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The Doctors' Trial at Nuremberg

I've been thinking about the Doctors' Trial at Nuremberg for the past year. It wasn't a subject I sought out; it found me. I thought I was researching something else altogether, and then one day I got stuck in Telford Taylor's Opening Statement for the Prosecution in the Doctors' Trial, spoken on December 9, 1946 in the Palace of Justice in Nuremberg. I got stuck in that Opening Statement and I couldn't get out. I'm still there.

I should say at the outset that I usually hate to speak at conferences. I know most academics enjoy it, but I don't. I'd much rather stay home and read and write and burrow into my cozy little hole on Long Island. Still, I've crawled out of that hole to be here today because I thought it would be good for me to teach someone else about the Doctors' Trial. To talk it out loud – to worry about it publicly – to see if this process might help me make sense of the Doctors' Trial. And truth to tell, it wasn't the Doctors' Trial I was trying to make sense of, but the conduct described in Taylor's Opening Statement that formed the basis of the charge. How could doctors, healers, upholders of the Hippocratic Oath of *do no harm* have performed those medical experiments on unwilling, suffering human beings?

The holocaust itself is a horrible package to unwrap. These human subjects were, after all, prisoners. They had been rounded up, forced out of their homes, and out of their families, transported on cattle cars to work camps, and put to slave labor. Had they not been found fit for work, they would have been killed. So this is the context in which this human experimentation took place. Once you've unwrapped the horrible package of the holocaust, and find yourself inside that box, you'll discover another horrible package inside, smaller, more discrete, needing to be unwrapped as well. Inside that package is what happened to some of those prisoners when they were drafted as human research subjects in experiments by Nazi doctors; a box within a box – a horror within a horror – evil squared – that's what I was trying to make sense of.

So I thought maybe speaking at a conference would help. How hard could it be? I asked myself. I'll take twenty minutes to describe what happened, and then leave ten minutes to ponder deep questions. It'll be just like teaching. Inform them a little, disturb them a lot. And just like teaching, I was hoping for revelation. It's been my experience that when you sing for your supper, you end up learning something about the song.

So let me inform you a little first. The Doctors' Trial was the first trial in Nuremberg after the War Crimes Trial of the most infamous Nazi war criminals. It was prosecuted solely by the United States. It was called the Doctors' Trial for the obvious reason that 20 of its 23 defendants were Nazi doctors; the other three were public health officials. The defendants were tried for a broad assortment of crimes, war crimes and crimes against humanity, including genocide and murder. They were also accused of carrying out forced sterilizations, and of taking part in the selection process on the arrival platforms of the concentration camps. Doctors were complicit in a wide array of Nazi crimes, but most of the evidence of the Doctors' Trial focused on the horrific medical experiments conducted on inmates of the Nazi concentration camps.[1]

Students of the holocaust are all familiar with the Doctors' Trial, but I'm surprised by how many people, even in academic circles, have never heard of it. The only people in the academy who I can absolutely count on to know something about the Doctors' Trial at Nuremberg are those who are engaged in medical ethics. The Doctors' Trial looms large in the field of medical ethics, particularly in the area of human experimentation. At the end of the Tribunal's written judgment in the Doctors' Trial, the judges wrote a ten-point code about how doctors should behave when using other human beings in their research. This code came to be known as the Nuremberg Code. It was the first international

[1] Arthur L. Caplan, *The Doctors' Trial and Analogies to the Holocaust in Contemporary Bioethical Debates, in* THE NAZI DOCTORS AND THE NUREMBERG CODE 258, 259 (George J. Annas and Michael A. Grodin, eds., 1992) [hereinafter THE NAZI DOCTORS].

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standard for the protection of human research subjects. Virtually all contemporary debate on human experimentation is grounded in the Doctors' Trial at Nuremberg, and in the Nuremberg Code.[2]

The principles of the Nuremberg Code are elegant and simple, and derive from what purports to be a universal, natural law. Its central tenet is that the research subject must give his informed consent. He must be told of any and all risks of participating in the experiment, and then he must voluntarily agree to participate. The experiment must be based on the results of animal experimentation. Moreover, the experiment must yield results for the good of society, and must not be procurable by other methods of study. It must not be random and unnecessary in nature, and must be conducted only by scientifically qualified persons.[3] In the last sixty years, a second, even a third, generation of international codes have been spawned,[4] but the Nuremberg Code still remains the grand-daddy of all international standards for the protection of human research subjects.

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[2] Michael A. Grodin, *Historical Origins of the Nuremberg Code, in* THE NAZI DOCTORS, *supra* note 1, at 121, 122.

[3] The Nuremberg Code, *in* THE NAZI DOCTORS, *supra* note 1, at 2.

