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Etienne Lepicard (eds.)

Silence, Scapegoats, Self-Reflection

The Shadow of Nazi Medical Crimes on Medicine and Bioethics

With 8 figures

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Jürgen Reulecke

Preface

As former spokesman of the Collaborative Research Center "Cultures of Memory" (*Sonderforschungsbereich "Erinnerungskulturen")* at the University of Giessen, which was one of the sponsors of the conference "Memories and Representations of Nazi 'Euthanasia' in Post-World War II Medicine and Bioethics", I am pleased that this omnibus volume with such an appealing topic and program is now available.

By way of introduction, due to my great interest as a contemporary historian not only in the history of medicine, but also in related sciences like demography, psychoanalysis and psychogerontology, I would like to say something about a text written nearly seventy years ago that has fascinated me ever since I discovered it: a short essay from the year 1946, written by the psychoanalyst Alexander Mitscherlich who was 38 years of age at the time. Mitscherlich was born in Munich in 1908 († 1982). After earning a degree in history at the University of Freiburg, he began studying medicine. During this course of study (after serving a prison sentence during the Nazi regime) he was introduced by Viktor von Weizsäcker, a neurologist from Heidelberg, to the "biographical method" as the core concept of an "anthropological medicine". Then Mitscherlich became the director of the German medical commission observing the Doctors' Trial in Nuremberg, which began in November 1946 and ended with the sentencing to death of the seven main defendants in August 1947 and their ultimate execution in Landsberg in summer 1948. Here I would like to briefly outline one of Mitscherlich's concepts, which I believe offers an outstanding prelude to the topics covered in the volume.

His essay in the literary journal *Die Fähre* of late fall 1946, entitled *Historiography and Psychoanalysis* (*Geschichtsschreibung und Psychoanalyse*),[1] written in response to his first impressions of the Doctors' Trial in Nuremberg, amounted to an appeal to initiate a close cooperation between the two, still quite

1 Alexander Mitscherlich, "Geschichtsschreibung und Psychoanalyse: Bemerkungen zum Nürnberger Prozess", in: *Die Fähre* 1(1), 1946, 29 – 39.

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distant disciplines. He entreated historians and psychoanalysts to contribute to a future in which "the nations [obtain] a truly refined ear for the tones of an impending disaster", in order to "render the perpetrators harmless before the crime", for all misdeeds always had a long history in the human psyche, which can never be entirely denied. However, with a view to us future generations of historians, Mitscherlich felt the need to establish that we, too, would presumably continue to direct our gaze only toward the "anonymity of an epoch, toward styles, files and battles", overlooking the acting subjects, namely the interplay between their sensual and mental experience on the one hand, and their unconscious experience in the historical process on the other. Thus he demanded an "unsparing memory", for one could only learn from history "if one has precise knowledge of the human gesticulation through which it is conveyed". Therefore he advocated giving the defendants in Nuremberg the chance to submit themselves to intensive psychoanalysis, so that their personalities could be assessed without any "self-projection". Analyzing historical events without linking them to insight into history and human nature presented a real danger that the individual defendants, who had appeared before the court in Nuremberg "like a band of street boys caught doing mischief", would become the "national victims of (later) legends".

In my view Mitscherlich's appeal is still justified today *cum grano salis:* Only gradually are historians opening up to suggestions from psychoanalysis, and just as gradually psycho-scientists are emerging who are willing to learn from historians that they must take seriously the long-term development from the here and now into what becomes history. This volume documents the forms and breadth of content in which the events in medicine during the National Socialist era became "legends" (Mitscherlich) – various narratives in the postwar period, which were then able to fulfill a wide variety of functions for the (de-)stabilization of the self-image of medicine as a profession, but were also applied to the (self-)critique of medical ideas and agendas as well as to legitimate positions on medical ethics. In this sense the volume presents a deep historical dimension, both to the self-conception of medicine and to the current debates about central issues of medical ethics and bioethics.

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Volker Roelcke, Sascha Topp, Etienne Lepicard

Introduction: Conflicting Values in Medicine and Bioethics

In international debates on medical ethics, it is frequently assumed that in Germany there are specific, restrictive positions regarding euthanasia, human subject research, and human reproduction. For example, the author of an essay on "The Dilemmas of German Bioethics" in the US-American journal *The New Atlantis* talks of the "burden of history" responsible for the hesitancy to accept new biotechnologies in relation to medicine and human reproduction: Supposedly, "Germany has enacted some of the strictest bioethics policies in the world" on euthanasia, experimentation with human subjects, and "manipulation of nascent human life".[1] Others speak of the public discussion in Germany as being "haunted" by its past.[2] Moreover, its Nazi past is used to explain Germany's allegedly unique position among European countries on the topic of euthanasia, an issue generally discussed in all the other countries in the same terms as abortion, divorce and homosexuality, namely as something with individual autonomy at its core.[3] Even in the German bioethics community itself, there is a widespread conviction and critique that core bioethical issues, especially surrounding end-of-life decisions, may not be freely discussed in the broader public, due to "the trauma inflicted by National Socialism". Triggered by conflicts around the highly controversial Australian bioethicist Peter Singer, but not restricted to this context, one protagonist of such critical views even characterized certain ethical positions that refer to the Nazi past as "anti-

1 Eric B. Brown: "The Dilemmas of German Bioethics", in: *The New Atlantis – A Journal of Technology and Society*, Spring 2004, 37 – 53, here 38, 39; available at http://www.thenewatlantis.com/publications/the-dilemmas-of-german-bioethics (accessed 30 August 2014).

2 Edward Stourton: "Germany's eugenics controversy", *BBC News World Edition*, 12 April 2001, available at http://news.bbc.co.uk/2/hi/programmes/correspondent/europe/1272125.stm (30 August 2014).

3 Joachim Cohen, Isabelle Marcoux, Johan Bilsen et al.: "Trends in acceptance of euthanasia among the general public in 12 European countries", in: *European Journal of Public Health* 16, 2006, 663 – 669, here 667.

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bioethics" – a polemic published in the prestigious bioethics journal *The Hastings Center Report*.[4]

Thus, the impact of the Nazi past on present-day German debates in medical ethics is widely taken for granted. It appears to be clearly fixed and almost self-evident, and beyond any need for further questioning or even investigating whether this impact is the same for all the fields of medical ethics named above, or whether the references to and consequences drawn from the past can potentially change over time. At the same time, in many, if not most such evaluations, it is assumed that the repercussions of the Nazi past are specific to Germany, and – what is more – that they may perhaps be understandable, but are not really justified.[5] However, some probing analyzes of the historical knowledge used in such critiques by bioethicists have shown that bioethicists' rejections of references to the Nazi past of medicine have frequently operated with stereotypes, and do not make use of the latest available historiography.[6]

One might ask whether the perceived link between recollections of the Nazi past and supposedly restrictive ethical positions really does exist, and – if it does – whether it is as static as frequently assumed. A further question is whether such a link is really unique in the international context. Have there really not been any debates on the implications of Nazi medical atrocities in the medical communities of other European countries, in Israel, or the United States, and – if so – what were the specific contexts and actors, and why did such discussions and deliberations disappear (if at all) over time?

As a matter of fact, since the end of World War II, Nazi medical atrocities have been a topic of ambivalent and constantly changing reactions and debates, both in Germany and internationally. After the initial legal proceedings, among which the Nuremberg Medical Trial (1946/47) received particularly broad international publicity,[7] the public attention quickly receded by the end of the 1940s with the

4 Bettina Schöne-Seifert, Klaus-Peter Rippe, "Silencing the Singer: Antibioethics in Germany", in: *The Hastings Center Report* 21, 1991, 20 – 27, quotation from the abstract.

5 See, e. g., Schöne-Seifert/Rippe, 1991; Barbara Guckes, *Das Argument der schiefen Ebene: Schwangerschaftsabbruch, die Tötung Neugeborener und Sterbehilfe in der medizinethischen Diskussion*, Stuttgart: Gustav Fischer 1997; Brown, 2004; Roland Kipke, "Schiefe-Bahn-Argumente in der Sterbehilfe-Debatte", in: *Zeitschrift für medizinische Ethik* 54, 2008, 135 – 146.

