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The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture

MATTHEW LIPPMAN*

I. INTRODUCTION

In October 1946, the United States occupation government in Germany indicted twenty-three Nazi doctors and medical personnel for subjecting concentration camp inmates to gruesome medical experiments.¹ The so-called Doctors Trial remains an historical landmark in the application of international criminal law. The decision clearly established that medical professionals possess ethical and international legal duties that transcend the demands of domestic law.

The proceedings, however, are of more than antiquarian interest. Regimes throughout the contemporary world that have deployed doctors to torture prisoners and detainees have emulated the Nazis' per-

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This Article is dedicated to Lidia Janus, who died of cancer on January 24, 1991. Lidia lived her adult life with death at the door. She did not have the luxury of retreat or rationalization. Yet, her heart had room for the world. For five years she traversed an arduous, but marvelous journey in a new land in which she accomplished and touched more than most. Lidia personified and clung desperately to life, never conceding that she might die. She bravely accepted her progressive inability to walk and see, as well as the loss of her stunning auburn hair and the bloating of her finely sculptured body from steroids. At the end, Lidia lost the ability to speak and write English, the language which this proud daughter of Poland had so exquisitely mastered. Still, she never flinched or lost her dignity. How does one commemorate a life so jealously forfeited at the young age of thirty-two? Lidia confided that "from the perspective of a brain tumor, there is nothing in life other than love. It is the oxygen of our existence." From the garden of her bed, love flowed and enveloped doctors, nurses, and all who were attracted to her magical presence. With each kiss, embrace, and parting glance we affirm that Lidia continues to live. She embodies the promise of what life can be. We know that Lidia is with us and for us in death as she was in life. In the stillness of the night, her spirit continues to echo—Lidia always will be with me and with all those who continue to love and adore her.

1. *United States v. Karl Brandt, et al.*, in 1 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 3, 8-10 (1950) [hereinafter TRIALS OF WAR CRIMINALS]. There has been an upsurge of interest in the actions of doctors and scientists in Nazi Germany. See Warren E. Leary, *Exhibition Examines Scientists' Complicity In Nazi-Era Atrocities*, N.Y. TIMES, Nov. 10, 1992, at B8.

version of the medical profession. The medical profession's involvement in torture has become so widespread that it has become an issue of international concern, and is the focus of this Article.² First, this Article summarizes Hitler's racial ideology and describes the nature and role of the medical profession in Nazi Germany. Second, this Article outlines the involvement of German doctors in medical experimentation during World War II. Third, it examines the decision of the United States war crimes tribunal in the Doctors Trial. Finally, this Article discusses the contemporary international legal instruments designed to prohibit professional medical involvement in torture.

II. HITLER'S RACIAL COSMOLOGY

Adolf Hitler's political ideology was firmly rooted in the doctrine of Aryan racial superiority.³ Aryans, according to Hitler, were the preeminent racial group. Hitler considered other races as possessing less desirable and less valuable genetic characteristics.⁴ Hence, Hitler believed, the only role for the non-Aryan races was to assist in the development of Aryans by serving as beasts of burden.⁵

Furthermore, Hitler believed that only Aryans were able to create culture.⁶ Consequently, Hitler condemned marriages between Aryans and other races, since he believed that the intermingling of the races inevitably would lead to the debasement of the superior group.⁷ Hitler wrote that history "shows with terrifying clarity that in every mingling of Aryan blood with that of lower peoples the result [has been] the end of the cultured people."⁸ Specifically, racial "crossing" results in:

- (a) Lowering of the level of the higher race;
- (b) Physical and intellectual regression and hence the beginning of a slowly but surely progressing sickness.

2. See generally Matthew Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, 1 UNIVERSAL HUM. RTS. 25 (1979).

3. See generally ADOLF HITLER, *MEIN KAMPF* (Ralph Manheim trans., 1971) (1924). This rambling and often hysterical volume remains the most detailed presentation of Hitler's views. Any analysis of this book runs the danger of crediting the volume with greater clarity and vision than is merited by the incoherent text.

4. See *id.* at 290, 296.

5. *Id.* at 294-95.

6. *Id.* at 290. Hitler divided groups of people into the founders, bearers, and destroyers of culture. *Id.*

7. *Id.* at 428.

8. *Id.* at 286.

To bring about such a development is, then, nothing else but to sin against the will of the eternal creator.⁹

Hitler considered Jews, in particular, to be a pernicious threat to the Aryan race and other superior cultures. He wrote that the “ultimate and most decisive” cause of decline of Germany was the “Jewish menace.”¹⁰ Culturally, the Jew “contaminates art, literature, the theater, makes a mockery of natural feeling, overthrows all concepts of beauty and sublimity, of the noble and good, and instead drags men down into the sphere of his own base nature.”¹¹ Jews, in Hitler’s view, debased, destroyed, and corrupted all superior cultures. Hitler believed that the Jews were responsible for “nine tenths of all literary filth, artistic trash, and theoretical idiocy,”¹² and possessed “no culture-creating force of any sort, since the idealism, without which there is no true higher development of man, is not present in him and never was present.”¹³

According to Hitler, Jews posed a particular danger since they were intent on relentlessly attacking and reducing other races to their own degenerate status. Hitler wrote:

With satanic joy in his face, the black-haired Jewish youth lurks in wait for the unsuspecting girl whom he defiles with his blood; thus stealing her from her people. With every means he tried to destroy the racial foundations of the people he has set out to subjugate. Just as he himself systematically ruins women and girls, he does not shrink back from pulling down the blood barriers for others, even on a large scale. It was and is Jews who bring the Negroes into the Rhineland, always with the same secret thought and clear aim of ruining the hated white race by the necessarily resulting bastardization, throwing it down from its cultural and political height, and himself rising to be its master.¹⁴

Hitler further noted, “Systematically these black parasites of the nation defile our inexperienced young blond girls and thereby destroy something which can no longer be replaced in this world.”¹⁵

Hitler warned that this Jewish “bastardization” and the influence of the “international world Jew” was devastating the German na-

9. *Id.*

10. *Id.* at 327.

11. *Id.* at 326.

12. *Id.* at 58.

13. *Id.* at 303.

14. *Id.* at 325.

15. *Id.* at 562.

tion.¹⁶ He admonished that this "blood poisoning" must be "removed from our national body" before "racial disintegration drags down and . . . destroys the last Aryan values of our German people."¹⁷ The German now has begun to "resemble the subjected aborigine more than his own ancestors."¹⁸ Hitler admonished his countrymen to be aware that "[a]ll who are not of good race in this world are chaff."¹⁹

Hitler further argued that it was not sufficient to eliminate the Jewish people. He advised that the revitalization of the Aryan race required a transformation of marriage from a "continuous defilement of the race" into an institution which produced "images of the Lord" rather than "monstrosities halfway between man and ape."²⁰ Hitler encouraged marriage between racially pure partners.²¹ Conversely, Hitler wanted to prohibit procreation by the "unfit" and "visibly sick," as well as by those who have "inherited a disease" and the "physically and mentally unhealthy and unworthy."²² Hitler considered it a crime and a disgrace to burden "innocent creatures" with such a defective heredity.²³ Hitler continued:

A prevention of the faculty and opportunity to procreate on the part of the physically degenerate and mentally sick . . . would not only free humanity from an immeasurable misfortune, but would lead to a recovery which today seems scarcely conceivable. If the fertility of the healthiest bearers of the nationality is thus consciously and systematically promoted, the result will be a race which at least will have eliminated the germs of our present physical and hence spiritual decay.²⁴

Accordingly, Hitler abhorred what he considered "half-measures," and stated, the "gravest and most ruthless decisions will have to be made. It is a half-measure to let incurably sick people steadily contaminate the remaining healthy ones The demand that defective people be prevented from propagating . . . if systematically executed represents the most humane act of mankind."²⁵ Thus, "human

16. *Id.*

17. *Id.*

18. *Id.* at 296.

19. *Id.*

20. *Id.* at 402 (emphasis omitted).

21. *Id.* at 403-04.

22. *Id.* at 404 (emphasis omitted).

23. *Id.* (emphasis omitted).

24. *Id.* at 404-05.

25. *Id.* at 255. Hitler expressed a prudish aversion to eroticism and sexuality. *Id.* at 254-55.

selection as such” was to be the centerpiece of Hitler’s “folkish state.”²⁶

Hitler’s views were reflected in the 1920 platform of his German Workers’ (“Nazi”) Party.²⁷ The early party program stated that only “those of German blood . . . may be members of the nation. Accordingly, no Jew may be a member of the nation.”²⁸ All non-German immigration was to be prohibited,²⁹ and Germans were to be united in a “Greater German” nation.³⁰

Hitler talked of the German plight in medical metaphors. For example, he portrayed the Germans as being assailed by a “creeping sickness,”³¹ “harmful poisons,”³² and a “malignant degeneration.”³³ The country’s economic plight was a “symptom of decay.”³⁴ The cure for this illness was to eliminate the defective germs and to permit the regeneration of the body politic.³⁵ The use of such language was not merely literary excess. Rather, Hitler found support for his racist ramblings in the scientific claims of the eugenics movement.³⁶

III. THE NAZIFICATION OF THE MEDICAL PROFESSION

A. *Eugenics And Nazi Ideology*

The early twentieth century eugenics movement was based on the principle that human character and conduct is determined by genetic inheritance.³⁷ The movement was splintered into various

26. *Id.* at 428 (emphasis omitted).

27. See *The Programme of the German Workers' Party, reprinted in 1 NAZISM 1919-1945: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS, THE NAZI PARTY, STATE AND SOCIETY 1919-1939 14* (J. Noakes & G. Pridham eds., 1984) [hereinafter *NAZISM: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS*]. The Party changed its name to the National Socialist German Workers' Party (“NSDAP”) in 1920. *Id.* at 18.

28. *Id.* para. 4.

29. *Id.* paras. 8, 15.

30. *Id.* paras. 1, 14.

31. HITLER, *supra* note 3, at 232.

32. *Id.* at 233.

33. *Id.* at 234.

34. *Id.* at 235.