[4] While the Nuremberg Code was the first effort to set an international standard for human experimentation, because the Code was created during the Nuremberg trials, it created the impression that it was merely a response to the horrific experiments of Nazi Germany. Dawn Joyce Miller, *Research and Accountability: The Need for Uniform Regulation of International Pharmaceutical Drug Testing,* 13 PACE INT'L L.REV. 197, 202-203 (2001). Furthermore, the experiments were all performed on healthy people who were prisoners of the state; the Code failed to distinguish between clinical research on healthy subjects and therapeutic clinical research that might offer a benefit for the presumably ill subjects. Sharon Perley, Sev S. Fluss, Zbigniew Bankoski, Francoise Simon, *The Nuremberg Code: An International Overview, in* NUREMBERG, THE NAZI DOCTORS, *supra* note 1, at 149, 156. Some of the principles of the Code were criticized as well. *See id.* at 154-156. In an effort to create a more comprehensive international code on human experimentation, the Helsinki Declaration was adopted by the World Medical Association (WMA). What is often referred to as "Helsinki I" was adopted by the World Medical Association in 1964, followed by three other congresses, "Helsinki II" adopted in Tokyo in 1975, "Helsinki III" adopted in Venice in 1983, and Helsinki IV, adopted in Hong Kong in 1989. DECLARATION OF HELSINKI RECOMMENDATIONS GUIDING DOCTORS IN CLINICAL RESEARCH, *in* THE NAZI DOCTORS, *supra* note 1, at 331[hereinafter DECLARATION OF HELSINKI] The Helsinki Declaration embodied all of the provisions of the Nuremberg Code, but distinguished between therapeutic clinical research and "pure" clinical research which anticipated little value or benefit to the subject. M. Cherriff Bassiouni, Thomas G. Baffes, John T. Evrard, *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation,* Vol. 72, No. 4, THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1597, 1610 (1981). Different guidelines were formulated for "Clinical Research Combined with Professional Care" and "Nontherapeutic Clinical Research." *Id.* The Helsinki Declaration also required an independent ethical committee to provide researchers with comments and guidance on their research protocol. "The design and performance of each experimental procedure involving human subjects should be clearly formulated in an experimental protocol which should be transmitted for consideration, comment and guidance to a specially appointed committee independent of the investigator and the sponsor..." DECLARATION OF HELSINKI, *supra* at 340. This committee had the responsibility for verifying that the researchers were qualified to conduct the experiment, that the experiments were properly designed, that test subjects had been equitably chosen, that privacy of the subjects would be respected, and that the potential humanitarian benefits arising from the experiment would justify the risk to the individual subjects. *Id.* at 340-341. Both the requirement that the research be guided by an independent committee, and the principle that "reports of experiments not in accordance with the principles laid down in this Declaration should not be accepted for publication," sought to shift the burden of determining whether research complied with ethical standards from the individual researcher's conscience to the professional community of researchers. *Id.* at 341. A system of checks and balances that did not exist in the Nuremberg Code was thus created by the Declaration of Helsinki; it sought to establish mechanisms to monitor and enforce ethical standards in human experimentation.

In addition to the Nuremberg Code and the Helsinki Declaration, in 1991 the Counsel for International Organizations of Medical Sciences (CIOMS), in collaboration with the World Health Organization, published the International Ethical Guidelines for Biomedical Research Involving Human Subjects (the Guidelines). The Guidelines represent the most recent effort by the international community to establish ethical principles for research involving human subjects. The Guidelines were first distributed for comment by the CIOMS in 1982 to ministries of health, medical research councils, medical faculties, non-governmental organizations, research-based pharmaceutical companies, developing countries, and medical journals. The final product includes fifteen guidelines, providing for: 1) individual informed consent; 2) essential information for prospective research subjects; 3) obligations of investigators regarding informed consent; 4) inducement to participate; 5) research involving children; 6) research involving persons with mental or behavioral disorders; 7) research involving prisoners; 8) research involving subjects in underdeveloped communities; 9) informed consent in epidemiological studies; 10) equitable distribution of burdens and benefits; 11) selection of pregnant or nursing (breast-feeding) women as research subjects; 12) safeguarding confidentiality; 13) right of subjects to compensation; 14)

It is somewhat ironic to me that the Nuremberg Code with its high ideals and implicit respect for persons was the product of systematic, on-going torture and abuse. The Nazi experimentation represents the paradigmatic worst case scenario for human research subjects. It was a nightmare that generated the Nuremberg Code. But that pattern often repeats itself in history: Nightmares generate norms. When moral boundaries are transgressed, we put the offenders on trial and punish them to manifest our disapproval. Most recently we have seen it in our prosecution of the American soldiers who engaged in that shocking, degrading treatment of Iraqi prisoners in Abu Graib. As part of that process, there is often a ritualistic articulation of ideal behavior – a mantra to ward off further evil. When the horrible thing was done by ourselves, we may engage in that ritual out of guilt. Perhaps we harbor the belief that if we had only written it down – how we are supposed to treat one another – the horrible thing would not have happened. In other instances, where we stand in judgment of others – as was the case in Nuremberg – the ritual has other dimensions. Not only does a document like the Nuremberg Code silently condemn, but it creates a vast symbolic distance between the authors of the norms and those people who transgressed them.

