in every situation involving its victims, up to and including when they were murdered. Nevertheless this seemed to be due to concerns of revolt and worries of public disquiet and disagreement, rather than the perpetrators actually feeling guilt or worrying that what they were doing was wrong. For emphasis, again, ethics were not just being distorted and used as means to end, but more accurately, were being re-conceptualized based on the differing beliefs held by Nazi Germany. Unfortunately, this served to further give language and a framework to its doctrine, which could be used to prove the appropriateness of its actions.

Another theme demonstrated throughout this discussion is that of how the social environment and historical setting influenced the acceptance and permissibility of these actions. Navigating ethics to fit and support the practices of Nazi Germany would likely not be possible in the same way, for example, in the social and professional atmosphere of the current day United States. This realization brings forth one very important point by demonstrating the need to acknowledge that our ethics are constantly changing with scientific advances, social norms, and, simply, with time. While this section clearly considered some of the dangers of ethical relativism, it should be noted that it also showed that the search for a universal ethic is not only

difficult because people disagree with each other, but also because people disagree with themselves over time. It is not always clear when we make a choice about what is the ethically sound decision that we will still consider that to have been the right choice in the future. How is it then that we can impress upon others the need to follow our ethics and values, when we are not even sure if we will always be true to them ourselves?

Likewise, just as ethics vary with time, they can vary with beliefs, backgrounds and motive. As discussed, in Nazi Germany ethics were redefined in a way that allowed them to converge with specific endeavors and certain beliefs, but nonetheless used the familiar language of principle based ethics. In this instance, the motives of the perpetrators were much more predictive of the outcomes of Nazi Germany than were the ethics they used to frame their actions. In other words, they navigated ethics to match their beliefs and motives, as opposed to using ethics to evaluate their actions or create a new doctrine based on common values and understanding. Nazi Germany did not set forth reasons for why what it was doing was right or, at least, not unethical; rather, it employed existing ethics to collaborate its cause. This, clearly, is not how the discipline of medical ethics is properly conducted. Unfortunately, however, it is not always obvious which approach is being undertaken. Without a clear right answer, it could be relatively easy to frame these differing points of view as diverging stances of ethics, or moral relativism, especially when the language of ethics is being employed to support a particular claim or belief. The next section addresses the Groningen Protocol, and considers the permissibility of cultural differences being categorized as morally relevant differences that permit the use of different ethical frameworks. This section further considers the potential shortcomings of ethical relativism, including the consideration of whether the protocol's claim of ethical relativism is rooted in differing ethical views, or simply a different use of ethics.

Human Life and the Groningen Protocol

The Holocaust was a large-scale genocide that methodically took a horrific number of human lives. Regardless of any ethical language employed, without question the actions of Nazi Germany were unethical and immoral, to say the least. One of the main bases for this claim is that human beings have a right to life and it is unethical and immoral for one human being to kill another. While there have since been arguments made in regards to exceptions, the Holocaust is clearly not one of them. Therefore, it might be said, that although the previous section presented some concerns, the Holocaust was an anomaly and not necessarily representative of the dangers of ethical relativism. However, what about when the situation is less clear? For example, when there is still a question over human life, but the right, or permissible, action is less obvious and valid arguments can be employed to support both sides of

the debate. The Groningen Protocol is a good example of this situation, and particularly relevant as a comparison to the action of Nazi Germany and its child “euthanasia” program.

The Groningen Protocol is a set of directives, constructed in the Netherlands, to determine when it is permissible for physicians to terminate the lives of newborns. It defines three groups of newborns for whom doctors must make end of life decisions, group 1 consists of newborns with no chance of survival, group 2 is newborns who “may survive after a period of intensive treatment, but expectations regarding their future condition are very grim,” and group 3 consists of those newborns who have an extremely poor prognosis, “who do not depend on technology for physiological stability and whose suffering is severe, sustained, and cannot be alleviated”¹. This protocol serves as a current medical ethics example of a policy that is similarly worrisome in light of the possible dangers of relative ethics, the potentially slippery slope of euthanasia, and the similarities that can be drawn between its ethical defenses and those of Nazi Germany. The Groningen Protocol specifically speaks to three separate themes of the current discussion: first, the possibility that something at the same level of ethical transgression as the Holocaust could occur again under the guise of ethical relativism; second, how, when there is no commonly agreed upon answer, we can be sure we are using ethics appropriately; and third, how it can be problematic to alternatively expect everyone to follow or agree to the same universal ethic.

One analysis set forth in favor of the Groningen Protocol maintains that opponents are inappropriately critical of the Protocol because they do not properly understand the values and norms of the Netherlands.² Specifically it claims that euthanasia is an accepted practice in the Netherlands and, therefore, if the Groningen protocol is to be evaluated fairly, it has to be evaluated based on these values. Thus, understanding and employing the context of the Netherlands is argued to make permissible taking the life of another in the defined instances,

Because we want to make *ethically* intelligible the practice that the protocol is intended to guide... we explain the shared moral understandings that form the context in which Dutch physicians sometimes end the lives of severely impaired newborns... we argue for the moral permissibility, in the Dutch context, of physician intervention to bring about the death of babies who fall within the category the protocol is meant to address³.

These proponents further present their differing culture as an ethically relevant difference that allows the protocol to be ethical in one place and time, even if not so in another. “Some other

¹ Lindemann, Hilde and Marian Verkerk, “Ending the Life of a Newborn: The Groningen Protocol,” *Hastings Center Report* 38, no. 1 (2008), 43-4.

² Ibid.

³ Ibid.

objections – about quality-of-life judgments and parents’ role in making decisions about their children – cannot be easily cleared away, *but at least in the context of Dutch culture and medicine, the protocol is acceptable*”⁴ (emphasis added).

In presenting these arguments, the authors effectively take away the ability of the reader to object to the protocol based on its fundamental purpose of allowing a physician to take the life of another; since it is accepted in the Netherlands and formulated for the Netherlands, it is no longer a valid point of debate. Instead, only procedural concerns are left for evaluation, such as how quality of life is being determined and the parents’ role in the process. This argument, whether or not it is incorrect, presents relevant concerns. First, its main basis of defense for taking the life of another human being is that it is already an accepted practice in the Netherlands, and that this protocol simply takes that premise one step further and applies it to a similar situation (group 3). This is somewhat reminiscent of Nazi Germany creating its own version of accepted ethics, and then gradually taking established practices of killing (“euthanasia”) and expanding them to new groups of individuals. Additionally, while presentations of ethical arguments will commonly set out a starting assumption so a specific point can be addressed from a common ground, they rely on the reader buying into that assumption. Here, the Groningen Protocol presents the Dutch context as absolute, a fact that simply needed to be clarified. Moral relativism was similarly therefore not left up for discussion. This section’s critiques, or rather cautions, still do not negate that euthanasia is an acceptable and ethically defensible practice to some, both within and outside of the Netherlands. The Groningen protocol, and specifically Lindemann and Verkerk’s argument, have these pitfalls, but the validity of the protocol itself is still a viable debate. The pitfalls, however, do make it more difficult to discern whether or not ethics are being used properly in this instance, and muddles whether or not their arguments are morally relevant differences.

One lesson that has stuck with me is how the unthinkable cannot only happen, but how it can happen methodically and with relative ease. Nazi Germany progressed from implementing its child “euthanasia” program to carrying out a large-scale genocide. It started out immorally and continued to fall down a slippery slope, with scant opposition. The Groningen Protocol, in its most basic application, makes quality of life judgments for newborns, including cases in which reduced quality of life or suffering will take place in the future and in which imminent death is not an expected outcome. It sets out guidelines to make it allowable for doctors to end the lives of newborns, and standardizes the practices to do so. It does so with the aim of making its processes and decisions more transparent. However, through its language choice and

⁴ Ibid.

standardization, the Groningen Protocol also lends recognition and legitimacy to its proposed actions, independent of the arguments it sets forth. The Groningen Protocol normalizes taking the life of another human being, within a profession that necessitates trust. The concerns raised by opponents of the Groningen Protocol are also reminiscent of the dark truth behind the Germany's former child "euthanasia" program: "[The protocol] lets doctors decide what is an acceptable quality of life, it lets doctors determine the morality of their own actions... it offers an incoherent criterion for deciding whether to end an infant's life...."⁵ Importantly, the intentions of the Groningen Protocol are nonetheless aimed at doing what is in the best interest of the individual patient, while the child "euthanasia" program of Nazi Germany was much more concerned with the fitness of the Volk. This does not, however, change that much of the language used and overt arguments in favor of both programs are relevantly similar, and confuses the use and intentions of ethics.

Karl Binding, a proponent of the Nazi "euthanasia" program, published "Permission for the Destruction of Worthless Life, its Extent and Forms." In this document he set forth reasons why Nazi Germany's "euthanasia" program was necessary, and also aimed to address any possible concerns or objections to its proposed actions. As delineated previously in regards to the program as a whole, Binding's reasoning was rooted in the claim that these lives were worthless to themselves and society, and was further bolstered by wartime loss of healthy, young men. His reasoning also serves as another example of Nazi Germany looking to morals and ethics to support its proposals:

Again, I can find no reason, either from a legal, or from a social, or from a *moral*, or from a religious standpoint for not giving permission for the killing of these people who represent the fearful counter-image of real human beings and arouse horror in almost everybody who encounters them- but naturally not to just anybody! In periods of *higher morality*- in ours all heroism has been lost – these poor people probably would have been released from their afflictions by the authorities.⁶ (emphasis added)

His argument was presented as admirable by fulfilling a difficult yet necessary obligation to relieve these individuals from their suffering. "Are there humans who have lost their human characteristics to such an extent that their continued existence has lost all value both for themselves and society? One only needs to pose the question and a feeling of anxiety stirs..."⁷ By acknowledging this likely reaction, Binding relates to the public then quickly goes on to explain away those concerns as understandable but misunderstood, that it is actually merciful, albeit

⁵ Lindeman, 42-3.

⁶ Binding, Karl, "Permission for the Destruction of Worthless Life, its Extent and Form," (1920),

⁷Ibid.

difficult to end these lives. This is similar to the reasoning and language employed in defense of allowing euthanasia of newborns that fall into group 3 of the Groningen Protocol:

It is precisely those babies who would continue to live but whose lives would be wretched in the extreme who stand in most need of interventions for which the protocol offers guidance. The whole point of the protocol is to help physicians end lives of newborns who are so severely afflicted that neither their dying nor their living should be prolonged... In bringing within its compass babies who are in no danger of dying – and, indeed, with proper care could live into adulthood.⁸

The stated motivation to relieve suffering is a reason also set forth by Nazi Germany and the authors and defendants of the Groningen Protocol. This similarity in their rationale can further be demonstrated through arguments presented to justify taking the life of another. As maintained in defense of the Groningen protocol, “In the Netherlands, as in all other countries, ending someone’s life, except in extreme conditions, is considered murder. A life of suffering that cannot be alleviated by any means might be considered one of these extreme conditions.”⁹ Comparably, Karl Binding claimed, “It cannot be doubted that there are people from whom death would come as a release and, at the same time, for society and the state in particular would represent liberation from a burden which, apart from being an example of great sacrifice, is not of the slightest use.”¹⁰ Both of these comments appeal to the idea that ending another’s life is not only permissible, but also necessary in order to be merciful to that human being.

It can also be argued that, through these examples and others, the language used to navigate and validate these lines of reasoning can become somewhat meaningless depending on who is interpreting and implementing their conclusions. In reference to Nazi Germany’s “euthanasia” program, Binding sets boundaries and then immediately navigates a way around them: “Every killing which is permitted must be felt, at least by the person concerned, as release; otherwise such permission must be ruled out. It follows from this, however, that it is absolutely vital to respect completely *everybody’s will to live, even that of the most sick, tortured or useless people*.” He then goes on to define a group in which this conveniently does not apply. “They have neither the will to live nor die. Thus, they are unable to approve their killing; on the other hand, it will not clash with any will to live which would have been broken.”¹¹ Of great worry, especially in light of the demonstrated similarities, is that protections, such as the Groningen Protocol aims to provide, may not always be adhered to. Exceptions can be constructed by adapting language to goals, as was also demonstrated through the discussion of

⁸ Lindeman, 46.

⁹ Verhagen Eduard and Pieter J.J. Sauer, “The Groningen Protocol – Euthanasia in Severely Ill Newborns,” *New England Journal of Medicine* 352, March 10, 2005 Perspective: 959-962

¹⁰ Binding.

¹¹ *Ibid*.

Nazi Germany and principle based ethics. Interestingly, while proponents of the Groningen Protocol rely heavily on past arguments in support of euthanasia to validate its actions, opponents have argued that the protocol does not even address the concept of euthanasia. Newborns cannot make the request, it therefore cannot be voluntary, and likewise cannot be euthanasia. This use of language greatly changes how the protocol is received, as did calling Nazi Germany's child "euthanasia" program a euthanasia program.

Admittedly, one of the reasons this presented comparison works so well is that both cases address euthanasia, and therefore inherently use some of the same language and arguments. It may therefore be less that the Groningen Protocol resembles Nazi Germany, and more that Nazi Germany was doing its best to resemble a morally acceptable version of euthanasia, which brings forth these similarities. Additionally, despite this section's discussion, there are clear and fundamental differences between the Groningen Protocol and what we now know to be the true intentions of the "euthanasia" program of Nazi Germany. This protocol, and its application, does not aim to trick parents or act against their will, the parents' consent is always required, and it never mentions society as relevant stakeholder in whether individuals live or die. The protocol is also specifically meant to make the process more transparent, which is in clear contrast to Nazi Germany. Nonetheless, I believe the arguments presented in this section are valid concerns and considerations. It is what was not known about Nazi Germany's euthanasia program then, and what might not be known about the Groningen Protocol now or in the future, that is important for this discussion. Karl Binding's article is a particularly useful example because it clearly shows how the program was represented to the public, whether or not it was fully truthful. Hindsight is twenty-twenty and at the time of the reign of the Nazis there was very little objection to the programs being implemented, and many professionals willingly participated in their application.

An exact repeat of the Holocaust is very unlikely, but that is not to say that history will not repeat itself in a similar fashion if we do not understand how it was possible in the first place. Through morally relative ethical arguments, such as claiming different permissibility for the Netherlands versus the United States, it becomes that much more likely that a Holocaust repeat, albeit under a different guise, could occur again. Recall that Nazi Germany believed in its doctrine and actions. It is not impossible that Nazi Germany propaganda was perceived then as the Groningen Protocol is perceived now. This further demonstrates the danger of not having a concrete or definite way to evaluate what is right and what is wrong.

More Questions than Answers

While this analysis was not able to formulate definitive answers, hopefully it provided a useful voice in addressing the question: Is there a universal or fundamental ethic? Although it seems necessary to have underlying principles on which to base our ethical analyses and conclusions, it likewise seems impossible to expect everyone to put faith in the same ethical code. Obviously the biggest fault of this analysis, and the biggest hurdle of the ethical relativism versus universal ethics debate, is that warning against the dangers of ethical relativism does not necessarily make a universal ethic evident or possible. However, perhaps of greater concern than the difficulty of finding a universal set of values and morals, is the question of what will happen if we do not?

As previously expressed, this fundamental theme has been discussed and debated time and again. Nonetheless, through a discussion of Nazi Germany and the Holocaust, I hoped to bring new considerations to what it can mean to not have a universal ethic, or common understanding of fundamental principles, with which to evaluate our actions. Through elucidating the ethics used in defense of Nazi Germany's programs I intended to parse out some of the justifications that allowed such a horrific event to take place under the guise of professional, ethical acts. By further comparing Nazi Germany's reasoning and language with that of the Groningen protocol, I aimed to demonstrate how past consequences of ethical relativism continue to be relevant to current medical ethics. Most basically, the goal of this analysis was to reflect on the Holocaust as a lesson for the present and the future. By beginning to understand and evaluate the conditions in which the Holocaust was allowed to take place, we can hope to avoid a similar act of depravity in the future.

Excerpt from
WHEN THE TWO WORLDS ARE TORN ASUNDER
REFLECTIONS ON MORALITY AND MEDICINE FROM THE T4 PROGRAM

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Despair and relief consumed me as I strolled through the crematoria of Birkenau. Despair from the terrified screams of the departed who were brutalized on these grounds ringing in my ears. Relief from the soothing sound of the wind blowing through the green leaves of the towering trees grown on the ashes of their bones. Something about the bright summer sun, the chirping swallows, and the frogs hopping around in the ponds formerly used as ash pits kept my soul at least at a relative peace. Being here at their grave site, pacing around the brick-filled pits that once formed the chambers, and silently shedding a few tears as we pay our respects reaffirmed to me the crucial fact that though they may have departed from us in body, they are somehow still here with us.

Nonetheless, I was conflicted. I went to Auschwitz & Birkenau the week prior to my first clinical rotation in medical school as part of the Fellowship for Auschwitz Study of Professional Ethics, a two-week intensive study of contemporary professional ethics through the lens of professionals' actions in the Holocaust, sponsored by the Museum of National Jewish Heritage. On the one hand, I could not but feel grateful that on the eve of a critical training period in medicine I had been granted the privilege to come to study in depth the past mistakes of the profession. I would not go into medicine ignorant of the horrific errors that blackened the profession's name. On the other hand, I could not extricate myself from the unsettling realization that if I were to have grown up in early twentieth century Germany, I too could have been the doctor depicted on the photo exhibit who stood at the unloading ramps of the train tracks sifting out the weak and frail to send to the crematoria.

Like me, medical students in early 20th century Germany went to medical school with good intentions. They wanted to help people and help society. As Holocaust expert Robert Proctor notes, even in the Third Reich "medical students took courses in medical ethics; medical textbooks in Nazi Germany discussed medical ethics." (Proctor 5) Moreover, "there was a great deal of attention given to the obligations of physicians to society, the state, and ...the individual." (5) In the late nineteenth and early twentieth centuries, German medical education was even hailed as a model for the West. Abraham Flexner used their system as the basis for the sweeping reform of 1910 that revolutionized American medical education to this day. Yet of all the professions that

cooperated in this genocide, medicine bears the most blame. Doctors stood in front of the unloading platforms and selected victims en masse for the chambers. Doctors pulled the lever to release Zyklon B. Doctors conducted useless experiments on human lives. What then, in this short period of time from the early 1900's to the onset of World War II, led to members of a model profession to go from being healers to murderers?

To consider such a question, I would like to take a step back in history to a period immediately prior to the Holocaust to explore the initial project that transformed doctors into killers: the T4 program. That is, the Nazi program of secretly exterminating handicapped and disabled that preceded the killing of Jews and Gypsies. According to Henry Friedlander, author of *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*, T4 was “the opening act of Nazi genocide.” (Friedlander 22) I would like, then, to offer T4 as a case study for how the medical profession of Nazi Germany first became complicit on a centralized level with mass murder that would eventually lead to what we now know as the Holocaust. In this respect, it represents a focal point for the subversion of the medical profession for adverse political ends that would eventually lead its practitioners on a course that would—as Cynthia Ozick describes—leave “a gash...in the world's brain that cannot be healed by medical conferences or monuments.” (Ozick 169)

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What, then, went wrong with the initial ‘public’ focus for which German medicine was hailed? For as Proctor notes, “There is nothing wrong with physicians working to preserve the health of a larger community; that, after all, is the essence of responsible public health.” (Proctor 4)

The root of the injustice done by the profession in the Third Reich lies in doctors’ systematic abandonment of the intrinsic morality of medicine. By using the tools they possessed to kill they abrogated the *raison d’être* of medicine to heal. Why is healing intrinsic to the medicine? Because illness is a fundamental human experience, and healing the sick is the purpose of medicine, *par excellence*. Healing is not simply an arbitrary category that happens to involve medicine. Healing is the profession. So when the doctors in the T4 program assembled in Berlin to use their medical knowledge to sift through the case reports of mentally ill and handicapped patients to decide whether or not to include them, they were acting against the very purpose of medicine by plotting to kill them.

If the morality that defines medicine is to heal, however, then one must also be clear about who is the proper subject of its efforts. Is the profession ultimately responsible to the individual or society? For if the profession is ultimately responsible for society, then the doctors who initially screened persons for inclusion into the T4 program could have very well made a case that they were improving the economic robustness of society. Indeed, the labeling of T4 subjects as “useless eaters” (and later on, Jews as a “gangrenous appendix”) was based on this very reasoning. Yet if we claim the other extreme—that medicine is only responsible to the individual—then people become reduced to isolated bodies removed from the larger social systems from which everyone inevitably exists. The art of healing then becomes the science of fixing, and the practice of medicine is transformed into mere mechanics. Indeed, contemporary bioethics has evolved largely as a reaction to the Nazi’s extreme view of medicine so geared towards society that led to the brutal consequences that we memorialized at Auschwitz.

Where then does the balance lie?

It is through a living dialogue with those who have gone before us—such as the departed we commemorated at the camps—and those who will go after us—to build a better world for our children and our children’s children. For it is only through the eternal that knowledge is transmuted into wisdom, and power over the here and now becomes tempered with a love for what lasts. Without the eternal, no matter how expansive the profession comes to conceive of the person, be it in social, psychological or physiologic terms, healing becomes subject to convenient redefinition for each new historical circumstance. A certain mystery behind the existence of each and every individual person that spans beyond the seen and touched necessitates a healthy reverence for the person that is not subject to manipulation. Otherwise, when the transcendency of the person is lost to a society, that society becomes *“a world without women, without children, a world in which everything is viewed solely in terms of power or profit-margin, in which everything that is disinterested is despised, persecuted and wiped out.”* (Von Balthasar 142)

Of course, for one who does not believe in a human spirit, “living dialogue with the eternal” may sound vague or amorphous or even meaningless. Yet if any lesson is to be taken from the Holocaust, one must acknowledge some good to human existence beyond simply our physical existence (call it spiritual, metaphysical, religious, or even simply eternal). Why else, for instance, would we memorialize those who were killed in the Holocaust? Why take the time to remember all those who were ‘selected’ for the gas chambers? The tradition of placing stones on Chaim Herzog memorial stone in Auschwitz, is an act of reverence for those killed who have departed in body but still exist with us somehow “in spirit.” One could certainly make a case for

memorialization of Holocaust victims that does not acknowledge a spiritual good—say the education of future generations to prevent repetition of past evils. Even in this case, however, the departed become a tool for our own ends (e.g. public education) and in consequence the word ‘memorialize’ becomes a mere euphemism.