6 See Hans-Walter Schmuhl, "Nationalsozialismus als Argument im aktuellen Medizinethik-Diskurs: Eine Zwischenbilanz", in: Andreas Frewer, Clemens Eickhoff (eds.), "*Euthanasie" und die aktuelle Sterbehilfe-Debatte: Die historischen Hintergründe medizinischer Ethik*, Frankfurt/Main 2000, 385 – 407; Eva Corinna Simon, *Geschichte als Argument in der Medizinethik: Die Bezugnahme auf die Zeit des Nationalsozialismus im internationalen Diskurs (1980 – 1994)*, Diss. Med., Giessen University 2004.

7 On the Nuremberg Medical Trial and other legal proceedings, see, e. g., Dick de Mildt, *In the Name of the People: Perpetrators of Genocide in the Reflection of their Post-War Prosecution in West Germany: The* "Euthanasia" *and* "Aktion Reinhard" *Trial Cases*, The Hague: Martinus Nijhoff 1996; Hanno Loewy, Bettina Winter (eds.), *NS-"Euthanasie" vor Gericht: Fritz Bauer*

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beginning of the Cold War. Although many victims of the atrocities wrote about their experiences in the early postwar period, their accounts found little resonance. A prolonged early period of (near) silence was followed by renewed attempts by victims, and later individual physicians and representatives of medical organizations, to describe what had happened.[8] Varying narratives developed, some of which served to stabilize the identity of the profession, whereas others had a critical and destabilizing effect.

Three basic narrative paradigms may be differentiated, which emerged consecutively since the 1960s, and some of which still coexist in Germany today: First, an isolationist paradigm, characterized by presumed historical discontinuities and the isolation of individual perpetrators. It created an image according to which the Nazi period was an isolated phenomenon in medicine, and those responsible for medical atrocities were isolated in the profession. It also implied that the culprits could be brought to trial, and that the "problems" of medicine began in 1933 when the Nazis came to power, that is, that they were the

und die Grenzen juristischer Bewältigung, Frankfurt/M./New York: Campus 1996, 35 – 58; Michael Marrus, "The Nuremberg Doctors' Trial in historical context", in: *Bulletin of the History of Medicine* 73, 1999, 106 – 123; Christian Bonah, Etienne Lepicard, Volker Roelcke (eds.), *La médecine expérimentale au tribunal: Implications éthiques de quelques procès médicaux du XXe siècle européen*, Paris: Éditions des Archives Contemporaines 2003; Paul J. Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent*, Houndmills/Basingstoke: Palgrave Macmillan 2004; Michael S. Bryant, *Confronting the "Good Death": Nazi Euthanasia on Trial 1945 – 1953*, Boulder, Colorado: The University Press of Colorado 2005. Little research has been performed on the reception of the Nuremberg Medical Trial and of specific medical atrocities, but see: Etienne Lepicard, "Trauma, Memory, and Euthanasia at the Nuremberg Medical Trial, 1946 – 1947", in: Austin Sarat, Nadav Davidovitch, Michal Alberstein (eds.): *Trauma and Memory: Reading, Healing, and Making Law*, Stanford: Stanford University Press 2007, 204 – 224.

8 For an early analysis of this silence, see "1946 – 1996, Le procès des médecins à Nuremberg: Éthique, responsabilité civique et crimes contre l'humanité – Actes du colloque tenu à l'UNESCO les 7 et 8 décembre 1996", in: *Revue d'Histoire de la Shoah*, no. 160, Mai-Août 1997. For a few random examples of victims' voices, see, e. g., Miklos Nyiszly, *Auschwitz: A doctor's eyewitness account*, New York: Fell 1960; Wanda Poltawska, *And I am afraid of my dreams*, London: Hodder & Stoughton 1987 (orig. in Polish, 1962); for voices of individual physicians, see e. g. Henri Baruk, "Les médecins allemands et l'expérimentation médicale criminelle", in: *Revue d'histoire de la médecine hébraique* 7, 1950, 7 – 21; Leo Alexander, "Medical Science under Dictatorship", in: *New England Journal of Medicine* 241, 1949, 39 – 47; Leo Alexander, "Ethics of Human Experimentation", in: *Psychiatric Journal of the University of Ottawa* 1 (1 – 2), 1976, 40 – 46; Helmut Ehrhardt, *Euthanasie und "Vernichtung lebensunwerten Lebens"*, Stuttgart: Enke 1965; Klaus Dörner, "Nationalsozialismus und Lebensvernichtung", in: *Vierteljahrshefte für Zeitgeschichte* 15, 1967, 121 – 152; Hartmut M. Hanauske-Abel, "From Nazi Holocaust to Nuclear Holocaust: A Lesson to Learn?", in: *The Lancet* 328, 1986, 271 – 273; William Seidelman, "Mengele medicus: Medicine's Nazi heritage", in: *Milbank Quarterly* 66, 1988, 221 – 239; Frank Schneider (ed.), *Psychiatrie und Nationalsozialismus*, Berlin: Springer 2011; more comprehensive bibliographic information is given in the specific chapters of this volume.

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result of outside political pressure. Thus, a few scapegoats within the field of medicine were blamed, while medicine as a profession remained "uncontaminated". There was almost no interest in the perspective or the suffering of the victims of the atrocities, nor attempts to support them, for instance, with measures for rehabilitation or compensation. Second, the continuity paradigm: It assumed and focused continuities on the level of physicians' careers, institutional structures, patterns of medical thought, and basic value orientations across the political breaks in 1933 and 1945. Accordingly, the medical atrocities were not simply the result of outside pressure from 1933 onwards, but rooted at least as much in latent, problematic potentials inherent in modern medicine itself. This kind of narrative justified a fundamental critique of postwar medicine. It was associated with first attempts to identify surviving victims and to support them, both on a personal level and in finding public and political recognition. Third, a complex-localizing paradigm which combined features of both preceding paradigms, but went beyond them. It conceded that there had been outside pressures on medicine, as well as such contributing factors as overarching mental dispositions (including value hierarchies). But it also pointed to the specificities and complexities of local constellations, and to the scope of choice generally available for individual and group action. This perspective increased the burden of responsibility on the part of physicians involved up to 1945, as well as the necessity for self-reflection by members of the profession in the postwar period.[9]

However, in contrast to the by now extensive historiography on medicine during the Nazi period,[10] studies which systematically examine the historical dynamics of the references to the Nazi past in post-World War II medicine and bioethics are scarce, and the few existing publications address only very circumscribed issues or individual institutions. Apart from the accounts of the

9 Volker Roelcke, "Trauma or Responsibility? Memories and Historiographies of Nazi Psychiatry in Postwar Germany", in: Austin Sarat, Nadav Davidovich, Michal Alberstein (eds.), *Trauma and Memory: Reading, Healing and Making Law*, Stanford: Stanford University Press 2007, 225 – 242.

10 For the most recent synthesis on human subject research during the Nazi period, see Paul J. Weindling, *Victims and Survivors of Nazi Human Experiments: Science and Suffering in the Holocaust*, London: Bloomsbury 2014; on the programs of patient killings ("euthanasia"), see Maike Rotzoll et al. (eds.), *Die nationalsozialistische "Euthanasie"-Aktion 'T4' und ihre Opfer*, Paderborn: Schöningh 2010; Gerrit Hohendorf, *Der Tod als Erlösung vom Leiden*, Göttingen: Wallstein 2013; for a general overview, see Volker Roelcke, "Medicine During the Nazi Period: Historical Facts and Some Implications", in: Sheldon Rubenfeld (ed.), *Medicine After the Holocaust*, New York: Palgrave Macmillan 2010, 17 – 28; an updated German version of this overview is published as "Medizin im Nationalsozialismus – radikale Manifestation latenter Potentiale moderner Gesellschaften? Historische Kenntnisse, aktuelle Implikationen", in: Heiner Fangerau, Igor Polianski (eds.), *Medizin im Spiegel ihrer Geschichte, Theorie und Ethik: Schlüsselthemen für ein junges Querschnittsfach*, Stuttgart: Franz Steiner 2012, 35 – 50; see also Wolfgang U. Eckart, *Medizin in der NS-Diktatur: Ideologie, Praxis, Folgen*, Vienna: Böhlau 2012.

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immediate postwar trials,[11] these studies focus almost completely on postwar German medical and bioethical contexts, thereby ignoring potential similar developments in other national contexts, or in the international community of physicians and bioethicists (such as the World Medical Association, WMA). What is more, most of these publications do not explore the broader implications of the individual cases. Thus, a first, very selective sketch of reactions in the German medical community up to the early 1990s is given in an article by Norbert Jachertz, commissioned by the German Medical Association (*Bundesärztekammer*, BÄK).[12] A detailed and carefully analyzed study by Thomas Gerst is limited to the immediate postwar period.[13] An outline for the following decades up to the 1980s is given in an article by Stefanie Westermann, using the BÄK's journal *Deutsches Ärzteblatt* as an exemplary source.[14] Further studies address, e.g., the strategies of university medical schools and their representatives in dealing with the Nazi past, specific medical disciplines such as psychiatry or pediatrics, or representatives of professional organizations.[15] So

11 See fn. 7.

12 Norbert Jachertz, "Phasen der 'Vergangenheitsbewältigung' in der deutschen Ärzteschaft nach dem Zweiten Weltkrieg", in: Robert Jütte (ed.), *Geschichte der deutschen Ärzteschaft*, Cologne: Deutscher Ärzteverlag 1997, 275 – 288 (for a critical analysis of this article, see the chapter by Volker Roelcke in this volume).

13 Thomas Gerst, *Ärztliche Standesorganisation und Standespolitik in Deutschland 1945 – 1955.* Stuttgart: Steiner 2004.

14 Stefanie Westermann: "'Die deutsche Ärzteschaft und ihre Standesvertretung will auch heute mit solchen Personen nichts zu tun haben': Die NS-Medizin im Spiegel des *Deutschen Ärzteblatts*", in: Richard Kühl, Tim Ohnhäuser, Gereon Schäfer (eds.): *Verfolger und Verfolgte: 'Bilder' ärztlichen Handelns im Nationalsozialismus*, Berlin: LIT-Verlag 2010, 241 – 259.

15 For university medical schools, see Sigrid Oehler-Klein, Volker Roelcke (eds.), *Vergangenheitspolitik in der universitären Medizin nach 1945: Institutionelle und individuelle Strategien im Umgang mit dem Nationalsozialismus*, Stuttgart: Franz Steiner 2007; for particular medical disciplines, see Gerrit Hohendorf, "The Representation of Nazi Euthanasia in German Psychiatry 1945 to 1998: A Preliminary Survey", in: *Korot – The Israeli Journal of the History of Medicine* 19 (for 2007/2008), 2009, 29 – 48; Sascha Topp, "Remembering Nazi 'Euthanasia' in Post-War Germany: The Case of German Pediatrics", in: *Korot – The Israel Journal of the History of Medicine and Science* 19 (for 2007/2008), 2009, 49 – 64; idem, *Geschichte als Argument in der Nachkriegsmedizin: Formen der Vergegenwärtigung der nationalsozialistischen Euthanasie zwischen Politisierung und Historiographie*, Göttingen: V & R unipress 2013, 41 – 56; for further specific aspects, see also Franz-Werner Kersting, Karl Teppe, Bernd Walter (eds.), *Nach Hadamar: Zum Verhältnis von Psychiatrie und Gesellschaft im 20. Jahrhundert*, Paderborn: Schöningh 1993; Michael Kater, "The Sewering Scandal of 1993 and the German Medical Establishment", in: Manfred Berg, Geoffrey Cocks (eds.), *Medicine and Modernity: Public Health and Medical Care in Nineteenth- and Twentieth-Century Germany*, Cambridge/New York: Cambridge University Press 1997, 213 – 234; Roelcke, 2007; Stefanie Westermann, Richard Kühl, Tim Ohnhäuser (eds.), *NS-'Euthanasie' und Erinnerung: Vergangenheitsaufarbeitung, Gedenkformen, Betroffenenperspektiven*, Berlin/Münster, LIT-Verlag 2011.

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far, conceptual issues related to the construction of collective memories of the medical field's Nazi past have been addressed only in an article by Sascha Topp, one by Lutz Kaelber, and in the introduction to a special issue devoted to the topic in *Korot – The Israel Journal of the History of Medicine and Science* (2007/2008).[16]

It is the aim of this volume to address the outlined issues in a more comprehensive and systematic manner and on an international level. It analyzes the emergence and dynamics of postwar narratives on Nazi medical atrocities in various national contexts, such as France, Germany, Israel, and the Netherlands, as well as the references to the Nazi past in the international discourse on biomedical ethics. The focus is on the following aspects in particular: legal proceedings in the immediate postwar period, with special attention to the Nuremberg Medical Trial (1946/47) (in the following: NMT) and its reception in various national contexts; debates and scandals concerning representatives of the profession, and associated narratives; collective memories and identity politics of professional medical organizations; and, finally, conclusions for ethics and medical professionalism drawn by historical actors, including victims and professional organisations.

The first part focuses on postwar trials which addressed medical atrocities, thereby setting the stage for the structure of emerging narratives. Paul Weindling focuses on the NMT and its legacies, in particular the emergence of what was later (since the 1960s) referred to as the "Nuremberg Code", the concept of "enlightened consent", as well as the implications of historiographical approaches taking into account the perspective of the victims of medical atrocities. Here, the hitherto neglected importance of commemoration and care of victims of medical experiments is illuminated.

Etienne Lepicard explores how the narratives on Nazi medical atrocities developed in the immediate aftermath of World War II within the medical communities of France and Israel. His study, based on the comparative survey of two leading medical journals in each country (*La Presse médicale*, *le Concours médical*, *Mikhtav le-haver* and *Dapim refuiyim*) takes as its starting point 1947,

16 Sascha Topp, "Collective Memory: Representation of National Socialist Euthanasia", in: *Korot – The Israel Journal of the History of Medicine and Science* 19 [for 2007/2008], 2009, 11 – 27; Volker Roelcke, Etienne Lepicard, "Medical Narratives on National Socialist Euthanasia: Professional Identity and Ethics between Politics of Memory and Historiography, ca. 1945 – 2000: Introduction", in: Etienne Lepicard, Volker Roelcke (eds.), *Medical Narratives on National Socialist Euthanasia: Professional Identity and Ethics between Politics of Memory and Historiography* (= *Korot – The Israel Journal of the History of Medicine and Science* 19 for 2007/2008), 2009, Special Issue, 3 – 9; Lutz Kaelber, "Child Murder in Nazi Germany: The Memory of Nazi Medical Crimes and Commemoration of 'Children's Euthanasia' Victims at Two Facilities (Eichberg, Kalmenhof)", in: *societies* 2, 2012, 157 – 194. doi:10.3390/soc2030157; for further information see: http://www.uvm.edu/~lkaelber/ (24 September 2014).

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the year in which the WMA was established. While *La Presse médicale* reflected the perspective of the Paris medical establishment, and indeed published accounts of the NMT as well as the ten principles of medical research ethics, the main place (*lieu de mémoire* in Pierre Nora's terms) where the Nazi medical atrocities were addressed was at the first meeting of the WMA in Paris in September 1947. There, another type of narrative developed, shaped by the personal experience of both Jewish survivor-physicians and former deportee-physicians, who requested a formal apology from the German medical community. It was not until the early 1950s, however, that the first attempts were made to address contemporary issues of medical ethics from a historical perspective. As a core example for this, Lepicard presents the case of the Jerusalem Declaration on Medical Ethics (1952).

Annette Weinke reconstructs the prosecution of Nazi medical crimes during the Allied military governments and in the first decades of divided post-war Germany. She identifies specific contexts in the two German states which help to explain the phenomenon of remarkably mild or even missing sentences pronounced by the courts. Beyond the already ambivalent positions of Allied judges towards aspects like human experimentation, basic assumptions and attitudes on the side of German authorities were frequently based on former traditions of German adjudication. Weinke implies that this may not simply be considered as a side-effect, but rather as the core of a more general kind of politics of memory (*Vergangenheitspolitik*) advocated by the judicial and medical communities as well as e. g. the churches: a politics characterized by commonly shared exonerating formulae – such as "mercy killing" – and furthermore by efforts to integrate former Nazi representatives into postwar society. And even new social developments in the Federal Republic in the 1960s and 1970s, such as the student protest movement, the strong efforts of the Frankfurt chief prosecutor Fritz Bauer, the Eichmann trial or the foundation of critical research institutions, did only slowly develop a deeper impact on the lenient policy of judging medical crimes.

The second part of the volume focuses on the perspective of the victims of Nazi medical atrocities, their memories, concerns, and legal issues as viewed from their point of view. Helmut Bader, son of a victim of the medical killings ("euthanasia"), gives a very personal account both of his father Martin's biography and the family's difficulties in dealing with the initially "lost" memory. Based on the results of personal research, the author embarks on a journey in which he himself – and with him, the reader – will meet his father (again). Complemented by the family memory of the mother's bitter and ultimately unsuccessful struggle for compensation in postwar Germany – she died in 1986 – this testimony is exemplary for thousands of wives, husbands, brothers and

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sisters, sons and daughters whose suffering went unheard prior to and again after 1945.