But let's return to the Doctors' Trial itself. Officially designated as *United States v. Karl Brandt*, it was a long trial, lasting for eight months. It started in late 1946 and ended in August 1947. For people who love to count things, there are a lot of things about the Doctors' Trial to count. For example, the Tribunal convened 139 times. There were a total of 85 witnesses, and over 11,000 pages of transcript. Seven of the defendants were sentenced to death by hanging; five were sentenced to life imprisonment; four were given lesser prison terms; and seven were acquitted and freed.[5] Lots of numbers to count, except for victims. Telford Taylor refers to them as the nameless dead,[6] but if you are in the counting game and you're counting victims, there are comparatively fewer nameless dead to count. One scholar speculates that there were probably no more than a few thousand prisoners used as human research subjects in the Nazi experiments, but no one knows for sure.[7]

But we do know that the total number of individuals actually harmed by the defendants in the Doctors' Trial was far smaller than the number of those who were killed as part of the final solution, or who died of disease or malnutrition in the concentration camps. Why would these medical experiments that only affected a few thousand prisoners form the heart of the prosecution's charge against the Nazi doctors? Surely the Nazi doctors were complicit in the mass murder of millions – so why go after them for the torture of a few thousand?

The most obvious explanation for this was evidentiary. The prosecution had to prove up its case against individual defendants, and it was much more difficult to assign individual responsibility for the murder of millions. The scale of those massive killings in the gas chambers required a complex bureaucracy with multiple players and tiers of authority. Individual responsibility became buried and impossible to dig out. And while the planning phases of the killing operations were all written down in incredible detail with illustrations, once the operations were put into place, the oral tradition took over.

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constitution and responsibilities of ethical review committees; and 15) obligations of sponsoring and host countries. INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (Council for International Organizations of Medical Sciences 1983) [hereinafter CIOMS Guidelines]. One of the goals of the CIOMS Guidelines was to provide strategies on how to implement the more abstract principles of the Helsinki Declaration. Unlike the Helsinki Declaration, the Guidelines require the approval of every research protocol involving humans by an independent ethical review committee. (Ethics and Research on Human Subjects) By mandating the review of all protocols using human subjects, the drafters of the CIOMS Guidelines believed that the principle of informed consent was insufficient to ensure the protection of human test subjects. The CIOMS Guidelines also represent the first international effort to tackle the issues arising out of clinical research conducted on an international scale; there are provisions that specifically apply to research in developing countries. Guideline 8 requests that research subjects from developing communities not be used in research that could be carried out reasonably well with subjects from developed countries. CIOMS Guideline 8.

[5] *Introduction* to THE NAZI DOCTORS, *supra* note 1, at 4. There were also over 1400 documents introduced.

[6] *Opening Statement of the Prosecution, December 9, 1946, reprinted in* THE NAZI DOCTORS, *supra* note 1, at 67.

[7] Arthur L. Caplan, *The Doctors' Trial and Analogies to the Holocaust in Contemporary Bioethical Debates,* THE NAZI DOCTORS, *supra* note 1, 258, 265.

Orders for the killings were sounded in the air, not written down. But the Nazi medical experiments purported to be science, and science ensured a well-documented record. It was relatively easy to prove up these cases against individual Nazi doctors. That ease of proof at least in part explains the prosecution's charging strategy.

I want to show you some photographs now. The first seven, I borrowed from an excellent book that I have relied upon a lot, edited by George Annas and Michael Grodin, *The Nazi Doctors and the Nuremberg Code*, published by Oxford University Press.[8] I am using those photographs with their permission. The last few are from the Photographic Evidence of the Prosecution.[9] I should warn you that a number of them are disturbing. I don't mean to be disrespectful of the victims by showing these pictures to you. I just think it is important to keep in mind just exactly what went on, and these pictures tell the story better than any words could.

PHOTOGRAPHS[10]:

[1] Here is a photograph of the Judges of the United States Military Tribunal No. One. Each of these judges was appointed by President Truman. Left to right: Harold L. Sebring, justice of the Supreme Court of Florida; Walter B. Beals, the presiding judge and justice of the Supreme Court of the state of Washington; Johnson T. Crawford, former justice of the Oklahoma District Court in Ada, Oklahoma; and Victor C. Swearingen, alternative member and former assistant attorney general of Michigan.

[2] This is a photograph of the Chief of Counsel for War Crimes, Brigadier Telford Taylor.

[3] Here is a photo of the general view of the courtroom on the opening day of the trial. Taylor is at the podium, delivering the Opening Statement.

[4] Here is a picture of the defendant physicians in the "Dock."

[5] This photograph is of the named defendant, Karl Brandt. He is age 43 here, and was the personal physician to Hitler, and the Reich Commissioner for Health and Sanitation. When Brandt was sentenced to death by hanging, he tried to avoid it by offering his living body for medical experiments, but he was turned down by the American authorities. At the gallows, Brandt declared, "It is no shame to stand on this scaffold. I served my fatherland as others before me."[11] He refused to end his speech, and finally the black hood was dropped over his head in mid-sentence.[12]

[6] This is a photograph of Dr. Leo Alexander, a Boston neurologist and psychiatrist, who was a consultant to the trial, and along with Dr. Andrew Ivy, drafted the Nuremberg Code. Here Dr. Alexander is examining a Polish girl who was permanently crippled from being a subject in an experiment.

[7] This is a freezing experiment at Dachau. The human subject is a political prisoner. He is being immersed in ice water. The freezing experiments were instigated by the German Air Force that wanted to know how to warm up aviators who were forced to parachute into the cold North Sea. In these experiments, human subjects were put in tanks of ice water for up to 3 hours, and then rewarmed by various means, including surrounding them by naked women. In other experiments, subjects were kept naked outdoors in freezing weather.[13] Many died.

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[8] THE NAZI DOCTORS, *supra* note 1, at 113-119.

[9] Photographic Evidence of the Prosecution. Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. I, 898-908 [hereinafter Trials of War Criminals, Vol. I].

[10] http://www.tourolaw.edu/Nuremberg.

[11] Alexander Mitscherlich and Fred Mielke, *Epilogue: Seven Were Hanged, in* THE NAZI DOCTORS, *supra* note 1, at 106.

[12] In the transcript at the end of the trial, each of the defendants was given a chance to address the Tribunal, and Karl Brandt's final statement before the Tribunal was very revealing. About the euthanasia programs, he characterized the conduct not as a crime against humanity, but as "pity for the incurable". *Final Statement of Defendant Karl Brandt, in* Trials of War Criminals: Nuremberg Military Tribunals, Vol. 2, at 139. Here is quote from Brandt's final statement, "...when I said 'yes' to euthanasia I did so with the deepest conviction, just as it is my conviction today, that it was right. Death can mean deliverance. Death is life – just as much as birth. It was never meant to be a murder." *Id.* at 140.

[13] *Opening Statement of the Prosecution, December 9, 1946, reprinted in* THE NAZI DOCTORS, *supra* note 1, at 74.

[8] These are photographs of an inmate from Dachau who is undergoing the terrific pain of low pressure in the high altitude experiments, also instigated by the German Air Force. They would lock the research subject in a low-pressure chamber and simulate pressures at high altitude, up to 68,000 feet. Then they would plunge him into a rapid descent without oxygen and witness and record his painful death.[14]

[9] Here are some pictures of phosphorus burns that were inflicted on inmates of Buchenwald. They would burn the human subjects, and then rub the burns with various preparations, to see which ones might heal, and which would cause infection, necrosis, and finally death.[15]

[10] This is a photograph of a young woman who underwent bone experiments. In these experiments, human subjects would have their legs broken, and then bone transplants performed. Transplantations of entire limbs from one person to another were performed. Usually the amputee would then be killed.[16]

[11] Here are corpses that were part of the transplantation experiments assembled in tanks containing formaldehyde for their preservation. To me, these have an otherworldly look to them, particularly the one there with just the amputated legs.

[12] Here is what the tanks looked like that preserved the corpses.

[13] Here is a corpse that has been carved up in preparation for dissection.

I've asked myself many times: with what degree of detail should I describe the horrific Nazi medical experiments at the conference? It's true, I just showed you some disturbing pictures, but I assure you, if you read the transcript of the Doctors' Trial, you would appreciate there were many worse tortures that I've left out that were not, and could not be, captured in photographic evidence. And I discovered something: I simply could not bring myself to say some of the things that happened to those people out loud. That was one of the surprises I did not anticipate in singing this song: that I would be unable to be a reporter of the truth.

I am reluctant to admit this, but there is something compelling about reading what happened in the research bays of the camps. The victims of the human experimentation *were* able to tell the truth, and many times I found I couldn't put the transcript down. I couldn't breathe as I read their testimony, spoken over sixty years ago by people who are long dead. But you can feel their suffering coming from the printed page. I don't think I will never read those transcripts again, but I do remember being there, inside that horrible little box of Nazi experimentation, in the pursuit of damnable knowledge about what might happen if you force the human body to exceed its limitations.

Perhaps too, this helps explain why the prosecution chose the medical experiments as the basis of their charge. They knew those survivors' stories were compelling. And so imaginable. Many of the deaths in the concentration camps took place in unimaginable circumstances, like lining up to take a shower that turns out to be a poisonous gas – who has ever been in such a situation? But it's not so hard to imagine how it might feel to be a human research subject. The setting would be familiar to all of us in this room: a medical facility of some kind, perhaps a laboratory in the doctor's office. I don't know about the rest of you, but I always feel so vulnerable when I go to the doctor, sitting there, waiting all alone in an examining room, half naked, dressed only in a white paper gown. Not only do I feel stripped of my clothes, I feel stripped of my identity and my dignity, and if there's something wrong with me physically, I feel anxious and mortal. I feel trapped inside this imperfect, confining, aging physical entity that weighs too much and hurts so much in the morning. All things considered, I'd rather be somewhere else.

The truth is: at times, the human body is a prison, and living inside of one is hard – that is the most basic fact of our universal human condition, and the basis of much of our suffering. So the stories described in the Doctors' Trial are ones that we can imagine. We can feel how trapped those human

[14] *Counts Two and Three of the Charge at the Doctors Trial, Judgment and Aftermath, in* THE NAZI DOCTORS, *supra* note 1, at 94-97.

[15] Trials of War Criminals, Vol. I, *supra* note 9, at 653-669.

[16] *Id.* at 391-418.

research subjects must have felt in their multiple prisons – the prison of the concentration camp, and then that other prison we all know too well – the prison of the human body. Except in the concentration camps, the doctor wasn't there to help you feel better, to transform your prison into a room with a door, or a place you could live in and with. He was there to use you, to cause you suffering, and to do you harm.

And so I have to confess to finding the stories of the Nazi experimentation compelling, and I own up to some morbid fascination about them. Perhaps some of you know what I'm talking about. I wonder – fear really – whether some emotions in the same genre – compulsion and morbid fascination – may have motivated the Nazi doctors themselves to perform those experiments. I shudder at the thought that I might understand them.

I suspect that Telford Taylor had the same conversation with himself about how much detail to go into about the experiments. He took the high road. His description of the experiments in the Opening Statement was purely factual, and devoid of any details of suffering. His list included, besides the experiments I just described, infecting prisoners with malaria and typhus, inflicting wounds that were then infected with mustard gas or pus to induce blood poisoning, forcing inmates to drink salt water, sterilization experiments, castrations, experiments on effective methods of poisoning in practice for the final solution, burning inmates with incendiary bombs, and killing Jewish inmates in order to help build a skeleton collection.[17]

How could we be talking about doctors? Doctors are healers. Doctors help people, prevent and cure disease, alleviate human suffering. We know that the Nazi doctors swore to the Hippocratic Oath. How could they have sworn to do no harm to their patients and then engage in gruesome scientific experiments on human subjects that not only did not benefit them, but harmed them, and caused them to suffer, and often to die?

I suppose the cheap answer might be: The Hippocratic Oath applies only in a therapeutic context, and this is scientific research. In a therapeutic doctor/patient relationship, the doctor's duty is clear. But these human subjects were not their patients, but their prisoners. And even if they were research subjects, who knew what the ethics were of using them in scientific experiments? That was how the defense argument went. But they *did* know. There *were* German codes predating the Second World War that set out the ethically permissible boundaries of research on human beings. A 1900 document called the Prussian Directive required the fully informed consent of the human subject in research; he had to be told of all "the adverse consequences that may result from the intervention."[18] Then again, in 1931, the Reich Minister of the Interior promulgated a set of guidelines for medical experimentation. The Reich Circular demanded that the researcher obtain the informed consent of the human subject, that he document any deviations from protocol, and that he justify the study of especially vulnerable populations.[19] Some have argued that the principles in the 1931 Reich Circular were "even more inclusive and formalistic than the Nuremberg Code in that they demand complete responsibility of the medical profession for carrying out human experimentation."[20]

So it is just historically inaccurate to say that there were no norms of proper research conduct before the Second World War. When Dr. Ivy cited the 1931 Reich Circular in his testimony to show that the Nazi doctors were surely familiar with the ethics of human experimentation, defense counsel responded

[17] Not listed, of course, since he was not a defendant, having slid away into the night, were the experiments on twins performed by Dr. Joseph Mengele. Infecting one twin with a germ, and using the other as a control, attempting to create Siamese twins on Gypsy twin girls by connecting blood vessels and organs, trying to connect the urinary tract of a seven year-old-girl to her own colon. Eva Mozes-Kor, *The Mengele Twins and Human Experimentation: A Personal Account, in* THE NAZI DOCTORS, *supra* note 1, at 53, 57.

[18] Michael A. Grodin, *Historical Origins of the Nuremberg Code, in* THE NAZI DOCTORS, *supra* note1, at 121, 127. The Prussian Directive was probably the first document ever to recognize the need to protect vulnerable populations from being used as subjects in experimentation. It banned nontherapeutic research on children and incompetents. *Id.*

[19] *Id.* at 131-132.

[20] *Id.* at 129.

that it was only a guideline, and did not have the force of law.[21] Frankly I don't care if the 1931 Reich Circular had the force of law. As far as I'm concerned, ethics need not have the force of law to be binding, but then again, I'm not much of a legal positivist. The Nazis were. I don't care what you call them, law, directives, guidelines, ethical principles – those documents described in detail how a doctor was supposed to treat a human research subject. I suspect that each of those Nazi doctors knew about those moral principles, and if they didn't, they should have as members of the medical profession.

But even if they had known about the ethics of human experimentation, it wouldn't have mattered. The racist theories about Aryan supremacy – theories embraced by most doctors in Germany in the 1930s – managed to move the subjects of those experiments out of the category of humanity. Hence there was little ethical *Angst* about how to treat them. The packages of the holocaust, and the little box within the box we are looking at right now – both of these packages were wrapped in a set of prevailing ideas known as "social Darwinism."[22] Fearing degeneration of the human race and of the Nordic German race in particular, the social Darwinists established a kind of Rassenhygiene, or racial hygiene.[23] By the mid-1920s, Rassenhygiene merged with the ideologies of National Socialism,[24] and the creation and maintenance of racial purity became a vital component of Nazi ideology.[25]

Given the importance of biology in the Nazi ideology, many doctors were attracted to the Nazi movement.[26] By 1942, more than half the doctors in the country were members of the Nazi party, and doctors were represented in the SS seven times more than the average for the employed male population. Most of the twenty or more institutes for racial hygiene were established at German universities before Hitler rose to power, and by 1932 Rassenhygiene was a fixture in the German medical community.[27] The practical results of the Nazi ideology of Rassenhygiene were three state programs: the Nuremberg Laws,[28] the Sterilization Law,[29] and the euthanasia program.[30] German

[21] *Id.*

[22] Robert N. Proctor, *Nazi Doctors, Racial Medicine, and Human Experimentation, in* THE NAZI DOCTORS, *supra* note 1, at 17 [hereinafter PROCTOR]. Many more Nazi doctors were involved in human experimentation beyond those 23 Nuremberg defendants; they were just the "tip of the iceberg." Christian Ross, *Nazi Doctors, German Medicine, and Historical Truth, in* THE NAZI DOCTORS, *supra* note 1, at 32, 34. Many who conducted experiments held prestigious academic positions. *Id.* at 24-28.

[23] PROCTOR, *supra* note 22, at 18. The founders of Rassenhygiene were Alfred Ploetz and Wilhelm Schallmayer. *Id. Rassenhygiene* was viewed as a complement to personal and social hygiene; it was characterized as a form of preventive medicine for the "German germ plasm," by "combating the disproportionate breeding of 'inferiors,' the celibacy of the upper classes, and the threat posed by feminists to the reproductive performance of the family." *Id.*

[24] Initially the eugenicists were worried more about "the indiscriminate use of birth control (by the "fit") and the provision of inexpensive medical care (to the "unfit") *Id.*

[25] *Id.* at 18-19.

[26] *Id.* In 1929, a number of physicians formed the National Socialist Physicians' League. Its purpose was to coordinate Nazi medical policy and to "purify the German medical community of 'Jewish Bolshevism.'" *Id.* Nearly 6 % of the medical profession had joined by 1933 before Hitler had risen to power. By 1942, more than 38,000 doctors were members of the Nazi Party, about half of the doctors in the country. In 1937, "doctors were represented in the SS seven times more than the average for the employed male population; doctors assumed leading positions in German government and universities." *Id.*

[27] *Id.* at 19-20.

[28] *Id* The Nuremberg laws excluded Jews from citizenship, prevented marriage or sexual relations between Jews and non-Jews, requiring the medical exams to ensure racial purity. *Id.*

[29] *Id.* at 20-21. The law was entitled the Law for the Prevention of Genetically Diseased Offspring. Physicians, dentists, nurses, midwives, and directors of mental institutions were required to register anyone suffering from the infirmities listed by the law, such as feeblemindedness, schizophrenia, manic depression, epilepsy, Huntington's chorea, genetic blindness, deafness, and alcoholism. Children under age 14 could not be forcibly sterilized, but a petition for sterilization could be issued for anyone over age 10. *Id.* at note 8, 30. Local health offices were empowered to inspect municipal and private institutions to ensure anyone falling within the categories established by the law was brought before the courts. Genetic Health Courts were established throughout Germany, and doctors were required to register every case of genetic illness; failure to register such an illness resulted in a fine. In 1935, The Genetic Health Courts were granted powers to "disbar any attorney who persisted too vigorously in arguing that their clients should not be sterilized." *Id.* There were also Appellate Genetic Health Courts. These courts were usually attached to local civil courts, and were presided over by two doctors and a lawyer; one of them had to be an expert on genetic pathology. *Id.* at 21. Physicians were also required to undergo training in genetic pathology at racial institutes created throughout the county. *Id.*

doctors were intimately involved in all three of them. Somewhere between 350,000 and 400,000 people were sterilized by German doctors.[31] Between 1939 and 1941, German doctors killed 70,000 patients from mental hospitals, in what turned out to be a "rehearsal for the subsequent destruction of Jews, homosexuals, Communists, Gypsies, Slavs and prisoners of war."[32] It was a logical extension of their medical power to use concentration camp prisoners as human subjects in experiments. It should have come as no surprise.

Rassenhygiene made all of these medical practices morally defensible to the doctors who engaged in them. That was what made the idea so potent. It urged the doctors to relieve the groaning lifeboat of useless eaters and the racially impure in order to save the human race. Rassenhygiene looked like a superseding moral principle to trump the Kantian notion of respect for persons. Elie Wiesel wrote about a dissertation he once read in which a psychiatrist argued that the sense of morality of the Nazi killers was not impaired. They knew how to differentiate between good and evil. Their sense of reality was impaired. Human beings were not human beings in their eyes. They were abstractions.[33] I quarrel with that psychiatrist's characterization. The impairment was one of morality, not of reality. To move another human being out of the moral community, to treat him as an abstraction, as nonhuman, as a means to another's end – that maneuver is a violation of morality. But Rassenhygiene created the illusion that the so-called science the doctors were engaged in promoted the public good. It was a moral sleight of hand, and enabled them to sleep at night – at least some of them, probably most of them. But it is important to have clarity about this: Believing in that illusion was a wrong thing to do. It may have skewered what the Nazi doctors believed to be reality, but at its heart, the impairment was moral, not ontological.

The transcripts of the Doctors' Trial reveal that some doctors in the concentration camps could not sleep at night. One defendant, for example, Dr. Romberg, testified about his efforts to protest what was going on. Dr. Romberg was an assistant to Dr. Rascher, a minor satellite of Himmler's. Himmler had given his consent to the high altitude experiments using concentration camp inmates who were condemned to death. The inmates in Dachau were supposedly going to receive some form of clemency if they survived the experiments, so in Dr. Romberg's mind he considered these human subjects as 'volunteers.' But there was an incident in the laboratory one day that upset Dr. Romberg very much. He was assisting Dr. Rascher in conducting an experiment with the altitude machine on one of the human subjects. The electrocardiograph indicated that the prisoner's medical condition was "getting dangerous." Dr. Romberg said to his superior, Dr. Rascher, "You had better stop now." I will read from the transcript:

"Question: And what did Rascher do?

Answer: Nothing. He kept that altitude and later death suddenly occurred.

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[30] *Id.* at 23. In 1939, Hitler ordered that certain doctors be commissioned to declare individuals "incurably sick by medical examination," and to grant them *Gnadentod*, or "mercy death." Between 1939 and 1941, German doctors killed over 70,000 hospitalized mental patients, and the operation turned out to be a "rehearsal for the subsequent destruction of Jews, homosexuals, Communists, Gypsies, Slavs, and prisoners of war." *Id.* As with the Sterilization Law, German doctors planned and implemented the Nazi euthanasia programs. Upon the occasion of killing patients in the Brandenburg Hospital in 1940, the head of the operation, Victor Brack, emphasized that the gassings "should be carried out only by physicians," citing the motto: "The needle belongs in the hand of the doctor." *Id.* at 24-25. The medicalized euthanasia operation and the "final solution" to the "Jewish question" was linked in both theory and practice. *Id.* at 25. The belief that some lives were not worth living and could therefore be eliminated on a mass scale in Germany's mental hospitals was merely expanded to justify the gassing of the Jews in work camps. The medical profession had already developed a successful technical apparatus to destroy the mentally ill; that apparatus was merely dismantled and shipped east to Majdanek, Auschwitz, and Treblinka. *Id.*

[31] *Id.* at 21.

[32] *Id.* at 24.

[33] *Introduction* to THE NAZI DOCTORS, *supra* note 1, at ix.

Question: When you observed the electrocardiogram was it quite clear to you that the person would die in the next second?

Answer: No, of course not. First of all I had never seen a death from high altitude. That was the first one I ever saw....the electrocardiogram change was, shall we say, doubtful. I myself would have stopped the experiment at this stage but he didn't. I only spoke up because I would have stopped the experiment at that moment.

Question: Did you speak to Rascher about this after the experiment?

Answer: It was not possible for me to object in view of Rascher's position, but I told him that such things should not happen."[34]

Dr. Romberg ended up going back to Berlin and reporting the death to another superior. This was in violation of an agreement that he had signed under Himmler's orders promising that everything that happened at the concentration camp would remain a secret. Dr. Romberg's superior convinced him not to report the death of the research subject in the altitude chamber. What good would it do? Dr. Rascher reported to Himmler, and Himmler was not going to give up the experiments. Not only that, Himmler would have started proceedings for treason or for sabotage of an essential war experiment against Dr. Romberg. Dr. Romberg ended up going back to Dachau, and continued to argue with Dr. Rascher when later deaths occurred in the altitude machine, but to no avail.[35]

When asked at the trial whether there was any possibility in Germany for a doctor in his position to resist, Dr. Romberg answered there were three types of resistance: to emigrate if you were able; open resistance which meant the complaining doctor would himself end up in a concentration camp or subject to a death penalty; or passive resistance, to apparently yield to orders, but to misplace and delay them. He referred to this third method of passive resistance as "internal emigration," and this was the mode Dr. Romberg chose for himself.[36] He felt he could not do otherwise, "in view of Rascher's position."

That phrase is so chilling to me, and yet I have some empathy for Dr. Romberg. I don't know what his circumstances were. He may have had children of his own to protect. I don't know, but I'm loath to judge him too harshly. It must be so difficult to keep your moral compass when you're in an inherently immoral context. That Dr. Romberg was acquitted, although somewhat reluctantly by the Tribunal, speaks well for the judicial process, and for the monumental effort of the prosecutors, defense attorneys and judges in the Doctors' Trial at Nuremberg to fine-tune degrees of culpability. Those eight months of testimony and documentary evidence and briefing and arguing by counsel made it possible for them to discriminate between the Dr. Raschers and the Dr. Rombergs. There is great virtue in that.

And so my time is about up. I have sung my song, and I did learn something. Two problems arose as I tried to write this; the first revealed something to me about the Doctors' Trial, and the second revealed something to me about myself. The first problem had to do with sequencing. I thought I would cover the experiments, the Doctors' Trial, and then explain the importance of the Nuremberg Code. That would have been neat and tidy, but it didn't work. The experiments and the trial clung together in a horrific unit of thought, but a chasm existed between that unit of thought and the Nuremberg Code. Between the horror within a horror, and the articulation of the elegant doctrine of informed consent – I felt like I was trying to paste the two sides of the Grand Canyon together with one tube of Crazy Glue.

There is little recognition in the Nuremberg Code of the horrific bigger box of the holocaust that the Nazi human experimentation took place in. Indeed, I find myself staring at the Nuremberg Code in some amazement, saying over and over to myself: What does this Code of ideal principles about

[34] *Extracts from the Testimony of Defendant Romberg, in* Trials of War Criminals, Vol. 1, *supra* note 9, at 192-193.
[35] *Id.* at 194-195.
[36] *Id.* at 198. Ironically, this term was also used by prisoners in concentration camps.

informed consent in medical research really have to do with the horrible things that happened to those people in the concentration camps? Is the doctrine of informed consent the most forceful moral principle that the Tribunal could come up with? Surely it represents noble ideals. I am heartily in favor of it being put into operation when researchers are testing new drugs or new medical procedures. But do we really think the norms of the Nuremberg Code reflect the nightmare that generated those norms? What possible good would it have done those prisoners? Voluntary, informed consent of the human subject would have been utterly irrelevant in the horrific bigger box of the holocaust. The Nuremberg Code is like looking at a roaring, rushing, flooding red river of blood, and offering a box of Q tips to stem its waters. I wonder if perhaps the Tribunal was morally shell-shocked, and could think of nothing else to say. It would be both understandable and forgivable.

The second problem I had in writing this I've already revealed to you. In thinking about how much detail to offer about the human suffering involved in the Nazi experiments, I had to own up to my own morbid fascination. I won't belabor the point, but it has profound implications for me. It implies in a very disturbing way that the duality between good and evil may itself be an illusion. It is far too easy to label those doctors at Nuremberg as Nazi monsters, to characterize what happened in those experiments as evil squared, to identify only with the humanity of their victims. It is far more difficult to look into your own heart, and to come, shuddering, to a threshold of understanding, of daring to contemplate the humanity of the defendants.

That contemplation is painful. I see a mirror there, and in that mirror I see not only morbid fascination with the human experiments, but I see racism. I see racism, in myself, and everywhere I look in the United States, perhaps here in Germany too. True, it is not the overt, foul racism of social Darwinism. But there are other subtler versions of racism still out and among us today. Julius Streicher's virulent anti-Semitism did not operate in a vacuum. It needed a receptive audience for his ideas to hold sway.

So I may not like the reflection in the mirror when I contemplate my own potential for complicity. Our potential for complicity. I don't think it is a good idea to look away either. Only by looking into that mirror of self, by recognizing the universality of our humanity, that we all possess both goodness and evil in our own hearts, each and every one of us – only then are we going to be able to generate norms that might really reflect the nightmares we are capable on imposing on each other.

Louise Harmon

Der Mediziner-Prozess in Nürnberg

Direkt nach dem Abschluss der Kriegsverbrecherprozesse begann in Nürnberg der so genannte Mediziner-Prozess. Von den Vereinigten Staaten als alleiniger Nation wurden 23 Nazi-Ärzte und Administratoren für eine ganze Reihe von Verbrechenstatbeständen angeklagt, einschließlich Kriegsverbrechen, Verbrechen gegen die Menschlichkeit, Genozid und Mord.

Diese angeklagten Ärzte hatten in weitem Umfang bei medizinischen Experimenten, u.a. Zwangssterilisationen und Selektionsprozessen in den Konzentrationslagern, mitgewirkt. Der Hauptanteil des bei dem Ärzte-Prozess vorgelegten Beweismaterials stammte aus den entsetzlichen medizinischen Experimenten, die an Insassen von Konzentrationslagern durchgeführt worden waren. Nach dem Gerichtsurteil, das sieben der Angeklagte zum Tode und neun andere zu Gefängnisstrafen verurteilte, formulierte das Gericht den „Nürnberger Code", durch den zum ersten Mal internationale Standards zum Schutz von menschlichen Versuchsobjekten in der medizinischen Forschung aufgestellt wurden.

Der Beitrag von Louise Harmon beschreibt die Experimente, die Prozesse, den „Nürnberger Code" und seine Bedeutung im Bereich der medizinischen Ethik und untersucht, wie Ärzte, die den Hippokratischen Eid geschworen hatten, derart grauenhafte medizinische Experimente durchführen konnten. Die Nazi-Ideologie der Rassenhygiene und eines nationalsozialistisch gefärbten Darwinismus motivierten viele der in der medizinischen Forschung engagierten Angeklagten und vermittelte ihnen die Illusion einer moralischen Rechtfertigung für eine ethisch nicht zu rechtfertigende Haltung.

Am Ende ihres Beitrages stellt die Autorin die Frage, ob die Doktrin der im „Nürnberger Code" artikulierten „informierten Zustimmung" den menschlichen Versuchsobjekten, die aus der an sich schon schrecklichen Umgebung eines Konzentrationslagers selektiert wurden, in irgendeiner Form von Nutzen gewesen wäre.