To conclude, I would like to mention the story of Bishop von Galen. Born in the southern part of the Duchy of Oldenburg, Clemens August von Galen was a Jesuit educated priest who became Bishop of Munster in 1933. In 1941, the same year that the T4 program began operations, Bishop von Galen began to issue a series of sermons protesting Nazi policies on euthanasia, Gestapo terror, forced sterilizations and concentration camps. (Allen 26) His attacks became so menacing to the Nazis that the local Nazi official Walter Tiessler proposed that the Bishop be executed. (26) Still, Bishop von Galen continued to speak out tirelessly. Most notably, on August 3 1941 in his sermon in Lamberti church in Munster he specifically called out the T4 program:

We are not dealing with machines, horses and cows whose only function is to serve mankind, to produce goods for man. One may smash them, one may slaughter them as soon as they no longer fulfill this function. No, we are dealing with human beings, our fellow human beings, our brothers and sisters. With poor people, sick people, if you like unproductive people. But have they for that reason forfeited the right to life? Have you, have I the right to live only so long as we are productive, so long as we are recognized by others as productive?...If it is once accepted that people have the right to kill ‘unproductive’ fellow humans—and even if it initially only affects the poor defenceless mentally ill—then as a matter of principle murder is permitted for all unproductive people, in other words for the incurably sick, the people who have become invalids through labor and war, for us all when we become old, frail and therefore unproductive. (Von Galen 190)

The words of Bishop von Galen reverberated throughout Germany: they were reproduced and distributed all over the country to families and to soldiers on the Eastern and Western front. The resulting protests led to immediate halting of the T4 program.¹ Though the local Nazi leader furiously asked for the immediate arrest of von Galen, authorities in Berlin refused to undermine the morale in such a heavily Catholic area of Germany. He died a year after the war from an undiagnosed appendicitis. His cause for beatification was approved by Pope John Paul II in 2004, and in 2005, he was beatified by Pope Benedict XVI in St. Peter’s Basilica in Rome.

How did Bishop von Galen manage to foresee the ethical implications of the T4 program with such unprecedented clarity? For von Galen, “there are sacred obligations of conscience

¹ Unfortunately, the program was picked up again later but in secret.

from which no one has the power to release us and which we must fulfill even if it costs us our lives.” (Von Galen 189) What do those sacred obligations include? For von Galen, the T4 program was not simply ethically problematic, it was a transgression of the moral order—a moral order which for him he understood separately from that which was agreed upon by social consensus. Yet we cannot simply credit his insight to the sacredness with which he perceived his pastoral duties. Indeed, many Nazi physicians packaged their cooperation with atrocities in terms of “sacred obligations” as well. The difference between the moral order ascribed to by von Galen and that ascribed to by Drs. Karl Brandt and Philipp Bouhler (masterminds of the T4 program) lies in the content of their respective moralities: the understanding of the human person. For Brandt and Bouhler, who were most certainly influenced by the eugenics movement that was running high support at the time, the individual person was, at best, expendable for the interests of the group. For von Galen, who was most certainly influenced by St. Thomas Aquinas’ understanding of the ultimate human good as man’s spiritual existence, each and every person’s existence spanned beyond simply the physiological, psychological or even social order.

Now, several months into my medicine clerkship, the 12 hour days I’m packing in running around the floors of New York Presbyterian Hospital leave me with little time to question my own complicity with evil to consume my thoughts as it did in Auschwitz. Passing my hours rounding on patients with the team, writing follow-up notes and discharge summaries, and studying for shelf exams feels like a few steps removed from the existential question of human salvation. Yet sometimes, when I look out of the patient’s window to the rising sun shining on the East River and the trees of Roosevelt Island, I feel the same feeling of relief as the wind blowing through the trees of Birkenau left me with. It is not a feeling of complacency, as if the question of my own cooperativity with evil has been resolved. Rather, it is a peace in knowing that the day’s events will offer me a chance, if even the smallest of ways, to make things right for my patients.

Some certainly doubt whether there really is any difference between myself and the doctors who pulled the lever for the gas chambers of Birkenau. I am convinced, however, that if there is any hope for the profession I am a part of, it is in those little moments of gazing through the window that inspire us with a renewed sense of wonder for the patients we treat and a duty to preserve all it entails—that same mystery that sparked a fire in Bishop von Galen’s voice when he delivered his sermons. Otherwise, if in medicine the world just beyond the sunset and the world of the sick patient lying in bed next to the window are torn asunder, I know not how if

faced with circumstances similar to those in the Third Reich, the profession now would be any different.

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GUILT, REMEMBRANCE AND RHETORIC: LEARNING FROM GERMAN PERSPECTIVES ON WORLD WAR II

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In September of 2005, I traveled to Berlin as a Fulbright scholar, hoping to collect oral histories of the Soviet 'liberation' of Berlin and East Germany in 1945. I had a few contacts from my previous studies in Germany as well as a few introductions from professors with whom I had worked in the U.S., and with their phone numbers in hand I embarked on a series of phone calls. Lengthy conversations and large quantities of coffee and *Kuchen* resulted, as did membership in a senior circle at a local church and participation in various Soviet and Communist-themed events. Although I succeeded in integrating myself into senior Berliner culture, reactions varied when I solicited interviews with the people I encountered. Although some were enthusiastic about sharing their stories, many others demurred, or offered to put me in touch with other individuals who were known to discuss their experiences during this period. This relative paucity of open communication was not unexpected. I was aware that the end of the Second World War had been a somewhat taboo subject until the late 1990s. The year 2005 marked the 60th anniversary of the end of the War, and the occasion was marked by numerous exhibits, talks and performances dedicated to exploring and discussing the German experience in 1945 and during the period immediately afterwards. This period of commemoration created a relatively open climate for discourse, and I suspect that I acquired more interviewees thanks to this more permissive climate; however, sixty years of silence commonly outweighed one of open communication.

Certain themes emerged during that year of interviews. Loss and sadness were prominent, as was an intense ambivalence about the war and about being a German during the war. RK, a soldier and party member during the war, who later became a leader in the Department of Education in the GDR, expressed a deep regret and shame for his participation in the war as a whole, and the Holocaust in particular.¹ EW grew up in Spandau, outside of Berlin. Her father was a member of the Nazi party; she herself was a member of the Hitler Youth, as was her entire social cohort. She talked freely about the privations suffered during the war, about her adventures seeking food and work, and about being robbed by the Soviets. When questioned about rape during the postwar period, EW distanced herself from the question, saying that she 'had friends who had that happen to them.'² CK grew up in a sanitarium near

¹ R.K. Personal Interview. 23 October 2005.

² E.W. Personal Interview. 1 December 2005.

Buchenwald, in Thuringia. Although she was only eight years old in 1945, she recalled prisoners being marched daily past the sanitarium to the quarry and fields associated with the camp. She noted that she could still conjure up the image of these *Haftlinge* (prisoners) trudging by.³

As my studies at the time pertained more to the immediate postwar period, and to the sufferings of the Germans at that time, I focused more on the privations suffered by my subjects than on the darker subtext of guilt and moral uneasiness. I was initially much more engaged in learning about the direct impact of the Soviets on the Berliners than in discussing my interviewee's feelings about the concentration camps. As the year passed, though, I began to notice that the question of moral equipoise emerged in almost every discussion. Without my prompting, interviewees consistently explored the question of how German sufferings during the war or postwar period did or did not balance the sufferings inflicted by Germans upon other groups. There were two key responses: the first, more prominent in former East Germans, was that German behavior during the war had been so atrocious that no compensatory amount of suffering could balance it out. The second response, which was repeated more frequently among former West Germans, was that, though the Germans had inflicted a considerable amount of suffering, they too had suffered—and this latter suffering was not adequately acknowledged by the world.

After I left Germany, I rapidly became engaged in other pursuits (namely, my medical studies), and filed these themes away for further evaluation at a later date. I did not have the opportunity to re-explore them until I arrived in Berlin in 2010 as one of thirty Fellows at Auschwitz for the Study of Professional Ethics. I suddenly became very aware of my own connections to Nazi Germany and of the perspectives I had absorbed from the cohort of Germans whom I had interviewed. I was surprised by my level of discomfort with our discussions of the Holocaust and of Germans as perpetrators, and I rapidly became frustrated that our discussions about the roles of physicians in Nazi Germany focused on what was perceived as 'bad traits' inherent to these individuals rather than on their more human motivations. I was not convinced that the Germans with whom I had spoken were uniquely evil, and I struggled with conveying that observation. Our initial visit to Auschwitz left me feeling physically ill as well as deeply confused. Later that day, I realized that the dominant emotion that I was experiencing was shame, both for the Germans I knew and for me as a self-assigned conduit for their experiences.

In her novel *Those Who Save Us*, Jenna Blum explores the relationship between Trudi, a professor of German history and her mother, Anna, an emigrant who lived in Dresden during

³ C.K. Personal Interview. January 2006.

the Second World War. When a colleague recruits her to help with a project collecting oral histories from Holocaust survivors, Trudi is inspired to collect oral histories of the German experience as well. Over the course of her interviews, she encounters varying levels of denial and guilt as well as outright nostalgia for the Nazi era. Her recruitment draws the attention of a German Jew who survived in Nazi Germany. He upbraids her for her project, noting that

First, that the Germans should be allowed to speak of what they did: this is wrong. Why should they be permitted the cleansing of conscience that accompanies confession? It is analogous to adultery: the guilty party, far from spilling out his misdeeds and easing his mind while injuring the innocent other, should have to live with the knowledge of what he has done. A very particular kind of torture subtle but ongoing. Let the punishment fit the crime [...]⁴

Trudi's own mother refuses to speak about her experiences during the war. As Trudi experiences other stories and definitions of innocence and guilt, she comes to realize that her mother has assumed for herself this mantle of silent guilt.

The credibility and trustworthiness of perpetrators and victims alike is a recurrent theme in the literature surrounding guilt and victimhood at both the individual and the social level. Two main constructs determine the credibility of a victim: (1) the competence to describe the events that occurred accurately, and (2) perceived trustworthiness as determined by the interviewer.⁵ Although we have assigned the roles of victim, perpetrator, and liberator in the discussion surrounding World War II, the degrees to which we choose to embrace those identities and impose them on others has varied. Over the years, World War II has earned the status of a 'Good War' in American history, the absolute triumph of good over evil. Challenges to this absolute portrayal have met with significant resistance: the 1992 attempt to pair display of the Enola Gay with the local effects of the bombing of Hiroshima and Nagasaki at the National Air and Space Museum in Washington, D.C. met with significant resistance from veterans groups, and the display was ultimately denied.⁶ Although there is no doubt that the victims of an historical event deserve an arena in which to describe their experience, we continue to debate whether the perpetrators deserve the same opportunity.

Recording the history of the perpetrator is complicated. Traditional historical and biographical writing assumes that most actions are guided by some level of reason, that we engage in and enable perpetration consciously, rather than out of fear or by default. By giving

⁴ Jenna Blum. *Those Who Save Us*. Orlando: Harcourt, 2004. 353.

⁵ G.R. Miller and J.K. Burgoon. "Factors affecting assessments of witness credibility." *The Psychology of the Courtroom*. Ed. N.L. Kerr and R.M. Bray. New York: Academic Press, 1982. Pp. 169-196.

⁶ Richard H. Kohn. "History at Risk: The Case of the Enola Gay." *History Wars: The Enola Gay and Other Battles for the American Past*. ed Edward T. Linenthal and Tom Engelhardt. New York: Metropolitan Books, 1996. Pp. 140-171.

perpetrators and enablers a voice, we risk learning that these acts lacked a coherent, perpetrator-specific rationale. If their acts lack an identifiably 'wrong' rationale, then it is not possible to distance ourselves from them. The group of Germans with whom I worked in Berlin had commonly been members of the Hitler Youth and or the NSDAP, but by the time of my interviews with them in 2005 they recognized and acknowledged the atrocities of World War II. Not one person tried to minimize the Holocaust; nor could anyone offer a concrete explanation for it or for their own role in Nazi German society. EW's explanation of her membership in the Hitler Youth was simply that, "Everyone was [. . .a member]." ⁷

By assigning the roles of 'victim' and 'perpetrator' to individuals and groups, we also pronounce judgment. The emotional valence we assign to participant roles in ethically/ morally troublesome situations is complicated and ultimately impacts the extent to which we relate to and learn from these events. Studies of Holocaust commemoration in Germany have demonstrated that Germans not unexpectedly have struggled with the wholehearted embrace of a perpetrator-centered identity. In Lars Rensmann's discussion of collective guilt in Germany following the Holocaust, he notes two main phenomena: (1) that collective guilt is distributed generationally, with younger Germans more likely to express feelings of collective guilt, and (2) that the degree to which an individual identified themselves with German national identity was inversely proportionate to the amount of guilt that they expressed. ⁸ He reports that during the postwar period in East Germany, collective guilt for the Holocaust was somewhat subsumed under collective guilt for the burden of the International Worker at the hands of capitalism and fascism in West Germany, a notion of 'collective victimhood' evolved in which West Germans viewed the privations they suffered during the war and postwar period as a sort of moral reparation for their misdeeds on the Eastern Front and during the Holocaust. ⁹ I observed these region-specific coping mechanisms in my own research. When the subject of the moral relevance of their own experience to the Holocaust arose in our interviews, West Berliners more frequently reported that they believed that their experiences during the Soviet liberation of Berlin were equivalent to the sufferings undergone by the Jews during the Holocaust. East Germans were more likely to report that German behavior had been so morally reprehensible that no punishment would have created moral equipoise, i.e. that no amount of suffering at the hands of the Soviets could compensate for the misdeeds of the Germans. This sense of moral inferiority centered around the atrocities perpetuated by German soldiers on the Eastern Front,

⁷ EW. Personal Interview. 23. January 2006.

⁸ Lars Rensmann. "Collective Guilt, National Identity and Political Processes in Contemporary Germany." *Collective Guilt: International Perspectives*. Ed. Nyla R. Branscombe and Bertjan Doosje. Cambridge, U.K.: Cambridge University Press, 2004. pp. 172-4.

⁹ Rensmann, pp 180-1.

though, rather than on those committed during the Holocaust, and I found very few East Germans who voluntarily discussed how genocide might fit into this moral retribution schema. Although these differences were quite pronounced among the older Germans I interviewed, I would expect younger generations to embrace a less disparate rhetoric. After all, the discourse surrounding World War Two in Germany evolved separately through 1989. Reunification saw the development of a unified perspective that reflected a broader sense of collective guilt held by the younger generation but also the widely held desire to repair the national image in the eyes of the world:

This illuminates the problems and ambiguities of the new discourse on the Holocaust in Germany. It is still moving between collective guilt feelings and guilt burden resentment, a tainted national identity and a revival of conventional identity narratives linked to normalization of nationalistic modes of thinking, which also bring about new defensive strategies towards national guilt.¹⁰

According to Rensmann, continued exposure to the Holocaust is essential for internalizing negative aspects of German culture and history and thus to the development of a 'post nationalist identity.' I think it also forces a certain level of self-examination, which, if conducive to the development of a healthy national identity, perhaps aids in the acknowledgement of responsibility at the individual level.

The acceptance of collective guilt involves assuming a certain level of responsibility and control, if not for a deed itself, then at least for its outcomes and long-term ramifications. The concept of 'collective shame' counterbalances that of collective guilt: whereas guilt implies acceptance of some responsibility, shame suggests assessment of an event in terms of its reflections on the group and the self. When we assign unique characteristics to a group of perpetrators or victims, collective shame is the result, whereas portrayal of the interconnectedness of behaviors in a group results in collective guilt.¹¹ The balance between collective guilt and shame feels tenuous in Holocaust discourse. As anthropologists Wohl and Branscombe¹² point out, the very assignment of guilt implies the absence of forgiveness both on the part victims and by global society at large. Willingness to forgive is greater when those characteristics attributed to the perpetrators are not assigned as "stable characteristics" of that

¹⁰ Rensmann p.

¹¹ Brian Lickel, Toni Schmader and Michelle Barquissau. "The Evocation of Moral Emotions in Intergroup Contexts: The Distinction Between Collective Guilt and Collective Shame." Collective Guilt: International Perspectives. Ed. Nyla R. Branscombe and Bertjan Doosje. Cambridge, U.K.: Cambridge University Press, 2004. pp 44-45.

¹² Michael J.A. Wohl and Nyla R. Branscombe. "Importance of Social Categorization for Forgiveness and Collective Guilt Assignment for the Holocaust." Collective Guilt: International Perspectives. Ed. Nyla R. Branscombe and Bertjan Doosje. Cambridge, U.K.: Cambridge University Press, 2004. P 285.

individual or group, but rather as facets of the essential character of a superordinate group of 'humans.'¹³ Wohl and Branscombe conducted a series of studies in which Germans and Jews were given genocide and Holocaust scenarios guised in the standard rhetoric of Germans and Jews as well as in this language of other ethnic/non-specific human groups . They found that both Germans and Jews assigned significantly more responsibility and guilt to the perpetrators when they were characterized as Germans than when the roles of perpetrator and victim were not identified with specific groups but described as anonymous individuals making decisions in a period of extreme societal change.¹⁴ Wohl and Branscombe conclude by suggesting that "when a group becomes genuinely cognizant of genocidal pervasiveness, situational explanations for it are more apt than group-based dispositional accounts."¹⁵ In essence, when we accept that we all have the capacity to become a perpetrator or a victim, we can both reduce the need to label each other as well as assume more responsibility for ethical wrongdoing. The act of identifying as a perpetrator limits the capacity for denial at the individual level; however, by expanding the base of perpetrators to include other members of society (and even in some cases ourselves), we diffuse responsibility among a larger collective, tacitly admitting that the brunt of the blame can be borne by society itself.¹⁶

Of course, what seems reasonable in theory often has limited relevance to reality. Branscombe goes on to hypothesize that acceptance of collective guilt is determined by three factors, the first being the degree to which the in-group is assumed to be responsible (and assumes responsibility) for what has happened. The second factor is the perceived illegitimacy/immorality of the actions perpetrated by the group, and the third the perceived costs and benefits of doing justice. The extent to which we are able to process all of these factors and assume collective guilt for the actions of the group is highly dependent upon the extent to which we identify with the in-group (i.e., the perpetrators).¹⁷ The problem of assuming collective guilt was beautifully illustrated in our own group's discussion of the Holocaust. Our initial discussions were safely distanced from the perpetrators: we discussed what 'they' did, and attempted to understand 'their' motivations from an almost clinical perspective. We expressed horror and incomprehension of the moral and ethical violations perpetuated by German physicians during the war. By the end of the fellowship, we had generated an extensive catalogue

¹³ Wohl and Branscombe, 285.

¹⁴ Wohl and Branscombe, 288-293.

¹⁵ Wohl and Branscombe, 293.

¹⁶ Nyla R. Branscombe. "A Social Psychological Process Perspective on Collective Guilt." Collective Guilt: International Perspectives. Ed. Nyla R. Branscombe and Bertjan Doosje. Cambridge, U.K.: Cambridge University Press, 2004. P. 325.

¹⁷ Branscombe, p. 323.

of the characteristics which we identified with the Nazi doctors and their choices during the war, a list which included such traits as fear, conformism, willingness to deny conscience, dehumanization and prejudice, but we also noted patriotism, sense of duty, ambition, hierarchy, scientific curiosity, and serving the public good. After 10 days of extensive examination, some members of the group were willing to assign these adjectives to themselves; others continued to insist that the Nazi doctors were uniquely immoral. These conversations took on deeper nuances as we debated contemporary issues in medicine such as euthanasia and determined that what some of us perceived as reasonable solutions to end of life issues others of us saw as morally unconscionable, a conversation potentially parallel to discussions held in Germany in the late 1930s. It became increasingly clear that fifteen medical students driven by a relatively altruistic collective interest in preventing ethical wrongdoing in our field were also driven by fifteen different perceptions of what was ethical.

The Fellowship was an attempt to explore the behaviors and characteristics of physicians as perpetrators and enablers, both in Nazi Germany and in ethically ambivalent situations today. As a social experiment, it also illustrated our willingness to label other individuals as perpetrators, our intellectual understanding of their motivations notwithstanding. We are less likely to see ourselves as potential perpetrators. These behaviors suggest that along with studying the Holocaust from a commemorative perspective we must also continually analyze with a 'human' slant, with the knowledge that we all can become perpetrators as well as victims. By narrowing the focus of our Holocaust discussion to a historical event involving primarily Germans and Jews, we redirect discussion away from the 'human' side of genocide and the universality of both roles. While context is incredibly important, too much context allows us to avoid confronting our own potential fallibility.

HAVING EMPATHY FOR THE UNSYMPATHETIC PATIENT

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I. Introduction

The patient was a woman with chronic pain and a long history of taking opioid medications. After dozens of visits to different doctors and every mode of imaging available, no one could find anything wrong. Today, the doctor informed her that he was not going to give her anything for pain and that she should leave his office. Turning abruptly on his heel, he walked out of the exam room. In tears, the woman shouted after him, "You took an oath to help people!" Poking his head back through the door, the physician replied, "Not for you, I didn't."

This story was told to me by a premedical student who was shadowing this physician. It disturbs me on several levels, from the student's obvious admiration of how the physician handled the situation, to the lack of professionalism shown by the physician. It also brings up a difficult question that every physician, every health care provider in general, struggles with on a regular basis: what should we do when faced with patients who evoke disgust or even malice in us? More broadly, how do we show empathy for the unsympathetic patient?

II. Medical Professionalism and Reflective Practice

Both the lay public and leaders of the medical community recognize that professionalism is an essential component of being a physician. There is a growing consensus that many problems in medicine, from loss of public trust in physicians to increasing numbers of malpractice lawsuits, are due to a perceived lack of professionalism by physicians.¹ In addition, studies of physician unprofessionalism suggest that patterns of unprofessional behavior begin very early in medical training. For example, there appears to be a relationship between being a physician who is disciplined for unprofessional behavior and having been a medical student who was found to display unprofessional behavior. This relationship is especially strong for physicians who were repeatedly found to be irresponsible while in medical school.^{2,3}

Over the last decade, medical educators have increasingly come to view training in professionalism as an essential component of medical training. The Accreditation Council for Graduate Medical Education (ACGME) now mandates that professionalism be included as one of the competencies that resident physicians must meet as part of their graduate academic training before they can be licensed as independent practitioners.^{1,4} Even at the undergraduate training level, those medical schools that use competency-based evaluations, such as the Cleveland Clinic Lerner College of Medicine (CCLCM), include professionalism as one of the competencies that must be met in order for students to be awarded their medical degrees.⁵

However, in spite of this emphasis on professionalism education, there is considerable nebulousness about what it means for a physician to be a professional. According to the Association of American Medical Colleges (AAMC), professionalism refers to the social contract that exists between physicians and the society at large. This implicit contract states that in exchange for giving physicians privileges such as allowing them to self-regulate their profession and educate future physicians, society will receive care from physicians who are competent, and who do not pursue their own self-interest over the welfare of their patients. As such, medical professionalism encompasses multiple attributes, including altruism, respect, honesty, integrity, and accountability.¹

The AAMC has noted that there are a multitude of competing considerations that threaten to erode a physician's sense of professionalism. These include the inherent inclination of most people to look out for themselves first; the common occurrence of situations that may tempt physicians to be self-serving; a sense by some physicians that society has broken the social contract by placing so many restrictions on medical practice; the overt and powerful intrusion of commercialism into the practice of medicine; and a medical socialization process that too often does not place value on adhering to standards of professionalism.¹

This last issue is of particular concern, because any good gained by formal instruction in professionalism will not endure a systematic lack of practice of professionalism. It was noted nearly 20 years ago that students and residents are often taught to consider ethics as a sort of tool to use when faced with difficult individual decisions; concurrently, they are steered away from being personally reflective, emotionally involved, or thoughtful about ethics on an institutional scale. More generally, medical students and residents learn more about professional behavior from the implicit process of acculturating into the normative expectations of medicine (the "hidden curriculum") than they do from the explicit training they receive in the classroom or on the wards.⁶

To help combat this, CCLCM has made reflective practice an additional required competency that medical students must demonstrate in order to graduate. However, this expectation does not guarantee that students will retain their "layman's view" of the systematic and systemic depersonalization that occurs during medical training. One particularly memorable example occurred during my fourth year, when another student and I were asked to speak during our school's anatomy commemoration ceremony. This ceremony is held in honor of families who have donated their loved ones' bodies to the medical school for use as cadavers. Afterward, the two of us were asked by one family member how we could adapt to the

gruesomeness of medicine, including gross anatomy. The other student immediately replied that we all got desensitized after a while. I said, “I’ve never gotten used to it, but I have learned to cope with my emotions.” This was followed by silence, and then the subject was changed. I realized that I had “admitted” something that was normally not admitted, even if it were thought or felt.

III. Empathy versus Sympathy

The ACGME includes empathy for patients as a component of its professionalism competency for residency.⁴ Although the terms empathy and sympathy are often used interchangeably, they actually describe two different concepts. The confusion is understandable, because these two words even appear interchangeably in the psychology literature.⁷ In addition, both empathy and sympathy represent ways of relating to the feelings of another person, which muddles the distinction between them. However, it is important to distinguish these two concepts, because it is not necessary to share another person’s feelings in order to comprehend them. In addition, empathy, but not sympathy, involves a set of cognitive skills that can be taught and learned.⁸

Sympathy describes an awareness of another person’s suffering, as well as the desire to help alleviate that suffering. A sympathetic person shares the feelings of the other person in such a way as to be involved in and even share the other person’s suffering. Sympathy is a way of relating; the focus is on the other person’s well-being.⁷⁻⁹ For example, when a patient told me about her dog’s recent death, I responded by telling her that I was sorry to hear that. Having lost a few beloved pets of my own, I shared her sadness, and we spent some time talking about how our pets had become such an integral part of our families. It is important to note that sympathy only applies to negative feelings, as one is not normally sympathetic if something good has happened to the other person.⁷

In contrast, empathy describes an intellectual attempt to understand what another person is feeling. An empathetic person is more detached; he or she wishes to comprehend what the other person is feeling without sharing that experience. Empathy is a way of knowing; the focus is on the understanding itself.⁷⁻⁹ For example, one patient complained to me about having to wait for several hours before being seen in the emergency department. Since this patient did not have a serious illness and the department was very busy that evening, I thought it was entirely appropriate that she had to wait as long as she did. However, I understood that she was feeling frustrated, and I acknowledged to her that waiting can be frustrating even though I didn’t sympathize with how she felt.

Although the last example illustrates an expression of empathy for a negative feeling, it is important to note that, unlike sympathetic interactions, it is possible to be empathetic toward another person's positive feelings as well. For example, an unmarried teenage patient who tested positive for pregnancy was pleased to find out that she was pregnant. Although I did not share her feeling, I commented that she seemed happy to hear this news, and she nodded excitedly. Since I understood that she wanted to have the baby, we then had a discussion about the importance of good prenatal care.

IV. Unsympathetic Patients

Early in the twentieth century, the predominating positivist philosophy held that physician interactions with patients were objective and based upon biomedical science. The thought was that physicians' personal feelings and beliefs did not enter into or otherwise affect their relationships with patients. However, over the past several decades it has been recognized that sociological factors do in fact substantially influence how a physician relates to a patient. One author categorized these sociological influences into four types: patient characteristics, clinician characteristics, the interaction between the clinician and the health care system, and the clinician-patient relationship.¹⁰ Here, we will primarily be interested in how negative physician perceptions of patients influence the clinician-patient relationship.

Freud called the unconscious reaction of a psychoanalyst to a patient countertransference; he used this term to refer to hostile or sexual feelings.^{11,12} The medical counterpart occurs when a physician has an incompletely recognized negative emotional reaction to a patient. It is important to note that countertransference comprises both unconscious negative feelings as well as unconscious harmful actions resulting from those feelings. In addition, countertransference can be a reaction that is idiosyncratic to a specific physician (internal), or it can be a reaction that would be common for many or even most physicians (external).¹² The negative feelings and actions of many physicians in response to unsympathetic patients would be an example of external countertransference.

Several authors have attempted to define categories of patients that are generally disliked by physicians. Groves wrote about "hateful patients," whom he defined as the types of patients that most physicians dread. He divided these patients into four general categories. "Dependent clingers" are patients who require inordinate amounts of reassurance, help, and attention; their demands eventually cause the physician to want to avoid them. "Entitled demanders" are patients who attempt to intimidate and control the physician, as by threatening to file a lawsuit; their sense of entitlement disgusts, angers, and frightens the physician.

“Manipulative help rejecters” are patients who almost seem to take pleasure when yet another therapy fails to work; their pessimism creates anxiety and a feeling of inadequacy for the physician. “Self-destructive deniers” are patients who constantly act at odds with the physician’s attempts to keep them alive and healthy; their self-destructive behavior evokes malice in physicians.¹¹

Marshall and Smith noted six types of unsympathetic patients that evoke countertransference feelings, four of which overlap with Groves’s categorizations.¹² Similar to Groves’s manipulative help rejecters, “somatizers” are patients who cause exasperation because it is never possible to find a therapy that works. “Challengers” are analogous to Groves’s entitled demanders. “Self-destructives” and “clingers” are described similarly by both authors. Going beyond Groves’s categories, these authors identified very ill patients with challenging biomedical conditions that can make physicians feel inadequate as a fifth category. Their final category is the “incommunicatives,” a frustrating group made up of patients with barriers to communication such as poor comprehension of English, low level of education, or mental illness.¹²

Najman *et al* defined several groups of patients against whom physicians often hold prejudices based upon a survey of physicians in multiple different specialties. They found that patients who are “socially deviant” tended to be disliked by their overwhelmingly middle class physicians. Examples include alcoholics, patients who have attempted suicide, drug addicts, prostitutes, mentally handicapped patients, and mentally ill patients. Interestingly, they also found that elderly patients and female patients were more likely to receive inadequate health care compared to younger men.¹³ Similarly, Eisenberg noted that patients who are seen as being of low social worth, such as alcoholics or noncompliant patients, may be given less time or consideration than patients who are seen as being of higher social worth.¹⁰

Finally, Papper classified “undesirable” patients based upon types of physician biases. Socially undesirable patients are similar to the social deviants defined by Najman. Attitudinally undesirable patients do not behave as the physician wants them to, such as being ungrateful or challenging the physician. Physically undesirable patients have illnesses (or lack of illnesses) that aren’t curable or that the physician doesn’t find interesting. Circumstantial undesirability occurs due to the patient showing up at an inopportune time, such as at the end of a shift. Incidental undesirability occurs because the physician is interested in doing something else instead of patient care, such as research.¹⁴

V. Examples of unsympathetic patients

Similar to Groves, I am defining unsympathetic patients as those patients who are disliked by most clinicians. In this section, I will go through examples of several classes of unsympathetic patients who, in my experience, evoke disgust or malice in clinicians. I will also attempt to explain why such unsympathetic patients evoke these often powerful negative reactions, and I will provide examples that illustrate how a partially unconscious aversion to specific patients can lead to suboptimal care. Finally, I will discuss parallels with the attitudes of Nazi physicians toward groups of people whom they considered to be unsympathetic.

A. *Patients Who Evoke Disgust*

Morbidly obese patients are among the most commonly seen patients who evoke feelings of disgust in clinicians. I believe that there are several factors that combine together to cause a fairly strong reaction against the obese. First, there is a sense of blame. Many clinicians have internalized the idea that obese people are obese due to a lack of discipline or willpower, as opposed to due to genetics or uncontrollable environmental circumstances. Second, obese patients are harder to care for than are their thinner counterparts. Any physical exam, imaging test, or medical procedure is more difficult to perform on a morbidly obese person than it is on a thinner person. Third, our society extols thinness as the ideal, such that an obese person is considered to be ugly simply by virtue of being obese.

Obese patients are aware that other people think their obesity is their own fault, and this can lead to a situation where the patient has trouble speaking honestly with the clinician. One of my outpatient clinic patients was obese and diabetic, and I was attempting to counsel her about weight loss. At one point, I asked her about her soda consumption, and she said she didn't want to tell me because she knew I would "tattle" to my preceptor. Although I reassured her that I was only asking because I wanted to help find a source of calories that she could cut out, she was too concerned about my preceptor finding out that she was still drinking soda to discuss it with me.

Another commonly seen group of patients who evoke disgust among many clinicians is the elderly. These reactions tend to be particularly strong if the elderly patient is demented, incontinent, institutionalized, or seriously ill. As with morbidly obese patients, I believe that part of the cause of this reaction stems from the fact that the elderly are considered to be ugly in a society that extols youth. But an even bigger reason is that the elderly represent a fear of death and disability that many people in our society do not want to confront. It is frightening to contemplate a future that includes being seriously ill, being dependent on others, or losing control of our minds and our bladders. Finally, even relatively healthy elderly patients just live

at a slower pace than younger patients do. Their tendency to speak and move more slowly may exasperate a harried clinician.

Unlike obese patients, seriously ill elderly patients may not be aware of the clinician's counter transference reaction to them. However, the repercussions for their care are just as serious, even if the elderly patient is relatively healthy and mentally competent. For example, an older female patient who visited the outpatient gynecology clinic tried to discuss her stress incontinence with the gynecologist after he completed her physical. The gynecologist did not want to deal with her problem and basically just dismissed her, saying that there wasn't anything he could do and that she could join a research study if she wanted. So the patient left the office without her problem being addressed and she not even receive a referral to an urogynecologist.

A third group of patients that can evoke disgust in physicians are the homeless. Physicians in many specialties do not typically encounter homeless patients in their practice, but I am including them here since emergency physicians will likely encounter them, especially in a large county hospital. Since the average physician comes from a middle class or upper middle class background, I believe that a large source of aversion to the homeless stems from their physical presentation, as they are more likely to have poor hygiene compared to other groups of patients. In addition, homeless patients can be frustrating to care for since they often have poor follow-up and may "bounce back" to the ED frequently. If the homeless patient also has addiction or mental health problems, the desire to avoid the patient can be even stronger. Finally, homeless patients may be seen as "leeches" on the system, i.e., as people who consume resources without contributing anything.

As with elderly patients, homeless patients are sometimes aware of the negative reactions of clinicians. During one of my ED shifts, a homeless man came in to be seen for his blisters. When I walked into the room, he showed me the blisters, and I was dismayed by how black with dirt his feet were, including the blisters. I'm not sure if he saw my reaction or if he was just tired of waiting, but he said he didn't want to be seen any more and walked out of the ED. I was so taken aback that I didn't even try to stop him. Later, I realized that I should have tried to talk him into staying and being seen. In addition, I decided that if I had another patient like this, I should excuse myself to go get a basin of warm water to soak his feet while we finished the interview.

Thinking about groups of patients who disgust American physicians, I am struck by the parallels with the feelings Nazi physicians had for their physically and mentally handicapped patients. In the early part of the 20th century, several influential physicians in Germany and

other countries advocated sterilization or even euthanasia of the mentally ill and physically handicapped.^{15,16} Although the publically stated argument was economic, it was based upon feelings of disgust evoked by the handicapped as well. For example, one publication referred to the mentally ill as so-called empty human husks that were parasites upon society.¹⁵

Although the idea of sterilizing or euthanizing the handicapped was debated in several countries, including here in the United States, it was in Nazi Germany that this proposal to eliminate “lives not worth living” was put into practice. At the beginning, physicians and midwives were required to register children who were born with birth defects. These children were subsequently brought to collecting institutions and killed by gassing, lethal injection, or starvation. Over a period of a few years, the program expanded to include physically handicapped adults and mentally ill patients living in institutions. It is estimated that over 70,000 mentally and physically handicapped patients were gassed.^{15,16}

The Nazi extermination of the Jews was similarly justified and carried out after medicalizing the Jews as a disgust-provoking group, which was then viewed as a parasite or cancer on the German society’s body.^{15,16} Drumming up of feelings of disgust for the Jews was aided by propaganda like the pseudo documentary “The Eternal Jew,” which interpolated images of running rats with images of Jews, and portrayed Jews as living in filthy and vermin-infested homes by choice.¹⁷ Again, this characterization of Jews as disgusting and sick paved the way for the “logical” next step of “quarantining” Jews into ghettos, and ultimately actively exterminating them.^{15,16}

Even if we leave aside the issue of the Jews for now, since many Nazi physicians saw them as an “other” race that was alien to Germany, this does not explain how Nazi physicians became involved with murdering tens of thousands of their own citizens. It is important to note that Nazi physicians were not forced to murder their handicapped patients—they were simply authorized to do so.^{15,16} The most shocking part of the entire operation is that not only did the medical community not advocate for their patients or try to stop the euthanasia program, but that they were actually the driving force providing the rationale, the techniques, and much of the manpower that made the program feasible to accomplish.¹⁶

While it is tempting to dismiss the possibility that the murder of “disgusting” patients could be carried out in this country, we must keep in mind that the eugenics ideas held by Nazi physicians were also in vogue in other Western countries, including the United States. Although American handicapped patients were not killed in gas chambers, several states and the Supreme Court were in favor of the sterilization of “imbeciles.”¹⁶ Fortunately, eugenics fell out of favor in this country, and that was as far as things went. However, we can see that ideology has the

potential to lead to immoral and unprofessional action by physicians in the right sociopolitical environment. By dehumanizing patients who disgusted them, pre-Nazi physicians opened the door to the organized destruction of these patients by physicians during the Nazi era. The resulting breakdown in professionalism led to the greatest betrayal of patients by their physicians that the world has ever seen.

B. Patients that evoke malice or a desire to punish

Suicidal patients are commonly disliked by physicians, but here, the overarching feeling is one of malice rather than disgust. By malice, I mean that the physician has a (possibly at least partly unconscious) wish to see harm come to the patient. Patients who have attempted suicide often require a significant amount of time and effort to resuscitate, and they may be hostile and ungrateful for the physician's efforts to save their lives. Therefore, some clinicians may feel that the patient should just do the job right instead of botching things up and being brought to the hospital to create pointless work for everyone involved in their care. If the patient has attempted suicide multiple times, the physician may feel especially resentful of having to care for them yet again. The physician may even want to "teach the patient a lesson" by treating them more roughly than necessary.

These feelings of malice toward people who attempt suicide are not limited to health care professionals. A premedical student told me that her fiancé, who is a public transit driver in San Francisco, has to deal with people attempting suicide by jumping in front of the train on a regular basis. Since he figures that someone who is suicidal will eventually succeed in killing themselves no matter what he does, any time he manages to thwart an attempted suicide by stopping the train before hitting them, he will get out and hand the person a transfer slip and directions for how to take a bus to the Golden Gate Bridge. That way, she explained, the person can "do their business" without creating more paperwork for him to fill out. (As a side note, the Golden Gate Bridge is the most popular place in the entire world to commit suicide,¹⁸ a fact of which this city employee is obviously aware.)

Another group of patients that can evoke feelings of malice among physicians are prisoners, especially those convicted or even suspected of serious crimes like child abuse, rape, and terrorism. Particularly for prisoners who are sentenced to die, physicians may feel that caring for them is pointless. Even if a prisoner is not under the death sentence, the seriousness of their crimes may make the physician feel that the prisoner doesn't "deserve" medical care, or that the prisoner has forfeited their right to be treated like a law-abiding member of society. Anger over the undeserved fate of the prisoner's victims can also make the physician feel like punishing prisoners by mistreating them.

Prisoners accused of terrorism provide a special challenge, as physicians caring for them may fall into the trap of becoming involved in torture. In 2004, information about possible physician participation in the torture of prisoners in Guantanamo Bay, Cuba and Abu Ghraib, Iraq became public. Physicians allegedly enabled torture of prisoners by failing to report wounds that were obviously caused by torture; giving interrogators access to prisoners' medical files; and possibly even altering the cause of death on the death certificates of prisoners who died while being interrogated.¹⁹ The news was alarming to many who saw the parallels with crimes committed by Nazi physicians, and it demanded explanation. Grodin and Annas proposed that physicians may have a special vulnerability to becoming perpetrators of torture due to the "hidden curriculum" portion of their training, which teaches them to compartmentalize and distance themselves from their patients.²⁰

One final group of patients that may evoke malice in clinicians comprises addicts and drug-seeking patients. As Najman¹³ and Eisenberg¹⁰ pointed out, part of the animosity clinicians feel toward these patients is due to a sense of them being socially deviant or of lower social worth than "good" middle class patients. However, similar to obese patients, there is also a sense that these patients are to blame for their own problems, and that they are ruining their own health due to insufficient willpower. Since some drug-seeking patients become belligerent if the physician refuses to give them painkillers, the stage is set for an interaction that can make the physician angry and lead to an unpleasant confrontation.

My experience has been that interactions like the anecdote used to introduce this paper are unfortunately fairly common. Particularly if a patient is a frequent user of medical services for complaints of pain, clinicians can have an almost reflex tendency to assume that the patient must be seeking drugs. Patients who are known to be drug-seekers, especially if they have failed to keep a narcotics use contract, are particularly likely to be treated in an unprofessional manner by a physician who is angry or lacks empathy. In the worst cases, this negative reaction can be accompanied by a desire to punish the patient by verbally denigrating them as the physician in the anecdote did.

Thinking about how physicians react to patients who evoke feelings of malice, I see a parallel to how turn-of-the-20th-century Germans treated the Hereros. The Hereros were a native tribe living in German colonial Africa. In 1904, they rebelled against the Germans, who regarded them as inferior and had enslaved them. Having put down the rebellion, the German commander declared the rebellion to be a race war, and he ordered his men to commit racial genocide.^{21,22} It wasn't enough to decisively defeat the Hereros; as a group of "inferiors" who did not conform to the social order, they were to be maliciously punished.

There is also a direct connection between how the Germans treated the Hereros and how they treated the Jews four decades later. In both cases, the group considered to be inferior was enslaved, imprisoned in death camps, and annihilated.^{21,22} In both cases, the justification for this policy was not only a feeling of racial superiority, but also a desire to punish the so-called inferior race for their evilness. And in both cases, the vilification of the other group was couched in medical language, and the annihilation was seen as necessary in the interest of the health of Germans.²² Several prominent Nazis had visited German colonial Africa, and it is therefore not a coincidence that the Nazis adopted many of the justifications and methods used in Africa as a blueprint for their policies toward the Jews.^{21,22}

After the end of World War II, many Americans had malice for the Nazis and what they represented, and this animosity extends to their modern anti-Semitic representatives. An essay published by a Jewish psychiatry resident described an anecdote told to him by a friend. Briefly, a man with a swastika on his chest was brought unconscious into the ED. The ED staff reacted by intentionally mistreating the patient. But when the man woke up, he explained that he was a former neo-Nazi who now went around to high schools to speak to students about tolerance.²³ The irony here is that in our zeal to distance ourselves from the evil of the Nazi physicians, we run the risk of committing the same evil ourselves any time we treat patients maliciously. The injustice is all the greater when we incorrectly judge a patient and maliciously hurt an innocent person.

Fortunately, physicians usually do not fully act on their malicious reactions to patients whom they regard as inferior, evil, or socially deviant. However, we have seen that physicians and public officials are sometimes complicit in actions that they know will cause harm to others, such as the San Francisco transit driver who cynically gives directions to suicidal people, and the military physicians who permitted interrogators to torture prisoners. As with the Nazi physicians who were disgusted by their handicapped patients, this dehumanization process of seeing others as deserving to die or be harmed sets the stage for taking the next step and actually killing them. In fact, the logical connection between deciding that another person or race deserves to die and actually killing them is much more straightforward than was the economic logic used by the Nazis to justify killing the handicapped.

VI. Developing empathy for unsympathetic patients

A. *Evolution of loss of empathy in medical training*

Levels of empathy for patients are known to change during the course of medical training. A recent longitudinal study found that empathy is greatest among preclinical medical

students, and that empathy steadily declines during the clinical second half of medical school. The authors also found that women tend to have higher levels of empathy than men do, and that students going into clinical specialties have higher levels of empathy than students going into technical specialties do. However, a parallel pattern of declining empathy was seen for all students, and this pattern of declining empathy continues during residency.⁸

Several reasons have been suggested for the loss of empathy over time by trainees. One proposed cause that has received a lot of attention is the dearth of appropriate clinician role models. Another is the often hostile environment that trainees encounter, including the pressure of academic demands, time limits, long-term sleep deprivation, and various forms of hazing. Other factors that may erode the role of the relationship between patients and trainees are the greater reliance on technology (both electronic medical records and imaging); a greater emphasis on evidence-based medicine that extols the randomized controlled trial as the gold standard for patient care; and changes in the way that medical care is delivered to a more customer service-oriented model.⁸

Interestingly, a significant minority of students, about a quarter of the sample, did not become less empathetic over the course of their medical school training. The authors noted that some of these students took the attitude that they could learn as much about what not to do from the “bad” doctors as they learned about what to do from the “good” doctors.⁸ This resonated with me, since I have often said the exact same thing. In fact, I would argue that I have often learn more about how to be empathetic by observing the least empathetic residents and attendings with whom I have worked.

B. Medicine is an art, not a science; doctors are healers, not mechanics

Having a general consensus that empathy for patients is a necessary component of professionalism, and that professionalism is a necessary component of being a healer, we are left with the question of how to increase levels of empathy and professionalism among medical students, residents, and attending physicians. In 2005, 54 hospitals in 21 states participated in a project that included holding grand rounds to discuss the factors that lead to compassionate patient-caregiver relationships. A symposium on the same topic was also held later that year. Participants in the discussions and the symposium included patients and other interested community stakeholders as well as clinicians.²⁴

Along with discussing this topic, the participants also gave suggestions for how to make medical care more compassionate. Three common themes came up from all of these meetings: communication, common ground, and treating the patient as an individual. Suggestions for improving communication were often stylistic, such as having the clinician introduce himself or

herself when walking into the room, sit down while talking to patients, and remember the patient's name. In order to find common ground with patients, it was suggested that clinicians should make a conscious choice to care about patients. Clinicians might also find common ground by sharing some personal information and admitting mistakes as appropriate. Finally, treating the patient as an individual requires a balance between guiding the patient while respecting the patient's wishes and choices.²⁴

One especially good point that came up at the symposium is that personal experiences are useful for developing empathy.²⁴ In particular, being a patient oneself is a valuable tool to help clinicians develop empathy.²⁴⁻²⁷ Since most trainees are young and may not have had personal experience with illness or being a patient, this could help explain why it may be harder for them to understand the patient's perspective as they need to if they are to have empathy for patients.²⁷ Some schools now require students to do activities such as following patients longitudinally in order to help with this aspect of empathy training.¹ Finally, it is important to point out that lack of empathy or professionalism should be seen as a chronic problem requiring life-long training and support, not as an "acute trauma."²⁴

For the purpose of formal instruction in developing empathy, there is a great deal of literature on specific phrases and nonverbal cues that physicians can use to show empathy and improve relations with their patients. For example, clinicians can make eye contact and nod to show that they are actively listening. In addition, they can reflect what the patient has told to them in such a way as to identify the emotions that the patient is feeling along with the factual details of the discussion. Importantly, clinicians can ask for corrections of their interpretations, and accept those corrections gracefully.²⁵

From a sociological perspective, one author suggests that medical students have a "hidden curriculum" based on a biomedical model that emphasizes perfectability, mastery, and control. While withdrawal from patients based in scientific objectivity is considered professional behavior, withdrawal for reasons of fear is not considered to be professional. Thus, there is a tendency to avoid emotional aspects of patient encounters and to see patients as puzzles or projects to be worked on. When patients are seen as objects in this way, empathy becomes irrelevant. She suggests that medical students should be encouraged to be self-reflective, and they should be taught an "ethics of imperfection" that entails accepting the limitations of our ability to control or master life. She also emphasizes the importance of role models who will share their own vulnerability with students and who will acknowledge the human bonds between clinicians and patients.²⁸

I agree that if we want to teach students to have empathy and to behave as professionals, an emphasis on self-reflection and the personal well-being of students should be a significant component of medical education. Medical schools are beginning to recognize the importance of these factors and are incorporating them into the curriculum; in fact, at CCLCM, self-reflection and personal development are two of our competencies.⁵ Many schools are also incorporating pedagogic tools such as case studies, discussion groups, journaling, and role-play into their curriculums to help students learn to cope with emotionally difficult situations while still maintaining empathy and professionalism.²⁷

Finally, it is essential to change the fact that much of the discourse on professionalism emphasizes what students should *not* do rather than what they *should* do. The AAMC has suggested, among other things, that public recognition of positive examples of professionalism and compassion would be a good way to reinforce the importance of these qualities. Some of their proposals include the white coat ceremonies that are already held by most medical schools to induct students into the profession of medicine, as well as starting chapters of the Gold Humanism Honor Society (GHHS).¹ The GHHS, which functions as the humanism analog of the Alpha Omega Alpha academic medical honor society, seems to be an especially good idea to me. It would give medical students, who tend to be a highly motivated and driven group of people, something tangible to work toward in terms of improving their compassion and professionalism. We don't currently have a CCLCM GHHS chapter, but I have been talking with the deans about starting one.

VII. Conclusion

When faced with an unsympathetic patient, the physician may feel jaded, helpless, disgusted, or malicious. However, these feelings often provide important insight into the patient's coping mechanisms,^{11,29,30} and they can help the physician cope by alerting him or her to the need to set limits on disruptive patient behavior.^{11,12,30} Thus, instead of reacting unthinkingly to strong negative feelings about a patient, the physician can acknowledge those feelings and make a conscious choice not to act upon them.^{11,12} The physician can also make an effort to understand a dislikable patient's perspective without necessarily agreeing. In this way, he or she can still have empathy for even the most unsympathetic patient.³⁰

The patient was a woman with chronic pain and a long history of taking opioid medications. After dozens of visits to different doctors and every mode of imaging available, no one could find anything wrong. Today, the doctor informed her that he was not going to give her anything for pain and that she should leave his office. Turning abruptly on his heel, he walked out of the exam room. In tears, the woman shouted after him, "You took an oath to help people!" Poking his head

back through the door, the physician replied, “The reason I’m not giving you any more drugs *is* to help you.”

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INTRODUCTION TO THE LAW PROJECTS

Last summer, Amos Friedland and I traveled with the first group of FASPE Law Fellows to Berlin, and from there to the death camps at Auschwitz-Birkenau, in beautiful late spring weather. I was unsure what the experience would mean for us individually and as a group. Before we left New York, we were perfect strangers. I was curious, and a little apprehensive, about the impact of an experience of such intensity shared with others with whom I had no emotional or other bonds to buffer it. I had been to Auschwitz once before, with my family, and their presence was an enormous comfort to me then. What would it be like to be back again, to visit the museum and walk the killing fields, with a group of young men and women I had met only a few days before, and with whom I shared nothing more than a professional commitment to the law and its ideals?

As it turned out, that commitment was enough to start us toward a sense of common purpose. And that in turn grew into something deeper and more substantial under the annealing power of the grief and perplexity that a visit to Auschwitz is bound to provoke. The memory of the visit is for me inseparable from the memory of the others with whom I shared it. I cannot think of it without thinking of them.

I think of the somber hours we spent in the camps themselves. I think of the hotel in Oświęcim, and of the great square in Krakow, surely one of the most beautiful in the world, where we continued our seminar discussions, after dinner, in groups of three and four, in the soft June air. I think of the questions we discussed and debated, trying to make sense of the total default of our profession, without much resistance at all, in the face of a movement inspired by a barbarism and inhumanity that are the exact opposite of everything the law represents. I think of our efforts to find lessons in that catastrophic failure to guide us in our understanding of the meaning of the professional duties of lawyers and judges today. And I think of the essential, but extraordinarily difficult, effort not merely to assume—what is so easy and reassuring—that we are better, more courageous and upright human beings, than the countless intelligent and well-educated Germans who capitulated to the madness of Nazism in the 1930s and 1940s, and that we, unlike them, are immune to the pressures to which they so easily succumbed.

At our final meeting, the students in the seminar were asked what lessons might be drawn from our experience. One of them said, “I don’t know. I’m not sure any lessons of a practical kind. But I can tell you this. It put the fear of God into me.” I thought then, and think now, that her words came about as close as any can to capturing a thought that lies beyond speech. I’m glad to have been a part of the experience, and to have had the comfort and wisdom of my fellow students in it.

One does not stop thinking about such an experience the moment it ends. My guess is that one never really stops thinking about it at all. In these pages, you will find some of the very different student reflections prompted by our first FASPE seminar. They are first fruits, and a promise of future harvests. I hope that reading them conveys the spirit of the remarkable venture in which they were born.

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REFLECTIONS ON AUSCHWITZ: POSITIVISM AND NATIONAL SOCIALIST JURISPRUDENCE

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I. Introduction

“Never again.” The words, inescapable, inevitable here, are uttered through clenched, trembling lips. They are released with an uneven growl, betraying a mix of anger and sadness, frustration and despair. Anger at the perpetrators who laughed, played, raised families, and carried on a normal life beyond the gritty, unforgiving wire of the camps, only to return during the day to serve as the demons tormenting the poor souls damned to a modern industrial Hell. Sadness at what was lost, the lives cut short, the culture stunted, the flame of potential of six million souls extinguished, the childhoods stolen, and the innocence forever destroyed. Frustration at our inability to save them, restrained by the iron bonds of time, forced to bear witness. All of this, an intricate, complex tempest, conveyed in two simple words: “never again.”

The sentiment comes easily. The harsh concrete, the unfeeling wire continue to confine the heart. Though the hallowed ground has been liberated for over 60 years, entering the gates of Auschwitz evokes a claustrophobic feeling deep in the pit of one's stomach. Though there on one's own accord, leaving, walking outside the wire is still a relief. Amid this emotional tumult, it is easy to vow, swear those words: never again. But that solemn oath is, in a manner, drunk sincerity. Without more, without a greater understanding of what led to that dark place, “never again” lacks meaning.

The horrors of the Third Reich and the apparent acquiescence of German jurists in the terrors of the Nazi regime led to a vigorous discussion, epitomized by the Hart-Fuller debate,¹ on role of morality in the law, and the potential for morality to serve as a bulwark against future abuses. At the core of this debate is the question “is morality an inherent element of law or are law and morality separate spheres?”

II. Positivism and Morality

The exact contours of positivism are difficult discern, so much so that Robert Summers “identified twelve different positions that were often labeled as ‘positivist,’ many of them mutually exclusive.”² One common denominator of positivist thought is a separation of law and morality. According to Frederick Schauer “an important part of the positivist program is the

¹ See Hart, H.L.A., *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); Fuller, Lon L., *Positivism and Fidelity to the Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

² Schauer, Frederick, *The Limited Domain of the Law*, 90 Va. L. Rev. 1909, 1943 (2004).

concern with autonomy of law, a concern that not implausibly grows out of historical positivism's traditional focus on actual (and not only conceptual) separation of law and morality."³ Schauer's view is reinforced by Markus Dubber, who posited that "[f]or the purposes of exploring positivism's contribution to the decision-making process of German judges, suppose one initially thinks of positivism . . . as the separation of spheres of law and morality."⁴ Accordingly, it is hardly surprising that H.L.A. Hart, the classic positivist posited that "in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law."⁵

It should be noted that positivism's separation of law and morality does not mean the law may not be influenced by moral precepts. As Hart asserts, critics of positivism, including Fuller, "revived an ancient libel on positivist thinkers by imputing to them a view of moral obligations to obey law which is not theirs."⁶ This "ancient libel" was also enunciated by Nazi legal scholar Carl Schmitt, who wrote that the "[t]he concept of legality inherits the situation established by princely absolutism: specifically, the elimination of every right to resistance and the 'grand right' to unconditional obedience."⁷ This view ignores the limitations of positivist philosophy. According to Frederick Schauer and Virginia Wise, "[i]t is the central and persistent claim of legal positivism that the criteria for the existence of law – collectively, the rule of recognition – are source-based."⁸ Morality may be relevant in the crafting of law, but for the positivist, it is not law of its own force. "Law to the legal positivism is a function of where it comes from and not what it says."⁹ Thus, in Hart's words, the view that substantively unjust law may still be law "at most . . . implies the belief that those who relied on such statutes were *legally* entitled to do so."¹⁰ Positivism may negate the *legal* right to resist unjust law, however it preserves the *moral* right to do so.

Positivism is distinct from the related doctrine of textualism. Like positivism, "textualism does not admit of a simple definition."¹¹ The common denominator in textualist philosophy is a

³ *Id.*

⁴ Dubber, Markus Dirk, *Judicial Positivism and Hitler's Injustice*, 93 Colum. L. Rev. 1807, 1824 (1993).

⁵ Hart, *supra* note 1, at 600.

⁶ Hart, H.L.A., *The Morality of the Law*, 78 Harv. L. Rev. 1281, 1289 (1965).

⁷ Schmitt, Carl, *Legality and Legitimacy* 10 (Jeffrey Seitzer, ed. and trans., Duke University Press 2004).

⁸ Schauer, Frederick & Wise, Virginia J., *Legal Positivism as Legal Information*, 82 Cornell L. Rev. 1080, 1093 (1997).

⁹ *Id.*

¹⁰ Hart, *supra* note 6, at 1290 (emphasis in the original).

¹¹ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

preference for rules based on the letter rather than the spirit of the law.¹² By rejecting interpretations based on the spirit of the law, both textualism and positivism are hostile to interpretations of statutes based on moral precepts alone. Where they differ is that textualism is an interpretive methodology; it is better for a variety of reasons to interpret the law based on the letter of the law than an amorphous spirit. As such, textualism presumes the validity of the law to be applied. Positivism is more circumspect; it has implications for interpretive methodology¹³ but is primarily focused on the validity of law qua law irrespective of the substantive morality of the law. In short, positivism is (unsurprisingly) a positive doctrine, while textualism may be considered normative.

The separation of law and morals inherent in positivism and textualism has several major virtues to acquit itself. In particular, they promote several virtues in the law and the application of the law which are viewed as morally desirable, most notably stability, predictability, and consistency.

Positivism and textualism serve as limiting factors on the domain of the law. Schauer defines the limited domain of the law by stating “[i]f law is a limited decisional domain, arguments permissible in other and larger domains become impermissible in law.”¹⁴ Presaging Chief Justice Roberts’ famous umpire analogy,¹⁵ Schauer elaborates:

Just as a baseball umpire is precluded from accepting otherwise good arguments that a World Series victory for the Boston Red Sox might mean more (for example, produce a greater utility or reward better behavior) for its fans than a New York Yankees victory would for the Yankees and its fans, law may be a domain in which otherwise acceptable moral, political, and policy arguments are unavailable, not because they are bad arguments, but rather because they are beyond the boundaries – out of play, if you will – of the institutions of the law.¹⁶

As Caleb Nelson observes, rule-like directives “might tell implementing officials to ignore some factors that they otherwise would have thought relevant to the goal behind the rule and to focus

¹² See *Id.* (identifying two main qualities of textualism, its association with “the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context” and a preference for “the letter of the statutory text over its spirit”); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 416 (2005) (“What is clear is that judges whom we think of as textualists have a greater affinity for ‘rules’ than judges whom we think of as intentionalists”).

¹³ See Schauer, Frederick, *The Limited Domain of the Law*, 90 Va. L. Rev. 1909 (2004) (asserting that positivism limits the types of considerations judges may account for in reaching judicial decisions).

¹⁴ *Id.* at 1915.

¹⁵ “Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.” *S. Comm. on the Judiciary: S. Hearing 109-158, Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong. 55 (2005) (Statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

¹⁶ Schauer, *supra* note 2, at 1915.

exclusively on a narrower set of issues identified by the rule.”¹⁷ By excluding moral justifications, positivism and textualism limit the nature of arguments that are permissible basis of law, increasing the predictability and stability of the law.

III. Positivism and Nazi Jurisprudence

Immediately following the Second World War, positivism received much of the blame for the complicity of the judiciary in the Nazi regime.¹⁸ This is in part because many of the former Nazi jurists cited positivism and the neutral application of the law as justifications. The defendants in the Justice Case at Nuremberg were typical in this regard. According to Matthew Lippman, “[t]he defendants [in the Justice Case] justified their conduct in terms of obedience to the law.”¹⁹ Thus, in his opening statement for all of the defendants Dr. Egon Kubuschok sought to exonerate the defendants by observing that “positivism of law has played a far more important part in Germany since the end of the nineteenth century than has been the case outside the continent. Only the written law [statutory law] and not general ideas on morals and rights constituted the directive for administration of law and justice.”²⁰

This theme was echoed in the closing statements of several of the defendants. Rudolf Oeschey, a former Chief Justice of the Special Court in Nuremberg and executive of the National Socialist Lawyers League,²¹ pleaded “I always acted in the belief and in the conviction that I was doing right, by obeying the law to which I was subjected and . . . to apply it in accordance with the will of the legislator”²² and defendant Günther Nebelung, former Chief Justice of the Fourth Senate of the People’s Court,²³ asserted “I was a German judge. I followed the laws of my country and my knowledge and my conscience in passing judgment.”²⁴ The problem with these arguments is, as Dubber observes, “[i]nsofar as it makes sense to speak of Nazi legal theory

¹⁷ Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 375 (2005).

¹⁸ See Curran, Vivian Grosswald, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 Cornell Int’l L. J. 101, 103 (2002).

¹⁹ Lippman, Matthew, *Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism*, 11 Temp. Int’l & Comp. L.J. 199, 301 (1997).

²⁰ *Opening Statement for all Defendants, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 108-109 (U.S. Gov. Printing Office 1951).

²¹ *Indictment, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 16 (U.S. Gov. Printing Office 1951).

²² *Final Statements of the Defendants, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 952 (U.S. Gov. Printing Office 1951).

²³ *Indictment, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 16 (U.S. Gov. Printing Office 1951).

²⁴ *Final Statements of the Defendants, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 950 (U.S. Gov. Printing Office 1951).

considering its incoherence, radical pragmatism, and ultimate irrelevance, positivism did not enter Nazi legal theory.”²⁵

i. Positivism and the Friend-Enemy Dichotomy

One way of understanding National Socialist thought is through the lens of Carl Schmitt. For Schmitt, the legal is an antithesis of the political,²⁶ where “[t]he specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”²⁷ This “distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation.”²⁸ If the friend- enemy distinction is of “the utmost degree of intensity,” and the political is defined in terms of this distinction, it follows that “[t]he political is the most intense and extreme antagonism.”²⁹ Due to this intensity, “[i]n its entirety the state as an organized political entity decides for itself the friend-enemy distinction” in order to protect itself from existential destruction at the hands of the enemy.³⁰ Accordingly, “[N]azism treated even the most basic questions of state organization as secondary to the substantial aim of the national revolution.”³¹

According to Schmitt, “[t]he real friend-enemy grouping is existentially so strong and decisive that the nonpolitical antithesis, at precisely the moment at which it becomes political, pushes aside and subordinates its hitherto [nonpolitical motives] . . . to the conditions and conclusions of the political situation at hand.”³² Thus the political where it exists “is always the decisive entity, and it is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there.”³³ In other words, the law is secondary and subordinate to the political. The state, as the sole arbiter of the political, is thus unconstrained by the law when it is acting the political sphere. Thus according to Miller, under National Socialist jurisprudence “[p]eople who do not act as the should must be punished, regardless of what the law says. Acts, if intended to help the state, become permissible even if formally proscribed. And so the courts become the moral guardians of society.”³⁴

ii. Nazi Jurisprudence and the Spirit of the Volk

²⁵ Dubber, *supra* note 4, 1828 .

²⁶ Schmitt, Carl, *The Concept of the Political* 23 (George Schwab, trans., University of Chicago Press 2007).

²⁷ *Id.* at 26

²⁸ *Id.*

²⁹ Schmitt, *supra* note 26, at 29.

³⁰ *Id.* at 29-30.

³¹ Caldwell, Peter, *National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate Over the Nature of the Nazi State, 1933-1937*, 16 Cardozo L. Rev. 399, 403 (1994).

³² Schmitt, *supra* note 26, at 38.

³³ *Id.*

³⁴ Miller, Richard Lawrence, *Nazi Justiz: Law of the Holocaust* 50 (Praeger Publishers 1995).

The notion that German law under the Nazi regime is to be interpreted according to the spirit of National Socialism is further reinforced by the belief that the Nazi regime embodies the spirit of the people. According to Vivian Curran, “Nazi legal theorists (including Schmitt well back into pre-Nazi times) associated positivism with individualism, a primary hallmark of the liberal political state to which they were opposed.”³⁵ For Schmitt and others, “the better judicial approach . . . was to evaluate the individual’s claims under the law with respect to how the result would affect the society as a whole (a society defined in terms of an ethnically homogenous Volk).”³⁶ As Peter Caldwell observes, under Nazi ideology, the Fuhrer “had a ‘natural’ authority as the ‘incorporation’ of the spirit and will of the Volk; the Volk had an ‘instructive’ and ‘infallible’ ability to detect the authentic leader.”³⁷ Thus according to Nazi law professor Karl Larenz, “judges are not to look for law in statute/enacted law (‘Gesetz’), but rather in the hanging together of law according to the spirit of the Fuhrer, which allegedly embodied the common will, the contemporary *Rechtswillen*.”³⁸ This view was echoed by Schmitt, who asserted that “[t]he whole of German law today . . . must be governed solely and exclusively by the spirit of National Socialism Every interpretation must be an interpretation according to National Socialism,”³⁹ and Nazi lawyer Helmut Nicolai, who stated “[a]ccording to German legal thinking law does not arise from the statute but is there before the statute.”⁴⁰ In National Socialist jurisprudence, “the principle of legality based on statute [*Gesetzmäßigkeit*] has been replaced by the principle of legality based on law in general.”⁴¹

The focus of National Socialist theory on the will of the Volk as embodied in the Fuhrer also helps explain an apparent hypocrisy in Nazi judicial practice. According to Curran, Nazi “courts took a positivistic approach to statutory interpretation when applying Hitler-era statutes” while “judicial liberty with enacted law was deemed appropriate when judges interpreted pre-Hitler statutes.”⁴² Since according to Schmitt, “law itself was defined in terms of ‘the objective and the will of the Fuhrer [sic],”⁴³ it would make sense that those laws enacted by the Fuhrer would more closely resemble his current will than those enacted prior to the Nazi regime. Thus,

³⁵ Curran, *supra* note 18, at 159.

³⁶ *Id.* at 159-160.

³⁷ Caldwell, *supra* note 31, at 409.

³⁸ Curran, *supra* note 18, at 167.

³⁹ Schmitt, Carl, *Nationalsozialismus und Rechtsstaat* in *Juristische Wochenschrift* 63, 713 (1947), *quoted in* Muller, Ingo, *Hitler’s Justice: The Courts of the Third Reich* 70 (Deborah Lucas Schneider, trans., Harvard University Press 1991).

⁴⁰ Miller, *supra* note 34, at 53 (emphasis in the original).

⁴¹ Weimar: A Jurisprudential Crisis 327 (Arthur Jacobson & Bernhard Schlink eds., 2000), *reprinted in* Curran, *supra* note 18, at 167.

⁴² Curran, *supra* note 18, at 172.

⁴³ *Id.* at 175. (quoting Frankfurt Gazette, 7 Oct. 1935).

as Curran observed, judges were admonished “to recognize and apply every enacted law (“Gesetz”) that met with the Fuhrer’s wishes, but otherwise not to seek law or judicial resolutions in enacted law.”⁴⁴

iii. Nazi Antipositivism in Practice

Nazi antipositivism was not just a philosophic proposition; the Third Reich sought to influence its judiciary to rule in accord with the spirit of the Volk. In a report prepared by the intelligence service (SD) of the SS, the Chief of the Security Police and SD lamented “the conventional conception of judicial independence according to which the judge was exclusively subordinate to the written law”⁴⁵ Rather, “obligations to the law National Socialist ideology must have precedence over obligations to the law if jurisdiction was not to be in opposition to the political objectives of the nation’s leadership.”⁴⁶ Accordingly, Reich Minister of Justice Otto Thierack admonished that National Socialist judges “will not slavishly cling to the letter of the law.”⁴⁷ Rather, the judge must judge “like the Fuhrer.”⁴⁸ The net result is that “[e]motion, empathy, and practicality must replace abstract academic analysis and scientific thinking.”⁴⁹

iv. Reconciling Positivist Justifications with Antipositivist Theory and Practice

A criminal trial is seldom the best forum for coaxing the truth from a defendant about the actions for which they face punishment. Accordingly, it is possible that the defendant’s “invocation of positivism constituted a disingenuous ex post attempt to wash its hands in the waters of legal theory.”⁵⁰ There is also an argument advanced by Dubber that positivism may be relevant to the complicity of the judiciary as a framework for jurists to rationalize participation in the Nazi system. Under this view, “[i]t is possible that “the defendants [at Nuremberg] viewed

⁴⁴ *Id.* at 173.

⁴⁵ *Translation of Document NG-071 Prosecution Exhibit 98: Secret Report of the Chief of the Security Police and SD, 3 September 1942 Concerning „The Control of Penal Jurisdiction” and the Reactions of Judges Thereto, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 456 (U.S. Gov. Printing Office 1951).*

⁴⁶ *Translation of Document NG-071 Prosecution Exhibit 98: Secret Report of the Chief of the Security Police and SD, 3 September 1942 Concerning „The Control of Penal Jurisdiction” and the Reactions of Judges Thereto, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 456 (U.S. Gov. Printing Office 1951).*

⁴⁷ *Partial Translation of Document NG-298 Prosecution Exhibit 81: The First Issue of the Judges’ Letters, 1 October 1942, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 456 (U.S. Gov. Printing Office 1951).*

⁴⁸ *Translation of Document NG-075; Prosecution Exhibit 27: Correspondence Between the Reich Chancellery and Hitler’s Adjunct, May and June 1942, Mentioning the Hitler Had Considered “Noteworthy” the Rothenberger Memorandum on Judicial Reform, reprinted in 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 474 (U.S. Gov. Printing Office 1951).*

⁴⁹ Lippman, *supra* note 19, at 238.

⁵⁰ *Id.* at 301.

themselves as professionals who had mechanically applied legal principles,”⁵¹ however inaccurate this self-portrait may be. In Dubber’s words:

Pointing out that all too many members of the German legal profession turned to their positivistic world view to rationalize to themselves and others their application of rotten Nazi laws does not commit one to shifting any responsibility for the legal catastrophe from the judges to the doctrine of legal positivism, or to their legal positivistic training, or to their legal positivistic teachers.⁵²

Whether it was an ex post facto or contemporaneous rationalization of some judges, positivism was not at the heart of National Socialist legal thought.

IV. Morality in the Law

i. Procedural Morality in the Law

Fuller and others reject positivism’s separation of law and morality and assert that there is an inherent morality in the law. In *The Morality of the Law*, Fuller identifies “eight distinct routes to disaster.”⁵³ Of these eight routes to disaster, “[t]he first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis.”⁵⁴ To phrase it slightly differently, Fuller’s first principle dictates that “a system of governance operates through general norms.”⁵⁵ Fuller’s other principles relate to the operation of these norms, and are:

(2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, (8) a failure of congruence between the rules as announced and their actual administration.⁵⁶

For Fuller, law that does fails to comport with these requirements is not properly called law.⁵⁷

⁵¹ Lippman, *supra* note 19.

⁵² Dubber, *supra* note 4, at 1807.

⁵³ Fuller, Lon L., *The Morality of the Law* 39 (Yale University Press 1969).

⁵⁴ *Id.*

⁵⁵ Kramer, Matthew H., *On the Moral Status of the Rule of Law*, 63 Cambridge L. J. 65 (2004). *See also* Hart, H.L.A., *The Morality of the Law*, 78 Harv. L. Rev. 1281, 1284 (1965) (identifying Fuller’s first demand of the inner morality of the law as the principle that rules should be “general”).

⁵⁶ Fuller, *supra* note 53.

⁵⁷ Fuller, *supra* note 53 (the “total failure in any one of these eight directions . . . results in something that is not properly called a legal system”).

In a way, Hart and Fuller are arguing past each other. Hart's view is a positive view of the way law functions, that law is law whether it is inherently moral or immoral. Fuller's view is arguably normative. With one exception, Fuller identifies his principles as "moralities of aspiration."⁵⁸ A "morality of aspiration" is not a definite rule, but rather a conception of the best development of human capacities.⁵⁹ As Matthew Kramer observes, "these basic precepts of legality are never perfectly satisfied by any regime of law."⁶⁰ When a judge is forced to rule in a case, "law" is a binary choice. Something is law, or it is not law. A judge cannot find that an edict is "sort of" law and give it coherent application. The fact that most of the principles of legality are aspirations rather than definite rules indicates that they exist on a continuum. Since they cannot be reduced to a binary dichotomy, they can not be the basis for a fundamentally binary determination, the existence of law.

Fuller acknowledges this defect in *The Morality of the Law*. According to Fuller, "[t]he citizen's predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality, such as occurred in Germany under Hitler."⁶¹ In such a situation, the citizen must decide for themselves whether their own moral compass permits them to abide by law which accords with some of the eight principles or whether they were free of their obligation to obey any law propagated under such a regime. Accordingly to Fuller, "the German citizen under Hitler faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror had left intact."⁶² At the practical level, this begins to look a lot like the practical proscriptions of positivism.

Fuller diverges from positivism in his view that a "law" which totally abrogates at least one of the eight identified principles is no longer law. This is not a trivial difference; there were laws under the Nazi regime that fit this description such as laws that were enacted in secret or were retroactive. Fuller would deny such edicts the status of law, while Hart would not. This has significance, but only for a very narrow set of laws. For the vast majority of edicts, the question of obedience for Hart and Fuller is a question of personal morality, not legality.

The notion that Fuller's precepts does not answer the question of how we get to never again is reinforced by the fact that Fuller's moral precepts do not impact the substantive morality of the law. Rather, it is possible to have a law which comports with Fuller's inherent morality but is highly substantively unjust. Hart criticized Fuller precisely on this ground, stating that the principles of legality identified by Fuller "are independent of the law's

⁵⁸ See Hart, *supra* note 6, 1286.

⁵⁹ See *Id.*

⁶⁰ Kramer, *supra* note 55.

⁶¹ Fuller, *supra* note 53, at 40.

⁶² Fuller, *supra* note 53, at 41.

substantive aims just as the principles of carpentry are independent of whether the carpenter is making hospital beds or the torturers' racks."⁶³ This is not just an abstract potential; the Nuremberg laws are an excellent example of just such an occurrence.

All of this is not to say that Fuller is of no value. His definition of the rule of law, and identification of normative principles which contribute to the efficacious operation of the law are incredibly valuable as guiding principles and as criteria for assessing the normative legitimacy of a legal system. This makes them especially valuable in a time when the United States and other western nations are actively engaged in national building efforts that include rule of law initiatives to inculcate notions of the rule of law in post-conflict societies. What Fuller's principles do not do is answer the question of what is a judge to do when faced with a substantively immoral or unjust law.

ii. Substantive Morality in the Law

One alternative to Fuller's procedural approach is to import substantive morality into the definition of law. This is not a straw man. This is precisely the thinking that underlies current thought *jus cogens* norms in the international sphere, and underpins contemporary debates about judges who judge based on "empathy" in the domestic political arena.

Ultimately, the importation of substantive morality into the definition of the law is undone by two simple questions: precisely what morality are we incorporating, and who has the authority to make that decision? To an extent, by claiming to represent the will of the Volk, the Nazi regime sought to define and apply a jurisprudential philosophy rooted in popular morality. This morality is antithetical to anything today we would view as normatively good, however it highlights the importance of determining what moral order is to be applied, and who is to make that determination. A less extreme example may be found in a plethora of modern American legal debates, including those surrounding gay marriage, abortion, and the death penalty, in which large numbers of Americans disagree about what legal posture is morally desirable.

In general, a system that imported substantive morality into the law would be normatively undesirable and counter to our notions of legality and the rule of law, including those principles identified by Fuller forming part of the inherent morality of the law. In particular, importing substantive morality of its own force into legal interpretations is in tension with Fuller's fourth, seventh and eighth rules.

Importing substantive morality of its own force into the law decreases the understandability of the law, and may lead to a failure of congruence between rules as announced and their actual administration. Importing morality by its own force into the law

⁶³ Hart, *supra* note 6, at 1284.

means that individuals may not glean the application of laws based on their text or legislative history. Rather, there is always a lurking outside force, the morality of the judge, which is crucial to understanding the application of the law. The importation of morality into the law may cause the ultimate disposition of the law to differ from the text and intent of those who wrote and announced the law.

A related concern is that the importation of morality means that interpretations may vary from judge to judge, even within the same judicial district. If each judge is free to invalidate law based on morality, then precedent loses its binding effect. In such a situation, the law becomes increasingly unintelligible, and it becomes possible to have such frequent changes in the law that the subject cannot orient his actions to it.

V. Conclusion

So where does all of this leave us? The recognition that Nazi law was law does not absolve Nazi jurists of moral culpability for their actions during the regime. Nazi judges may still be criticized for their participation in the system. As Curran observed, “Hart insisted that laws are laws, no matter how evil, when they are generated by the authorized law-making authorities, but he insisted with equal vigor that a duty of conscience requires violating laws that do not deserve to be obeyed.”⁶⁴ Accordingly as David Fraser notes, “[t]he question of Nazi law is not . . . a question of ‘not law’ versus law but rather what we should, can and must do when confronted with legalized evil.”⁶⁵

A judge may have a professional obligation to apply the law as it is, even if that law is evil, but an individual is under no similar obligation to be a judge. Nazi judges remained free to resign, particularly if such resignation was “quiet.” By doing so, individuals both remove themselves from having to apply an immoral law, and may delegitimize the underlying regime. At very least, if large portions of the judiciary resign, removes the fig leaf of legality and legitimacy from the naked application of power via juridical formalisms.

There are several examples of fascist judges resolving the potential moral tension between their professional obligation to apply the law and their moral obligation not to support state-sponsored tyranny. In *Hitler’s Justice*, Muller tells the story of the “one documented case of resistance in which a judge opposed the system in the course of carrying out his professional

⁶⁴ Curran, *supra* note 18, at 134-135.

⁶⁵ David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* 42 (Carolina Academy Press 2005).

duties,” the case of Dr. Lothar Kreyssig.⁶⁶ After being summoned to the Ministry of Justice in response to efforts to stop the Nazi euthanasia program,⁶⁷ Kreyssig was summoned to the Nazi Ministry of Justice, he was informed that if he “‘did not recognize the will of the Fuhrer as the font of law,’ then he could no longer be tolerated as a judge.”⁶⁸ In response, Kreyssig wrote a letter requesting permission to retire early “‘since his conscience would not allow him to withdraw the injunctions against the hospitals.”⁶⁹ Kreyssig’s request was granted, and ongoing investigations against him were closed, contrary to the popular claim that a judge had “no alternative but to apply the unjust laws, and risked his own life if he objected.”⁷⁰

Placing the law in its proper context also allows us to direct our focus to those who are, in my opinion, more responsible for the abuse of law under the Nazi regime: those in the legal profession who drafted the odious laws and coordinated the state organs for the Final Solution. In *The Destruction of the European Jews*, Raul Hilberg identifies four stages in the destruction process: definition, expropriation, concentration, and annihilation.⁷¹ Definition is a fundamentally legal function. According to Raul Hilberg, “the definition of the victim was an essential requisite for further action.”⁷² Hilberg went on to note that “Hellmut von Gerlach, one of the anti-Semitic deputies in the Reichstag during the 1890s, explained in his memoirs why the sixteen anti-Semitic members of the legislature had never proposed any anti-Jewish law: they could not find a workable definition of the concept *Jew*.”⁷³ Nazi lawyers, bureaucrats, and doctors, particularly those in the Interior Ministry had a key role overcoming this hurdle, providing definitions of “Aryans” and “Jews” which enabled the legal alienation of the Jewish people. The role of lawyers, particularly those in the government, in the destruction process continued through the final annihilation. Eleven out of 17 group leaders of Einsatzgruppe A, a mobile killing unit responsible for the deaths of hundreds of thousands in the northeastern

⁶⁶ Muller, Ingo, *Hitler’s Justice: The Courts of the Third Reich* 193 (Deborah Lucas Schneider, trans., Harvard University Press 1991). Muller did identify two other Nazi judges who were “executed for resistance during the Third Reich,” Dr. Karl Sack and Dr. Johann von Dohnanyi. *Id.* at 192. Muller distinguishes their cases from that of Kreyssig on the basis that “neither judge was persecuted for their professional conduct,” observing that “both of them had highly successful careers in the Third Reich” before evidence of their work with resistance movements emerged. *Id.* at 193.

⁶⁷ Kreyssig issued several injunctions prohibiting several hospitals from transferring patients without his permission in response to reports of Nazi euthanasia programs and brought criminal charges against the Nazi party leader named responsible for the T4 program. *Id.* at 194. In addition, Kreyssig had previously engaged in “numerous minor acts of insubordination” against the regime, characterized Nazi church policies in 1937 as “injustice . . . masquerading in the form of law.” *Id.*

⁶⁸ Muller, *supra* note 66, at 194-195.

⁶⁹ *Id.* at 195.

⁷⁰ Schorn, Hubert, *Der Richter im Dritten Reich* 176 (Klostermann 1959), *reprinted in* Muller, *supra* note 66, at 192.

⁷¹ Hilberg, Raul, *The Destruction of the European Jews* Vol. 1 53-54 (Holmes & Meier Publishers, Inc. 1985).

⁷² *Id.* at 53.

⁷³ *Id.* at 65.

Soviet Union,⁷⁴ and one of the things I was surprised to learn in Germany was that over one-third of the participants at the Wannsee Conference had legal backgrounds. While the role of lawyers in the Nazi government as distinct from other government bureaucratic professions is a subject on which I would need to conduct more research to definitively comment, what is clear is that they abdicated their role as moral professionals by participating in the policy (as distinct from legal) process of the Third Reich and facilitating the murder of millions throughout Europe.

So how do we ensure “never again?” Unfortunately, there are no simple answers. While positivism and textualism may restrain some of the excesses of a totalitarian regime by forcing regime behavior to conform to written law, there is still the danger of unjust and immoral statutes. However unsatisfying it may be, preventing future atrocities, ensuring never again, appears to be more of a function of personal morality than judicial philosophy.

⁷⁴ David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* 42 (Carolina Academy Press 2005).

POWER OF PHOTOGRAPHS: RESISTING DEHUMANIZATION

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Introduction: The Photos in the Camps

Just outside of the small town of Oświęcim, Poland, there are two concentration camps—Auschwitz I and Auschwitz II-Birkenau. Prior to participating in the Fellowship at Auschwitz for the Study of Professional Ethics, I did not know this. Before the Fellowship I knew only what readings and stories and my imagination could bring to me. Visiting these sites confirmed what I intuited: that actually being in these places, both hallowed and horrendous, was beyond imagination in many ways, large and small.

Auschwitz I is strikingly small. It is an old army garrison. There the prisoners—mostly non-Jewish Polish political prisoners—were housed in long red brick barracks. The two story barracks with their pitched roofs are arranged in rows running between the street that leads into town and the railroad tracks. This is the camp that to enter or leave you must pass under the iron gate proclaiming “Work Makes you Free,” cross over the rail road tracks and through two once electrified barbed-wire fences.

At Auschwitz I there is a relatively small gas chamber and crematoria—relative to Auschwitz II-Birkenau. The size however does nothing to dampen the intensity of standing inside that place where so many people were killed, nor the reality that this was one small part of an enormous system of extermination that legal and medical professionals helped bring into being and maintain under law. Lawyers crafted the Nazi programs to fit within the constitution, and judges neutrally applied these laws, sending millions to their deaths. Doctors developed the first gas chambers at state hospitals.

Birkenau is vast beyond imagination. In this place named for the birch trees that surround it, acres and acres of now lush green fields are checkered with the foundations of wooden barracks, their brick chimneys still standing in rows. In mid-summer it is so green, vibrant with flowers and frogs, that the paradox of such beauty in a place of so much death shocked my senses. There the train tracks run right down the center of the massive camp, through the main gate and straight between two of the gas chambers, now ruins. In Birkenau the four gas chambers and crematoria were so enormous that tens of thousands of people could be murdered in a day. Today their collective ashes are there, spread over the fields, laying at the bottom of ponds. The enormity is overwhelming.

In Auschwitz I, photos of the people imprisoned there line the halls of the barracks. Running the entire length of the long buildings, on both sides of the narrow hall, three rows

high, face after face stares into the camera, looking directly at you as you pass. Women and men. These photos of the prisoners were taken after the person's hair, and if they had a beard, their beard, had been shaved. Some people's eyes are so wide, the terror evident. Others were obviously beaten, with one eye swollen shut, the other looking straight ahead. There are elders, grandmas—women with creased skin around their eyes and lips, looking so tired. There are young beauties. There are boys whose soft faces show they have just cusped into puberty. Some seem to look at the camera defiantly, their chests thrust out. Others look so weary; they know what is to come. Of course, I am imagining, because how could I actually know?

During the Soviet occupation of Poland, the government turned Auschwitz I into a museum, an historic site documenting the crimes of fascism. The barracks contain different exhibits arranged in the rooms off the long halls. Our group walked down the halls, in and out of the exhibits, met again and again by these faces, these eyes. On one photo, someone had tucked a bright plastic flower. This face was someone's person. Under each photo is the person's name, their occupation, their birth date, date of arrival to the camp, and date of death. It was difficult to find anyone who lived more than a year after their arrival. Some lived only a few weeks, particularly if they arrived in winter. All of these people whose faces were before me died there in Auschwitz, within the barbed wire inside which I stood. At the time it felt important to look into their eyes, read their names.

At Birkenau there is a very different photo exhibit. There, many of the people brought to the camp were marched straight from the cattle cars, past the barracks, to the gas chambers. The Nazis did not make a record like that in Auschwitz I of all the people arrived and killed. Over a million people, most of them Jewish, were killed there, and were potentially gone without a trace. Except that they had packed for their journey, traveled with whatever they may have needed wherever they were headed—including photo albums, pictures tucked into wallets. Their belongings were hauled into warehouses, where some of these photos survived and are now exhibited at the camp. These are photos of people's lives before the camp. They are of families on holiday, couples getting married, people running their shops, mothers posing with their newborns, acrobats doing tricks.

The two photo exhibits at the two camps are so very different, but I think both serve to humanize the people imprisoned and murdered there. In both sets, in different ways, you can see individuality and personality. The exhibits resist, and ask us to resist, the Nazi attempt at total domination and dehumanization of the individual. Looking at these photos we are confronted with faces reminding us that individuals lived and died in this mass murder.

These photos made me think about the power of the picture, and the work a photo can do. They brought to mind the importance of context and the importance of seeing the other's face. The faces of so many murdered at Birkenau would be unknown if not for these photos, their scenes of family, work, community, which brought so many of our group to tears.

There are other pictures that survive, photos of people participating in the Nazi state. This archive too can provide a humanizing function. We see the individuals at work, performing the daily tasks that in aggregate comprised the Nazi state and the mechanisms for genocide. We see party members with their families. Many of these photos do not show violence. They require us to see that the perpetrators of genocide do not always appear monstrous, challenging our conception of what we can know by seeing, and the comfort that could come of imagining Nazis as so different from ourselves.

We can learn so much from a picture, but it is important to put the picture into context. Without context, a violent scene can be viewed as innocuous. Seeing people in their professions, a doctor at work, nurses lined up awaiting patients, actually involved in mass murder can be invisible. Our own connections to the subject of the camera can be masked. In this paper I look at several photos from the Nazi program of "euthanasia" and by providing historical context and analysis try to unsettle the images that appear mundane on their own. I present these images through poems, because a poem can convey information that would take paragraphs of footnoted text to explain, and because a poem invites you in to participate, to have your senses be engaged and unsettled.

•History, Eugenics, and the Law•

Photo of a girl,
Brandenberg Hospital, 1941¹

The girl stands against the wall. Against
dark horizontal brick, her face is luminous
with its impish grin, dark eyes gleaming
beneath a thick lintel of bangs. She is surrounded
by other children, arms all angles, heads
looking off, looking down, looking up to the light
pouring in through a high barred window. Only
she looks forward, looks at the camera, smiling
at her murder.

In only her underwear she poses
with pride, as if this is her first

¹ Photo from the Brandenberg Memorial, reproduced in A WORLD WITHOUT BODIES. (Brace Yourselves Productions 2001).

school photo and I wonder
why she is there—to slow
to learn to speak? Walks with a limp? Perhaps
occasionally falls in an epileptic fit? Maybe
just born out of wedlock? Is she cold? Does she
miss her mama and running
through ripe fields of wheat?—the only thing
certain is her death, veins flooded
with Luminal, and then the doctor holding
her small ovaries, like marbles won.

I wish I could tell you her name.

Hitler signed her death warrant in 1933.

“NAZIS TO STERILIZE ALL WEAK-MINDED: Officials Reveal That Those Only Slightly Below Normal Must Submit to Operations,” reported the *New York Times* in November 1934.² This was not breaking news. More than a year earlier, Hitler had signed the “Law for the Prevention of Progeny with Hereditary Diseases,” the compulsory sterilization law.³ A few weeks later *The New York Times* reported on its front page that the new law precipitated “profuse and approving discussion.” Quoting Minister of Propaganda Dr. Goebbels on the law, “Germany can be lifted to a higher cultural level only by race purity and the attainment of national puissance.”⁴ The article continues, pointing out that this “law reflects all facets of Nazi ideology and its conception of a community of race and blood.”⁵ This was true, but eugenic laws and ideologies were not germane to the Nazi National Socialist state.

Seven years earlier in the case of *Buck v. Bell*, the United States Supreme Court found forced sterilization of the “feeble-minded” constitutional.⁶ Oliver Wendell Holmes delivered the

² *Nazis to Sterilize All Weak-Minded: Official reveals that those only slightly below normal must submit to Operations, Party Plans Wide Purge, agitation for Rise in Population Arouses Clash Between ‘Family’ and ‘Free Love’ Advocates*, N.Y. Times, November 12, 1934, 12.

³ Alexander Mitscherlich, M.D. and Fred Mielke, *DOCTORS OF INFAMY: THE STORY OF NAZI MEDICAL CRIMES* 90 (1949). The Law was signed on July 14, 1933

⁴ Guido Enderis, *Pure German Race is Aim of New Law: Experiment in Weeding out of Unfit by Sterilization to Begin Next Jan. 1, Submission Compulsory, Police to Quell Resistance to Eugenic Court Decrees, Secrecy Pledged*, N.Y. Times, August 4, 1933, 1

⁵ *Id.*

⁶ Carrie Buck was the plaintiff in the case. She was a young white woman from a poor family. Her mother was a single woman who allegedly did sex work—at the time this was enough to be deemed feeble-minded—and was incarcerated at the Lynchburg Colony for the Epileptic and Feeble-minded. Carrie was sent to live with relatives where she was raped by her cousin. Carrie became pregnant as a result of the rape. Being an unwed, uneducated, poor, pregnant, white woman, Carrie was also labeled feeble-minded and incarcerated at the Lynchburg Colony. When her daughter Vivian was seven months old a social worker decided merely by looking at her that something “wasn’t quite right” and declared the child an imbecile, leading to Holmes’ famous quote that “three generations of imbeciles are enough.” Vivian made the honor roll in school. Carrie was forcibly sterilized the same day of the Supreme Court ruling. *THE LYNCHBURG STORY* (Worldview Pictures Production 1993); see also Edmund Black, *WAR AGAINST THE WEAK: EUGENICS AND AMERICAN’S CAMPAIGN TO CREATE A MASTER RACE* 108-122 (2003).

majority opinion of the Court. Speaking for the U.S. government he said, “It is better for all the world... if society can prevent those who are manifestly unfit from continuing their kind.” The court ruled that the principal “sustaining compulsory vaccination was broad enough to cover the proposition of sterilization.”⁷ Carrie Buck, the plaintiff in the case, was forcibly sterilized after the ruling. After *Buck v. Bell*, thirty states passed sterilization laws and more than 70,000 people were forced or coerced to comply.

This was the era of the “Eugenic Atlantic.”⁸ Racialized science was in vogue. “Experts” and ideas crisscrossed the continents, while Aryan peoples in the United States and Germany grew increasingly anxious about the degeneration of the white “biological stock” of their nations.⁹ For people invested in a “strong society” with “racial purity,” the pseudo-science of Eugenics seemingly offered social and biomedical solutions. Eugenics was not a fringe fad; it was a cornerstone of social policy. The Nazi genocide of the Jews and Roma is the most extreme case of the application of the racist biomedical vision. Their test run was on people with disabilities.

Eugenicists and politicians in both countries deemed people with impairments a menace to the purity, productivity, and security of the nation. Disability was constructed within the elastic ends of eugenics and a diverse group of people fell into this category. The common denominator was that they were all marginalized by dominant white middle and upper class society.¹⁰ Viewed as “contaminants” to the race, eugenicists targeted this group of people for sterilization. Explaining why even people just “slightly below normal” were intensely targeted in this campaign, Dr. von Holst of Germany said “that the ‘heavy’ feeble-minded class is less a menace than the ‘lighter’ because the latter more easily escapes identification.”¹¹ In this way, a broad spectrum of people was identified by the subjective criteria of eugenics as “socially unfit.” According to historian Henry Friedlander’s research, the German sterilization program was so vast that by the beginning of World War II, physicians had sterilized 5% of the German population.¹² Back in the United States administrators at the Lynchburg Colony for the Feeble-

⁷ *Buck v. Bell*, 274 U.S. 200, 207 (1927); see also *Upholds Operating on Feeble-Minded, Supreme Court Majority Finds Virginia Sterilization Law Valid, Right to Protect Society*, N.Y. Times, May 2, 1927, 1.

⁸ Sharon Snyder and David Mitchell, *THE CULTURAL LOCATIONS OF DISABILITY* 100 (2006). A term they derive from Paul Gilroy’s *BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993).

⁹ Matthew Frye Jacobson, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS IN THE ALCHEMY OF RACE* (1998); James Lifton and Eric Markusen, *THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT* (1990).

¹⁰ Snyder and Mitchell at 116.

¹¹ N.Y. Times, November 12, 1934, 12.

¹² Henry Friedlander, *THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION* 30 (1995). When I delivered a paper including this statistic at a conference someone pointed out how questionable it is—but Friedlander is an authority and I rechecked it.

Minded and Epileptic, where Carrie Buck was incarcerated, noted the “success” of the German program. In a 1934 report one administrator wrote, “The Germans are beating us at our own game... Apply the pruning knife with vigor.”¹³

If this was a game in which the end was the eradication of human life marked by difference, Germany took the cake. In the U.S., eugenics never took the form of outright mass extermination (though according to Snyder and Mitchell between 10 to 25% of asylum inmates died in their first two years of incarceration, and death was a known side effect of sterilization operations gone awry.)¹⁴ In Germany, as early as 1935, Hitler planned that if war came he would institute a program of “euthanasia.”¹⁵ This was not to “clear the decks for war” as historian Michael Burleigh claims,¹⁶ but to explore the capacity for ordinary people to participate in mass killing, to rid the nation of people represented as economic burdens, and to begin the “purification” of the German nation and Nordic race.

The sterilization law was the beginning of the legalized exclusion of people with disabilities from German citizenry. The ultimate exclusion was death. Actual state organized killing of disabled people officially began with children in August 1939. A month later doctors and other professionals in the Nazi Party began killing adults with disabilities. The killing took place in state hospitals where families sent their members for care or where Hereditary Health Courts committed individuals deemed unfit. Gas chambers and crematoria were developed at these hospital-killing centers.

Hitler signed the order for this killing program in October 1939, back dating to September 1, the day the war began.¹⁷ Named after the physical location of the covert bureaucratic headquarters at #4 Tiergartenstrasse in Berlin, the “top secret” killing operation was known as Aktion-T4, or simply T4. T4 was the beginning of genocide.

A year into the mass murder, SS Chief Himmler wrote with concern about the Grafeneck killing center, “What happens there is secret, and yet it is no longer secret.”¹⁸ With the crematoriums burning every night and the long grey buses used to transport people to the killing centers running through towns daily, it would have been impossible for common people not to suspect what was happening in the six killing centers. But the doctors and nurses who volunteered to become killers swore an oath of secrecy and obedience. According to one nurse who worked on the killing wards from 1940 until the end of the war, “violation of the oath was

¹³ THE LYNCHBURG STORY.

¹⁴ A WORLD WITHOUT BODIES.

¹⁵ Mitscherlich and Mielke at 91 from Karl Brandt’s testimony at Nuremberg

¹⁶ Michael Burleigh, ETHICS AND EXTERMINATION: REFLECTIONS ON THE NAZI GENOCIDE 113 (1997).

¹⁷ Henry Friedlander, THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION 67 (1995).

¹⁸ Mitscherlich and Mielke at 112, from a letter to T4 Dr. Brack

punishable by death.”¹⁹ Nazis during the Third Reich relied on initial secrecy to carry out the murder first of people with impairments, and then of convicts, homosexuals, Roma, and Jews. Today, Nazi groups rely on stealth and secrecy for their continued existence. In writing about the medicalized murder of people with impairments and the T4 program, I challenge the silence Nazi horror seeks to impose and work to ensure what was once a secret is now known.

•The Professionals•

Nurses, Hadamar, 1941²⁰

By their short sleeves you can tell
It is summer. Ten pretty nurses stand
in a doorway waiting. Some on the steps,
Someone the ground, a few look
Out the windows, into the distance,
Anticipating...

Young and smiling in starched white
Smocks they stand together
Like schoolgirls do. See the two
In the center? At any moment one might
Lean into the other's ear. They'll whisper,
They'll giggle—at what? A handsome doctor
Passing by? The memory of last night's debauchery
Celebrating the ten thousandth person
Gassed? Or maybe they are laughing at the way
Your body shook as you resisted the
Death they forced on you.

Hadamar, Brandenburg, Grafeneck, Sonnenstein, Bernburg, Hartheim Castle. To my anglicized ear this list sounds beautiful and ominous. Nearly every hospital and clinic in Germany participated in the killing program, registering and transporting patients, killing with injections on a smaller scale, but these are the names of the six main killing centers in operation during the mass killing period (1939-1941). It was in these institutions masquerading as hospitals that doctors competed professionally to develop the most efficient way of killing large numbers of people and disposing of their bodies. In these institutions the first gas chambers were constructed and used. The nurses, after welcoming the patients, registering them, taking their personal effects, marking a cross on their backs if they had gold fillings, and photographing each person from three angles, would hand them a towel and a toothbrush and lead them to the

¹⁹ *Id.* at 95. From the sworn statement to nurse P. Kneissler.

²⁰ Photo of T4 Nurses 1941, from WORLD WITHOUT BODIES.

chamber. If someone resisted, they were drugged and dragged in. Occasionally a doctor or nurse would shoot someone outright if they struggled.²¹

After the war, professionals who participated in the medical killing insisted that they killed only “brain dead” people and people who had no will to live. After prosecuting the perpetrators of the killing program at Hadamar, U.S. Supreme Court Justice Jackson wrote of the victims, “It was easy to see that they were a substantial burden on society, and life was probably of little comfort to them.”²² And yet there was resistance. People struggled on the way to their death. Children ran away from hospitals. Families brought food to their starving children. Parents and spouses filed pleas with state attorneys to get their loved ones back.²³

Hitler’s secret order for the killing of people with disabilities was brief:

“Reich Leader Bouhler and Dr. Brandt are charged with the responsibility for expanding the authority of physicians, to be designated by name, to the end that patients considered incurable in the best available human judgment after critical evaluation of their state of may be granted a merciful death.”²⁴

This decree came at the urging of physicians participating in the killing. They were professional and wanted to work within the law. A law though, would be published in the public record, and annul the secrecy which surround the program. A decree from Hitler, having the power of law, sufficiently placated the professionals enabling them to go forward and kill in the name of science and nation without fear of prosecution or the moral dilemma of breaking the law.

Professionalism and legality were important. It allowed doctors, nurses, and judges in the hereditary health courts the comfort of just doing their jobs, applying the law of the nation. Maintaining a professional appearance of hospitals and routine procedures created a double-agenda. What seemed to be normal, “patients” arriving and being examined, for instance, was not normal at all. They were usually were killed within twenty-four hours of arrival.

These doctors, who leant the killing an air of normalcy, were government workers who volunteered for the program. Often they were young, ambitious, and excited by their positions close to eminent names in their field, the opportunity to research and advance scientific understanding. As government workers, they had quotas, which they were anxious to meet and,

²¹ Friedlander at 96

²² Earl W. Kintner, *THE HADAMAR TRIAL* xiv (1949). From the foreword by U.S. Supreme Court Associate Justice Robert H. Jackson. At Hadamar the people who lived and were killed there worked gardens and provided food for the institution. Justice Jackson’s statement demonstrates the pervasive ideology that disabled life was not worth living, a view obscuring the reality of individual lives.

²³ Friedlander, Chap 9 has many examples of people trying to access the courts to gain the release of their loved ones and other forms of resistance to the murder of people with disabilities.

²⁴ Reproduced in Mitscherlich and Mielke at 92

according to historian Henry Friedlander, complained if not enough victims were sent to them.²⁵ There was incentive. In these institutions, young doctors made their careers violating the bodies of their victims for research. The more victims that came, the more varied bodily difference doctors had to examine and dissect. Also, killing center staff that exceeded their quotas received monetary bonuses.²⁶

Invested in maintaining a “professional” nature to the murder, certain physicians were specifically named to grant “merciful death.” They were responsible for examining victims before they were killed, turning the on the gas, and selecting bodies for autopsies and research.²⁷ After the medical professionals gassed and killed the people with disabilities, working-class people called “stokers” or “decontaminators” dragged the bodies out of the gas chamber and piled them in the body stacking room before they were cremated.²⁸ In Hadamar, the bodies were moved from the chamber to the ovens by conveyer belt and burned six to a furnace.²⁹

What was supposed to be a secret, *designed to be unbelievable*, was hard to disguise. People who lived in nearby towns could not avoid noticing the ever smoking crematoriums, the smell and the ashes. The long black buses with their windows painted black used to transport inmates from other institutions to the killing centers were conspicuous, driving through towns two or three times a day. The Bishop of Limburg wrote that as the buses rolled through children would say, “There comes the murder van again.” Revealing an even deeper level of understanding and cultural indoctrination, children taunted each other: “You’re not quite bright, they’ll put you in the oven Hadamar.”³⁰

By the summer of 1941, the meticulous Nazi bureaucracy, ablest³¹ attitudes of the people, and the technology of the gas chamber enabled a killing rate exceeding the capacity of the crematoria. It also exceeded the people’s capacity to deny what was happening. Due not necessarily to public pressure, but to public knowledge of the killing program, Hitler issued the stop order to the adult killing program that August. The crematorium ovens were dismantled and shipped to the death camps. Doctors also transferred to the camps, using their “expertise” acquired in T4 to perform infamous medical experiments and the selections.

²⁵ Friedlander at 58

²⁶ *Id.*

²⁷ Friedlander at 96-97

²⁸ *Id.*, see also WORLD WITHOUT BODIES

²⁹ Mitscherlich and Mielke at 105.

³⁰ Reproduced in Mitscherlich and Mielke at 108.

³¹ Ablest is the term used to refer to attitudes of prejudice against people with disabilities, or the attitude that able-bodiedness is superior or normal. It is akin to words like sexist, heterosexist, and racist.

The gas chambers remained intact in most the killing centers. In some hospitals doctors exterminated the entire adult population. After the stop order some of the institutions worked in “over-flow” killing capacity for the death camps.

The stop order did not mean the killing stopped. The murder of adults continued through starvation and drugging. The stop order did not apply to the children. At this point most adults had been sterilized, could work in the institutions or the war effort, or were dead. Children remained, representing a continued threat to the purification of the state. Idestein, Kantenhof, Brandenburg-Görden, and Eichberg. These were the killing centers for children, where kids-- infants to teens— grew listless and lifeless, starving as food was removed a little at a time and increased dosages of barbiturates were mixed in. They were slowly killed. Parents either relinquished their children to the hospitals or were forced or coerced to give them up to the “Children’s Wards for Expert Care.” They were promised their child would receive the best “available therapeutic interventions made possible by recent scientific discoveries,” in order to “save children from permanent invalidism.”³² In this double-speak, to be saved from “permanent invalidism” was to be killed. The killing of children continued even after the war.

Doctor at Work³³

He looks like a kindly
Gentleman, looking up
From his work, about to nod
Hello. Sleeves rolled up,
In a baggy black smock
He goes about his business
And his sweet eager face, a few feet
Above the face of a little boy,
With a smart crew-cut, laid out
On the table before him, is astonishing.
I imagine his breath washing over
The still boy: sauerkraut, pipe smoke,
Formaldehyde, ambition. He looks pleased
We’ve popped in and thrusts
His hand forward to show us his find.

It is an old photo, black and white,
And I can’t quite make
Sense of what lies across the physician’s
Outstretched palm. I want to
Make metaphor, say “butterfly”
Or “creature wrenched dripping
From the sea,” but that is not
Right. This can’t be made

³² Friedlander 47

³³ Photo of forensic pathologist, Dr. Osterek, from WORLD WITHOUT BODIES.

Pretty. It doesn't make sense.
Genitals unattached from the body
Don't make sense.



And then he slid
The boys genitals—future
Progeny that will never be—
Into a canning jar
And sealed it up.

Later, when the war
Is lost and the dream
Withered, doctors will hurriedly
Pack their hideous harvests into
Cases—brains, balls, stilled and
Graying hearts sloshing about in
Specimen jars—they'll make their
Escape, they'll take their leave, they'll
Flee into the mountains, into towns, home
To their mothers, or to America, clutching
Their cases, thinking "this is for science, this
Is for humanity, this was the pinnacle
Of my career."

•The Past Doesn't Go Away: The Legacy and Lineage of Eugenics•

In the growing body of Holocaust literature, there is relatively little published about the Nazi 'euthanasia' program.³⁴ German Fulbright Scholar and disability activist Rebecca Maskos says, "that though there are many memorials for the Holocaust in Germany, few people know about the 'euthanasia' program. It is not part of the German consciousness."³⁵ This is just as applicable, if not more so, to the U.S. In doing research for this project, there was very little to be found that focused on T4. Most information about Nazi medical crimes focuses on the medical experimentation in which doctors tortured concentration camp prisoners while advancing their own careers and modern science. Most of these doctors had their early practice and brutalization in T4 institutions.³⁶ Their work in "euthanasia" taught the art of killing and

³⁴ Everything I read either built on archival sources or quoted from the same body of literature.

³⁵ WORLD WITHOUT BODIES.

³⁶ This is best documented in the extensive files from the Nuremberg Medical Case. One of the first American trials in Germany was about the Hadamar killing center. The transcripts of this trial are published as part of a War Crimes Trial Series, see *infra*. It was largely concerned with the murder of Poles and Russians and reinforces the both the that the murder "involved only the incurably sick, insane and mentally deficient patients of the institution, and that while still agregis, this made it slightly less so. See *Infra* Kintner. Friedlander's detailed archival reconstruction of medical crimes is by far the most in depth study of the 'euthanasia' program.

accustomed those who directed and those who administered the death injections to the taking of human life.”³⁷

The Nazi genocide was the implementation of a biomedical world vision in which people who were deemed “socially unfit,” “life unworthy of life,” and “useless eaters,” along with non-Nordic peoples, were expunged from the gene pool of the nation. This was the extreme expression of the era of eugenics. After the revelation of Nazi atrocities, academics and politicians across the Atlantic actively distanced themselves from the pseudo-science and concepts of “racial biology.”³⁸ Eugenics may have gone out of vogue, but it is important to historicize and explore its legacy as it reverberates in the social and medical discourses of today. In writing, I seek to resist narrative closure and deny that eugenic ideology, medicalized killings, and the people who perpetrated them simply stopped being after the fall of Nazi Germany and the Nuremberg Trials. Ideologies morph or become clandestine. Murderers spend time in jail and/or assimilate into non-war-time society. Very few were tried at Nuremberg and in post war Germany many Nazi party members continued working in their positions in government, education, law, and medicine because how else could a country continue to function? How do we honor the dead? How do we acknowledge who is not here? How do we confront this legacy?

Recently in the U.S., a number of states issued public apologies to people who were forcibly sterilized. Alexandra Minna Stern, a historian of medicine, notes that though important, there is danger in public apologies that don’t address the underlying ideologies. She says, “The biggest danger of the public apologies is that they too readily allow us to blame our predecessors as being scientifically misguided or evil and pat ourselves on the back for an enlightened, morally informed present.”³⁹

The legacy of eugenics exists in many forms. One way is absence. According to disability scholars Sharon Snyder and David Mitchell, “today entire populations of disabled people (such as the many polio survivors who contribute to disability studies thinking and activism in the United States and the United Kingdom) are largely absent from the contemporary German landscape.”⁴⁰ Another is the pervasive notion that life with disability is not worth living. Evidence of this ideology and valuation of life can be seen in legal and popular culture. For instance in 1972 in the U.S., a doctor and Florida state representative introduced a “death with

³⁷ Kintner xiv, from the foreword by U.S. Supreme Court Associate Justice Robert H. Jackson.

³⁸ Jacobson at 99-100

³⁹ Howard Markel, *The Ghost of Medical Atrocities: What’s Next, After the Unveiling*, N.Y. Times, December 23, 2003, F6

⁴⁰ Snyder and Mitchell at 125.

dignity” bill, suggesting that 90% of people in state institutions “might qualify for elimination.” The bill passed, but did not become law.⁴¹

Physician assisted suicide continues to be a complex legal, political, and social site where, regardless of where you come down on the issue, it is undeniable that the legacy of eugenics is present. Representations of assisted suicide in popular culture, like Clint Eastwood’s sentimentalized mercy killing in *Million Dollar Baby*, depict life with disability as life not worth living and are devoid of the greater social and legal contexts.⁴² Recently in Connecticut, the Superior Court dismissed the claims of two doctors bringing suit against the State’s Office of the Division of Criminal Justice. The doctors sought injunctive and declaratory relief prohibiting the state from prosecuting them under the manslaughter statute if they proscribed lethal medication to terminally ill patients who wished to die.⁴³ While the case was dismissed on jurisdictional grounds, the court noted concerns that physician-assisted suicide may threaten the “most vulnerable in society, including the poor, the elderly, and the disabled, who are at risk of being threatened, coerced, or influenced to end their lives to spare their families the financial costs and emotional strain of caring for them.”⁴⁴

Today, increased understanding about the human genome combined with advancing science in pre-natal testing decreases the rate of people with a range of impairments being born. Disability related abortion has made interesting bedfellows between disability activists and “right-to-life” activists. In 1991, the National Right to Life Committee chose Robert Powell, a person with paraplegia, as president. Taking the post he said, “I am concerned with the theory

⁴¹ Shapiro at 273.

⁴² MILLION DOLLAR BABY (Warner Bros. 2004). In *Million Dollar Baby* Clint Eastwood’s character kills his boxing protégé at her request mere months after she sustained a devastating spinal cord injury. In the film, Eastwood uses light, space, and camera angles to create a sense of confinement in the character’s hospital room. The windows are bright, but you cannot see out. There is a sip-and-puff wheel chair in many of the scenes, but never once does the main character use or maneuver it. After she sustains the injury, her physical and mental health deteriorate. We never see her outside of her hospital room. She begs Eastwood to kill her and he is torn. Eventually he sneaks in at night, delivering a fatal dose of adrenaline. Despite the reality that this would cause an excruciating death, she dies peacefully and Eastwood slips out into the night. It is high sentimental drama lacking in context. No one offers the main character counseling to deal with depression or the option of an assisted living facility, group home, or in home care. Eastwood does not tell us that she has the right to refuse treatment and could have had her ventilator turned off and a therapeutic dose of morphine administered. Instead he works to justify the idea that life with disability is not worth living and make his killing of the main character inevitable.

⁴³ *Blick v. Office of the Division of Criminal Justice*, 2010 WL 2817256 (Conn.Super., 2010).

⁴⁴ *Id.* at *10. This is not to say that people should not have the right to end their lives when faced with excruciating pain at the end of life. Since 1990, the U.S. Supreme Court has recognized the right of individuals to refuse medical treatment, even if that refusal causes their death. *Cruzan v. Director, Missouri Dept. of Mental Health*, 497 U.S. 261 (1990). But the court rightly recognizes that this right can only be granted if there are mechanisms in place to protect the most vulnerable. The Court seems persuaded by the Connecticut Office of Protection and Advocacy’s (OPA) brief and affidavits in support of its motion to intervene in the case. In the brief and affidavits, OPA relays its experience of representing clients with treatable illnesses whose guardians opt to withhold treatment on the basis that the person has a disability. OPA argues that disability prejudice is profound and the concept that life with disability is life not worth living is pervasive.

gaining popularity that it is better to be dead than to be disabled... Many of us find it alarming that it is considered acceptable to abort an unborn child just because of disability.”⁴⁵ The evolving science of genetics and pre-natal medicine generates all sorts of ethical and practical questions. What does it mean when a fetus is defined before birth as “abnormal” or “defective”? Will insurance companies assess this pregnancy and potential person in an economic way and refuse to pay for pre and post-natal care if a woman continues the pregnancy? What do you say to your queer-couple friends creating a designer baby? What do we do in a society with technology to keep many people alive, but without attitudes of inclusion or social supports in place?

What of the terms “mercy killing” and “euthanasia”? Under these banners the German medical profession carried out mass murder and found enough comfort to morally justify the killing. Labeling people “incurable,” “insane,” “feeble-minded” was enough to overlook the humanity of each person, reduce them to “life unworthy of life.” Even after the murder was reported, and the doctors were sent to trial in Nuremberg, the press and judges referred to medical crimes as “mercy killings” despite all the evidence against this.

What of the doctors? In Nuremberg, 23 medical workers were tried and convicted of medical crimes. Some were killed, some served some time and went on with their lives. During FASPE we learned jail times were very short, few, and far between. We talked about how many people—judges, administrators, doctors—who had played key roles in the Nazi regime continued in their positions after the war. People were needed to run the country.

Every few years after the war *The New York Times* reported on another Nazi doctor appearing in an unlikely place: 1952, “Nazi Physician Leaving the U.S. Air Force;”⁴⁶ 1955, “Nazi Doctor Arrested... in connection with Sterilization Tests;”⁴⁷ 1958, “Nazi Doctor Penalized: Woman Once Jailed for War Crimes Loses License;”⁴⁸ 1966, “Ex-Nazi Doctor, in Ghana, Admits He Directed [80-120,000] Killings” to empty hospital beds.⁴⁹ Not all doctors lost their licenses; not all went to trial.

More recently, in 1993, the newly elected head of the World Medical Association, Dr. Hans-Joachim Sewering, resigned due to his past as a Nazi doctor. German doctors openly protested his election and four nuns broke their vows of silence to speak out against Sewering. The sisters affirmed that doctors at the hospital where Sewering worked and was an attending

⁴⁵ Shapiro at 280.

⁴⁶ *Nazi Physician Leaving: Finletter Advises Doctors Here Schreiber Will Go Soon*, N.Y. Times, March 11, 1952, 11.

⁴⁷ *Nazi Doctor Arrested: Clauberg Held in Connection with Sterilization Tests*, N.Y. Times, November 23, 1955, 9.

⁴⁸ *Nazi Doctor Penalized: Woman Once Jailed For War Crimes Loses License*, N.Y. Times, August 12, 1958, 9.

⁴⁹ *Ex-Nazi Doctor, In Ghana, Admits He Directed Killings*, N.Y. Times, October 27, 1966.

physician sent 909 patients to their deaths at the Eglfing-Haar euthanasia site. Dr. Sewering worked as an official for the World Medical Association since the mid-1950s.⁵⁰ In 1995, the Anti-Defamation League, in conjunction with more than 100 U.S. physicians, ran a full-page ad in the New York Times urging the state of Bavaria to stop harboring Dr. Sewering and bring him to justice. As of 1995, Dr. Sewering still practiced medicine in Dachau.⁵¹

Is there room for rehabilitation? Repentance? What does it mean when some perpetrators of genocide are tried and killed, or jailed and lose the licenses that allowed them to perpetrate the crimes, and others walk free? Doctors just as deeply embedded with genocidal ideology, ideology in which the cure for the incurable is death, went on to be family doctors in small towns, or the head of the World Medical Association. When we live in a dominant culture that fears disability, and medicine works to eradicate it, does the unbelievable still occur? What does it look like today?

Atlas of Humanity
Brilliant colors spread,
In capillary action, across
The page: Pulp purple to crimson,
Vermillion to gold, anular
Cruciform parts covering tendon
Sheaths, pisiform on the wrist protecting
Empty ulnar artery.

I want to grasp you there,
Fingers to wrist, skin to nerve, and pull
You through the page, radius,
Bicep, trapezius, clavicle, and haul
You by your shoulders, head
First, back into this world,
Return to you your robe of
Skin, wrap you in clean cotton, hold
A cool porcelain cup
Of water to your lips, whispering
You are safe here.

•What remains, How we are accountable?•

And what of the bodies? And what of the artifacts? In 1990, hundreds of brains from T4 victims were found in the basement of the Max Planck Institute for the Advancement of Science.⁵² The BBC reported in 2000, “Nazi victims’ organs still stored” at the Institute for

⁵⁰ Jennifer Leaning, *German Doctors and Their Secrets*, N.Y. Times, February 6, 1993, 21 (The Sat. Op-Ed Page).

⁵¹ The Anti-Defamation League, *The German State of Bavaria is Harboring an Accused War Criminal*, N.Y. Times, July 14, 1995, A13. More than 100 U.S. doctors sign the ad.

⁵² WORLD WITHOUT BODIES.

Anatomy in Austria. One hundred or so preserved body parts were buried with honor.⁵³ Is this restoration? The parts of executed people were reconstituted as “specimens” referring to human bodies, and then, once again, were recognized as human. Apologies were uttered as they were laid beneath a mantle of earth.

Mitchell draws on Foucault’s *Birth of the Clinic* in his analysis of Nazi medicine and the medically defined body. He says Nazi science is another example of how the “bodies of people who are ill, disabled, lower class,” and non-white have been used “to inform the upper-class” how to maintain and increase their health and ward off illness.⁵⁴ Mitchell argues that the foundations of modern medical science rest on the violation of disabled bodies by the Third Reich.

This is not a theoretical argument. The *Atlas of the Topographical and Applied Human Anatomy* is a standard text for teaching anatomy. Dr. Eduard Pernkopf, a physician, artist, and director of the Institute of Anatomy at Vienna University, produced the book. A fervent National Socialist, he told his faculty:

"To assume the medical care -- with all your professional skill -- of the body of the people which has been entrusted to you, not only in the positive sense of furthering the propagation of the fit, but also in the negative sense of eliminating the unfit and defective. The methods by which racial hygiene proceeds are well known to you: control of marriage, propagation of the genetically fit whose genetic, biologic constitution promises healthy descendants: discouragement of breeding by individuals who do not belong together properly, whose races clash: finally, the exclusion of the genetically inferior from future generations by sterilization and other means."⁵⁵

He used the bodies of the people excluded by “other means,” as well as political prisoners, to create these detailed anatomical drawings that are still used in teaching today.⁵⁶ Nazi scientists took succor in biomedical ideology, in the deep belief that they were professionals advancing medical science. What do we do with the fact that our modern medicine, in some ways our individual personal health, is predicated by genocide?

What of cure? James Lifton writes that the Nazi implementation of T4 and the ensuing genocide was conceived as a purifying cure to revitalize the wounded nation.⁵⁷ The Nazi biomedical vision rooted evil in biology, or to be more accurate, in what was constructed as

⁵³ *Nazi victims' organs still stored*, *BBC World Service*. April 20, 2000 (December 1, 2010, 2:15 PM), <http://news.bbc.co.uk/2/hi/health/721037.stm>

⁵⁴ WORLD WITHOUT BODIES.

⁵⁵ Excerpt from Dr. Eduard Pernkopf’s first speech to faculty, reproduced at <http://www.whonamedit.com/doctor.cfm/2031.html> (December 1, 2010, 2:25 PM)

⁵⁶ Uri Weinberg and Shmuel Reis, *The Holocaust and Medicine—A learning Moment*, 331 *BMJ* 668 (2005).

⁵⁷ Lifton at 52.

biology, i.e., race, ethnicity, disability. Only, in the eradication of the evil, and the survival of the good could the nation be revitalized, cured.⁵⁸ And for the actual bodies this purgative program was perpetrated on, the only cure was elimination. This was not actual cure; it was the ideology of cure. The ideology of cure continues to shape concepts of disability and normality today, often with exclusionary and violent consequences.

FASPE pushed our group to think about contemporary ethics within the context of the Holocaust. This is a challenging enterprise. One potential outcome (not the intended one) of situating our contemporary professional choices within the context of the Holocaust is that of creating a comparison between ethical issues we may be faced with and the Nazi state, giving us a pass of sorts, because what could compare to genocide?

But FASPE, the readings we did, the lectures we attended, and our conversations pushed us to see the parts of the National Socialist State that made up the whole. So many small things made the genocide possible: an individual's small actions, mundane tasks, acts of omission, the erosion of evidence law, excessive powers given to the police. Judges applied abstract concepts of law crafted by the legislature, cloaking the bench with professional comfort while legitimating the legal mechanisms of the Nazi State.

Contextualizing our contemporary ethics with this nuance pushes us young lawyers to look at the small actions in which we participate and the incredible legitimizing power the law has. While we are taught that judges must apply the law neutrally, placing this argument within the context of the Nazi state demonstrates that at times this is absurd--and also historically incorrect. There are plenty of instances throughout the history of the United States where the courts, as the protectors of the Constitution and civil liberties, have encountered unjust and unconstitutional laws and creatively changed the jurisprudence. The law is not static. The Supreme Court has expanded the list of fundamental rights and protected classes of people, and expanded constitutional rights to be consistent with the evolving standards of decency.⁵⁹ Lawyers have argued on both sides of these cases.

As lawyers we do not apply the law neutrally, we advocate and counsel within the law. Under our professional code of ethics, lawyers owe a duty of diligence to our clients.⁶⁰ Our

⁵⁸ Lifton at 56.

⁵⁹ See e.g. *Skinner v. Oklahoma*, 316 U.S. 135 (1942) recognizing procreation as a fundamental right; *Griswold v. Connecticut*, 381 U.S. 479 (1965) recognizing privacy as a fundamental right; *Loving v. Virginia*, holding anti-miscegenation laws unconstitutional and recognizing access to marriage as a fundamental right; *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938) Footnote Four set out the idea of "discrete and insular minorities" providing the basis for recognizing suspect classes in later equal protection analysis; *Atkins v. Virginia*, 536 U.S. 304 (2002) holding the Eighth Amendment prohibits the execution of defendants with intellectual disability (mental retardation).

⁶⁰ American Bar Association Model Rule 1.3

clients set forth their objectives and it is our job to counsel them about and provide them with the most effective means of meeting those objectives.⁶¹ If we disagree with the client's objective, we can take comfort in the rule that our representation does not constitute endorsement of the client's political, economic, and social values.⁶² As important a rule as this is in many respects, there is also danger in it. It allows us to say we were just doing our jobs. It allows us to delve into the abstractions of the law to come up with creative approaches and positive outcomes for our clients, but creates the danger that in doing so we lend our action, skill, and privilege to harmful enterprises.

It is important to remember and reflect on the consequences of the application of the legal principles and precedent we deploy. After visiting Auschwitz, the FASPE Fellows discussed *Abdullahi v. Pfizer*.⁶³ This is a suit brought by children or the families of children who were killed or injured after Pfizer conducted a two-week long test of the meningitis drug Trovan on the children in Nigeria.⁶⁴ Pfizer did not follow protocols, get true informed consent from the children's guardians, or inform the families that a drug that was known to be a safe and effective treatment was available to them for free.⁶⁵

The Court of Appeals held that Pfizer's actions constituted illegal nonconsensual medical experimentation. The Court based its reasoning in part on the "history that illustrates that from its origins with the trial of the Nazi doctors at Nuremburg through its evolution in international conventions...the norm prohibiting nonconsensual medical experimentation on human subjects has become firmly embedded and has secured universal acceptance in the community of nations."⁶⁶ This reasoning is key because it allowed the court to recognize the plaintiffs' claims, and makes this case one in which the court is arguably expanding the law. But this is not the only reason we examined this case.

Our faculty raised the question for us: what would you do if you were an attorney for Pfizer and your client came to you and asked if it was legal to do this testing in Nigeria? At the time of that request, it was arguably legal because there was no express prohibition. The lawyers were obligated to work diligently for their clients, and even if we disagree with the idea of testing experimental drugs on children, our representation does not stand as an endorsement of this

⁶¹ American Bar Association Model Rule 1.2(a)

⁶² American Bar Association Model Rule 1.2(b)

⁶³ *Abdullahi v. Pfizer*, 562 F.3d 163 (2nd Cir. 2009), *cert. denied*, *Pfizer v. Abdullahi*, 130 S.Ct. 3541 (2010). I give this case very short factual treatment here. The case itself has an in-depth background section on the violation of procedural protocols, Pfizer's motivation for a speed drug trial that would not have been possible to do in the U.S., and the harms suffered by the children and their families.

⁶⁴ *Id.* at 169.

⁶⁵ *Id.* at 169-170.

⁶⁶ *Id.* at 183-84.

idea. So long as lawyers are not participating in or advising a client how to perpetrate a crime or an action that will result in someone's certain death or substantial bodily harm, we must work to meet our clients objectives.⁶⁷ Here, the children's deaths were not certain; the drug could have worked. A lawyer advising Pfizer would arguably have been within professional and legal boundaries. They were just doing their jobs. But is this enough for us?⁶⁸ FASPE lays the ground work to push us to look at situations like that encountered by the lawyers for Pfizer and examine our role and responsibility beyond the bounds of the code of ethics. We have to see how our work on discrete cases can reflect larger concepts about whose lives have value and what our responsibility is to ensure that our duty of diligence to a client does not prevent us from reflecting on the impact of our work. Imagine a photo of a lawyer at their desk drafting documents, doing research. It appears innocuous.

•Conclusion•

I am writing about the legacy of T4 not to heap on the burden of history, nor to be macabre. In writing about, memorializing, researching, and pushing into the public consciousness the history of medical murder, we can situate ourselves in relationship to it. We can add to our understanding of the power and history of words – insane, incurable, psycho, lame—that are still scrolled across newspaper headlines, shouted on playgrounds, and land with thuds on the bodies of people with impairments. We can learn to shake disbelief from our brains and to trust our guts when we hear of things that seem simply unbelievable, things that firm up the concepts of the dominance of “normality,” things that have consequences embedded in our bones. In looking at this legacy, we can challenge the still black and white photos that lend themselves to historicization, to banality, to obfuscation of action.

Through the Fellowship at Auschwitz for the Study of Professional Ethics we were challenged as nascent professionals to look at our fields in the context of this history, in the context of the Holocaust in which doctors and lawyers acted in ways that legitimated sovereign power masquerading as legal state action. The experience of FASPE pushes me to consider this history, and to work to be aware of the extreme legitimizing power the legal profession has, the solace people find in acting within the law, and work to be accountable to communities that are negatively impacted by certain legal measures. This history, the sites we visited, and the photos we saw remind me that life is precarious and we do not always know how our actions impact

⁶⁷ See generally American Bar Association Model Rules 1.6 and 8.4.

⁶⁸ This is a question on a small scale. This case demonstrates that our health today is not only based on work done by Nazi doctors, but that the health of people in industrialized countries is at times still predicated by testing on people outside the protection of the body politic.

others, how our lives all depend on each other. The pictures at Auschwitz and Birkenau, the presence and the absence, remind me of the importance of recognizing each other, our humanness and the value of all our lives. Lawyers, unlike doctors, do not have a professional obligation to “do no harm.” Our very work may harm, or be construed as harming another. We must be vigilant, and we must remember that we all can make choices—the clients we take, the advice we give, and that we can choose to take a personal oath that in our work we will aim to do no harm.

THE EXCEPTION AS THE RULE AS THE EXCEPTION: THE RULE OF LAW AND JUSTICE IN DEMOCRATIZING GERMANY

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I. INTRODUCTION: EXCEPTION AS THE RULE

Carl Schmitt wrote in *Political Theology*, “Sovereign is he who decides on the exception.”¹ As an impending lawyer and legal scholar, I believe, instead, that legitimate sovereignty is based on laws, which are rules, rather than exceptions; and so this characterizes my worldview. In other words: what defines legitimate political power or democratic sovereignty is the Rule of Law.² A basic exegesis of the word “rule” discovers a threefold meaning: (1) “rule” implying power, dominion, sovereignty; (2) “rule” implying the norm, or the “non-exception”; and (3) “rule” implying the act of making decisions (i.e. a judicial “ruling”).³

The case of Nazi Germany in the 1930s and ’40s is the exact opposite of my classical liberally informed viewpoint, which is inextricably rooted in “law,” and instead aligns with Schmitt’s characterization, which is inevitably rooted in “politics.”⁴ What made the Third Reich so exceptional from a legal standpoint was the nearly total and utter breakdown of the Rule of

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I would like to thank Prof. Anthony Kronman, Amos Friedland, David Goldman, Prof. Peter Molnar, Prof. Richard Weisberg, Max D. Baumgarten, and the 2010 FASPE Fellows for their various types of direct and/or intangible contribution to this paper.

¹ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab, ed., 2006).

² I have chosen to capitalize the phrase “Rule of Law” because as I use it in this paper, it refers less of an abstract concept than it does to a system of legality. Features of such a system—which throughout the course of this project will be defined by what it is *not* via the case of its absence in the Third Reich—include basic notions and principles of a sound liberal judicial system: an independent judiciary, *nulla poena sine lege*, judicial review, to name a few. Thus the “Rule of Law” as I use it, refers to the way the sovereign achieves order and justice through these aforementioned principles and through laws, *not* through exceptions.

³ See also BLACK’S LAW DICTIONARY 1357, 1360 (8th ed. 2004) (defining “rule” as (*n.*) “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation”; and (*vb.*) “1. To command or require; to exert control . . . 2. To decide a legal point . . .”).

⁴ In *The Concept of the Political*, Schmitt outlines the how the “exception” is used to illuminate the “friend-enemy” distinction, which in his outlook, lies at the core of political decision-making. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (University of Chicago Press, 1995) (1932). This idea is also explored by Gunther Teubner: “Justice begins where the law ends” *quoted in* Roger Friedland, *Institution, Practice, and Ontology: Toward a Religious Society* in *INSTITUTIONS AND IDEOLOGY: RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS* 67 (Renate E. Meyer, et al., eds. 2009).

Law. In a Schmittian sense, the governance of the Third Reich was a Rule by Exception, essentially the polar opposite of the Rule of Law. Widespread and ingrained in the quasi-legal framework, the exceptions punched so many holes in the rules that the Rule of Law was but illusory, if that. Other scholars on the subject have referred to the curious “legal” status of the Third Reich as the “prerogative state,”⁵ “unitary state,”⁶ “total domination,”⁷ “a twelve-year-long state of emergency,”⁸ or “suspension of the legal order in its totality.”⁹

Whichever of these terms that is used, the Third Reich was a system of pure politics, where law was replaced by the highly subjective notion of “justice”—in a mythological sense of the term.¹⁰ The status of the law during the Third Reich as one of absence: the Third Reich was a purely political system of “a-legality,”¹¹ virtually devoid of any semblance of the rule of law.

It was with this “a-legal” characterization that the builders of the Federal Republic of Germany (and later unified Germany) after World War II tackled the precarious question of how to return to a democratic judicial and political system, where each member of society has the right, ability and access to control the destiny of his state, while at the same time ensuring that the state will not devolve into a system of a-legality lacking basic notions of rights and freedoms. It was this a-legal past that the postwar re-builders sought to adjudicate and avoid for the future. In this paper I will first expound upon the notion of what I deem as the highly exceptional sovereign status of a-legality that characterized National Socialism. I will use this foundation to then explore this very issue that lies at the heart of the legitimacy of a democracy that emerged from a past characterized as an a-legal dictatorship.

II. A-LEGALITY UNDER THE THIRD REICH

A legitimate invocation of martial law typically involves a reaction to a genuine existential threat. The features of functional martial law involve the promise that (1) civil Rule of

⁵ ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941).

⁶ Karl Loewenstein, “Law in the Third Reich,” 45 *YALE L.J.* 779, 779 (1936).

⁷ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 437-457 (2nd ed. 1958).

⁸ Giorgio Agamben, *State of Emergency*, lecture given at the Centre Roland Barthes-University of Paris VII, Denis-Diderot (available at <http://www.makeworlds.org/node/162>).

⁹ *Id.*

¹⁰ The Nazi legal system was grounded in the same race-hierarchy myth that culminated in the Holocaust. Before the physical death of millions of persons along racial lines, though, necessarily occurred judicial genocide of peoples. The Nazi conception of “justice” was derived not from the mind, but from the blood, and it did not pass into the veins of outsiders. The “law” that was derived from such a conception of “justice” was equivalent to whatever would preserve of the German racial purity via the advancement of the Third Reich state. “Thus, law is not a technique or a science, but innate and transmitted only by blood; so that only he who enjoys the proper racial inheritance has the creative spirit of law . . . No devised law is good; only the pure racial conscience confers legal values.” Loewenstein, *supra* note 6, at 786.

¹¹ My term “a-legality” does not mean “illegality” but rather the absence of law. The distinction between “a-legality” and “illegality” is the same as that between “amorality” and “immorality.”

Law is threatened, (2) the Rule of Law is to be restored (via martial law), and (3) martial law will cease once order and the Rule of Law is restored.¹² The passage of the Enabling Act in 1933 was essentially an invocation of martial law, based on a supposed existential threat to the current order (the most immediate of which was the Reichstag Fire). However what made the invocation of a state of emergency in fact a *coup* were the actual circumstances under which it was made: that the invokers (i.e. the National Socialists) (1) caused or created the *perception* of an existential threat to the Rule of Law; (2) paradoxically maintained and perpetuated a status of martial law despite claims that order had been restored; and (3) had no intentions of reverting the state of emergency back to the Rule of Law.¹³ Complete governmental power was bestowed in a single party and concentrated and perpetuated by the Fuhrer concept indefinitely.

The substitution of a-legality for the Rule of Law was by no means abrupt or overt; racial myths of justice fastened gossamer of legality over the Third Reich, giving the impression that the *coup* of law and state was “legal” and “constitutional.” Hitler was open about his ambitions to revolutionarily rectify what he saw was the injustice of the Weimar Republic after World War I, but he always stressed respect for the authority of the current Weimar Constitution and government.¹⁴

Karl Loewenstein’s tremendous YALE LAW JOURNAL article *Law in the Third Reich*,¹⁵ was written in 1936 as an analysis of the status of law and justice in the new experimental form of National Socialist government that had recently replaced liberal representative parliamentary rule in Germany. The article outlines the characteristics of the a-legal overhaul of sovereignty, which, for purposes of providing a summary, I have synthesized and categorized into four general categories.

First, the Rule of Law was replaced by martial law, as discussed *supra*. It is essential to note that executive actions “of political nature” (which essentially were *all* executive actions) were beyond judicial control or review.¹⁶ This applies to actions executed by the Gestapo and SS, like those involving the bringing of individuals into forms of protective custody like concentration camps.¹⁷

Second, private (i.e. civil) law was replaced by politics. Since Nazi ideology lays its roots in racial myths, notions of justice as achieved via the law became equivalent to anything that is

¹² FRAENKEL *supra* note 5.

¹³ *Id.*

¹⁴ IAN WARD, LAW, PHILOSOPHY AND NATIONAL SOCIALISM 5 (1992); *see also* GEORGE SCHWAB, THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936 90 (1970).

¹⁵ *See* Loewenstein, *supra* note 6.

¹⁶ *Id.*

¹⁷ *Id.*

good for the *German* people (with all the exclusionary implications). Therefore, what was deemed “legal” became essentially whatever would advance the political (and racial) motives of the Third Reich. Law and judicial decisions could take ANY form as long as it is wrapped in the idea that it was done for the good of the state: “As law under National Socialism is a purely political conception intended for the promotion of the interests of the state or the community, any norms enacted by the political authorities are ‘right’ in the sense of ‘just.’”¹⁸

Third, judicial review, judicial independence and separation of powers were all replaced by the Fuhrer concept via the Enabling Act’s invocation of emergency powers.¹⁹

And fourth, basic norms and concepts what comprises a sound system of justice—*stare decisis*, universal access to free courts, due process, *habeas corpus*, and the idea of *nulla poena sine lege*—were all but eliminated from the legal framework.²⁰

A poignant illustration of this breakdown of the Rule of Law is the case of Marcus Luftgas, a Jewish merchant from Silesia who had been convicted of hoarding large quantities of eggs. After finding out that Luftgas had been sentenced to two-and-a-half years’ imprisonment by the Special Court, Hitler intervened to “correct” the sentence, ordering Luftgas to be executed. Reich Minister of Justice, Franz Schelgelberger—a prominent jurist and highest ranking defendant at the Nuremberg *Justice Case*²¹—thereupon turned Luftgas over to the Gestapo for execution.²² This was just one of many such examples of (1) Hitler’s intervening into the affairs of the judiciary and (2) judicial decisions being made to fulfill the vague and highly subjective political aims and notions of justice of the Third Reich where “any offense could be interpreted as treasonable, and increasingly, the Nazi creations, the Peoples Courts and the Special Courts, swept aside their Bismarckian predecessors.”²³ The judiciary became not one characterized by modern liberal concepts equality grounded in rules that applied to and were fair for all, but rather one characterized by mythological notions of *voelkisch* justice.²⁴

Thus was created a legal vacuum—an a-legal political system, where “anything was possible.”²⁵ A 1938 quote from Franz Guertner, a Minister of Justice in Hitler’s cabinet highlights the bizarre and paradoxical a-legal logic of the Third Reich:

¹⁸ *Id.*, at 813.

¹⁹ *Id.*, at 803.

²⁰ *See id.*, at 805-814.

²¹ *See infra*, Part III.A.

²² United States v. Altstoetter, et al. (*The Justice Case*), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL LAW NO. 10, at 1085 (1951); *see also* *WAR CRIMES: The Bureaucrat*, TIME MAGAZINE (Mar. 29, 1948), available at <http://www.time.com/time/magazine/article/0,9171,804566,00.html>.

²³ WARD, *supra* note 14.

²⁴ *Id.*

²⁵ Agamben uses this phrase to describe the Nazi concentration camp as well as a metaphor for a political sovereignty. GIORGIO AGAMBEN, *MEANS WITHOUT END: NOTES ON POLITICS* (2000).

In our country, the question of right or wrong used to be exclusively decided in conformity with the wording of the law; but this formal view has now been replaced by the material one, according to which any act detrimental to the interest of the community or conflicting with them is liable to punishment. We believe that the respect for the law will become all the greater the more we absolve the judge from the necessity of taking the letter of the law for this guide and the more we enable him to based his decisions upon the living spirit.²⁶

From a classical liberal standpoint, this policy of allowing—or even requiring—judges to render any decisions based on what is good for the political party actually achieves the objective opposite to preserving the Rule of Law: it does away with the Rule of Law altogether. This is in fact the a-legal judiciary system: a series of executive orders where notions of laws and judges adhering to them are given way to judges’ “prerogatives.”²⁷ This “prerogative” is essentially a theological²⁸ decision based on the principle of furthering the aims and goals of the Nazi party platforms, the Fuhrer and the Third Reich state. Essentially, judges and German executive officials were making un-challengeable decisions based on what they personally believed was right or “just” with regards to the furtherance of the Nazi party, Third Reich state, and the German people.

In this sense, the Nazi judiciary’s making purely political decisions—as opposed to judicial or legal ones—precisely maps onto Schmitt’s concept of “political theology.”²⁹ Essentially, any and all actions over which the Nazi courts had jurisdiction were decided on a case-by-case basis to discover which would, or more ominously, would not, further the Nazi Party’s *political* agenda. Each case—like that of Luftgas—stood on its own. The only rule was the exception.

This notion of the “theological” prerogatives of the Nazi officials is linked to a problematic conception of “justice”³⁰ when it is used as justification tool for purely political actions. Unfettered application and allowance of pure “justice” goes hand in hand with “a-legality” in assailing the Rule of Law. Each individual has his own conception of the “just” thing to do, just as each individual has his own sense of morality and philosophies by which he lives;

²⁶ Quoted in WARD, *supra* note 14.

²⁷ This term taken from Fraenkel’s characterization of the Third Reich as the “Prerogative State.” See FRAENKEL, *supra* note 5.

²⁸ I use the word “theological” here not entirely in a religious sense, but more so to mean something which cannot be proven right or wrong using open and rational discourse. A “theological” argument or decision exists outside the sphere of rational and productive public discourse.

²⁹ See *supra* note 1 and accompanying text.

³⁰ The general conception or definition of the term “justice” as I use herein is “the societal maintenance of morality.” The problem with this definition is that “morality” is also a highly abstract and nearly totally subjective term that most often leads to an impasse is discourse on public policy and politics. For purposes of this paper, the highly subjective and “prerogative” notions of both “justice” and “morality” illuminate the problem with the a-legal system of the Third Reich.

pure “justice” therefore is almost entirely subjective. Law on the other hand, is a compromise, a more moderate approach; perhaps the “good enough” average of each individual’s³¹ personal conception of “justice.”

I do not doubt that the Nazi judges believed that they were doing justice. Ultimately, however, this is an irrelevant question because of the highly subjective nature of the term.³² What is ultimately problematic is their use of the *political* in judicial decision-making. Allowing judges to transpose what they politically believe constitutes “justice” onto the lives and beings of individuals—individuals who are by definition subordinate to the state—is what happened in the Third Reich on the road to total a-legality. The a-legal prerogative state of permanent martial law, therefore, can be thought of as uninhibited “justice” (the subjective) without law (the objective).³³ Ruling solely by “justice” is essentially ruling without precedent, without norms; ruling without rules; in Schmittian terms, ruling by exception.

III. OVERCOMING A-LEGALITY AND MOVING TOWARDS DEMOCRACY: THREE PROBLEMS

It is with this notion of the a-legality and uninhibitedly perverse sense of “justice” that characterized the Third Reich that I turn to the postwar processes of retribution, reconciliation and rebuilding. I perceive the issue of a-legality as an overarching specter that guided the Nuremberg Trials, the occupation period and the rebuilding process. More simply, the issue of a-legality could not help but manifest itself in the post war legal culture, particularly when issues of free speech and the legitimacy of democratization were at stake.

A. Problem from the Nuremberg Trials

The following is a quote from the Prosecution’s opening statement in the Nuremberg *Justice Case*:

Indeed, the root of the accusation here is that those men, leaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an

³¹ Or, at least each individual’s legislative representative.

³² See *supra* note 30.

³³ It is worth acknowledging here Winston Churchill’s flirtation with denying the Nazi leaders the Nuremberg Trials and instead simply having them all executed on the spot by firing squad. It can be argued that that would have constituted justice. It can also be argued that the trials at Nuremberg constituted justice. See Norbert Ehrenfreund, Judge of the Superior Court of California, Ret, Remarks at the Robert H. Jackson Center: Reflections on Nuremberg Trial (June 13, 2005) (transcript available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/reflections-on-nuremberg-trial>). What makes the Nuremberg trials more socially acceptable than Churchill’s fleeting notion is that they are suffused with law. They represent at one-hundred-and-eighty degree turn from the Nazi judiciary with its wide application of rule by exception, or political theology. See *infra* Part III.A.

unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage and slaughter....

In summary, the defendants are charged with judicial murder and other atrocities which they committed by *destroying law and justice* in Germany, and by then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale. It is the purpose of this proceeding to hear these charges and to render judgment according to the evidence under law.

The true purposes of this proceeding, therefore, are broader than the mere visiting of retribution on a few men for the death and suffering of many thousands. I have said that the defendants know, or should know, that a court is the house of law. But it is, I fear, many years since any of the defendants have dwelt therein. Great as was their crime against those who died or suffered at their hands, their crime against Germany was even more shameful. They defiled the German temple justice and delivered Germany into the dictatorship of the Third Reich, “with all its methods of terror, and *its cynical and open denial of the rule of law*.”³⁴

This passage illustrates the concerns of the prosecutors at the Nuremberg Trials, particularly at the *Justice Case*: that the abandonment of the Rule of Law and dissent into a-legality is one of the main routes by which a democratic state could devolve into one representing international terror and imperial power. It is this concern that forms the backdrop of postwar program of de-Nazification and democratization. The *Justice Case* rhetoric shows that the Allied occupiers, as well as the builders of the Federal German Republic, acknowledged the “legalized” breakdown of the Rule of Law and the dire consequences that would result. Therefore, in addition to adjudicating those architects of the a-legality that defined the National Socialist state, the Occupiers and new regime sought to create a liberal democratic system that would impede such an a-legal devolution.³⁵

The problem for a postwar democratizing Germany that arose out of the Justice Trial involved ensuring that this “cynical and open denial of the rule of law”³⁶ does not become the exceptional norm again. Essentially the anti-hate speech laws of the postwar years which culminated in the 1985 Holocaust denial law³⁷ were implemented with that goal in mind.³⁸ Such

³⁴ *The Justice Case*, *supra* note 22, at 32-33 (emphasis added).

³⁵ It is highly worth noting the importance to the Allied powers the existence of the Nuremberg Trials, which would in hindsight represent a landmark in war crimes adjudication. *Cf. supra* note 33.

³⁶ *The Justice Case*, *supra* note 22, at 33.

³⁷ STRAFGESETZBUCH [STGB] [PENAL CODE] 1985, I REICHSGESETZBLATT [RGBL.] 945, as amended, §130, para. 3 (Ger.) (“Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.”). *See also* STRAFGESETZBUCH [STGB] [PENAL CODE] 1985, I REICHSGESETZBLATT [RGBL.] 945, as amended 1992, §189 (Ger.) (“Whoever disparages the memory of a deceased person shall be punished with imprisonment for not more than two years or a fine.”).

³⁸ *See Donna Arzt, Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal*, 12 N.Y.L. SCH. J. HUM. RTS. 689 (1995).

laws were codified as safeguards to preserve the Rule of Law³⁹ despite, or perhaps via, the curtailing of individual rights and freedoms.

The fear derived from the Third Reich was that the Rule of Law that could be rendered null and void precisely through forms of speech and publication.⁴⁰ It is worth acknowledging the execution of Julius Streicher, the prominent Nazi propagandist. Streicher, who was adjudicated as one of the 24 defendants at the main Nuremberg Trial, was convicted for crimes against humanity via incitement to genocide for promulgating what today would likely be considered “hate speech.”⁴¹

In perhaps a bout of poetic justice, Streicher *had* been convicted for propagating what we would likely call “hate speech” in what is known as the “Great Nuremberg Ritual Murder Trial” of 1929.⁴² The charge and conviction was for violating Paragraph 166 of the Weimar Criminal Code, which suppressed the public “insult” of a group on religious grounds,⁴³ for particularly Streicher’s well-researched Talmudic-based attacks on the Jews in his notorious publication *Der Stürmer*.⁴⁴ Streicher was sentenced to two months in prison.⁴⁵ This was 17 years, an a-legal transformation, a Holocaust genocide, and a World War before he received the ultimate sentence, again at Nuremberg.

The two Streicher trials can be seen perhaps as mirror images of each other. In the prewar Nuremberg criminal indictment for violation of religious insult prohibitions, Streicher was convicted of a hard-and-fast law designed to protect religious minority groups. This trial arguably only served as fuel to Streicher and the Nazi goals for sovereignty by exception. In the postwar Nuremberg Trials, Streicher was convicted of legally-murky war crimes designed to prevent genocide and bring its perpetrators to “justice.” Ignoring for the moment the legal theories and jurisprudential justifications of anti-hate speech laws, the fact of the Holocaust and a-legal devolution that occurred despite the Weimar Criminal Code in between the two trials adds another twist to the question of the utility of such legislation.⁴⁶

³⁹ *Id.*

⁴⁰ *Id.*, at 694-696.

⁴¹ *Id.*

⁴² Streicher was also tried in various civil libel suits. Dennis Showalter, *Jews, Nazis, and the Law*, Museum of Tolerance (1997), available at <http://motlc.wiesenthal.com/site/pp.asp?c=gvKVLcMVIuG&b=395155>.

⁴³ “Whoever publicly insults one of the Christian churches or another existing religious society [including Jews] with rights of corporation in the federal jurisdiction, its institutions, or customs . . . will be punished with a prison term of up to three years.”

⁴⁴ Showalter, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ While it is not the aim of this paper to explore the utility and efficacy of anti-hate speech legislation in Germany, I still feel that its question is at least worth acknowledging. Adjudicating and punishing those who commit, perpetrate and/or incite genocide poses a logical problem in terms of theories of just punishment, according to Arendt. See discussion *infra* Part IV.

Ultimately, the Nuremberg Trials sought to adjudicate and punish those perpetrators of Nazi a-legality and build a Germany guided by the Rule of Law. Doing this, meant somewhat compromising classical liberal values—like those of free speech and representation⁴⁷—and involving near-total occupation. The Trials, a nearly unprecedented international legal event, had to take some un-democratic liberties to achieve its goals of de-Nazification and democratization:⁴⁸ fighting a-legality with a-legality.

B. Problem from the Banning of Political Parties

The following is quoted from the German Basic Law Article 21 ¶ 2 [Political Parties], as part of the Constitution of the Federal Republic of Germany:

Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.⁴⁹

Some scholars have argued that the ban on political parties was just as much a reaction to National Socialism as it was a reflection of the anti-Communist fear/sentiment of the Allied Occupying powers in the years that followed the war.⁵⁰ In the transition from Allied occupation to an independent Federal Republic of Germany, the courts faced questions concerning how to apply this constitutional provision towards questionable political parties. When weighing the motions in 1951 to ban the Sozialistische Reichspartei (SRP) and Kommunistische Partei Deutschlands (KDP) the pivotal question the Federal Constitutional Court faced was, Which principles characterize the “free democratic basic order”⁵¹ that must be adopted by any political party that wishes to remain legal?⁵²

Part of the Court’s answer (from the reasoning of affirming the SRP ban) was establishing a baseline, the “rules of the game” by which any party that wishes to play an active role in determining the destiny of the state must abide. Included in this baseline standard, in addition to recognition of basic human rights, are “separation of powers . . . an administration governed by the rule of law, independent courts.”⁵³

⁴⁷ The line between free speech and incitement to genocide is quite thin and therefore quite problematic for a democracy. *See id.*

⁴⁸ Arzt, *supra* note 38. *See also* text accompanying *infra* note 58.

⁴⁹ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I (Ger.).

⁵⁰ Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties*, 3 GERMAN LAW JOURNAL (July 2002), available at <http://www.germanlawjournal.com/article.php?id=164>.

⁵¹ GRUNDGESETZ, *supra* note 49.

⁵² Niesen, *supra* note 50.

⁵³ *Id.*

Decisions like these show that the Court and nascent Federal Republic believed that civil liberties (the protection of which is the primary aim of any liberal governmental system) could only be possible through a system where the Rule of Law is in order and is what in fact preserves the order.⁵⁴ One could argue, perhaps successfully, that banning parties and various forms of hate speech amounts to denying civil liberties in the name of protecting them. But I would ask this question: is the “civil liberty” of someone seeking to deny someone else of his civil liberties (perhaps via advocating the breakdown of the Rule of Law) really a civil liberty that is worth protecting? or a civil liberty at all?

Theories of democracy call for allowing each citizen to have a say no matter what that say may be. Schmitt’s “anti-equal chance” theory, which arguably has been applied in Germany and elsewhere, stands as an exception to this theoretical principle of democracy. Schmitt wrote in *Legality and Legitimacy* about what he called the “equal-chance” characteristic of liberal parliamentary governing; that all parties, even revolutionary or “negative” ones, have the right to representation in a liberal democracy.⁵⁵ He believed that this could only work when all parties agree on the “rules of the game.”⁵⁶ He argued in 1932 that such parties that exist for or advocate the subverting the state or status quo order can and should be excluded from representation.⁵⁷

While Schmitt’s argument seems ironic given the status the National Socialist party has garnered as the epitome of an extremist party, it is worth acknowledging the connection between his “anti-equal chance theory” and the party-banning decisions that developed in democratizing Germany.

C. Problem from Censorship under Allied Occupation

The Allied Occupation’s party ban and widespread anti-Nazi censorship was just as linked to an intention to revise, preserve and perpetuate the governmental Rule of Law. The process de-Nazification, demilitarization and democratization—i.e. the prevention of the a-legal devolution—was inextricably linked to an Allied-implemented program of removal. In addition to the removal of leading and middle-tier Nazi officials from their governmental posts, the Allied powers sought to remove the publically perpetuated semblances—like that of Streicher—of the Nazi “hate speech” and propaganda. In addition to helping to frame the new constitution

⁵⁴ *Id.*

⁵⁵ CARL SCHMITT, *LEGALITY AND LEGITIMACY* (1932)

⁵⁶ George Schwab, *Introduction* to CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 3, 14 (University of Chicago Press, 1995) (1932).

⁵⁷ Carl Schmitt, similar to the German Constitutional Court, called therefore for the stamping out of such “negative” political parties. However, the perceived extremism in his views comes in the form granting a unitary executive the power to do this. Essentially, this provided the theoretical basis for his support of the Nazi takeover in 1933. See SCHMITT, *supra* note 4; SCHMITT, *supra* note 55; Schwab *supra* note 56.

German Basic Law (art. 21 and others), such a problem was tackled via a program of censorship and confiscation of Nazi publications and presses.⁵⁸

The censorship that occurred in the Occupation Zone occurred during a time of war or at least time of occupation was arguably a necessary program to facilitate the transitional period from an a-legal martial law to a Rule of Law democracy. However, a question that arose from this period was, How much of the censorship as well as party-banning would remain in the FRG and a post-Cold War reunified Germany? The answer has been set in place, though not without debates about the theoretical and practical, by the speech limitation legislation that is still in place today.

IV. CONCLUSION: THE PROBLEM FROM THE TRIAL OF ADOLF EICHMANN⁵⁹

The basic problem with the Eichmann Trial is expressed in the by Hannah Arendt in *Eichmann in Jerusalem*:

Foremost among the larger issues at stake in the Eichmann Trial was the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime. On nothing, perhaps, has civilized jurisprudence prided itself more than on this taking into account of the subjective factor. Where this intent is absent . . . we feel no crime has been committed. We refused, and consider barbaric, the propositions “that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wrong collectivity owes a duty to the moral order to punish the criminal.” And yet I think that it is undeniable that it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, that they were, in fact, the supreme justification for the death penalty.⁶⁰

Taking for granted Arendt’s characterization of Eichmann—that Eichmann was merely a sort of automaton that “never realized what he was doing”⁶¹—Arendt’s fear that the Eichmann Trial was held for the base and subjective notion of “justice” illustrates the tension between the Rule of Law and notions of justices explored *supra* at the end of Part II.

⁵⁸ Arzt, *supra* note 38.

⁵⁹ While the Eichmann Trial, of course, did not take place in Germany, it did play a significant and public role in the postwar German reconciliation process. See generally Lily Gardner Feldman, *The Role of History in Germany’s Foreign Policy of Reconciliation: Principle and Practice*, American Institute for Contemporary German Studies, Johns Hopkins University, 2008, available at www.wiscnetwork.org/ljubljana2008/getpaper.php?id=150.

⁶⁰ HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 254 (rev. ed. 1964) (quoting YOSAL ROGAT, THE EICHMANN TRIAL AND THE RULE OF LAW (1962)). Arendt also wrote, “I held and hold the opinion that this trial had to take place in the interests of justice and nothing else.” *Id.*, at 286.

⁶¹ *Id.*, at 287.

The Eichmann Trial therefore can be viewed as an exception in that Eichmann was tried merely for the base notion of “justice.” This is akin to the state of exception by under which Churchill made his initial suggestion for the postwar trials of the German leaders.⁶² This notion of uninhibited “justice” is akin to the state of exception by which the National Socialists came to power and under which they ruled.⁶³ Additionally, the various postwar measures built to ensure that National Socialism will not plague Germany again—the Nuremberg Trials, anti-“hate speech” legislation, censorship in the period of Allied Occupation, and the banning of various political parties—themselves can be viewed as micro-states of exception, exceptions to a pure democracy. Such measures were a step towards “ruling on the exception” in that they limited basic premises of democratic rule such as the notion that each individual can play a part in controlling the destiny of his own government. Perhaps, it becomes apparent, then, that, assuming pure democracy is a practical impossibility, necessary to a functional and orderly democracy, in the face of the Rule of Law, is the exception.

⁶² Ehrenfreund, *supra* note 33.

⁶³ See text accompanying *supra* notes 30-31.