From the immediate postwar period onwards, the West German politics of compensation excluded victims of the Nazi sterilization and euthanasia programs from any kind of indemnification. The argument was that they had not been victim of "typical National Socialist injustice", in particular anti-Semitism, or atrocities in the context of Nazi warfare. Rolf Surmann analyzes the development of these politics of compensation by analyzing legislative texts, ministerial statements, expert panel proceedings and parliamentary debates. He reconstructs how – compared to other victim groups – those suffering from the consequences of medical crimes were marginalized time and again over decades. Some of the medical experts involved in the compensation debates – including even former perpetrators – combined the refusal of compensation claims with demands for a new sterilization law in the early 1960s. In addition, the Ministry of Finance in the (Konrad) Adenauer era strongly shaped the political discussion. As Surmann reconstructs, it was only from the 1980s onward that as a consequence of changing political cultures, the foundation of a new victim organization as well as the activities of younger representatives from the medical profession, some modest improvements could be achieved on behalf of the "forgotten victims" of over-restrictive indemnification rules. The main steps of political recognition of this group of victims (1988, 1998, 2006) took almost too long as many of those concerned already had died.

Professional organizations, their representatives, and their strategies of addressing medical atrocities that occurred during the Nazi period are at the center of the following part of the volume. Gerrit Hohendorf analyzes the case of Hans Joachim Sewering, former president of the BÄK and in the early 1990s president-elect of the WMA. Sewering had to withdraw from the office of WMA-president in January 1993 after mounting public pressure on him as well as on the WMA following accusations that he had been responsible for the death of a 14-year old girl in the context of the program of child euthanasia. Next to the historical facts available in the early 1990s, Hohendorf reconstructs three distinct narratives of relevant actors in the conflict, namely the narrative of Michael Franzblau, an American physician who was among the group insisting on Sewerings withdrawal and thereby relied on a fixed image of the "Nazi doctor"; the narrative of Sewering himself of the past events as given in public statements and in an interview with the author; and that of representatives of the catholic institution Schönbrunn in Bavaria which had been home of the killed girl, and for which Sewering had acted as interim medical director in the years from 1942 onwards. Hohendorf documents that it was only a change of strategy of the catholic institution in defending the nuns who had worked in Schönbrunn at the time which resulted in a sudden implausibility of Sewering's account of the past. Until

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that shift of strategy, Sewering's account had resonated well with broader post-war exonerating narratives of unknowledgeable physicians which had been instrumentalized or even mislead by the regime.

Sascha Topp addresses the question in which constellations the crimes of Nazi child euthanasia were referred to in the professional organization of German pediatrics (*Deutsche Gesellschaft für Kinderheilkunde*/DGK). Four distinct phases of dealing with the past may be identified. Until the end of the 1950s, the DGK made every effort to go back to day-to-day business and to again become internationally integrated in the scientific community. Therefore at the level of the DGK's board, there was a mere silence on the years between 1933 and 1945, and former NSDAP members as well as protagonists of Nazi euthanasia were unanimously accepted in the association's ranks. However, at the beginning of the 1960s, pediatricians had to deal with the issue anew since Professor Werner Catel, member of the DGK and one of the main protagonists of the child killing program was at the core of a public scandal. His renewed and public claim for legitimate "limited euthanasia" of severely malformed children – so-called "monsters" – provoked a wide range of reactions. Two groups in particular stood against him: representatives of social pediatrics, aiming for the rehabilitation of children with combined disabilities, as well as particular members of the DGK who had suffered Nazi persecution. Catel also functioned as a scapegoat, since all critical attention resulting from confronting the killing program was focused on him, whereas the broader involvement of the community of pediatrics was not looked at. The Catel dispute had a deep impact: First, on subsequent debates on medical ethics, here in terms of a significant delay of discussing important questions of the medical treatment of handicapped children; and second (in association with the upcoming of a new generation in medical schools and professional networks), a profound shift within the cultures of memory in the 1990s, resulting in new forms of representation of what had happened before 1945. Concerning the most recent phase of critical self-reflection, the author uncovers a process of internalization of the precarious past into the self-image of the association's members and representatives, consisting of two consecutive steps: the recognition of the fate of Jewish colleagues by the end of 1990s, as well as the activities to implement a living memory of the victims of Nazi child euthanasia and their relatives (since 2012).

The chapter by Donna Evleth examines the French Medical Association (*l'Ordre des Médecins*) created by the Vichy government in October 1940 to regulate the practice of medicine in France. It describes the anti-semitism that existed within the *Ordre* during the Vichy period from 1940 to 1944, and the way in which the governing body of the *Ordre*, the *Conseil Supérieur*, implemented the anti-semitic legislation of the Vichy regime. The chapter goes on to discuss the new *Ordre des Médecins* created in 1945. It focuses on this new *Ordre*'s

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characteristic method of dealing with its Vichy and anti-semitic past: amnesia and silence. The silence was not broken until 1997, when Bernard Glorion, then president of the *Ordre*, made a public statement of repentance for the *Ordre*'s exclusion of the Jews during the Vichy period. Yet this statement was not endorsed by the *Ordre* as a whole.

Rakefet Zalashik investigates how the medical discourse in Jewish mandatory Palestine and Israel was affected by, first, the news about the Nazi medical atrocities that reached the *Yishuv*, i. e. the Jewish community in mandatory Palestine, and then the first-hand testimonies of survivor-physicians. She identifies two main periods – the pre-state (1942 – 1948) and the Israeli stages (1948 – 1980s), which she presents in detail by analyzing the publications of Israeli physicians from the early 1940s up to the 1990s. She documents the relative absence of broader debates on the related issues during the second period, and the transition that occurred in the 1990s with the development of a curriculum on the topic in Israeli medical schools.

The next section of the volume looks into post-war debates on potential implications of Nazi medical atrocities for ethics and professionalism in medicine. James Kennedy describes the references to the patient killings during the Nazi period in post-war Dutch discussions on euthanasia which were initiated by the booklet *Medische macht en medische ethiek* ("Medical Power and Medical Ethics"), published in 1969 by the psychiatrist and psychologist Jan Hendrik van den Berg. The booklet articulated the public unease about medical capabilities (in particular regarding intensive care treatment) that seemed to go beyond the humane. Van den Berg used this unease to argue for the right to die and to legitimate mercy killing. The debate took place mainly in the 1970s and early 1980s and lead to a shift in publicly accepted value hierarchies, from a priority of the sanctity of life to a preference for continuing life only where it was judged as "meaningful". The decision about the meaningfulness of life was seen to be completely up to the individual concerned, implying that it was voluntary, and that the individual was acting in full autonomy. Initial critical arguments that there might be larger social and economic ramifications at work which might exert pressure on the decision of those concerned, or create the plausibility of assumed consent in the absence of the ability to decide, had disappeared by the early 1980s. References to the Nazi past, present in the initial phase of the debate, did not strengthen the cautionary position towards euthanasia, but to the contrary: Since National Socialism supposedly had nothing to do with the Dutch past, according references – it was argued – were not applicable to the Dutch context. As a result of this development, it was seen as the task of the physician to help the patient in case of his or her voluntary decision to die.

Isabelle von Bueltzingsloewen documents and analyzes the broad resonance of the allegation, since the early 1980s, that the excessive mortality in French

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psychiatric asylums during World War II was the result of a deliberate decision of the Vichy regime to let the mentally ill people starve to death. According to the rumor, this phenomenon amounted to a French "euthanasia" program comparable to the "T4" program perpetrated by German physicians together with the Nazi state. In her book published in 2007, *L'Hécatombe des fous,* Bueltzingsloewen has already demonstrated the inanity of what she called "the gentle extermination thesis". In particular, she showed that, if there had indeed been an excessive mortality, it was due not to any deliberate decision, but to a lack of solidarity within French society. After summarizing the main findings of her extensive previous study, Bueltzingsloewen in the present contribution addresses the question as to how such a weak thesis could spread so easily and so quickly over these last two decades. According to her analysis, one central explanatory factor is the instrumentalization of the "gentle extermination thesis" within the psychiatric profession, and from outside, for a critique and reform of institutions of psychiatric care.

Since the 1980s, both public debates on the Holocaust, and activities in medical historiography confronting the Nazi period have markedly intensified in the German national context. Volker Roelcke reconstructs the long path of the BÄK from defensive and self-exonerating reactions to outside critique towards an acknowledgement of the initiative and responsibility of medical organizations themselves, and their representatives, for many, if not most of the medical atrocities during the Nazi period. Starting with the strong reaction of the BÄK-president Karsten Vilmar after a critical essay in the prestigious British medical journal *The Lancet*, Roelcke analyzes the further steps to self-reflection, and an increasing readiness to see the duty of the organized medical profession not only in protecting its supposedly endangered image, but also in confronting the causes and corollaries of extreme forms of misconduct. Exemplary stages in his reconstruction are the project of a published edition of the NMT protocols and evidence, the debates and activities around the re-detected patient files of the "Aktion T4"-medical killing program, as well as topic statements by BÄK representatives and publications commissioned by the organization, converging in the Nuremberg Declaration of the German Medical Assembly (*Deutscher Ärztetag*) in 2012. The various references of the BÄK to the Nazi period at these particular occasions implied specific and changing images and narratives of this past. Next to the hesitant development of self-reflection on the side of BÄK-representatives, Roelcke's analysis points to the fact that time and again, the dynamic of this process was driven not by the respective presidents, or the board of the BÄK, but rather by individuals or groups who were marginal to the organization, and occasionally even viewed as whistle blowers (as in the case of the *Lancet*-author Hartmut Hanauske-Abel).

The two concluding chapters represent dedicated voices from two different

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perspectives on the repercussions from the Nazi period for present day medicine and bioethics. William Seidelman speaks as a physician with comprehensive clinical experience in treating Holocaust survivors, and at the same time conscious of problematic traditions and value hierarchies implicit in modern medicine, including the Nazi period. Having personally been involved in the debates around the former BÄK-president and WMA-president elect Hans Joachim Sewering in the early 1990s, he recounts official and background activities and statements of BÄK- and WMA-representatives, as well as those physicians critical towards Sewering taking office. He documents the BÄK's polemic interpretation of Sewering's withdrawal as a consequence of activities of the World Jewish Congress, and on the other hand it's lack of interest, and explicit repentance regarding the fate of Babette Fröwis, the girl in whose killing Sewering was involved.

Michael Wunder, a clinical psychologist, represents the working group on the history of Nazi euthanasia and forced sterilization (*Arbeitskreis zur Erforschung der NS-Euthanasie und Zwangssterilisation*), formed in the early 1980s in the context of larger social movements and the history workshop movements, and closely associated with the central organization of those concerned by forced sterilization and euthanasia. As an outspoken voice of these groups, Wunder is also member of the German Ethics Council (*Deutscher Ethikrat*). In his contribution, he compares the normative arguments and the available empirical evidence on the practice of euthanasia between the present German bioethical debate, the debates and practices in the Netherlands since the early 1990s, and the Nazi period. He argues that although it is not possible to directly learn *from* history, it is necessary to learn *with* history in the sense of clarifying the historical implications and dynamics when talking about the supposed autonomous decisions on the value of an individual's life.

The volume is completed by an appendix with a number of official statements on the relevance of Nazi medical atrocities for postwar medicine and bioethics by various medical organizations (from the Motion of the Jewish Medical Association of Palestine, 1947, to the Nuremberg Declaration of the German Medical Assembly, 2012) and by the organization of victims of euthanasia and forced sterilization (the former *Bund der Euthanasie-Geschädigten und Zwangssterilisierten*). Beyond their immediate documentary value, these documents are contextualized and analyzed in some detail in particular in the contributions by Etienne Lepicard, Volker Roelcke, and Sascha Topp.

Given the variety of contributions to this volume and their multitude of perspectives and national contexts, some insights and conclusions may be summarized with regard to conflicting values in medicine and bioethics: The striking early silence, or else exculpatory strategies, like pointing to individual scapegoats, or minimizing the extent of atrocities initiated by physicians (and

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instead referring to outside actors like "the state", or "the Nazi regime") may all be understood as responses to a major concern of physicians' organizations and their representatives: the concern that confronting the question of the potentially broad involvement and even the initiative of physicians and their representatives in the atrocities could imply imminent danger to the reputation of, and trust in, the profession and its organizations, both in the public sphere as well within the international scientific community. Interestingly, this concern implied the potential for contradicting modes of action. Over decades this fear stimulated harsh reactions like the refusal to accept supposed accusations of collective guilt, as well as a general avoidance of confronting the past other than through stereotypical formulas about the criminal nature of the political regime. However, since the 1990s and coinciding with the end of the Cold War, new approaches to accepting historical responsibility may be observed, culminating even in public apologies. Apparently, these activities are again important for the self-image, and concern on reputation of German medical associations or for the way they are perceived abroad, since now it is perceived to result in bad reputation if an institution would *not* be prepared to confront its Nazi past. Such activities were part of a broader stream of public apologies on the international level occurring around the turn of the millennium.[17] These developments indicate the extent to which debates on medical atrocities were and are intermingled with and embedded in wider national and international representations of the Nazi past.

On another level, the various cases presented here document that, as long as strategies of rejection of guilt dominated professional medical groups, most of the critical questions and considerations originated either from outside of the professional groups or from their margins, but not from the center, that is, from representatives of such organizations. As documented in several chapters (e. g., those by Hohendorf, Lepicard, Roelcke, Seidelman, Topp, Weindling, and Zalashik), the victims of Nazi medical crimes or individual physicians who had close ties to and knowledge of the suffering of victims of medical atrocities were frequently the first and often isolated voices who could be understood as agents of memory.

Regarding bioethical debates, the exemplary cases presented here (e. g., in the chapters by Kennedy, Topp, Weindling, Wunder) show persistently recurring motives and argumentations, for instance with regard to end-of-life decisions since the beginning of the 20th century. Despite the deep social shifts in the second half of the last century, it becomes obvious that current justifications of

17 See Carola Sachse, "Was bedeutet 'Entschuldigung'? Die Überlebenden medizinischer NS-Verbrechen und die Max-Planck-Gesellschaft", in: *Berichte zur Wissenschaftsgeschichte* 34, 2010, 224 – 241.

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the expansion of limits on legal euthanasia (most recently this year in Belgium, Switzerland, the Netherlands, and Luxembourg) have been (and still are) in part based on utilitarian arguments throughout this ethical debate. Whereas supporters of legal euthanasia frequently refer to the values of "autonomy", "humanity", "liberalization" and "democratization", historical examples amply document that precisely these humanitarian and liberal arguments were used to shift the boundaries of self-determination and heteronomy into contexts in which newborns and mentally disabled children, comatose patients, or other individuals with restricted or no capacity for self-determination became the targets of "humanitarian" killings. The proclaimed notion of a clear demarcation between conditions of autonomy and those with a lack thereof may thus clearly be discounted as a myth.

A last reflection on the contributions is that, although hardly anyone would deny the relevance of past events on a biographical level – be they as recent as yesterday, or part of a more distant past – particularly for making current and future life decisions, experiences made by other human beings are so easily dissociated from one's own perception of what is relevant. Perhaps this is why the voices of the survivors of Nazi medical atrocities and the Holocaust should not be lost out of sight, since they are so important for a more comprehensive, historically grounded understanding.

Finally, a few words on a very specific and important issue are in order: Namely, the question as to how we might appropriately speak about Nazi medical atrocities. Although we use the "scientific" language of historiography, all of us are very much emotionally affected by the content of our work, and that these emotions cannot be separated from the intellectual and moral reasons and motivations for doing this work.

Nevertheless, we are convinced that in order to adequately describe and understand the past, we have to use the theoretical and methodological tools of historiography, which include the moral and the scientific terminologies used in the historical sources, for example, the term "euthanasia". Among other reasons, the use of this term makes it possible to analyze the rationality and self-perception of the historical actors, the continuities of thought and action which they constructed themselves. It also helps to direct attention to the ways these rationalities and self-perceptions were seen and interpreted within the medical community in the post-World War II era, in legal trials, and in public debates. The term "euthanasia" was already used in debates on the killing of "life unworthy of living" (such as severely disabled newborn babies) decades before the Nazi period, both in Germany and abroad, as in the U. S. or the United Kingdom. As documented in several contributions to this volume, it was also used in the postwar justifications by physicians involved in the Nazi "euthanasia" program. To substitute it specifically for the Nazi period by the terms "killing" or "murder" would be historically inadequate and

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would disrupt this broader context of the use of these terms. At the same time, we are well aware that we must constantly reflect on the appropriateness of these tools and terminologies in enabling us to adequately describe the perspectives of the victims, while not concealing the rationalities of the perpetrators. Our ultimate intention for this kind of historical research consists in creating knowledge and attitudes that contribute to systematic self-reflection by physicians, biomedical scientists, ethicists, and all others concerned with human suffering.

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Post-War Trials: Setting Stages, Structuring Narratives

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Paul Weindling

Consent, Care and Commemoration: The Nuremberg Medical Trial and Its Legacies for Victims of Human Experiments

The "Nuremberg Code"

On 18 August 1947 the tribunal of three judges presiding at the Nuremberg Medical Trial (NMT) promulgated a set of guidelines on the conduct of human experiments, and how research subjects could be protected. This feature of concluding judicial guidelines at the Medical Trial was unique among all the Nuremberg Trials, and the Trial was also distinctive in that victims gave eloquent testimony about what they had endured at the hands of their medical torturers. It meant that the trial documentation gained iconic status as an overview of human experimentation and atrocities under National Socialism. After the Trial, involved lawyers and psychiatrists supported efforts to secure compensation, and even arranged care for some victims. The legacy of the NMT has substantial importance in medicine of the second half of the twentieth century when there was an upswing of clinical research, and an evident need for ethical regulation.

The question was raised around the time of the Nuremberg Trials as to those victims who were killed, and how they could be best commemorated? An International Scientific Commission on Medical War Crimes worked parallel to the Medical Trial to assemble details of all unethical experiments and research by the Nazis.[1] The task emerged as too great for the limited resources at the time, and the Commission was further marginalized in the post-war medical politics.[2] The focus became that of legally based "informed consent". However, the history is wider ranging and more complex.

It is overlooked how several of the Trials considered evidence for medical

1 Paul J. Weindling, "Die Internationale Wissenschaftskommission zur Erforschung medizinischer Kriegsverbrechen", in: Angelika Ebbinghaus, Klaus Dörner (eds.), *Vernichten und Heilen: Der Nürnberger Ärzteprozess und seine Folgen*, Berlin: Aufbau-Verlag, 2001, 439 – 451; Paul J. Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent*, Basingstoke: Palgrave-Macmillan 2004.

2 Idem, *John W. Thompson: Psychiatrist in the Shadow of the Holocaust*, Rochester/New York: Rochester University Press 2010.

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atrocities. Human experiments were already raised at the four-power International Military Tribunal. They were given a high profile as part of a general pattern of Nazi atrocities. During the following period of United States administration, the trials of Air Marshall Erhard Milch (because of the low pressure experiments) and the SS economic administrator Oswald Pohl also considered the experiments, because of his resourcing of the experiments in the concentration camps. Other trials concerned atrocities perpetrated by specific groups (notably the judiciary, high command and industrialists).[3]

The fact that victims did not volunteer or consent was part of the prosecution case in the successor trials. The issue was raised in the trial against 23 officials of the IG Farben chemical corporation, when the extensive typhus *(Fleckfieber)* experiments at Buchenwald were part of the prosecution case. The defense countered that conscientious tests with animals were carried out to ensure the safety of the drugs.[4] Moreover, the defense alleged that the criteria for criminality of experiments established at the Medical Trial were not met. The defense argued, using evidence from the Auschwitz and Mauthausen-Gusen camp doctor, Helmuth Vetter (a former scientist at Elberfeld), that rather than (criminal) experiments, there had been allegedly legitimate "clinical tests" or "practical tests".[5] "Medical Experiments" figured as part of Count Three (slave labor) in the charges against the defendants. Here the charge was of: "Experiments on human beings (including concentration camp inmates), without their consent, were conducted by IG Farben to determine the effects of deadly gases, vaccines, and related products."[6] Indeed, the defense took the position of a collective denial of responsibility and knowledge of the criminal experiments at Auschwitz.[7] The accused pleaded that they were conscientious professionals. The judges accepted the distinction between an experiment *(Versuch)* and a clinical test or trial:

> "Without going into detail to justify a negative factual conclusion, we may say that the evidence falls short of establishing the guilt of said defendants on this issue beyond a reasonable doubt. […] The question as to whether the reports submitted to Farben by its testing physicians disclosed that illegal uses were being made of such drugs revolves

3 Idem, "Victims, Witnesses and the Ethical Legacy of the Nuremberg Medical Trial", in: Kim C. Priemel, Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, New York: Berghahn Books 2012, 74 – 103. Paul J. Weindling, "Der Nürnberger Ärzteprozess: Ursprünge, Verlauf, und Nachwirkungen", in: Kim C. Priemel, Alexa Stiller (eds.), *NMT: Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung*, Hamburg: Hamburger Edition 2013, 158 – 193.

4 *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10*, Washington: US Government Printing Office 1950 (in the following: TWC), IG Farben Case, VII, 250.

5 Ibid., 253, 328.

6 Indictment, TWC, vol. VII, 54, 55.

7 Case VI, Closing Statement for all defendants, TWC, VIII, 972.

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> around a controversy as to the proper translation of the German word 'Versuch' found in such reports and in the documents pertaining thereto. The prosecution says that 'Versuch' means 'experiment' and that the use of this word in said reports was notice to the defendants that testing physicians were indulging in unlawful practices with such drugs. The defendants contend, however, that 'Versuch', as used in the context, mean 'test' and that the testing of new drugs on sick persons under the reasonable precautions that Farben exercised was not only permissible but proper. Applying the rule that where from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must prevail, we must conclude that the prosecution has failed to establish that part of the charge here under consideration."[8]

This verdict of the judges at the IG Farben trial that "tests" were permissible effectively reversed the verdict and guidelines pronounced by the judges at the close of the Medical Trial. The distinction between a therapeutic "test" and an experiment relied on some skilful conjuring with terminology by the defendants and defense lawyers. Here, it can be seen that the Nuremberg Trials left an ambivalent and contradictory legacy, on the one hand with guidelines to protect research subjects, and on the other hand permissive allowing constant clinical testing.

Victims of experiments are a hardly researched group. Most research is perpetrator oriented. The result is that very basic knowledge of victims' identities is still being established.[9] Until recently we had only details of clusters of victims. There is a strange irony regarding the ethical and legal protection of victims of medical atrocities. This is that the principles of informed consent and protection of personal data lead to the withholding of victim-related data. This is a sort of "Catch 22" (to echo the title of the novel by Joseph Heller) situation, when the bureaucratic rules are absurd: that the information about victims cannot be released without their consent, but you will never know who the victim may have been unless this is released. Such a situation prevents the reconstructing of victims' life histories – something that provides a long overdue historical basis for compensation and recognizes victims and survivors as individual persons. The effect of non-disclosure of names is not to protect the victims but to protect the identities of the perpetrators of medical atrocities. Moreover, the idea of a "Nuremberg Code" with "informed consent" as a key feature can be seen as retrospective constructs dating from the 1960s. From about this time, the first efforts to identify victims arose, but this was (and remains) a highly marginalized activity, outside the historical mainstream.

The Medical Trial was in Chief Prosecutor's Telford Taylor's words "no mere murder trial", by which he meant that human experiments were more complex

8 Case VI, Decision and Judgment, TWC, VIII, 1172.

9 Paul J. Weindling, *Victims and Survivors of Nazi Human Experiments: Science and Suffering in the Holocaust*, London: Bloomsbury 2014.

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in terms of their intention and organization than straightforward acts of violence.[10] In fact, the prosecutors delegated to the medical case construed medical atrocities as acts of violence and murder, but ethical issues were periodically discussed in court. The resulting judicial guidelines on human experiments provided research subjects with safeguards, both at an individual and collective level.

How public was the judicial declaration on human experiments? The NMT was conducted under military security. Yet throughout journalists, the German delegation of medical observers, other medical observers and national delegates were present. In 1949 the neurologist Alexander Mitscherlich who led the delegation from the not as yet institutionally fully unified Medical Chambers of the West German states (*Arbeitsgemeinschaft der Westdeutschen Ärztekammern*) included the judicial guidelines as a contribution for a future international agreement in his published documentation of the trial.[11] Although 10.000 copies of *Wissenschaft ohne Menschlichkeit* were distributed to the chambers of physicians, it is likely that the circulation was in fact limited through the lack of interest by the physician-members, a situation which the chambers themselves apparently did not try to change.[12] The reissued edition in April 1960 did include the judicial guidelines, and Mitscherlich's book has shaped all subsequent analyzes of the NMT, at least in Germany.[13] It was even used by German officials

10 Idem, "'No mere murder trial': The discourse on human experiments at the Nuremberg Medical Trial", in: Volker Roelcke, Giovanni Maio (eds.), *Twentieth-Century Ethics of Human Subjects Research: Historical Perspectives on Values, Practices, and Regulations*, Stuttgart: Franz Steiner 2004, 167 – 180.