35. See *id.* at 403-04.

36. See *infra* notes 37-46 and accompanying text.

37. MICHAEL BURLEIGH & WOLFGANG WIPPERMANN, *THE RACIAL STATE: GERMANY 1933-1945* 23-43 (1991). One author describes “eugenics” as:

a political strategy denoting some sort of social control over reproduction. In the interest of ‘improving’ the hereditary substrate of a given population, this supposed science seeks to regulate human procreation by encouraging the fecundity of the allegedly genetically superior groups in society and simultaneously discouraging and even prohibiting so-called inferior types from having children.

strains: racial and national supremacists, meritocratists, assimilationists, and social reformers. All claimed to base their social ideology on scientific proof and engaged in a constant colloquy. For instance, do certain economic and racial groups possess superior genetic qualities? Does racial inter-breeding promote or weaken the viability of the human family? Are genetic traits affected by social conditions? What are the respective roles of genetics and social conditions on human behavior? These questions were of more than academic interest. The supremacists proposed strict limits on procreation by "racial degenerates" and advocated prohibitions on marriage between racially superior and inferior groups. The belief that genetic inheritance could be improved led some eugenicists to advocate social reform. In contrast, the genetic determinists and supremacists viewed social welfare programs as unwisely assisting the weakest, least valuable members of the community. Eugenicists believed that those at the bottom should be pitted against one another and forced to prove their worth in a Darwinian struggle for existence.³⁸

Even the most liberal eugenicists were inclined to rank various groups on a scale of genetic value. They predictably tended to view their own Nordic European racial strain as most superior.³⁹ By the end of World War I, the racial supremacists had come to dominate the eugenics movement, and controlled the major eugenics research institutions in Germany.⁴⁰ The Nazi regime later integrated these supremacists into the German medical research establishment and found them to be ardent allies in the scientific struggle against the Jewish disease.⁴¹

SHEILA FAITH WEISS, RACE HYGIENE AND NATIONAL EFFICIENCY: THE EUGENICS OF WILHELM ACHALLMAYER 1 (1987).

38. See generally BURLEIGH & WIPPERMANN, *supra* note 37, at 7-43.

39. ROBERT PROCTOR, RACIAL HYGIENE: MEDICINE UNDER THE NAZIS 23-24, 55-56 (1988). The ranking of groups reflected the eugenics movement identification with the biological theories of Charles Darwin. The notion of natural selection suggested that only the strong who were able to adapt to changes in the environment would prosper and survive. Therefore, only those who were viewed by eugenicists as culturally and economically advanced were perceived as genetically superior. However, the eugenicists believed that these superior groups could be weakened by inter-marriage and "cross-breeding." Progressives reconciled this genetic elitism with their liberal political ideology by claiming that Jews and most prominent socialists were Aryans. *Id.* at 24. See also BURLEIGH & WIPPERMANN, *supra* note 37, at 28-29.

40. PROCTOR, *supra* note 39, at 26.

41. *Id.* at 45. Proctor contends that the Nazis did not pervert existing medical practices. The Third Reich merely encouraged and advanced a pre-existing intellectual movement. Prior to the Nazi take-over, in the winter semester of 1932-33, most German universities taught

Fritz Lenz, one of Germany's most prominent eugenicists, declared that Hitler was "the first politician of truly great import who has taken racial hygiene as a serious element of state policy."⁴² Hitler was affectionately referred to as "the great doctor of the German people," and proudly proclaimed that the Nazi movement was "the final step in the overcoming of historicism and the recognition of purely biological values."⁴³ The Nazis rejected the liberal tradition of democratic individualism, and dismissed the notion that an individual possessed inherent value and worth as unscientific romanticism. According to the Nazis, scientific evidence clearly demonstrated that people were unequal. Human beings, for the Nazis, were mere aggregates of genes, and their social status should be based on their genetic worth. Those with desirable Aryan attributes were to be valued as biological building blocks of the future Germany. In contrast, the members of inferior races, the weak, and the ill only had value as slave labor.⁴⁴

The Nazis rejected the argument that their theories were mere theology. The Nazis claimed that their racial views were firmly rooted in the soil of science. Thus, Nazi anti-semitism, according to their theory, was based on fact rather than fanaticism. Deputy Party Leader Rudolf Hess proclaimed at a gathering in 1934 that "National Socialism is nothing but applied biology We wanted to put into effect the laws of life, which are biological laws."⁴⁵

In addition, Heinrich Himmler, Minister of Interior and chief police official in the Reich, specifically described the Nazi task in scientific terms. The Nazi official was "like the plant-breeding specialist who, when he wants to breed a pure new strand from a well-tried species that has been exhausted by too much cross-breeding, first goes over the field to cull the unwanted plants."⁴⁶

racial hygiene, and a number of research journals on this subject already had been established. *Id.* at 38-39, 44.

42. Robert N. Proctor, *Nazi Doctors, Racial Medicine, and Human Experimentation*, in *THE NAZI DOCTORS AND THE NUREMBERG CODE HUMAN RIGHTS IN HUMAN EXPERIMENTATION* 17, 19 (George J. Annas & Michael A. Grodin eds., 1992) [hereinafter *THE NAZI DOCTORS*].

43. *Id.*

44. See BURLEIGH & WIPPERMANN, *supra* note 37, at 23-43.

45. ROBERT J. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 31 (1986).

46. *Id.* at 16-17.

B. *The Nazi Regime And the Medical Profession*

Medical research that substantiated racial differences was a cornerstone of the Nazi ideological edifice. In an early speech to the National Socialist Physicians' League, Adolf Hitler proclaimed that while he could implement his policies without the assistance of other groups, "you, you National Socialist doctors, I cannot do without you for a single day, not a single hour, if not for you, if you fail me, then all is lost. For what good are our struggles, if the health of our people is in danger?"⁴⁷ Hitler later specifically urged doctors to become guardians of the racial hygiene of the Reich.⁴⁸

The German medical profession included some of the early and most enthusiastic supporters of National Socialism. In 1929, at the Nuremberg Nazi Party meeting, forty-four doctors formed the National Socialist Physicians' League. The organization's avowed purposes were to coordinate Nazi medical policy, promote racial science, and purge the German medical community of the influence of Jewish Bolshevism.⁴⁹ By early 1933, prior to Hitler's ascendancy to power, almost 2800 doctors had joined the National Socialist League. These doctors represented six percent of the entire medical profession. By contrast, in the same time period only 2.3% of all engineers and less than 0.5% of all judges were members of the Nazi Party. Following Hitler's appointment as Chancellor on January 30, 1933, medical doctors rushed to join the National Socialist Physicians' League. By October 1933, 11,000 doctors had enlisted in the Nazi movement. The National Socialist Physicians' League continued to be inundated with applications from medical personnel and in 1934, the League was forced to announce a moratorium on membership.⁵⁰ Ultimately, forty-five percent of all German physicians joined the Nazi Party.⁵¹ Medical personnel not only joined the Nazi Party in large numbers, but disproportionately enlisted in elite units. Twenty-six percent of

47. PROCTOR, *supra* note 39, at 64.

48. *Id.*

49. *Id.* at 65.

50. *Id.*

51. MICHAEL H. KATER, *THE NAZI PARTY: A SOCIAL PROFILE OF MEMBERS AND LEADERS 1919-1945* 112 (1983). Nearly 40,000 physicians enrolled in the league by 1942 and by the beginning of 1943, some 46,000 physicians had joined. Proctor concludes that roughly one-half of all doctors were party members. PROCTOR, *supra* note 39, at 66. Between 1925 and 1944, there were proportionately almost three times as many doctors (including dentists and veterinarians) in the party as in the population of the Reich. KATER, *supra*, at 112-13. By 1936, membership was highest among those under forty years of age. PROCTOR, *supra* note 39, at 68.

all male doctors were in the party militia known as the storm troopers (the "SA"), compared with eleven percent of all college teachers; and more than seven percent were members of the police and state security organization (the "SS"), compared with less than half of one percent of the general public. In 1937, the membership of doctors in the SS was seven times higher than that of the average for the employed male population.⁵²

Medical faculty members, who publicly endorsed the Nazi regime, were disproportionately represented among the academia. These doctors were later rewarded by the Nazi regime with top administrative posts and prizes. In 1943, Leonard Conti, the top civilian medical officer in the Reich, observed that "doctors, among all the professions, were the earliest and most active participants in the National Socialist movement."⁵³

A number of factors contributed to the German physicians' enthusiasm for the Nazi regime. The medical profession traditionally had been aligned with conservative and nationalist causes and, naturally, was attracted to the Nazi movement. Doctors also enjoyed Hitler's respect and reverence for the power of physicians. Many older doctors felt threatened by technological advances and blamed Jews for introducing specialization, scientism, and socialism into the practice of medicine. The older doctors hoped that the elimination of Jewish doctors would result in a return to a simpler, less technologically sophisticated era. Younger doctors also faced shrinking opportunities. In addition, the German economy was crumbling under the weight of World War I, and the purging of Jewish doctors promised increased professional opportunity and mobility.⁵⁴ Doctors thus viewed the Nazi regime as ushering in an era of revitalization. In December 1933, Germany's leading medical journal optimistically described the future: "Never before has the German medical community stood before such important tasks as that which the next Socialist ideal envisioned for it."⁵⁵

The Nazi regime took steps to insure that medical doctors were inculcated into "the eugenic way of thinking."⁵⁶ Medical professionals were expected to support the government with both the "marching

52. PROCTOR, *supra* note 39, at 66.

53. *Id.* at 94.

54. *Id.* at 69.

55. *Id.* at 70.

56. *Id.* at 79. Ironically, German civilians soon became disillusioned with the National Socialist's reformed German medical profession. They variously complained that doctors were

boot and the book.”⁵⁷ Rudolf Ramm of the University of Berlin’s medical faculty admonished doctors that their primary duty was no longer to minister to the sick. Instead, the doctor was to become a “biological soldier” devoted to the advancement of the Aryan race through the preservation and strengthening of the German gene pool.⁵⁸ These “caretakers of the race,” by preventing “bastardization through the propagation of unworthy and racially alien elements . . . and maintaining and increasing those of sound heredity,” could help to attain the Nazi’s goal of “keeping our blood pure.”⁵⁹ The notion of “love of thy neighbor” was to be replaced by the “ice-cold logic” of necessity.⁶⁰ In 1936, most German universities established racial hygiene as an obligatory course of study and included it as a field on medical exams. Medical students also were required to attend courses at one of Germany’s two medical academies, both of which offered courses on racial hygiene.⁶¹ Doctors also were required to attend continuing education courses, which stressed racial hygiene and sterilization techniques.⁶²

The Nazis believed that it was intolerable to permit Jews and those opposed to the Reich to continue to practice medicine. Consequently, the Nazis propagated negative images of Jewish doctors. For instance, Jewish doctors were portrayed as aborting pure Aryan children and as raping German patients. Jewish medical practitioners were also blamed for sexual perversion, the breakdown of the family, and the spread of pornography and degenerate Freudian psychoanalysis.⁶³ In March and April 1933, the leaders of the medical profession called for the elimination of all remnants of Jewish life and thought from German medicine.⁶⁴ The Law for the Restoration of the Civil Service of April 17, 1933 excluded non-Aryans⁶⁵ and politically unreliable individuals from the civil service.⁶⁶ The law excluded Jewish

negligent, incompetent, and only concerned with serving the powerful. See KATER, *supra* note 51, at 136.

57. LIFTON, *supra* note 45, at 38.

58. *Id.* at 30.

59. *Id.*

60. *Id.* at 32-33.

61. PROCTOR, *supra* note 39, at 81.

62. *Id.* at 82.

63. LIFTON, *supra* note 45, at 41-42. In March and April of 1933, thirteen percent of German doctors were Jewish. PROCTOR, *supra* note 39, at 90.

64. PROCTOR, *supra* note 39, at 90.

65. Law for the Restoration of the Profession Civil Service (April 7, 1933), in NAZISM: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS, *supra* note 27, at 223.

66. *Id.* § IV.

doctors from civil service positions and later expanded to exclude Jewish doctors from coverage by insurance schemes. The latter meant that patients who obtained treatment from Jewish physicians were no longer covered by medical insurance.

Jewish doctors were also excluded from teaching positions.⁶⁷ For instance, at Berlin's Charite University Hospital, 138 Jewish professors were discharged or forced to resign. Meanwhile, at the Rudolf Virchow Hospital in Berlin, twenty-six of eighty-one Jewish physicians were fired.⁶⁸ The majority of German physicians, of course, were employed in the private sector and, thus, were not affected by the civil service law. However, in December 1935, the Reich Physician's Ordinance placed the entire medical profession under government control.⁶⁹ In addition, on August 3, 1939, the medical licenses of all Jewish doctors were nullified.⁷⁰ Lastly, German doctors were discouraged from referring to the work of Jews in their scientific papers. In those instances in which Jewish doctors were cited, they were to be included on a separate list of references.⁷¹

Only a few doctors protested the Nazi regime's views and policies. While perhaps only 350 doctors are known to have committed medical crimes, the vast majority of doctors tolerated the expulsion of their Jewish colleagues from the medical profession and accepted the Nazi's dubious racial theories.⁷² Some anthropologists disputed the Nazi's notion of a static gene pool and argued that the German race had become integrated with various slavic peoples. Most of those who articulated these views were removed from their posts. The most dramatic opposition was organized by a group of medical students called the "White Rose." This group drafted and distributed leaflets attacking the Nazi regime. However, its members were quickly detected, convicted, and most were executed.⁷³

C. *Sterilization And Euthanasia*

On June 2, 1933, Reich Minister Wilhelm Frick announced the formation of an Expert Committee on Questions of Population and

67. PROCTOR, *supra* note 39, at 91.

68. *Id.* at 92-93.

69. *Id.* at 93.

70. LIFTON, *supra* note 45, at 36.

71. *Id.* at 37.

72. *Id.* at 43-44.

73. *Id.* at 39. The most profound conflict between the Nazi leadership and physicians involved the National Socialists' support for alternative medical practitioners. *Id.* at 41.

Racial Policy. The committee brought together an array of racial theorists and charged them with the task of constructing a new racial policy.⁷⁴ At the group's first meeting, Frick declared that "[w]e must again have the courage to grade our people according to its genetic value."⁷⁵ Moreover, Frick noted that some experts had concluded that as much as twenty percent of the German population was genetically defective.⁷⁶ This, Frick warned, meant that Germany was in danger of "the death of the race," thus requiring harsh and sweeping measures.⁷⁷

The committee acted quickly. On July 14, 1933, the government promulgated the Law for the Prevention of Genetically Diseased Offspring.⁷⁸ This legislation was a response to the Reich's concern with the decline in the population, as well as with the fact that "countless numbers of inferiors and those suffering from hereditary ailments [were] reproducing unrestrainedly while their sick and asocial offspring [were] a burden on the community."⁷⁹ The law provided for both elective⁸⁰ and mandatory sterilization⁸¹ of individuals in cases where "there is a strong probability that his/her offspring will suffer from serious hereditary defects of a physical or mental nature."⁸² A lengthy list of such allegedly hereditary diseases were enumerated: congenital feeble-mindedness, schizophrenia, manic depression, hereditary epilepsy, Huntington's disease, chorea, hereditary blindness, deafness, and serious physical deformities.⁸³ Chronic alcoholism also was considered to be grounds for sterilization.⁸⁴ The responsibility for issuing sterilization orders was vested in the newly-created Hereditary Health Courts, which were comprised of a magistrate and two physicians, one of whom was "particularly familiar with the theory of hereditary health."⁸⁵

This law was portrayed as preventive rather than punitive. Ru-

74. PROCTOR, *supra* note 39, at 95-96.

75. BURLEIGH & WAPPERMANN, *supra* note 37, at 253.

76. *Id.*

77. LIFTON, *supra* note 45, at 25.

78. Law for the Prevention of Hereditarily Diseased Offspring (July 14, 1933), in NAZISM: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS, *supra* note 27, at 457.

79. *Id.* at 458.

80. *Id.* at 457.

81. *Id.* See also *id.* at 458.

82. *Id.* at 457.

83. *Id.*

84. *Id.*

85. *Id.* at 458.

dolf Ramm of the medical faculty of the University of Berlin argued that sterilization was an unfortunate, but necessary, sacrifice that some citizens were compelled to bear in order to strengthen the German race. While Ramm recognized that erroneous diagnoses might be made, he concluded that it was better to make a mistake than to risk polluting the national gene pool.⁸⁶ Others defended sterilization as a crime control measure. They noted that genetically defective individuals also were likely to be morally degenerate and thus more prone to engage in criminal conduct.⁸⁷

In 1934, 181 health courts were established to determine "genetic health."⁸⁸ These courts ruled in favor of sterilization in ninety percent of the cases,⁸⁹ with only about a three percent success rate in appeals to the appellate health court.⁹⁰ The courts were responsible for ordering the sterilization of approximately 300,000 to 400,000 persons. During each of the first four years of the law, doctors performed an average of 50,000 sterilizations.⁹¹

The victims of sterilization were equally divided between men and women.⁹² The most frequently recited reasons for sterilization were feeble-mindedness (fifty-three percent) and schizophrenia (twenty percent).⁹³ These broad and vague categories often served as pretexts to justify the sterilization of Bohemians, rebels, and deviants.⁹⁴ The onset of World War II halted the sterilization program; only a small number of sterilizations were performed after 1939. However, military conflicts diverted public attention from domestic affairs, enabling the Nazi regime to undertake a more radical program of genetic cleansing.⁹⁵

In early October 1939, Hitler issued a secret and brief memorandum authorizing, but not requiring, doctors to kill those adjudged incurable.

86. PROCTOR, *supra* note 39, at 102.

87. *Id.*

88. *Id.* at 102-03.

89. *Id.* at 106.

90. *Id.* at 107.

91. *Id.* at 108. The most common techniques of sterilization involved tubal ligations for women and vasectomies for men. Roughly 2000 persons died during these operations. *Id.* at 109.

92. BURLEIGH & WIPPERMAN, *supra* note 37, at 253.

93. *Id.*

94. *Id.* at 254.

95. PROCTOR, *supra* note 39, at 114. Roughly five percent of all sterilizations were performed after 1939. *Id.*

Reich Leader [Philip] Bouhler and Dr. [Karl] Brandt are charged with the responsibility for expanding the authority of physicians, to be designated by name, to the end that patients considered incurable according to the best available human judgment of their state of health, can be granted a mercy death.⁹⁶

Because Hitler desired to maintain tight control over this program and to limit its visibility he placed it under the joint control of Dr. Karl Brandt, his personal physician, and Philipp Bouhler, Chief of the Nazi Party Chancellery. Hitler also took extreme care in selecting doctors for the program who shared the Nazi ideology.⁹⁷

By August 24, 1941, the completion of the initial phase of the euthanasia initiative, over 70,000 patients from more than one hundred German hospitals had been killed.⁹⁸ Hitler's memorandum authorizing euthanasia was backdated in order to link the program with the initiation of military conflicts. This association between war and euthanasia called upon the sick, as well as the healthy, to sacrifice their lives in defense of the Fatherland. The Reich reasoned that it could not defend itself against its rapacious neighbors if required to devote resources to the care of the incurably ill.⁹⁹

The initial phase of the program targeted children. The government requested midwives and doctors to register with local authorities all children born with deformities. Doctors were also required to fill out questionnaires detailing the condition of all deformed children under the age of three who were under their care.¹⁰⁰ The questionnaires were then compiled and reviewed by three pediatricians. Children selected to be killed by the reviewers were marked with a "plus" sign; those allowed to live were marked with a "minus." The evaluators worked quickly, neither examining the children nor consulting with the families. Those children receiving a "plus" were ordered into one of twenty-eight institutions equipped with extermination facilities, including some of Germany's oldest and most respected hospitals.¹⁰¹ At least 5200 infants and adolescents were killed during the program's initial phases.¹⁰²

The methods of extermination included morphine injections, in-

96. LIFTON, *supra* note 45, at 63.

97. *Id.* at 64-65.

98. PROCTOR, *supra* note 39, at 177.

99. *Id.* at 182.

100. *Id.* at 186.

101. *Id.* at 187.

102. BURLEIGH & WIPPERMAN, *supra* note 37, at 144.

gesting poisonous tablets, and gassing with cyanide or chemical warfare agents. Poisons were commonly administered over several days or weeks so that the cause of death could be attributed to pneumonia, bronchitis, or some other malady. In other instances, patients were deprived of heat or food. Such treatments enabled doctors to claim that they had merely deprived the children of care and had not engaged in euthanasia. Parents usually were informed by a form letter stating that their son or daughter had died of an illness, and that because of the danger of an epidemic the body was immediately cremated.¹⁰³

In 1939, the Nazi regime expanded the euthanasia program to encompass adults interned in psychiatric institutions. The operation, code-named T-4, was based on the Berlin address of the transport company serving as the shadowy headquarters of the enterprise.¹⁰⁴ As with the children's program, forms were filled out by doctors at various institutions and then evaluated by forty-eight medical doctors. The evaluators received monetary compensation based upon the number of applications they processed.¹⁰⁵ In addition, the pace was frenetic; during one seventeen-day period at least one doctor was required to complete 2109 questionnaires.¹⁰⁶ In the first stage of the adult program, 75,000 of the 283,000 cases evaluated were marked for death.¹⁰⁷

In January 1940, over 4000 mental patients were executed during the Nazi invasion of Poland.¹⁰⁸ German patients faced a more humane technique; they were "disinfected" through the use of carbon dioxide.¹⁰⁹ Typically gas chambers were disguised as showers and equipped with a crematorium to burn the bodies. The police did not control these operations. Instead, in every instance, medical doctors operated the chambers.¹¹⁰ This procedure was in accordance with the Nazi view that these were medical operations. The slogan often re-

103. PROCTOR, *supra* note 39, at 187. The age of those subjected to the euthanasia procedure gradually was increased from three to seventeen. Jewish children originally were excluded from the program on the grounds that they did not merit such merciful treatment. In 1943, however, the program was broadened to include the healthy children of non-Aryan races. *Id.* at 188.

104. LIFTON, *supra* note 45, at 65.

105. PROCTOR, *supra* note 39, at 189.

106. LIFTON, *supra* note 45, at 66-67.

107. PROCTOR, *supra* note 39, at 189.

108. *Id.*

109. *Id.* at 190.

110. *Id.* at 190.

peated was that "the syringe belongs in the hand of a physician."¹¹¹ The gas chamber was portrayed as an advance in medical technology, which satisfied the humane requirements of medicine, as well as the practical needs of the state.¹¹²

The intent was to carry out the program according to a formula: "1000:10:5:1 — that is, for every 1,000 Germans, 10 needed some form of psychiatric care; 5 of these required continuous care; and among these, 1 should be destroyed."¹¹³ In the end, the program resulted in the death of 70,273 Germans.

The medical profession accepted and endorsed the program. In 1941, for example, the staff of the psychiatric institute at Hadaman witnessed and celebrated the cremation of its ten-thousandth patient. In fact, all those in attendance received a ceremonial bottle of beer.¹¹⁴ The commitment of those participating in the program was strengthened by a stream of propaganda documenting that the euthanasia operation had achieved successes, such as saving the Reich over 880 million Reichmarks in food costs and freeing up roughly 100 thousand hospital beds.¹¹⁵ The program ended on August 24, 1941. Nevertheless, the killings continued on an informal basis.¹¹⁶ Gradually, the informal operation expanded to include inmates in concentration camps who could no longer work.¹¹⁷

Furthermore, doctors completely supervised the late 1941 Nazi policy of wholesale extermination of concentration camp inmates. The camp doctors greeted the trains and directed those who were ordered to die to the gas ovens, which were disguised as showers. As part of the deception, the doctors stood adjacent to and rode in a van displaying the comforting Red Cross symbol. The doctors then supervised and monitored the gassings and oversaw the extraction of gold teeth.¹¹⁸ The records suggest that the camp doctors were less concerned with the selection process than with the technical challenge of gassing and immolating large numbers of people.¹¹⁹ In short, the German medical profession implicated itself in mass murder. There

111. LIFTON, *supra* note 45, at 71.

112. *Id.* at 72.

113. PROCTOR, *supra* note 39, at 191.

114. *Id.*

115. PROCTOR, *supra* note 39, at 184.

116. *Id.* at 192.

117. BURLEIGH & WIPPERMAN, *supra* note 37, at 161-65.

118. LIFTON, *supra* note 45, at 166, 171.

119. *Id.* at 177-78.

now seemed to be no remaining ethical restraints or limits on German physicians.

IV. DOCTORS AND THE DEATH CAMPS: MEDICAL EXPERIMENTATION

Following World War II, United States war crimes investigators discovered that the notorious Block 10 in Auschwitz was used as a site and coordinating center for medical experimentation. Nazi doctors carried out dangerous and deadly procedures on Gypsies, Poles, Russians, and Jews, claiming to advance scientific knowledge and to provide potential medical benefits for German combatants. The experiments concerning high altitude, the effect of cold temperatures, and the potability of processed sea water were allegedly intended to alleviate the hazards confronting air and naval combatants. Additionally, the mustard gas and phosphorous burn experiments, as well as those relating to the healing value of sulfanilaide, were supposedly designed to improve the treatment of battlefield wounds and infections. Experimental subjects also were exposed to malaria, jaundice, and typhus, and were subsequently treated with various vaccines. These procedures were devised to develop treatments for the principal diseases that affected the German military.¹²⁰

In the name of science, the Nazis inflicted intense pain on those who were involuntarily forced to serve as experimental subjects. There is evidence that:

in some instances the true object of these experiments was not how to rescue or to cure, but how to destroy and kill. The sterilization experiments were, it is clear, purely destructive in purpose. The prisoners at Buchenwald who were shot with poisoned bullets were not guinea pigs to test an antidote for the poison; their murderers really wanted to know how quickly the poison would kill.¹²¹

The goals of these experiments concealed a sinister purpose, the development of destructive methodologies designed to assist the criminal Nazi regime in eradicating its opponents.¹²² This new gruesome science has been referred to as "thanatology," or "the science of producing death."¹²³

[T]he experiments were not only criminal [B]ut a scientific failure. It

120. TRIALS OF WAR CRIMINALS, *supra* note 1, at 37.

121. *Id.* at 37-38.

122. *Id.* at 73.

123. *Id.* at 38.

is indeed as if a just deity had shrouded the solutions which they attempted to reach with murderous means. . . . Even if [the Nazi doctors] had merely been forced to pay as little as two dollars for human experimental subjects, such as United States investigators may have to pay for a cat, they might have thought twice before wasting unnecessary numbers, and thought of simpler and better ways to solve their problems. The fact that these investigators had free and unrestricted access to human beings to be experimented upon misled them to the dangerous and fallacious conclusion that the results would thus be better and more quickly obtainable than if they had gone through the labor of preparation, thinking, and meticulous preinvestigation.¹²⁴

A chemist could have solved the question of the potability of seawater by utilizing a piece of jelly, a semi-permeable membrane, and a salt solution. Instead, scarce medical resources were devoted to a lengthy experiment in which forty-two internees were involuntarily subjected to unspeakable horrors.¹²⁵ For instance, it should not have been a revelation that an intravenous injection of phenol or gasoline is a relatively inexpensive method of killing a human being within sixty seconds.¹²⁶ Thus, these experiments were a manifestation of a "creeping paralysis of Nazi superstition [that] spread through the German medical profession and, just as it destroyed character and morals, it dulled the mind."¹²⁷

The high altitude experiments were conducted in the Dachau concentration camp in 1942. The origin of the experiment was a letter written by Dr. Sigmund Rascher, a captain in the medical service of the German Air Force, to Heinrich Himmler. Rascher complained that high altitude experiments with monkeys had proven unsatisfactory and that it was necessary to carry out experiments with "human material."¹²⁸ Himmler replied that prisoners "will, of course, gladly be made available to the high-flight researches."¹²⁹

Consequently, the German Air Force provided Rascher with a movable pressure chamber.¹³⁰ Russian, Polish, and Jewish inmates, as well as German political prisoners, were selected at random to par-

124. *Id.* at 73-74.

125. *Id.* at 74.

126. *Id.* at 73.

127. *Id.* at 74.

128. *Id.* at 38.

129. *Id.*

130. *Id.* at 39.

ticipate in these experiments.¹³¹ Approximately 180 to 200 individuals were subjected to experimentation, as many as eighty who may have died.¹³² “The victims were locked in the low-pressure chamber, which was an airtight, [spherical] compartment.”¹³³ The pressure then was altered to simulate the atmospheric conditions prevailing at extremely high altitudes. At times, the pressure was rapidly altered so as to replicate the conditions encountered by a pilot whose plane was spiraling downward or who had ejected from the plane by parachute. Rascher’s first report detailed the death of a Jew deprived of oxygen at a simulated height of twelve kilometers, whose breathing stopped after thirty minutes. Rascher further reported:

After 4 minutes the experimental subject began to perspire and wiggle his head, after 5 minutes cramps occurred, between 6 and 10 minutes breathing increased in speed and the experimental subject became unconscious; from 11 to 30 minutes breathing slowed down to three breaths per minute, finally stopping altogether.

Severest cyanosis [discoloration of the skin] developed in between and foam appeared at the mouth.¹³⁴

Other prisoners were killed by keeping them at a simulated altitude of 12,000 meters without oxygen for thirty minutes; one died when exposed to a height of 20,000 meters for about six minutes without oxygen.¹³⁵ Jews who had committed “race pollution”¹³⁶ were used in an experiment designed to determine whether air embolisms (gas bubbles which block a blood vessel) caused the death of those exposed to parachute descending tests. Before regaining consciousness, experimental subjects who survived these procedures were placed under water until they died.¹³⁷ Then, these subjects’ skull, chest, and abdominal cavities were opened under water. As aviation theorists long had known, scientists discovered enormous amounts of air emboli in the vessels of the brain, the coronary vessels, and the vessels of the liver and intestines.¹³⁸

There is no doubt that pain was involved. One experimental subject was fitted with an oxygen mask and raised in the chamber to a

131. *Id.* at 101.

132. *Id.* at 101.

133. *Id.* at 39.

134. *Id.* at 39.

135. *Id.* at 106.

136. “‘Race pollution’ refers to ‘Jews’ who [have] sex with German women.” *Id.*

137. *Id.*

138. *Id.* at 106-07.

simulated elevation of 47,000 feet. The mask was then removed at the same time a parachute drop was simulated. Rascher's report describes the victim's reactions as: "spasmodic convulsions," "agonal convulsive breathing," "clonic convulsions," "groaning," "yells aloud," "convulses arms and legs," "grimaces, bites his tongue," "does not respond to speech," "gives the impression of someone who is completely out of his mind."¹³⁹

An Austrian inmate, Anton Pacholegg, who worked for Rascher, testified as to what he observed through the window of the decompression chamber:

[The subjects] would go mad and pull out their hair in an effort to relieve the pressure. They would tear their heads and face with their fingers and nails in an attempt to maim themselves in their madness. They would beat the walls with their hands and head and scream in an effort to relieve pressure on their eardrums. These cases usually ended in the death of the subject.¹⁴⁰

These reports were so gruesome that Himmler suggested that those subjects who survived should be pardoned to life imprisonment in a concentration camp.¹⁴¹ However, Himmler later clarified that this offer did not extend to Poles and Russians.¹⁴²

Immediately following the completion of the high-altitude procedures, a series of freezing experiments were initiated.¹⁴³ The stated purpose of these tests was to develop methods of rewarming German aviators who were forced to parachute into the North Sea.¹⁴⁴ In one test, naked victims were forced to remain outdoors in freezing weather for nine to fourteen hours.¹⁴⁵ One experimental subject was strapped to a stretcher, covered with a linen sheet, and forced to remain outdoors throughout the night. A bucket of water was poured over him every hour.¹⁴⁶ In other cases, subjects were forced to remain in a tank of ice water for three hours. The temperature was lowered every hour, and a quart of blood was periodically taken for analysis from an artery in the subject's throat. The organs of the victims who

139. *Id.* at 41.

140. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 985 (1960).

141. *TRIALS OF WAR CRIMINALS*, *supra* note 1, at 40.

142. *Id.*

143. *Id.* at 41-42.

144. *Id.* at 42.

145. *Id.*

146. *Id.* at 201.

died during these freezing experiments were extracted and sent to the Pathological Institute at Munich.¹⁴⁷ Some subjects were successfully rewarmed in a hot bath. In yet another series of experiments, frozen victims were placed between women from the Ravensbrueck concentration camp in order to test the warming capacity of the human body.¹⁴⁸

Ultimately 280 to 300 subjects were forced to participate in as many as 400 freezing experiments. Roughly 80 to 90 died. As many as 18 out of 60 inmates involved in another series of freezing experiments also died.¹⁴⁹ There is little question that those involved suffered great pain:

An experiment on two Russian officers who were exposed naked to the ice-cold water in the basin was particularly brutal. These two Russians were still conscious after 2 hours. Rascher refused to administer an injection. When one of the inmates who attended the experiment tried to administer an anaesthetic to these two victims, Rascher threatened him with a pistol. Both experimental subjects died after having been exposed at least 5 hours to the terrible cold.¹⁵⁰

These freezing experiments were well-known. In October 1942, the experiments and findings were reported to a gathering of ninety-five leading German scientists. Despite the nature of these experiments, there is no record that any of these scientists articulated misgivings.¹⁵¹

In February 1942, in another series of experiments, over 1200 inmates at Dachau were deliberately exposed to malaria. The inmates were infected directly by mosquitoes or through injections derived from a serum drawn from the glands of mosquitoes. The subjects then were treated with various drugs including quinine, neosalvarsan, pyramidon, and antipyrin. The malaria infections directly caused

147. *Id.* at 42.

148. *Id.*

149. *Id.* at 200.

150. *Id.*

151. SHIRER, *supra* note 140, at 987. In another water experiment, an attempt was made to develop a method of rendering sea water drinkable. Subjects were fed shipwreck emergency rations. One group received no water; a second, ordinary sea water; a third, sea water processed by the so-called "Berka" method which concealed the taste, but did not alter the saline content of the water; and a fourth group was given sea water treated so as to remove the salt. The tests commenced in July 1944. Gypsies forced to consume sea water underwent "terrible suffering, became delirious or developed convulsions, and some died." TRIALS OF WAR CRIMINALS, *supra* note 1, at 46-47.

thirty deaths; 300 to 400 others died as the result of subsequent complications.¹⁵²

Experiments undertaken at Ravensbrueck between July 1942 and August 1943 tested the effectiveness of sulfanilamide (a white odorless organic sulfur compound) on gangrene. The protocol involved fifteen male concentration camp inmates and sixty Polish women.¹⁵³ One witness described the pain and abuse that several women endured as follows:

Weronica Kraska . . . died of cramps caused by tetanus. Kazimiera Kurowska was artificially infected with gangrene bacillus. She was a healthy Polish girl of 23 years. From day to day her leg became blacker and more swollen. She was given care for only the first few days. After that she was taken to Room 4 in the hospital where she lay for days in unbelievable pain and finally died Aniela Lefanowicz was infected with oedema malignum (excessive accumulation of serious fluid in the tissues). Her leg kept swelling more and more, the blood vessels eroded, and she died from bleeding. Maczka (an expert witness) testified that the blood vessels should have been tied off and an amputation carried out in order to save her life. She was completely neglected after the first 2 or 3 days. Zofia Kiecol died under similar circumstances.¹⁵⁴

Six of those who survived were subsequently executed to prevent them from testifying about the experiments.¹⁵⁵

Beginning in December 1941, Nazi scientists conducted a program of medical experimentation on infectious diseases using concentration camp inmates at the Buchenwald and Natzweiler as subjects. Hundreds died in these tests designed to investigate the effectiveness of various vaccines. The most barbaric experiments involved typhus. Some of those infected with typhus were denied treatment while

152. TRIALS OF WAR CRIMINALS, *supra* note 1, at 43-44.

153. *Id.* at 355.

154. *Id.* at 359. In one set of experiments, incisions were made on the legs of several of the camp inmates in order to simulate battle-caused infections. A bacterial culture, fragments of wood shavings, or tiny pieces of glass were forced into the wounds. The wounds then were treated with sulfanilamide. *Id.* at 45. Other experiments were conducted to discover a method of coagulating blood. Battlefield wounds were simulated by shooting or wounding concentration camp inmates. These wounds were then treated with an experimental drug known as polygal. *Id.* at 46.

155. *Id.* at 363. At Sachsenhausen, Natzweiler, and other concentration camps, prisoners were deliberately wounded and then infected with mustard gas. A report written at the end of 1939 described such cases. The arms were described as badly swollen and the pain was reported as enormous. *Id.* at 44. Approximately 220 inmates of Russian, Polish, Czech, and German nationality were subjected to these experiments, fifty of whom died. *Id.* at 322.

others were injected with an anti-typhus vaccine. Yet another group was deliberately infected in order to keep the virus alive and generally available in the blood stream of inmates.¹⁵⁶ One study reported that 154 of the 729 inmates involved in the typhus experiment died. Between 90 and 120 subjects who were used to incubate the disease also died.¹⁵⁷ Those infected often reacted with raving madness, delirium, and refused to eat.¹⁵⁸

The Ravensbrueck concentration camp was the site of perhaps the most horrifying operations. These operations involved experiments on bone, muscle and nerve regeneration, and bone transplantation, primarily on female inmates. In most cases, these operations were "senseless, sadistic, and utterly savage," lacking a credible scientific objective. These female subjects were also deprived of even elemental post-operative care.¹⁵⁹ Some of these victims died, and a large number were maimed for life.¹⁶⁰ The most gruesome operations involved the amputation of whole arms, shoulder blades, or legs. These procedures were usually performed on mentally disturbed women who were then immediately killed by an injection of evipan.¹⁶¹ The specimens then were carefully wrapped in sterile gauze and used in a futile effort to heal the injured limbs of German soldiers.¹⁶²

One of the Nazis' main priorities was to develop an inexpensive and efficient method of sterilization to control births among Gypsies, Jews, Poles, Russians, and other "undesirable" people.¹⁶³ The objective was to deploy these people as slave labor while also eliminating the danger that they would continue to propagate.¹⁶⁴ Roughly 100 inmates were forced to participate in x-ray sterilization experiments. In one typical case, experimenters subjected an individual to severe doses of x-ray in the genital area, and subsequently castrated him in order to determine the effects of the x-ray. Nearly all of the inmates

156. *Id.* at 50-51.

157. *Id.* at 511.

158. *Id.* at 585 (Extracts From The Testimony Of Prosecution Witness Eugen Kogon). In another procedure, poison was administered to Russian prisoners of war in their food. German doctors stood behind a curtain to watch the reactions of prisoners. In another set of experiments, victims were shot with poisoned bullets. *Id.* at 52-53.

159. *Id.* at 45.

160. *Id.* at 401-02.

161. *Id.* at 401.

162. *Id.*

163. *Id.* at 48.

164. Letter from Viktor Brack to Heinrich Himmler (1942), in TRIALS OF WAR CRIMINALS, *supra* note 1, at 49-50.

were later exterminated when the experimenters discovered that their severe x-ray burns rendered them incapable of working.¹⁶⁵

This perversion of medical science was again exemplified by the experiments on human twins which were primarily conducted by Doctor Josef Mengele. The twins were subjected to amputations, lumbar punctures, typhus injections, and wounds in order to compare their reactions. "Scores . . . died . . . many . . . from a particularly bizarre experiment in which the blood supplies of different pairs of twins were interchanged."¹⁶⁶ Mengele is alleged to have simultaneously executed numerous pairs of twins in order to compare their internal organs and general development during the autopsies.¹⁶⁷ Some of Mengele's other experiments were even more gruesome. These experiments included sewing children together,¹⁶⁸ throwing three hundred children into a fire,¹⁶⁹ bone marrow transplants, cutting off breasts, taping a mother's breasts so as to deny her baby milk, standing on pregnant women's stomachs, and the dissection of a living baby.¹⁷⁰

Meanwhile, Karl Sievers and his associates in the Ahnenerbe Society, an organization devoted to racial research, compiled a collection of skulls and skeletons which represented various inferior races. Sievers wrote Heinrich Himmler in February 1942 reporting that the society required additional Jewish specimens. Sievers noted that the war against Russia "presents us with the opportunity to overcome this deficiency. By procuring the skulls of the Jewish-Bolshevik Commissars, who represent the prototype of the repulsive, but characteristic subhuman, we have the chance now to obtain a palpable scientific document."¹⁷¹ Sievers proposed establishing an office charged with the responsibility for collecting Jewish skulls. The office would be responsible for measuring, photographing, and interviewing those Jews who were apprehended. Sievers continued:

Following the subsequently induced death of the Jew, whose head should not be damaged, the delegate will separate the head from the body and will forward it to its proper point of destination in a

165. TRIALS OF WAR CRIMINALS, *supra* note 1, at 702.

166. GERALD L. POSNER & JOHN WARE, MENGELE: THE COMPLETE STORY 37 (1986).

167. *Id.* at 38-39.

168. *Id.* at 37.

169. *Id.* at 45-46.

170. *Id.* at 44. For additional details on Mengele's experiments, see LUCETTE MATALON LAGNADO & SHEILA COHN DEKEL, CHILDREN OF THE FLAMES: DR. JOSEF MENGELE AND THE UNTOLD STORY OF THE TWINS OF AUSCHWITZ (1991).

171. TRIALS OF WAR CRIMINALS, *supra* note 1, at 54.

hermetically sealed tin can, especially produced for this purpose and filled with a conserving fluid.

Having arrived at the laboratory, the comparison tests and anatomical research on the skull, as well as determination of the race membership of pathological features of the skull form, the form and size of the brain, etc. can proceed. The basis of these studies will be the photos, measurements, and other data supplied on the head, and finally the tests of the skull itself.¹⁷²

Ultimately, scientists agreed that the appropriate skulls would be obtained from inmates at Auschwitz. A total of 115 inmates were selected, killed, and the corpses sent to the site of the skeleton collection in Strasbourg.¹⁷³

Nazi researchers also avidly collected human skin, particularly tattooed flesh. Inmates who possessed particularly decorative skin were carefully executed so as to avoid blemishes. Their skin was then preserved and placed in museum collections or fashioned into lamp shades and other ornamental household articles.¹⁷⁴

Others viewed the extermination process as an opportunity to collect brains. Professor Julius Hallervorden instructed the staff at extermination centers to carefully remove the brains of corpses and, as he recounted:

they came bringing them like the delivery van from the furniture company. . . . There was wonderful material among those brains, beautiful mental defectives, malformations and early infantile diseases One was the case of a severe athetoid disorder which developed in the child of a mother who had suffered accidental carbon monoxide poisoning when she was five months pregnant.¹⁷⁵

Ironically, the National Socialists' manipulation of medical science may not have occurred if the Nazi regime had considered the so-called inferior races to possess the same value and worth as animals. On November 24, 1933, the Reich adopted a statute for the protection of animals. The statute was designed to prevent cruelty and indifference towards animals and to inculcate the Germans with sympathy towards their feral friends. This statute required written authorization prior to any experiments on animals. In addition, the statute permit-

172. *Id.*

173. *Id.* at 55.

174. SHIRER, *supra* note 140, at 983-84.

175. BENNO MULLER-HILL, *MURDEROUS SCIENCE: ELIMINATION BY SCIENTIFIC SELECTION OF JEWS, GYPSIES, AND OTHERS, GERMANY 1933-1945* 67 (George R. Fraser trans., 1988).

ted procedures involving the use of cold, heat, or infection only under exceptional circumstances. One writer observed that "it probably never even occurred to [the Nazis] that human beings should be treated with at least equal humanity."¹⁷⁶ William L. Shirer concludes that:

The Nazi medical experiments are an example of . . . sadism, for in the use of concentration camp inmates and prisoners of war as human guinea pigs very little, if any, benefit to science was achieved. It is a tale of horror of which the German medical profession cannot be proud. Although the "experiments" were conducted by fewer than two hundred murderous quacks — albeit some of them held eminent posts in the medical world — their criminal work was known to thousands of leading physicians of the Reich, not a single one of whom, so far as the record shows, ever uttered the slightest public protest.¹⁷⁷

How did the concentration camp doctors bring themselves to engage in such barbaric conduct? It is clear that the concentration camp doctors gradually accepted the ideology of the Nazi regime. The doctors rationalized that they were furthering scientific knowledge by engaging in intellectually valuable experiments on their racial inferiors, who, in any event, were condemned to death. In the end, the opportunity to experiment upon an unlimited supply of human subjects overwhelmed the doctors' ethical concerns.¹⁷⁸ Robert Lifton argues that the Nazi doctors underwent a process which he describes as "psychological doubling." Under this process, the doctors maintained their normal identities and values outside the concentration camp; however, when they entered the camps, they accepted their role as the "theorists and implementers of a cosmic scheme of racial cure by means of victimization and mass murder."¹⁷⁹

This was the "healing-killing paradox," the belief that the German people would be healed and protected by annihilating the virus of racial inferiority.¹⁸⁰ The doctors' willingness to exterminate Jews, Gypsies, and Slavs became the ultimate test of their loyalty to Adolf Hitler and to the German people.¹⁸¹ As Heinrich Himmler preached, the Germans must be "honest, decent, loyal and comradely to mem-

176. TRIALS OF WAR CRIMINALS, *supra* note 1, at 71.

177. SHIRER, *supra* note 140, at 979.

178. See generally LIFTON, *supra* note 45, at 202.

179. *Id.* at 418.

180. *Id.* at 202.

181. See *id.* at 434-36.

bers of our own blood, but to nobody else . . . [so that if] 10,000 Russian females fall down from exhaustion digging an anti-tank ditch . . . [that] interests me only insofar as the anti-tank ditch for Germany is finished.”¹⁸²

Lifton notes that the Auschwitz doctors dehumanized their victims and distanced themselves from the consequences of their actions.¹⁸³ Doctors assuaged their qualms by projecting responsibility onto the Fuhrer, Adolf Hitler.¹⁸⁴ The doctors also were able to suppress their lingering moral concerns by focusing on the purely technical aspects of their experiments.¹⁸⁵

The importance of the medical profession to the Nazi regime cannot be underestimated. Doctors were viewed as biological soldiers who were fighting on the frontlines against the racial pestilence which threatened the German people. Their involvement in experimentation, torture, and genocide was essential for preserving the Nazi myth that the National Socialist regime was engaged in medicine rather than murder.¹⁸⁶ Those physicians who worked in the concentration camps assured themselves that they were involved in the restoration of health rather than the destruction of human beings.¹⁸⁷

V. UNITED STATES PROSECUTION OF NAZI WAR CRIMINALS: THE DOCTORS' TRIAL

On October 25, 1946, the United States indicted twenty-three high-level Nazi doctors and medical officials for war crimes as well as crimes against humanity stemming from their involvement in medical experimentation.¹⁸⁸ The tribunal based its jurisdiction on Law No. 10

182. *Id.* at 436.

183. *Id.* at 442.

184. *Id.* at 451.

185. *Id.* at 453-55.

186. *Id.* at 460.

187. *See id.* at 488-89.

188. TRIALS OF WAR CRIMINALS, *supra* note 1, at 3. The war crimes tribunal was comprised of Judge Walter B. Beals, Chief Justice of the Supreme Court of Washington; Judge Harold L. Sebring, Associate Justice of the Supreme Court of Florida; and Judge Johnson T. Crawford, formerly a District Court judge in Oklahoma. The alternate was Judge Victor C. Swearingen, formerly Special Assistant to the Attorney General of the United States. *Id.* at 5. The defendants were Karl Brandt, personal physician to Adolf Hitler and Reich Commissioner for Health and Sanitation; Siegfried Handloser, Chief of the Medical Services of the Armed Forces; Paul Rostock, Chief Surgeon of the Surgical Clinic in Berlin and Surgical Advisor to the Army; Oskar Schroeder, Chief of Staff of the Introspective of the Medical Service of the Luftwaffe; Karl Genzken, Chief of the Medical Department of the Waffen SS; Karl Gebhardt, personal physician to Reichsfuhrer Heinrich Himmler and Chief Surgeon of

of the Control Council for Germany.¹⁸⁹ The panel concluded that the record clearly demonstrated that the defendants were guilty of having committed war crimes and crimes against humanity. The defendants were found to have engaged in criminal medical experiments on non-Germans which were carried out on a large scale in Germany and the occupied territories. These experiments were not the "isolated and

the Staff of the Reich Physician SS and Police; Kurt Blome, Deputy of the Reich Health Leader; Rudolf Brandt, Ministerial Counsellor and Chief of the Ministerial Office in the Reich Ministry of the Interior; Joachim Mrugowky, Chief Hygienist of the Reich Physician SS and Police, and Chief of the Hygienic Institute of the Waffen SS; Helmut Poppendick, Chief of the Personal Staff of the Reich Physician SS and Police; Wolfram Sievers, Reich Manager of the "Ahnenerbe" Society and Director of its Institute for Military Scientific Research; Gerhard Rose, Vice President, Chief of the Department for Tropical Medicine and Professor of the Robert Koch Institute; Siegfried Ruff, Director of the Department for Aviation Medicine at the German Experimental Institute for Aviation; Hans Wolfgang Romberg, Doctor on the Staff of the Department for Aviation Medicine at the German Experimental Institute for Aviation; Viktor Brack, Chief Administrative Officer in the Chancellery of the Fuhrer of the Nazi Party; Hermann Becker-Freyseng, Chief of the Department for Aviation Medicine of the Chief of the Medical Service of the Luftwaffe; Georg Augustweitz, Chief of the Institute for Aviation Medicine in Munich; Konrad Schaefer, Doctor on the Staff of the Institute for Aviation Medicine in Berlin; Waldemar Hoven, Chief Doctor of the Buchenwald Concentration Camp; Wilhelm Beiglboeck, Consulting Physician to the Luftwaffe; Adolf Pokorny, Physician, Specialist in Skin and Venereal Diseases; Herta Oberheuser, Physician at the Ravensbrueck Concentration Camp; and Fritz Fischer, Major in the Waffen SS and Assistant Physician at the Hospital at Hohenlychen. *Id.* at 8-10.

189. 2 TRIALS OF WAR CRIMINALS (Judgment), *supra* note 1, at 172. Control Council Law No. 10, *reprinted* in 6 TRIALS OF WAR CRIMINALS, *supra* note 1, at XVIII-XXI.

Control Council Law No. 10 defined both war crimes and crimes against humanity:

War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Id. art. II(1)(b), at XIX.

Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

2 TRIALS OF WAR CRIMINALS, *supra* note 1, art. II(1)(c), at 173. The defendants were also indicted for membership in criminal groups or organizations declared criminal by the International Military Tribunal at Nuremberg. *See id.* art. II(1)(d), at 173. Law No. 10 of the Control Council imposed liability upon any individual who acted as a principal, accessory, or one who ordered or abetted or took a consenting part in the commission of war crimes or crimes against humanity. Liability also was imposed on an individual who was connected with plans or enterprises involving the commission of war crimes or crimes against humanity or who was a member of any organization or group connected with the commission of any such crime. *See id.* art. II(2), at 173. The tribunal ruled that it lacked jurisdiction over the separate substantive offense of conspiracy. *Id.* at 173-74.

casual acts of individual doctors and scientists working solely on their responsibility.”¹⁹⁰ Instead, high governmental officials developed a coordinated policy viewing the experiments as an “integral part of the total war effort.”¹⁹¹

The core component of the tribunal’s opinion was its formulation of the so-called Nuremberg Code which established standards regulating human experimentation.¹⁹² The tribunal observed that certain types of medical experiments on human beings, when kept within well-defined bounds, conform to the ethics of the medical profession. While certain experiments benefitting society can only be carried out on human subjects, the judges stressed that “certain basic principles must be observed in order to satisfy moral, ethical and legal concepts.”¹⁹³

The central requirement is that the “voluntary consent of the human subject is absolutely essential.”¹⁹⁴ This consent must not be the product of force, fraud, deceit, duress, or coercion. The consent must also be informed consent, and the subject must have sufficient knowledge and comprehension to make an “understanding and enlightened decision.”¹⁹⁵ This requires that individuals be aware of the nature, duration, and purpose of the experiment, the method by which it is to be carried out, and all the inconveniences and health hazards associated with the procedure.¹⁹⁶

The experiment also must have a reasonable prospect of yielding fruitful results that will benefit society. These results must be unprocurable by other methods or means. In addition, the experiment must be designed and based on the results of animal experimentation reflecting knowledge concerning the natural history of the disease under study. The experiment must also be organized so as to avoid all unnecessary physical and mental suffering and injury. No experiment is to be conducted where there is reason to believe that death or disabling injury will occur. However, such experiments may be permitted where the experimental physicians are willing to serve as subjects. In all cases, proper preparations must be made to protect the experimental subjects against even the remote possibility of injury, disability, or

190. 2 TRIALS OF WAR CRIMINALS, *supra* note 1, at 181.

191. *Id.*

192. See generally THE NAZI DOCTORS, *supra* note 42.

193. 2 TRIALS OF WAR CRIMINALS, *supra* note 1, at 181.

194. *Id.*

195. *Id.*

196. *Id.* at 182.

death.¹⁹⁷

Furthermore, the experiment must be conducted by scientifically qualified persons. Such individuals are required to apply the highest degree of skill and care. Thus, during the experiment, the human subjects must be allowed to halt the experiment at any time. The scientist in charge must also be prepared to terminate the experiment if there is probable cause to believe that continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.¹⁹⁸

The United States war crimes tribunal determined that in the experiments conducted by the Nazi doctors these principles were "much more frequently honored in their breach than in their observance."¹⁹⁹ The tribunal emphasized that the conduct of the experiments fell within the tribunal's jurisdiction over war crimes and crimes against humanity since many of the victims of these atrocities were citizens of countries other than Germany. These non-German nationals included Jews, Gypsies, prisoners of war, and civilians who were forced to submit to tortures and barbarities without trial. The subjects neither consented nor were they permitted to withdraw from the experiments. In many cases, the experiments were performed by unqualified persons under intolerable physical conditions and lacked any convincing scientific rationale. The experiments also involved unnecessary suffering and injury and few precautions were taken to safeguard the human subjects from injury, disability, or death. In every experiment, the tribunal determined that the subjects experienced extreme pain or torture as well as permanent injury, mutilation, or death. These injuries and fatalities either resulted from the experiments or from the lack of adequate follow-up care.²⁰⁰ In sum, the tribunal had little difficulty in concluding that the experiments were unethical as well as illegal under international law. The tribunal stated:

Obviously all of these experiments involving brutalities, tortures, disabling injury, and death were performed in complete disregard of international conventions, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of

197. *Id.*

198. *Id.* at 181-82.

199. *Id.* at 183. The tribunal declared that it would focus on those requirements that were "legal in nature" and which would not require that the tribunal go beyond its "sphere of competence." *Id.*

200. *Id.*

all civilized nations, and Control Council Law No. 10. Manifestly human experiments under such conditions are contrary to 'the principles of the law of nations as they result from usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.'²⁰¹

The tribunal next turned its attention to the guilt of defendant Karl Brandt, who was charged with special responsibility for participation in experiments involving freezing, malaria, poison gas, and sulfanilamide; bone, muscle and nerve regeneration and bone transplantation; sea-water, epidemic jaundice, sterilization, and typhus. Brandt was the chief medical official in the Reich and possessed primary authority over health care and medical science and research. He served as Hitler's personal physician and was later appointed plenipotentiary for Health and Medical Services. In 1944, Brandt was named General Commissioner for Medical and Health Matters.²⁰²

The tribunal found Brandt criminally liable based on his failure to intervene and halt the medical experiments. The tribunal determined that Brandt was aware of the scope and nature of the sulfanilamide experiments conducted at Ravensbrueck. In fact, Brandt knew that three inmates had died during the initial stages of the project. The judges noted that Brandt neither objected to the experiments nor made any effort to determine whether to continue such experiments.²⁰³ The judges ruled that his failure to affirmatively intervene constituted gross criminal conduct.²⁰⁴

Had [Brandt] made the slightest investigation he could have ascertained that such experiments were being conducted on non-German nationals, without their consent, and in flagrant disregard of their personal rights; and that such experiments were planned for the future.²⁰⁵

Brandt certainly was aware of and assisted other experiments.²⁰⁶

201. *Id.*

202. *Id.* at 190-91.

203. *Id.* at 193.

204. *Id.* at 198. The tribunal concluded:

We find that Karl Brandt was responsible for, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed. To the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity.

Id.

205. *Id.* at 193.

206. *Id.* at 194-97.

The tribunal emphasized that Brandt held a high ranking position and that he was in a position to intercede on all medical matters. As a result, the judges charged him with a positive duty to intervene and halt the medical experiments on human subjects.²⁰⁷ The judges further found that:

It does not appear that at any time he took any steps to check medical experiments upon human subjects. During the war he visited several concentration camps. Occupying the position he did, and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.²⁰⁸

Hitler also placed Brandt in charge of the euthanasia program. Brandt conceded that he was integrally involved in the killing of German "incurables." However, he contended that in the summer of 1941, he delegated authority to his staff and was unaware that the program had been extended to non-German nationals. The tribunal admonished that Brandt's alleged ignorance did not exonerate him from legal liability. It ruled that Brandt had an affirmative duty to closely monitor and administer the program, and thus must share in the legal liability of his subordinates.²⁰⁹ As a result, Brandt was held liable for involvement in the genocidal Nazi program that legalized the "plain murder and torture of defenseless and powerless human beings of other nations."²¹⁰

Brandt's affirmative duty to intervene was based on his position as chief medical officer with authority over health services and research. As a doctor, he also possessed a responsibility to insure that

207. *Id.* at 193.

208. *Id.* at 193-94.

209. *Id.* at 197-98.

210. *Id.* at 198. The tribunal did not rule on the international legality of the Nazi euthanasia program against German nationals.

We have no doubt but that Karl Brandt — as he himself testified — is a sincere believer in the administration of euthanasia to persons hopelessly ill, whose lives are burdensome to themselves and an expense to the state or to their families. The abstract proposition of whether or not euthanasia is justified in certain cases of the class referred to is no concern of this Tribunal. Whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens is likewise a question which does not enter into the issues.

Id. at 197-98.

Brandt also was convicted of being a member of the SS, which was declared to be a criminal organization by the International Tribunal at Nuremberg. *Id.* at 198.

medical science was used to advance, rather than to aggravate, the human condition.²¹¹

In other instances, the tribunal based this duty to take affirmative action to prevent atrocities on a defendant's military rank and authority. Siegfried Handloser was Chief of the Wehrmacht Medical Service Forces. He had authority to issue orders to the chiefs of the medical services of the army, navy, and Luftwaffe, and directed and coordinated all military health research.²¹² Military personnel were closely involved in those experiments of relevance to the armed forces, such as freezing, and treating infections and typhus.²¹³ The tribunal determined that even after Handloser obtained actual knowledge of inmates who were dying during the course of these experiments, he made no effort to investigate or to exercise any control over those under his command. It concluded that had Handloser exercised this authority, the deaths of countless numbers of non-German nationals would have most likely been prevented.²¹⁴

The tribunal held that Handloser, as a military officer, had a duty to take steps to prevent the violation of the laws of war by those under his command, as they were within his power. The enforcement of the code of conflict, according to the tribunal, requires that military commanders actively intervene to insure that the soldiers under their command comply with the dictates of the law. Absent such supervision, troops will inevitably feel free to ignore the well-being of both civilians and prisoners of war. Handloser, in the opinion of the tribunal, had knowledge that non-German nationals were being used in the concentration camp experiments. Yet, he "failed to exercise any proper degree of control over those subordinated to him who were implicated in medical experiments . . . had he exercised his responsibility, great numbers of non-German nationals would have been saved from murder."²¹⁵

In contrast, Doctor Karl Gebhardt asserted that the victims of the experiments would have died in any event. Doctor Gebhardt was the attending physician to Heinrich Himmler and, in 1943, was appointed chief clinical officer of the Reich Physician SS and Police. Gebhardt was directly involved in various procedures, including sulf-

211. *See generally id.* at 193-98 (Brandt's position, coupled with his ability and experience as a physician, gave him necessary knowledge and control).

212. *Id.* at 199.

213. *Id.* at 200-07.

214. *Id.* at 206.

215. *Id.* at 207.

anilamide experiments, and he personally carried out the initial operations. Gebhardt conceded that inmates were forced to participate in the torturous sulfanilamide program and that several died.²¹⁶

Gebhardt pointed out in his defense that all of the experimental subjects were former members of the Polish Resistance Movement who had been condemned to death and were marked for legal execution. The tribunal dismissed this argument as irrelevant. It emphasized that the Polish women had been condemned to Ravensbrueck without trial and had not consented to become involved in the sulfanilamide experiments. The tribunal asserted that even those properly condemned to death are entitled to the protection of the law of civilized nations. Furthermore, while the law of war does provide for the execution of rebels and resistance fighters who violate specified provisions of the humanitarian law of war, it does not "under any circumstances countenance the infliction of death or other punishment by maiming or torture."²¹⁷

Gebhardt also argued that a governmental regime has an interest in alleviating human suffering and, as a result, may require prisoners condemned to death to participate in medical experiments. He contended that this is the case even in those instances in which the experiments may involve great suffering or death. The tribunal ruled that whatever may be the right of a State to experiment upon its own citizens, "it is certain that such legislation may not be extended so as to permit the practice upon nationals of other countries who, held in the most abject servitude, are subjected to experiments without their consent and under the most brutal and senseless conditions."²¹⁸

The tribunal also rejected the necessity and good motive defenses offered by defendant Wolfram Sievers. Sievers was a member of Himmler's personal staff and Reich Business Manager of the Ahnenerbe Society, which was devoted to the advancement of scientific research on the culture and heritage of the Nordic race. As business manager, Sievers funded, supported, and participated in the experiments through the Institute of Military Scientific Research which was administratively attached to the Ahnenerbe Society.²¹⁹ The tribunal concluded that there was little doubt that Sievers was aware of the

216. *Id.* at 223-24.

217. *Id.* at 224. *See also id.* at 247 (discussing criminal liability of defendant Joachim Mrugowsky).

218. *Id.* at 227.

219. *Id.* at 254.

nature and consequences of the concentration camp experiments.²²⁰

The United States panel rejected Sievers' defense of superior orders. It ruled that there was no evidence that Sievers had acted entirely pursuant to the commands of his superiors. While Sievers' superiors decided upon which of the broad policies Sievers was to pursue, he possessed an unlimited degree of discretion in implementing the experiments. In any event, as the tribunal noted in adjudicating the guilt of Captain Wilhelm Beiglboeck, who carried out sea-water experiments at Dachau, superior orders is not recognized as a defense to war crimes and crimes against humanity. Superior orders will only be considered, if at all, in mitigation of punishment.²²¹ In addition, Sievers raised the related defense of necessity. He claimed that he "could not have refused an assignment."²²² The tribunal, however, contended that the "record shows the case of several men who did, and who have lived to tell about it."²²³

Sievers also contended that as early as 1933 he had joined a secret resistance movement which plotted to overthrow the Nazi regime and to assassinate Hitler. Sievers alleged that he obtained the appointment as Reich Business Manager of the Ahehnenerbe Society so that he could be close to Himmler and monitor his movements. As a result of this position, Sievers explained that he unavoidably became enmeshed in criminal experiments. Despite his involvement in the experiments, Sievers explained that various resistance leaders advised him to remain in the position of business manager. The resistance leaders allegedly believed that Sievers would be able to gain essential information which would contribute to the eventual overthrow of the Nazi regime.²²⁴ The tribunal rejected Sievers' good motive defense:

Assuming all these things to be true, we cannot see how they may be used as a defense for Sievers. The fact remains that murders were committed with cooperation of the Ahenerbe upon countless thousands of wretched concentration camp inmates who had not the slightest means of resistance. Sievers directed the program by which these murders were committed.

It certainly is not the law that a resistance worker can commit no crime, and least of all, against the very people he is supposed to

220. *See id.* at 256-59.

221. *Id.* at 291.

222. *Id.* at 263.

223. *Id.*

224. *Id.*

be protecting.²²⁵

Nor was it recognized as a defense that an individual proposed a less intrusive and dangerous alternative to a planned experimental program. The tribunal rejected the defense of Adolf Pokorny, an Army Captain and medical officer, that he proposed that Jews be sterilized through the injection of caladium seginum in order to prevent the continued castration and sterilization of Jews by conventional surgical methods.²²⁶ Pokorny alleged that he realized that sterilization through injection of caladium seginum would prove to be ineffective and that he proposed this unobtrusive method "not for the purpose of furthering, but of sabotaging the program."²²⁷ Although Pokorny's defense was rejected he was acquitted based on a failure of proof.

In the case of Pokorny the prosecution has failed to sustain the burden. As monstrous and base as the suggestions in the letter are, there is not the slightest evidence that any steps were ever taken to put them into execution by human experimentation. We find, therefore, that the defendant must be acquitted—not because of the defense tendered, but in spite of it.²²⁸

Fifteen high-level German defendants were found to be guilty of war crimes and crimes against humanity. Seven were sentenced to death by hanging; four were condemned to life in prison; two defendants were given twenty years; and one received fifteen years in prison.²²⁹ Those German physicians who escaped prosecution generally feigned ignorance of the National Socialists' policies and blamed a few zealots for the excesses which were committed during the Nazi regime.²³⁰ Many of these alleged zealots were recruited by the victorious Allied Powers who were eager to utilize the knowledge that these scientists had gained in conducting their criminal experiments.²³¹

225. *Id.*

226. *Id.* at 293-94.

227. *Id.* at 294.

228. *Id.*

229. *Id.* at 298-300. Helmut Poppendick, Chief of the Personal Staff of the Reich Physician SS and Police, was only convicted of membership in the SS, an illegal organization, and was sentenced to ten years in prison. *Id.* at 299.

230. See MULLER-HILL, *supra* note 175, at 87.

231. See generally TOM BOWER, *THE PAPERCLIP CONSPIRACY: THE HUNT FOR THE NAZI SCIENTISTS* 214-32 (1987).

VI. THE MODERN PHYSICIAN'S INVOLVEMENT TORTURE

A. *Medical Involvement in Torture*

Unfortunately, the utilization of medicine to harm rather than to heal did not end with the trial of the Nazi doctors. Several studies attest to the medical profession's involvement in the practice of torture. Unlike their Nazi predecessors, contemporary doctors tend to aid and abet those who practice torture and rarely inflict pain directly on detainees and prisoners. Still, however distant their role in the practice of torture, these doctors are not able to rationalize that they are involved in improving the state of scientific knowledge. Their only role is to facilitate and legitimize the infliction of pain and suffering on those who, like the Jews in Germany, are viewed as a threat to the health of the body politic.²³² Medical involvement in torture takes various forms:

[T]o perform medical examinations on suspects before they are subjected to forms of interrogation — which might include torture; to attend torture sessions in order to intervene, as in a boxing ring, when the victim's life is in danger; to treat the direct physical effects of torture, and often to 'patch up' a seriously injured torture victim temporarily so that later on the interrogation can be continued; to develop, by means of his own techniques, methods which produce the results desired by his superiors, as when psychiatric methods are used.²³³

Doctors, at times, also have assisted in concealing the incidence of torture. For example, they have issued certificates that falsely attest to a torture victim's good health before the detainee is released

232. See *THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS* (Eric Stover & Elena O. Nightingale eds., 1985) [hereinafter *THE BREAKING OF BODIES AND MINDS*]. The Convention Against Torture And Other Cruel Inhuman Or Degrading Treatment Or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN. 4/72, Annex (1984) [hereinafter *Convention Against Torture*] defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. art. 1.

233. Eric Stover & Elena Nightingale, *Introduction: The Breaking of Bodies and Minds*, in *THE BREAKING OF BODIES AND MINDS*, *supra* note 232, at 1, 13.

from a detention center.²³⁴ In other instances, doctors were directly involved in amputating limbs and injecting drugs.²³⁵

The Committee on Scientific Freedom and Responsibility of the United States Association for the Advancement of Science documented the Chilean medical profession's complicity in the practice of torture during the 1970s and early 1980s.²³⁶ The Committee found that doctors examined suspects before torture sessions in order to insure that the detainees were able to withstand the pain. These examinations also were designed to detect the suspects' physical and psychological vulnerabilities and weaknesses. In addition, medical personnel attended torture sessions in order to insure that the detainees' lives were not endangered. During these sessions the doctors witnessed prolonged beatings, electric shock to the body and burning with cigarettes and acid.²³⁷ This medical presence permitted the interrogators to engage in repeated and systematic torture without the concern of an embarrassing number of deaths.²³⁸

Chilean doctors also assisted interrogators through the administration of non-therapeutic drugs and hypnosis. Detainees allegedly were injected with thiopental sodium (pentothal) in order to reduce their resistance. In other instances, doctors resorted to hypnosis and moral suasion.²³⁹ Medical personnel also trained interrogators in psychological techniques designed to produce anxiety and a loss of self-esteem. These included "confinement and prolonged isolation often in unsanitary conditions; direct or veiled threats; sensory deprivation or incessant stimulation; and interrogation methods that alternate cruel treatment with kindness."²⁴⁰ The Chilean Medical Association documented several instances in which doctors instructed interrogators in the manipulation of medical technology. In one case, a doc-

234. ERIC STOVER, *THE OPEN SECRET TORTURE AND THE MEDICAL PROFESSION IN CHILE* 21 (1987).

235. *THE BREAKING OF BODIES AND MINDS*, *supra* note 232, at 13, 17.

236. *See id.*

237. *See CHILE: AN AMNESTY INTERNATIONAL REPORT* 63 (1974).

238. *THE BREAKING OF BODIES AND MINDS*, *supra* note 232, at 24-28.

239. *Id.* at 29. *See also* Albert R. Jonsen, *The Participation of Physicians in Torture: A Report of The Chilean Medical Association*, in *CHILE: AN AMNESTY INTERNATIONAL REPORT* 65, 71-72 (1974) [hereinafter *Chilean Medical Report*]. There also is evidence that medical personnel working with the Chilean secret police administered overdoses of cyclophosphamide to some detainees, resulting in hemorrhagic cystitis (the hemorrhaging of blood into the bladder) and psychoactive drugs, such as the antipsychotics chlorpromazine and haloperidol. *See* Albert R. Jonsen & Leonard A. Sagan, *Torture and the Ethics of Medicine*, in *THE BREAKING OF BODIES AND MINDS*, *supra* note 232, at 30, 32.

240. *Chilean Medical Report*, *supra* note 239, at 72.

tor supervised a suspect's repeated removal from a life support system which induced spasms and the vomiting of blood.²⁴¹

Chilean doctors also regularly issued certificates of good health before torture victims left the detention center. These certificates helped conceal the abuse that was inflicted on detainees and lent credence to the Chilean regime's claim that allegations of torture were contrived efforts to embarrass the government. In some cases, doctors went so far as to ignore multiple contusions and fractured skulls.²⁴² The Chilean Medical Association concluded in a report that "these certificates fail to comply with their intended purpose of protecting the detainee. On the contrary, they have become part of a routine allowing excesses to be committed with impunity. Physicians who issue such certificates, therefore, became accessories to these excesses."²⁴³

Physicians covered up torture by issuing incomplete or falsified autopsy reports or death certificates. Signs of torture were deliberately omitted from these medical records. The deaths typically were attributed to blows which the police were forced to administer as self-defense or in order to subdue a detainee during an arrest or interrogation.²⁴⁴

In short, various Chilean physicians left detainees at the mercy of their captors and did not raise a voice in protest. Other doctors were aware of their colleagues' involvement, but chose to remain silent.²⁴⁵ Relatively few of those health professionals who were complicit in torture were reprimanded or sanctioned by the Chilean Medical Association, while those few who protested suffered swift retribution.²⁴⁶ The complicity of Chilean doctors in torture is not unique.²⁴⁷ Regimes, when criticized for their mistreatment of detainees, rather than abandoning their practices, tend to require that doctors attend interrogation sessions in order to limit the possibility of abuse.²⁴⁸ There is also a trend for governments to demand that doctors become directly

241. *Id.* at 72.

242. STOVER, *supra* note 234, at 29-31.

243. *Chilean Medical Report*, *supra* note 239, at 74.

244. *Id.* at 74.

245. *Id.* at 75.

246. STOVER, *supra* note 234, at 51, 55.

247. See generally RICHARD P. CLAUDE ET AL., *HEALTH PROFESSIONALS AND HUMAN RIGHTS IN THE PHILIPPINES* (1987).

248. See Dr. Herman van Geuns, *The Responsibilities of the Medical Profession in Connection with Torture*, in AMNESTY INTERNATIONAL, *CODES OF PROFESSIONAL ETHICS* 12, 15 (2d ed. 1984).

involved in using sophisticated drugs and technologies to punish or to extract confessions from detainees.²⁴⁹ There is little question that this medical involvement in torture is illegal under international law.

B. *The Illegality Of Torture Under International Law*

There is an overwhelming consensus that the practice of torture is a gross violation of human rights. For example, the Universal Declaration of Human Rights, the foundational document of the contemporary human rights movement, proclaims that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."²⁵⁰ Additionally, the binding International Covenant On Civil And Political Rights, in Article 7, reiterates this language and contains the additional provision that "no one shall be subjected without his free consent to medical or scientific experimentation."²⁵¹ The prohibition on torture is also expressed in the European Convention For The Protection Of Human Rights And Fundamental Freedoms,²⁵² the American Convention On Human Rights,²⁵³ and in the African Charter On Human And Peoples' Rights,²⁵⁴ Common Article 3 of the Geneva Conventions, which regulates the conduct of combatants during armed conflict, prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment."²⁵⁵ The Standard Minimum Rules For The Treatment Of Prisoners ("Standard Minimum Rules") sets forth the principles and practices which guide the management of penal institutions.²⁵⁶ The Standard Minimum Rules

249. See CAROL ACKROYD ET AL., *THE TECHNOLOGY OF POLITICAL CONTROL* 229-53 (1977).

250. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

251. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

252. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

253. *American Convention on Human Rights*, Nov. 22, 1969, art. 9, I.L.M. 673.

254. *AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*, June 26, 1981, 21 I.L.M. 59.

255. See *Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, art. 3(1)(a), 6 U.S.T. 3114, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, art. 3(1)(a), 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

256. *Standard Minimum Rules for the Treatment of Prisoners*, pmbl., U.N. Doc. A/

state that no prisoner shall be punished unless he has been informed of the offense alleged against him and has been provided with a proper opportunity to present his defense.²⁵⁷ Article 31 prohibits "corporal punishment, punishment by placing in a dark cell, and all cruel inhuman or degrading punishments . . . as punishments for disciplinary offenses."²⁵⁸

The practice of torture is not merely a violation of human rights, it is an international crime. In 1984, the United Nations adopted the Convention Against Torture And Other Cruel Inhuman Or Degrading Treatment Or Punishment.²⁵⁹ Article 4 requires that each "State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."²⁶⁰ Each State Party shall make these offenses punishable by "appropriate penalties which take into account their grave nature."²⁶¹

Furthermore, under this Convention, victims of torture are entitled to fair and adequate compensation as well as to full rehabilitation.²⁶² Article 2 states that "[n]o exceptional circumstances" may be invoked to justify torture.²⁶³ The acts made punishable in the Convention must be included as extraditable offenses in any extradition treaty existing between State Parties.²⁶⁴ Each State Party also must ensure that education and information regarding the prohibition against torture are fully included in the training of various professionals, including medical personnel.²⁶⁵ The provisions of the United Nations Convention Against Torture are repeated in the Inter-American

CONF/6/1, Annex I, U.N. Sales No. 1956.IV.4 (1956); adopted by the U.N. Economic and Social Council, July 1, 1957, E.S.C. Res. 663, U.N. ESCOR, 24th Sess., Supp. No. 1 at 11, U.N. Doc. E/3048 (1957) [hereinafter Standard Minimum Rules]. The Standard Minimum Rules later were extended to protect persons arrested or imprisoned without being charged with a criminal offense. E.S.C. Res. 2076, U.N. ESCOR, 62nd Sess., Supp. No. 1 at 35, U.N. Doc. E/59888 (1977) cited in Matthew Lippman, *Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances*, 4 CONN. J. INT'L L. 121, 138 n.143 (1988).

257. Standard Minimum Rules, *supra* note 256, art. 30(2).

258. *Id.* art. 31.

259. