

## **THE NUREMBERG TRIALS AND THEIR LEGACY FOR THE RIGHTS OF PATIENTS AND RESEARCH SUBJECTS**

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### **“THE NUREMBERG CODE”**

When does clinical research designed to save lives and advance medicine become assault and murder? In the twentieth century the line between legitimate research on human subjects and criminal assault has been variously drawn. The demands of the researcher and the voice of the research subject and patient have received varying recognition. With the upswing of clinical research in the early twentieth century and some dramatic breakthroughs in medicine there was a tendency to heroise the researcher in the “fight” against disease. In Nazi Germany, there were strong pressures to conduct research on lives deemed worthless in the hope of producing valuable breakthroughs in medical research to benefit the nation and race. After all, if the mentally ill and racially inferior Jews and Gypsies were going to be killed, their bodies might still serve a useful purpose. After WW2 the Nuremberg Trials were conducted on the basis of “crimes against humanity”, and by documenting wartime atrocities did much to safeguard human rights and dignity. After the four-power International Military Tribunal at Nuremberg came the trial against 20 Nazi doctors and three SS administrators: this concluded with a declaration on the conduct of research based on the autonomy and consent of the research subject.

On 18 August 1947 a tribunal of three judges at Nuremberg promulgated these guidelines on the conduct of human experiments, and how research subjects could be protected. The judges spoke of the

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requirement for a “Voluntary Consent” on the part of the research subject. This declaration was unique among all the Nuremberg Trials, both the International Military Tribunal of 1945-46 and the subsequent series of United States-conducted “successor trials” at Nuremberg from 1946 to 1951. The Doctors’ Trial was the only occasion that a set of principles arising from the judicial proceedings was promulgated. The judges stated that while the principles provided rationales for their verdicts, they also hoped that these principles would establish guidelines for best practice in research.

These principles have subsequently been called the “Nuremberg Code” and have been linked with the emergence of the principle of “Informed Consent”. These principles represent a significant extension of liberties in that they protect an individual’s body and personal autonomy. Contrary to what is often assumed, the term “Informed Consent” does not appear in the original statement of principles. The term “Nuremberg Code” is also retrospective, and applied only in the mid-1960s.<sup>1</sup> Certainly ideas of consent have become fundamental for clinical research. Indeed, they have been extended to all clinical practice. A further step during the 1990s is to see consent as governing all aspects of human relations. Important issues arise: first, how well the Medical or Doctors’ Trial took on aboard Nazi medical abuses, which were ultimately genocidal? What distinction there might be between “voluntary consent” and “informed consent”? Here issues arise concerning disclosure of medical information concerning the rationales of the experiment on the one side, and the autonomy of the research subject on the other.

The historiography divides into two camps. One sees the Nuremberg verdict on the Nazi doctors and medical officials as central. The other sees a series of case law verdicts as leading to informed consent. Coincidentally both strands consider the post-war period with the rise of clinical research as crucial.<sup>2</sup>

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<sup>1</sup> Paul Weindling, ‘Consent, Care and Commemoration: The Nuremberg Medical Trial and its Legacies for Victims of Human Experiments’ in Volker Raelcke, Sascha Topp and Etienne Lepicard (eds), *Silence, Scapegoats, Self-Reflection: The Shadow of Nazi Medical Crimes on Medicine and Bioethics* (V & R Academic 2014) 29-46. Certain passages in the paper cover similar ground, and that the current piece explores issues within a wider context of human rights history

<sup>2</sup> Ruth Faden, Tom L Beauchamp and Nancy King, *A History and Theory of Informed Consent* (OUP 1986). Henry K Beecher, *Research and the Individual* (Little, Brown 1970). Jay Katz, *Experimentation with Human Beings* (1st edn, Russell Sage Foundation 1972).

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The Medical Trial happened to be the first of a series of trials dealing with different sectors of the Nazi system of power. The Trial was also distinctive in that victims gave eloquent testimony about what they had endured at the hands of their medical torturers. At times the judges asked for opinions from both defendants and prosecutors for their views on the conduct of medical research. In this sense the trial was also an ethics tribunal. 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 arranged care and supported efforts to secure compensation. The legacy of the Nuremberg Medical Trial 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 legacy of the Doctors' Trial or more accurately the Medical Trial – as three Nazi officials were prosecuted - may be viewed as consisting of the ethical requirement of consent, and the lesser known efforts to provide care, and to commemorate the victims. 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 War Crimes worked parallel to the Medical Trial to assemble details of all unethical experiments and research by the Nazis.<sup>3</sup> The task emerged as too great for the limited resources at the time, and the Commission was further marginalised in the post-war medical politics. The focus became that of legally based “informed consent”. However, the history is wider ranging and more complex.

It is often overlooked how several of the Nuremberg Trials considered evidence for medical atrocities. Human experiments and coerced research 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 Milch and the SS economic administrator Oswald Pohl also considered the coerced and often fatal experiments. Other trials

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<sup>3</sup> Paul Weindling, ‘Die Internationale Wissenschaftskommission zur Erforschung medizinischer Kriegsverbrechen’, Angelika Ebbinghaus and Klaus Dörner (eds), *Vernichten und Heilen. Der Nürnberger Ärzteprozess und seine Folgen* (Aufbau-Verlag, 2001), 439-451. Paul Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent* (Basingstoke, Palgrave-Macmillan: 2004).

at Nuremberg dealt with atrocities perpetrated by specific groups (as the judiciary, high command and industrialists).<sup>4</sup>

The fact that victims did not volunteer or consent to the experiments 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 as Count Three concerning war crimes. The defence countered that conscientious tests with animals were carried out to ensure the safety of the drugs.<sup>5</sup> Moreover, the defence alleged that the criteria for criminality of experiments established at the Medical Trial were not met. The defence argued, using evidence from the Dachau camp doctor, Helmuth Vetter (a former scientist with IG-Farben at Leverkusen and who later oversaw experiments at the concentration camps of Auschwitz and Mauthausen-Gusen), that rather than (criminal) experiments, there had been allegedly legitimate “clinical tests” or “practical tests.”<sup>6</sup> “Medical Experiments” figured as part of Count Three (slave labour) 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 Farben to determine the effects of deadly gases, vaccines, and related products.”<sup>7</sup>

Himmler had ambitions for the SS to become a major producer of pharmaceuticals, surpassing IG-Farben. He authorised large-scale infectious disease experiments in concentration camps as a way of realizing these schemes. Typhus, transmitted by infected lice, was denounced as a “Jewish fever” that had to be conquered as it was endemic in Eastern Poland and the Soviet Union. The SS medical researchers effectively stole an innovative vaccine devised at the Pasteur Institute in Paris and produced from typhus rickettsia cultured on rabbit lungs. At the concentration camp of Buchenwald SS medical researchers infected prisoners, using some prisoners (who mostly died) as “Passage-Persons” to maintain cultures of the vaccine, and others as test subjects for the new vaccine.<sup>8</sup>

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<sup>4</sup> Paul Weindling, ‘Victims, Witnesses and the Ethical Legacy of the Nuremberg Medical Trial’ in Kim Priemel and Alexa Stiller (eds), *The Nuremberg Trials* (Berghahn Books 2013) 74-103.

<sup>5</sup> *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10* (Washington: US Government Printing Office 1949) [hereafter TWC] IG Farben Case, VII 250.

<sup>6</sup> *Ibid* 253, 328.

<sup>7</sup> *Ibid* VII, 54, 55 (Indictment).

<sup>8</sup> Paul Weindling, *Epidemics and Genocide in Eastern Europe* (OUP 2000).

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The defence at the IG-Farben Trial took the position of a collective denial of responsibility and knowledge of the criminal experiments at Auschwitz.<sup>9</sup> 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 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.”<sup>10</sup>

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 defence 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.

The Nuremberg Medical Trial of 1946–47 was necessarily selective as to who was available for prosecution, and since then only clusters of victims have been identified. In the early 1980s Günther Schwarberg, a journalist for the illustrated magazine *Stern*, named a set of child victims for his reconstruction of the life histories of the “twenty children” killed in

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<sup>9</sup> Case VI, Closing Statement for all defendants, *TWC* (n 5), VIII 972.

<sup>10</sup> *Ibid* VIII 1172, case VI (Decision and Judgment).

Hamburg after transport from Auschwitz for a tuberculosis immunisation experiment. The question arises whether what Schwarberg achieved in microcosm can be achieved for the totality of victims? Victims of experiments have only recently been systematically researched, and the evidence is that there were at least 15500 victims of the coerced research.<sup>11</sup> 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. A sort of “Catch 22” situation arises: 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 recognises victims and survivors. The effect 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 marginalised activity, outside the historical mainstream.

The Medical Trial was in Chief Prosecutor Telford Taylor’s words “no mere murder trial”, by which he meant that human experiments were more complex in terms of their intention and organisation than straightforward acts of violence. 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 Nuremberg Trials were 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 German Medical Chambers included the judicial guidelines as a contribution for a future international agreement.<sup>12</sup> Although 10000 copies of his analysis of the Medical Trial,

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<sup>11</sup> Paul Weindling, *Victims and Survivors of Nazi Human Experiments: Science and Suffering in the Holocaust* (Bloomsbury 2014); Paul Weindling and others, ‘The Victims of Unethical Human Experiments and Coerced Research under National Socialism’, *Endeavour* (2015).

<sup>12</sup> Alexander Mitscherlich and Fred Mielke, *Wissenschaft ohne Menschlichkeit* (Lambert Schneider 1949) 267-68. Cf Alexander Mitscherlich, Fred Mielke (eds),

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Wissenschaft ohne Menschlichkeit (Science without Humanity) were printed, it is likely that the circulation was in fact limited through the antagonism of senior clinicians. The reissued edition in April 1960 did include the judicial guidelines, and the book has shaped all subsequent analyses of the Medical Trial, at least in Germany.

The ethical discourse was by no means restricted to the courtroom. Victims had established an ethical agenda prior to the Medical Trial. There was an explosion of human rights declarations around 1946-48, as the UN General Assembly Convention on the Crime and Punishment of Genocide of 9 December 1948 and the UN Declaration on Human Rights of 10 December 1948. The UN declared Genocide as a crime under international law:

“genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”<sup>13</sup>

Here, the judicial declaration should be considered in the context of a wider human rights discourse. Figures like the campaigner for the recognition of genocide as an international crime, Raphael Lemkin saw how minorities – whether ethnic, religious or cultural were inherently in peril and vulnerable to persecution and wholesale extinction. Lemkin escaped the Nazis when Poland was invaded, and invented the term “genocide” in 1944. The issue of genocide was significant in shaping issues for prosecution at the Nuremberg Medical Trial. The medical

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*Das Diktat der Menschenverachtung* (Lambert Schneider 1947). Mitscherlich, Mielke, *Medizin ohne Menschlichkeit, Dokumente des Nürnberger Ärzteprozesses* (S Fischer 1960). Mitscherlich, Mielke (with contributions by Ivy, Taylor, Alexander and Deutsch), *Doctors of Infamy: The Story of the Nazi Medical Crimes* (Henry Schuman 1949).

<sup>13</sup> United Nations Treaty Series, art II, vol 78 (1951) 277.

intelligence officer, John Thompson, provided a link between the Nuremberg Medical Trial and international organisations like Unesco.<sup>14</sup>

## TOWARDS A CODE

The term “Nuremberg Code” was not used until the 1960s. The idea of consent was qualified in a variety of ways, for example as “enlightened” or “voluntary”. Once one scrutinises 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.

The origins of “informed consent” lie in prisoner protests against maltreatment. During the war, victims protested that coerced 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. 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 organised committees and issued newsletters about the experiments. 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 to tackle “medical war crimes”, illustrates this loss of perspective. Crucial was the encounter with victims, in his case survivors at Bergen-Belsen. Thompson’s position was to combine Martin Buber’s idea of a communing relationship of physician and patient with a spiritually based philosophy of the whole person. In late November 1945 Thompson flagged up the issue of Nazi human experiments by introducing the concept of a “medical war crime”. Thompson defined what scientific 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

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<sup>14</sup> Paul Weindling, *John W Thompson, Psychiatrist in the Shadow of the Holocaust*, (Rochester University Press 2010). Paul Weindling, ‘Zwischen Forschung und Genozid, ‘Der Nürnberger Ärzteprozess 1946/47: Raphael Lemkins Standpunkt über Menschenversuche und Genozid’ (2007) 48 *Acta Historica Leopoldina* 79-87.

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was the first to identify the human experiments as “Medical War Crimes” – this new term provided a basis for joint medical and legal investigations. 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.”<sup>15</sup> Thompson secured an inter-Allied meeting of war crimes investigators. He established the International Scientific Commission at Nuremberg to document and ethically analyse all unethical medical experiments, not just those which took place in concentration camps, as it became Allied policy to prosecute only the latter.

Thompson provides a corrective to a standard bioethical approach of seeing a progressive development of codes from the generalised Hippocratic Oath to the Helsinki Declaration by the World Medical Association of 1964 when “informed consent” was key:

“9. In any research on human beings, each potential subject must be adequately informed of the aims, methods, anticipated benefits and potential hazards of the study and the discomfort it may entail. He or she should be informed that he or she is at liberty to abstain from participation in the study and that he or she is free to withdraw visor her consent to participation at any time.”

This approach moves from the Hippocratic Oath, to the Reich regulations on the conduct of research with humans of 1931, to the Nuremberg Code, and then on to Helsinki Declaration. Thompson’s response to the concerns at the Nuremberg Trials was to put the suffering person first: he combined Buber’s idea of a communing relationship with the Roman Catholic philosopher Jacques Maritain, person-based philosophy. By way of contrast, other medical experts at the Nuremberg, the American physiologist Andrew Ivy and neurologist Leo Alexander looked back to Hippocrates. We know from the work of Thomas Rütten that Hippocrates was an ambivalent basis.<sup>16</sup>

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:

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<sup>15</sup> Ibid.

<sup>16</sup> Thomas Rütten, ‘Hitler with- or without- Hippocrates? The Hippocratic Oath During the Third Reich’ (1997) 12 *Korot* 91-106.

“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.”

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 recognised ethical limitations. The issues of animal and human rights converged. 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:

“Voluntary or Informed Consent provided a safeguard within a model of science that was reductionist.

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. 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. The German Medical Observer at the Medical Trial, the neurologist, Alexander Mitscherlich 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 recognise what happens when the individual suffering human being becomes an object or a case – “einen Fall”.<sup>17</sup> 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” (these were 74 Polish women experimental subjects who were originally

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<sup>17</sup> Alexander Mitscherlich, ‘Der Arzt und die Humanität: Erste Bemerkungen zum Nürnberger Ärzteprozeß’ *Die Neue Zeitung* 20 December 1946.

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called “Rabbits” by fellow prisoners and used the name to express defiance, solidarity and contempt for their tormentors). As the literary critic George Steiner has observed, the Nazis used euphemisms like “disinfection” to disguise their murderous conduct. The “Rabbits” used their name as a very direct protest against what they considered the injustice of being condemned for resistance, but then gratuitously abused for experiments. Another victim giving evidence concerning his experiences of malaria experiments and then of survival in freezing water experiments at Dachau was a Roman Catholic priest, Leo Michalowski, also from Poland.<sup>18</sup> 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 courtroom incident, the Roma victim of a Dachau seawater drinking experiment, Karl Hoellenrainer, 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 experimented on – as sulphonamide treatment of wounds, or seawater drinking, but even more broadly of victims as a whole.<sup>19</sup> Their role raises a crucial issue of how many victims there were and how widespread the experiments.

### *“Enlightened Consent”*

The neurologist Leo Alexander realised that the legal basis of the Medical Trial – 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”.<sup>20</sup> 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 generalised

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<sup>18</sup> Harvard Law Library, ‘Nuremberg Trial Project’ (*Harvard Law School Library* <[http://nuremberg.law.harvard.edu/php/pflip.php?caseid=HLSL\\_NMT01&docnum=2585&numpages=3&startpage=1&title=Exhibit.&color\\_setting=C](http://nuremberg.law.harvard.edu/php/pflip.php?caseid=HLSL_NMT01&docnum=2585&numpages=3&startpage=1&title=Exhibit.&color_setting=C)> accessed 14 October 2015).

<sup>19</sup> Weindling, ‘Victims, Witnesses and the Ethical Legacy of the Nuremberg Medical Trial’ (n 4 ) 74-103.

<sup>20</sup> 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’.

viewpoint, that the experiment should not be unnecessary; both agreed 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.<sup>21</sup>

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.
- 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.”

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<sup>21</sup> Leo Alexander, ‘Ethics of Human Experimentation’ (1976) 1 *Psychiatric Journal of the University of Ottawa* 40.

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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.<sup>22</sup> While the Code was not applied in sentencing, the judges followed Ivy in intending that it should prevent future abuses.

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, in shifting responsibility to an abusive state. 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."<sup>23</sup>

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."<sup>24</sup> 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 ethics of the German medical profession.<sup>25</sup> Physicians turned the abuses of Nazi medicine into a rallying cry against the socialisation of medical services. The autonomy of science reflected a situation of doctors (notably through the *British Medical Association*) opposing central state planning and the welfare state. The scales of justice were heavily tilted by the weight of Cold War requirements for strategically

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<sup>22</sup> Evelyne Shuster, 'Fifty Years Later: The Significance of the Nuremberg Code' (1997) *The New England Journal of Medicine* 1436; Evelyne Shuster, 'The Nuremberg Code: Hippocratic Ethics and Human Rights' (1998) 351 *Lancet* 974.

<sup>23</sup> AC Ivy, 'Nazi War Crimes of a Medical Nature' (1948) 139 *The Journal of the American Medical Association* 131.

<sup>24</sup> 'Doctors on Trial' (1947) 1 *British Medical Journal* 143.

<sup>25</sup> Washington University (Seattle) Beals Papers, Box 1 folder 16 Fishbein to Beals, 20 May 1947.

relevant clinical research, and by professional defence 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.<sup>26</sup> 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 recognised 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 the hope for a non-toxic therapy. Unfortunately, the drug was bogus, and Ivy was discredited.

Ivy has been further discredited in that historian Jon Harkness argues that Ivy committed perjury at Nuremberg. In contrast to the UK, experiments on prisoners were established practice in US penitentiaries. Ivy maintained that Statesville, Illinois penitentiary experiments had the approval of an ethical committee. Although this committee had been

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<sup>26</sup> ‘War Crimes and Medicine’, Statement by the Council of the Association for Submission to the World Medical Association, (BMA 1947).

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appointed, it had not met, a mitigating factor is that Ivy did correspond with committee members on an individual basis. One might also see Ivy as taking in effect “Chairman’s Action”. So while technically giving a misleading impression regarding the Committee, there were some exonerating circumstances.<sup>27</sup> Ivy has also been – unfairly – lambasted as incompetent in his evidence at Nuremberg. While infectious diseases were not a special area of his expertise, Ivy did well regarding digestive physiology regarding the seawater drinking experiments. He had conducted a self-experiment, and was tolerant when research subjects absconded. He astutely noticed that the accused medical researcher Beiglböck altered evidence in his prison cell. Ivy is a tragic figure, and although not beyond criticism does merit a degree of rehabilitation, as not unethical in his experiments, and as essentially well motivated.

Ivy’s engagement with Krebiozen shows something more positive than just scientific naivety: as motivated by support for a non-toxic cancer cure. So while he allowed scientific standards to lapse, the motive was patient welfare. Here we see a common pattern with medical scientists involved at Nuremberg. Alexander moved from neurology to psychiatry, more concerned with care for the whole person. Thompson similarly moved from neuro-physiology to education (initiating the Unesco programme for Germany), and then also to psychiatry. For, the contact with victims remained a determining experience. Those driving forward the ethical agenda cared for victims. Alexander supported the efforts to look after the Polish “Rabbits” indicate this, with the efforts of others in the USA to organise care and therapy.

### LEGACIES

The victims’ perspective opens the way to more fully historicised concepts and procedures in the understanding of the patient both historically and in modern clinical contexts. Informed Consent as the cardinal principle of physician-patient relations is a very recent innovation, and linked to the “birth of bioethics” since the early 1970s when dedicated institutes – the Kennedy Institute and Hastings Centers - were founded in the United States.<sup>28</sup> Bioethics chimed with more critical and sceptical views of science as part of the counter-culture of protest since the 1960s.

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<sup>27</sup> Jon M Harkness, ‘Nuremberg and the Issue of Wartime Experiments on US Prisoners: The Green Committee’ (1996) 276 JAMA 1672.

<sup>28</sup> Albert Jonsen, *Birth of Bioethics* (OUP 1998).

Bioethicists – as an emerging lay professional group - wanted a code as part of a sense of the need to regulate innovations. A code also served to legitimate bioethicists’ nascent endeavours. Thus the Nuremberg principles became referred to as the “Nuremberg Code” during the early 1960s. Many of the Nuremberg Trials dealt with aspects of unethical medical research. In formulating a set of principles, the American judges had two aims: first to make clear the principles supporting their judgment. Second, - at the prompting of Ivy who was expert witness to the court – to issue a series of guidelines that might prevent such abuses occurring in the future. Ivy had two objectives: first, that there should not be a massive public surge of outrage against all clinical research. In this sense the judicial principles that he recommended were permissive – it was the lay judges who empowered the research subject by inserting that the subject could terminate the experiment at any time. Second, that public opposition to vivisection should be defeated by showing that human research was by far the greater cruelty.

There is a thin thread of evidence linking the Helsinki Declaration of 1964 to what has been called – retrospectively the Nuremberg Code, the judicial pronouncement of 19 August 1947. On the other, and here philosophical commentaries are enlightening – consent goes back to the contract tradition in philosophy. This has echoes of commercial contracts, as well as of the regulation of political power between subject and ruler.<sup>29</sup>

To their credit, the first major collection on the Nuremberg Code was edited by the Boston University bioethicists George Annas and Michael Grodin in 1992.

Despite their important efforts, the history of informed consent remains problematic as de-historicised and restricted to a series of legal verdicts. It involves less the democratising of clinical knowledge but the notion of being informed. Here the subject takes a passive role, with the expert being actively in authority, as instructing about risks etc. The term “Nuremberg Code” is retrospective construct: it appears to have first been used from 1963.

On the one side, the American bioethicist, Jay Katz argued that although the Nuremberg Code was an important symbolic statement, it had no major role, as case law was decisive.<sup>30</sup> His view contrasts to that of Annas and Grodin that “all contemporary debate on human

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<sup>29</sup> Neil C Manson and Onora O’Neill, *Rethinking Informed Consent in Bioethics* (CUP 2007)

<sup>30</sup> Jay Katz, *Experimentation with Human Beings: The Authority of the Investigator, Subject, Professions, and State in the Human Experimentation Process* (Russell Sage Foundation 1972).

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experimentation is grounded in Nuremberg”. They commend – rightly in my view – the remarkable “focus on universal ethical codes in the context of a trial.” But their view is ironically as fixated on courtroom procedure as Katz. The Harvard anaesthetist Henry Beecher, a noted critical voice against unbridled experimentalism, in 1966 cautioned against excessive experimentation, and characterised the Nuremberg code as “legalistic”, whereas Helsinki more wholly ethical in spirit.<sup>31</sup> American bioethicists have been content to work through a legal framework, and since 1973 references have been made to Nazi doctors in US court rulings.<sup>32</sup>

The legacies have conventionally been considered at a medical level – at that of the World Medical Association, and the transition to the Helsinki Declaration’s principles on human experimentation. What this shows is that the judicial principles were ignored, then the effort was made to introduce a Hippocratic style “Code of Geneva”, and finally informed consent came to operate. While both paths are significant, it seems to me that two elements are missing: the commemoration, and care of victims of the experiments.

The twenty children were commemorated anonymously, not least on a memorial plaque dating from 1967. The journalist Günther Schwarberg first found photographs in 1977, and a list of names in 1978. (Two were incorrect; one identified by the mother in 1982, and another by his sister in 2015). It meant that relatives could be finally informed as to their children’s fate. A memorial dates from 1980, and rose garden from 1982. In 1994 two Dutch victims were commemorated by a memorial stone in Eindhoven. This commemorates the children by name. In 1995 on the 50<sup>th</sup> anniversary streets were named in the Hamburg district of Burgwedel after the children.<sup>33</sup>

In 1985 the radical historian Götz Aly called for the destruction of body parts from anatomical collections. Until this time, institutions felt aggrieved when accusations were levelled against them, and Aly was primarily concerned to show the networks of perpetrators. The distinguished biochemist Otto Butenandt declared this an insult to the dignity of the Max Planck Society, the prestigious research organisation directed by him. Then things suddenly changed in 1989. This culminated in a conference of German university ministers and rectors in 1989. In December 1990 histological specimens and brains of 33 children and

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<sup>31</sup> George Annas, Michael A Grodin (eds), *The Nazi Doctors and the Nuremberg Code* (Oxford: OUP 1992) 205.

<sup>32</sup> *Ibid* 206-8.

<sup>33</sup> Günther Schwarberg (tr), *The Murders at Bullenhuser Damm: The SS Doctor and the Children* (Indiana UP 1984); Schwarberg, *Meine zwanzig Kinder* (Steidl 1996).

youths killed in 1940 at Brandenburg-Görden and held by the Max Planck Institute for Brain Research in Frankfurt were buried. But representatives of German academic institutions were present, rather than relatives or other Nazi victims.<sup>34</sup> Removal of body parts was done rapidly in the Federal Republic from 1989, virtually as (to use a National Socialist phrase) a *Nacht und Nebel* (“Night and Fog”) Action in that the “contaminating” specimens disappeared without documentation. The idea was not to document and to establish provenance. There is consequently no listing of institutes which held body parts deriving from Nazi persecution and genocide. In Austria, the process took longer but has been more thoughtful, as individual urns at the *Zentralfriedhof* Vienna received the parts of victims in 2002.

Memorials for victims of research atrocities are few, and only exceptionally commemorate victims with the dignity of their full name. The Strasbourg gravestone for the victims of the Jewish anatomical collection is stark and dignified, yet necessarily anonymous. The identities of the victims are now known, and we can understand how Auschwitz was a selection centre for victims across Europe. The most personally and engaged is for the twenty children selected in Auschwitz, experimented on with a tuberculosis preparation at Neuengamme concentration camp, and brutally killed in the cellar at Bullenhusen Damm on 20 April 1945. Here the lives of the children have been reconstructed with a caring dignity. In Heidelberg, Carl Schneider’s victims are commemorated, but the memorial depersonalises. Known victims have been de-identified.<sup>35</sup>

History offers an important form of public accountability for medical malpractice. The historian can assess whether practitioners and researchers have shown due care for persons in their care. Unless one names, we cannot identify, understand the extent of the atrocity and the suffering. For without a name, we cannot understand the networks of institutions, how a person was transferred from camp to camp, and clinic to clinic.

There has been a lack of compensation for victims. The UN Human Rights Division passed on 4 July 1950 a resolution on the plight of victims of the so-called scientific experiments. The Federal German

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<sup>34</sup> ‘Trauerfeier für Präparate von NS-Opfern’, *Frankfurter Allgemeine Zeitung* (19 December 1990).

<sup>35</sup> Paul Weindling, ‘From Scientific Object to Commemorated Victim: the Children of the Spiegelgrund’ (2013) 35 *History and Philosophy of Life Sciences* 415; Christoph Mundt, Gerrit Hohendorf und Maika Rotzell (eds), *Psychiatrische Forschung und NS Euthanasie: Beiträge zu einer Gedenkveranstaltung an der Psychiatrischen Universitätsklinik Heidelberg* (Heidelberg 2001).

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Ministry of Finance turned down numerous applications from the mid-1950s onwards. Under regulations of 1953 and 1956 the Bonn government denied compensation on the grounds that the experiments were not harmful, or that the victim was not in need. At first sterilisation victims and all former Resistance combatants were automatically excluded, but then given the lowest rate of compensation. While 87 sterilisation victims received 2000 DM, only one had received compensation for sulphonamide experiments, albeit at a far higher rate. The German governmental position was regarded with contempt both by survivors' representative bodies, and psychotherapists, sympathetic to what was becoming recognised as "survivors' trauma". There was hardly any effort to cover the full costs of care, and to provide medical assistance for victims. The demands of sterilisation victims for operative reversal of sterilisation were ignored. Sickness insurance funds have never responded to the need to redress medical injuries. Most attention was given to the maimed and injured "Rabbits" of Ravensbrück, but generally the situation has been and remains one of neglect and marginalisation. The final chapter in the history of compensation is that of the injuries falling into the category of "sonstige Personenschäden" attached as subsidiary to the forced labour compensation. Here, the single lump sum compensation has been often retraumatising and perceived as a further injury. This view was vividly stated by the sterilisation survivor, Simon Rozenkier to the *New York Times* in 2003.<sup>36</sup>

By the early 1960s the Federal German government wished to declare the post-war era over, and terminate compensation procedures, which still did not adequately recognised medical crimes.<sup>37</sup> Doctors who were former Nazis adjudicated on compensation applications. Their diagnostic categories were relics of the Nazi era.<sup>38</sup> Psychiatrists pointed out that by labelling a claimant as a hereditary schizophrenic, the Germans were denying responsibility for the traumatic after effects of the experiments. At this point John Thompson teamed up with the New York psychiatrists Martin Wanh, Kurt Eissler and William Niederland, who had pioneered analysis of "survivors' syndrome", to organise the Provisional Committee for Victims of Human Disasters in 1964. The Committee protested to the German Chancellor Erhard that 43% of compensation claims were

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<sup>36</sup> Steven Greenhouse, 'Capping the Cost of Atrocity; Survivor of Nazi Experiments Says \$8,000 Isn't Enough' *New York Times* (New York, 13 November 2003).

<sup>37</sup> Christian Pross, *Wiedergutmachun.: Der Kleinkrieg gegen die Opfer* (Athanaüm 1988) 110.

<sup>38</sup> *Ibid* 142.

rejected by the Federal German government, which disregarded clear evidence of damage to health because of “outmoded” medical knowledge.<sup>39</sup> Their studies acted as symbolic bridge between first hand observers of the atrocities and concerned social scientists and historians. In September 1964 Jay Katz asked Taylor about preparatory drafts of the Final Code.<sup>40</sup> The Committee invited the Yale psychologist, Robert Lifton to address the meeting on psychological effects on the Hiroshima and Nagasaki victims – indicating a wish to critically engage with the psychology of the victor.<sup>41</sup> Lifton contacted Leo Alexander, McHaney and Telford Taylor, as his interest was aroused by the problem of the Nazi medical psychology.<sup>42</sup> The meeting rekindled recognition for the victims of human experiments, and marked an entry point of historians and bioethicists into the field. The Nuremberg Code at last began to achieve legal recognition, although this has been a lamentably slow process.

We are left with an irony. Data protection laws and ethics are meant to protect victims. The effect is to protect perpetrators, by concealing the places where a particular victim was selected. On balance, data protection laws protect the perpetrators, and the legal, administrative and financial agencies supporting research. Despite Germany’s efforts in Holocaust recognition, commemoration and memorials are few for victims of medical atrocities. The medical victims can be seen as marginalised, misunderstood, and essentially forgotten – indeed, never recognised in any meaningful way. There is no death book giving the names for all victims of the “euthanasia” killings. While a number of institutions have memorials for victims of “euthanasia” at respective institutions, but full names are never given in the Federal Republic (in contrast to Austria). At most, as at the Heidelberg Psychiatric clinic, the first name and initial is given. Public prosecutions could allow names to be cited. Here, we may cite the history of the adolescent, Ernst Lossa, who was a medically murdered victim at Kaufbeuren, as an exception.<sup>43</sup>

Informed consent has become a sacrosanct principle of bioethics. Consent forms have become part of routine clinical procedure in the UK.

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<sup>39</sup> Robert J Lifton, ‘Provisional Committee to Chancellor Ludwig Erhard’ (1965) New York Public Library, Lifton Papers, Provisional.

<sup>40</sup> Columbia Law Library Telford Taylor Papers, TTP-CLS-14/5/6/115 Katz to Taylor 2 September 1964; Taylor to Katz 11 September 1964.

<sup>41</sup> NYLP LP Martin Wangh to Lifton 7 February 1965.

<sup>42</sup> TTP-CLS-14/6/16/343 Lifton to Taylor 3 July 1979. NYPL Lifton Papers Box 5 Alexander to Lifton 10 Oct 1978.

<sup>43</sup> Paul Weindling, “‘Jeder Mensch hat einen Name’: Psychiatric Victims of Human Experiments under National Socialism’ (2010) 7 *Die Psychiatrie* 255.

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One point of concern is that informing requires expertise and specialist knowledge. How to inform meaningfully is intrinsically problematic. The risk is that the information will be so technical and expert that the subject ultimately relies on trust which is however not part of the system.

The irony of the current situation is that an ethic nominally to protect the person has the effect of depersonalising and limiting the ethical obligation of physician to patient in terms of a formulaic contract. We find a situation of anonymisation and depersonalisation reflected in our limited understanding too of Nazi medical atrocities limited to perpetrators, and disinterested in victims and their life histories. In the Federal German Republic, there has been a situation of nominal and inadequate compensation. Every conceivable barrier has been placed to block understanding of victims of medical atrocities. The system generally is one of screening out the identity of the individual person. The anonymised blacked out or partially suppressed names are synonymous with a society uncomfortable with the legacy of a traumatic past. The strict confidentiality required serves to protect institutions and bureaucrats from scrutiny. The question remains, whether the mission to legitimate clinical research rendered the Code too permissive in what it condoned, and too weak in its laying down of safeguards for the patient?