11 Alexander Mitscherlich, Fred Mielke, *Wissenschaft ohne Menschlichkeit*, Heidelberg: Lambert Schneider 1949, 267 – 268. There exists an earlier, preliminary and more selective documentation published before the conclusion of the NMT: Alexander Mitscherlich, Fred Mielke (eds.), *Das Diktat der Menschenverachtung: Der Nürnberger Ärzteprozeß und seine Quellen*, Heidelberg: Lambert Schneider 1947. The 1949 edition was reprinted, with a new introduction, as Alexander Mitscherlich, Fred Mielke, *Medizin ohne Menschlichkeit, Dokumente des Nürnberger Ärzteprozesses*, Frankfurt/M.: S. Fischer 1960; see also the modified English version of the preliminary documentation: Alexander Mitscherlich, Fred Mielke (with contributions by Ivy, Taylor, Alexander and Deutsch), *Doctors of Infamy: the Story of the Nazi Medical Crimes*, New York: Henry Schuman 1949 – this, of course, did not include the guidelines proclaimed by the judges in their final statement during the trial.

12 On the origins and distribution of the two versions of the documentation, see Thomas Gerst, "'Nürnberger Ärzteprozess' und ärztliche Standespolitik: Der Auftrag der Ärztekammern an Alexander Mitscherlich zur Beobachtung und Dokumentation des Prozeßverlaufs", in: *Deutsches Ärzteblatt* 91(22 – 23), 1994, A-1606 – 1622.

13 The various documentations of the NMT in Germany, the US, and France, each selective in its own way and their specific references to euthanasia and human subjects research are analyzed in Etienne Lepicard, "Trauma, Memory, and Euthanasia at the Nuremberg Medical Trial, 1946 – 1947", in: Austin Sarat, Nadav Davidovitch, Michal Alberstein (eds.): *Trauma and Memory: Reading, Healing, and Making Law*, Stanford: Stanford University Press, 2007, 204 – 224.

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of the Ministry of Finance (*Bundesfinanzministerium*) to adjudicate compensation applications.

The ethical discourse was by no means restricted to the courtroom.[14] Victims had established an ethical agenda prior to the NMT. There was an explosion of human rights discussions around 1946 – 48, as with the UN Genocide Declaration and the UN Declaration on Human Rights. Here, the judicial declaration should be considered in the context of a wider human rights discourse. Figures like the genocide campaigner, Raphael Lemkin, and the medical intelligence officer, John Thompson, provide a link between the Medical Trial and international organizations like UNESCO.[15]

Towards a code

The term "Nuremberg Code" was probably not used until the 1960s. The idea of consent was qualified in a variety of ways, for example as "enlightened" or "voluntary". Once one scrutinizes its origins, status and meaning, the Nuremberg Code and the associated idea of "informed consent" are retrospective constructs of a more recent bioethical discourse – when there was a "codification of the Code" from the 1980s.

During the war, victims protested that experiments violated their rights as prisoners. On 4 March 1945 liberated Auschwitz prisoner doctors made an international declaration on how prisoners had been treated as experimental animals; they hoped that the Allies and neutral states would bring to trial those responsible.[16] Their intention was that bringing the perpetrators to justice would mean that such atrocities should not recur in the future. Survivors and witnesses of human experiments called for documentation of Nazi medical atrocities, justice and compensation. The released prisoners organized committees and issued newsletters about the experiments.[17] By asking when the issue of unethical experiments was first raised, and by whom and in what circumstances, we find that the research subject, and medical understanding of the victim is at the core of the story. This contact with victims was lost, when what later became known as the Nuremberg Code has achieved recognition.

The Allied Medical Intelligence Officer, John Thompson, who drove forward an ethical agenda, illustrates this loss of perspective. Crucial was the encounter with victims, in his case survivors at Belsen. Thompson defined what scientific

14 On the parallel debates in Palestine and France, see the contributions by Etienne Lepicard and Rakefet Zalashik in this volume.

15 Weindling, 2010.

16 The National Archives of the UK (TNA) WO 3O9/470. Weindling, 2004.

17 Weindling, 2004.

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practices were criminal, and began documenting where and when the criminality occurred. He alleged that 90 % of the work of leading German clinicians and researchers was criminal. In November 1945 he was the first to identify the human experiments as "Medical War Crimes" – this new term provided a basis for joint medical and legal investigations.[18] Thompson alleged that "the sacrifice of humans as experimental subjects" was widespread in Germany. He demanded comprehensive documentation and ethical analysis. He was convinced that inaction would condone the experiments, and that "there is equally a danger that these practices may continue in Germany or spread to other countries".[19] Thompson secured an inter-Allied meeting of war crimes investigators. He established the International Scientific Commission at Nuremberg to document and ethically analyze all unethical medical experiments, not just the handful that came to trial.

Thompson provided a corrective to a standard bioethical narrative of seeing a progressive development of codes from the generalized Hippocratic Oath to the Helsinki Declaration. This approach moved from the Hippocratic Oath, to the Prussian regulations on medical experiments of 1900, the Guidelines of the Reich's Ministry of the Interior on human subject research (*Reichsrichtlinien*) of 1931, to the Nuremberg Code, and then on to the Helsinki Declaration.[20] Thompson wished to put the suffering person first: He combined Martin Buber's idea of a communing relationship with the Roman Catholic philosopher Jacques Maritain's person-based philosophy.[21] By way of contrast, other medical experts at Nuremberg, the American physiologist Andrew Ivy and the neurologist Leo Alexander looked back to Hippocrates. We know from the work of Thomas Rütten that Hippocrates was an ambivalent basis for medical ethics, not least because the SS viewed Hippocratic medicine as heroic.[22]

Ivy's "Outline of Principles and Rules of Experimentation on Human Subjects", presented at a meeting at the Pasteur Institute on 1 August 1946, importantly began with the demand: "I. Consent of the subject is required", i. e. only volunteers should be used; "(a) The volunteers before giving their consent, should be told of the hazards, if any."[23]

18 Idem, 2010, 115 – 116, 147.

19 Ibid., 115 – 116.

20 On the Prussian regulations and the *Reichsrichtlinien*, see Jochen Vollmann, Rolf Winau, "Informed consent in human experimentation before the Nuremberg code", in: *British Medical Journal* 313, 1996, 1445 – 1449

21 Weindling, 2010, 83, 99, 240, 291.

22 Thomas Rütten, "Hitler with or without Hippocrates?", in: *Korot: The Israeli Journal of the History of Medicine* 12, 1997, 91 – 106.

23 Weindling, 2010, 138 – 39. Minutes of Meeting to Discuss War Crimes of a Medical Nature, Appendix B, TNA, WO 309/471. For a variant text, see the Outline in Medical Experiments no.125990, National Archives and Records Administration (NARA), RG 338 290 – 59 – 17.

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Ivy's agenda of a set of guiding principles was intended as a modern form of Hippocratic Oath, and his public speaking frequently mentioned the Oath. At the same time, his outlook was permissive in terms of research, even though he recognized ethical limitations. Ivy was at root a mechanistic physiologist, relying on animal experiments. Again, there is a contrast to Thompson, who advocated that students should learn from their own bodies rather than animal experiments.

The ethos of Ivy's viewpoint was geared to the take off of clinical research and trials. Two implications were:

1. Voluntary or Informed Consent provided a safeguard within a model of science that was reductionist.
2. The relationship was contractual between researcher and subject, or by extension physician and patient.

Ivy briefed the legal staff of General Taylor on the ethics of experimenting on prisoners. His concern was that the public should not lose confidence in "ethical experimentation". Ivy's route was essentially a bargain struck between researcher and subject, and by extension between physician and patient. Taking a philosophical view, the corresponding epistemology in the analysis of experimentation was empirical and associationist, and mechanistic in its presuppositions. Mitscherlich, the German medical observer at the Medical Trial, reflected on what was the human component in doctor-patient relations. Mitscherlich declared that it would be a mistake for physicians to distance themselves from the Trial, by seeing the accused in terms of an individual lapse of moral standards. In fact, every doctor needs to recognize what happens when the individual suffering human being becomes an object or a case – "*ein Fall*".[24] This position represented a quite fundamental critique of mechanistic reductionism as the epistemological basis of medicine.

Survivors of experiments were key prosecution witnesses at the Nuremberg Medical Trial. They included four of the Ravensbrück "Rabbits", and a Roman Catholic priest. The Nuremberg prosecutors had appealed in the press and on the radio for victims' testimony. The survivors' voice was heard strongly. The resulting evidence brought out links to "euthanasia" and genocide. In one dramatic incident, the Roma victim of a Dachau sea water drinking experiment, Karl Höllenrainer, when called to give evidence punched the experimenter the Austrian internist, Wilhelm Beiglböck. This was an exceptional confrontation in its directness, but is indicative of the stress of the courtroom encounter. Those survivors who gave evidence were representative not only of the groups ex-

24 Alexander Mitscherlich, "Der Arzt und die Humanität: Erste Bemerkungen zum Nürnberger Ärzteprozeß", in: *Die Neue Zeitung*, 20 December 1946.

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perimented on – as sulfonamide treatment of wounds, or seawater drinking, but even more broadly of victims as a whole.[25] Their role raises a crucial issue of how many victims there were and how widespread the experiments.

"Enlightened Consent"

The neurologist Leo Alexander realized that the legal basis of the NMT – the prosecution of war crimes as crimes against humanity – was too narrow. He tried to broaden the basis of the trial by applying the genocide concept. Alexander argued that the German research represented "killing methods for a criminal state", and as "an aggressive weapon of war".[26] As in Ivy's draft Code of 31 July 1946, Alexander required consent, and voluntary participation of the experimental subject. While Ivy required the experiment to be useful, Alexander preferred a more generalized viewpoint, that the experiment should not be unnecessary; both concurred that results should be for the good of society. Alexander amplified the concept of consent, as based on proven understanding of the exact nature and consequences of the experiment. He considered that a doctor or medical student was most likely to have the capacity for full understanding. The degree of risk was justified by the importance of the experiment, and the readiness of the experimenter to risk his own life.[27]

Alexander as a neurologist had a greater psychological understanding than Ivy, when he defined what constituted "enlightened consent". His criteria were "legally valid voluntary consent of the experimental subject" requiring: "A. The absence of duress. B. Sufficient disclosure on the part of the experimenter and sufficient understanding of the exact nature and consequences of the experiment for which he volunteers, to permit an enlightened consent on the part of the experimental subject." The idea of an enlightened consent gave the subject greater agency than being merely a recipient of passive information.

His outline of principles went on to state:

> "2. Experiments should be humanitarian "with the ultimate aim to cure, treat or prevent illness, and not concerned with killing or sterilization.
>
> 3. No experiment is permissible when there is the probability that death or disabling injury of the experimental subject will occur.

25 Weindling, 2013a, 74 – 103.

26 Alexander Papers, Durham NC 4/34 Memorandum to Taylor, McHaney and Hardy, "The Fundamental Purpose and Meaning of the Experiments in Human Beings of which the Accused in Military Tribunal No. 1, Case No. 1) have been Indicted: Thanatology as a Scientific Technique of Genocide".

27 Leo Alexander, "Ethics of Human Experimentation", in: *Psychiatric Journal of the University of Ottawa* 1(1 – 2), 1976, 40 – 46.

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4. A high degree of skill and care of the experimenting physician is required.
5. The degree of risk taken should never exceed that determined by the humanitarian importance of the problem. Ethically permissible to perform experiments involving significant risks only if not accessible by other means and if he is willing to risk his own life.
6. […] the experiment must be such as to yield results for the good of society and not be random and unnecessary in nature."[28]

Finally, to protect the research subject, Alexander included special provisions to protect mentally ill patients, requiring where possible the consent of the patient in addition to the next of kin or guardian. This provision was not included in the eventual Code.

The judges adopted Ivy's notion of voluntary consent, which was less comprehensive than Alexander's enlightened consent. They shifted the focus away from the physician to the research subject. What was novel was the right to withdraw from the experiment. Ivy had required far less when he called for informing the subject of potential hazards. The view that the Code "grew out of the Trial itself" omits the formative preliminary period, and the crucial inter-Allied discussions.[29] While the Code was not applied in sentencing, the judges followed Ivy in intending that it should prevent future abuses.[30]

Alexander and Ivy cited the Hippocratic notion of the doctor's duty of care for a patient. Hippocratic ideas were opaque given the problems of translation and interpreting the semi-mythical Hippocrates. They became subsumed in the political ideology of totalitarianism. Medical opposition to interference in the doctor-patient relationship meant that – in Ivy's words "We must oppose any political theory which would regiment the profession under a totalitarian authority or insidiously strangle its independence."[31]

Ivy found support in the medical press. An editorial in the *British Medical Journal* diagnosed the problem as political: "the surrender, in fact, of the individual conscience to the mass mind of the totalitarian State."[32] Morris Fishbein, the editor of the *Journal of the American Medical Association* (JAMA) linked the evidence on compulsory sickness insurance to the deterioration of the

28 Ibid.
29 Evelyne Schuster, "Fifty Years Later: the Significance of the Nuremberg Code", in: *The New England Journal of Medicine* 337, 1997, 1436 – 1440; idem, "The Nuremberg Code: Hippocratic Ethics and Human Rights", in: *The Lancet* 351, 1998, 974 – 977.
30 Paul J. Weindling, "Le Code de Nuremberg, Andrew Conway Ivy et les crimes de guerre médicaux nazis", in: Christian Bonah, Etienne Lepicard, Volker Roelcke (eds.), *La médecine expérimentale au tribunal: Implications éthiques de quelques procès médicaux du XXe siècle européen*, Paris: Éditions des Archives Contemporaines 2003, 185 – 214.
31 Andrew C. Ivy, "Nazi War Crimes of a Medical Nature", in: *Phi Lambda Kappa Quarterly* 22(4), 1948, 5 – 12.
32 "Doctors on Trial", in: *British Medical Journal* 1, 25 January 1947, 143.

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ethics of the German medical profession.[33] Physicians turned the abuses of Nazi medicine into a rallying cry against the socialization of medical services.[34] The autonomy of science reflected a situation of doctors opposing central state planning and the welfare state. The scales of justice were heavily tilted by the weight of Cold War requirements for strategically relevant clinical research, and by professional defense of the status of the individual practitioner.

In June 1947 the British Medical Association issued a statement on War Crimes and Medicine, diagnosing that the corruption of medicine arose from its becoming "an instrument in the hands of the state to be applied in any way desired by its rulers." The view conveniently absolved physicians from primary guilt.[35] The World Medical Association has remained the main international body setting international standards on human experimentation. It was first at this Association that voluntary and enlightened consent became "informed consent".

The Nuremberg Code thus arose from the concerns of Allied medical war crimes investigators as they encountered the survivors of the human experiments and gathered the records of medical atrocities in concentration camps and clinics. Thompson took a crucial initiative in convening an international committee of forensic pathologists and other medical and legal investigators. His International Scientific Commission offered an alternative tribunal to a public trial – that of expert evaluation conducted in closed session. The debates on research provided the initial stimulus for the formulation of a code of experimental ethics. The judges reverted to Ivy's notion of "voluntary consent", while they recognized the autonomy rights of the experimental subject in having the freedom to leave the experiment at any time.

The judicial promulgation of the guidelines left the status of these guidelines unresolved. Although promulgated to a military tribunal, the proceedings were conducted under a glare of publicity with press, and medical, legal and governmental observers. It meant that the guidelines were effectively published. Subsequent accounts of the Trial, the US abbreviated edition and the digest by the medical observer Alexander Mitscherlich, included these.

Ivy warned how the evils of bureaucratized and unethical Nazi science could recur. The lesson Ivy drew from Nuremberg was that it was necessary to sustain clinical freedom for the medical researcher. The cancer drug Krebiozen offered

33 Washington University (Seattle), Beals Papers, Box 1 folder 16 Morris Fishbein to Walter Beals, 20 May 1947.

34 This argumentation may also be identified in the contemporary French medical context, as pointed out in the chapter by Etienne Lepicard in this volume.

35 "War Crimes and Medicine", Statement by the Council of the Association for Submission to the World Medical Association, London: British Medical Association, June 1947.

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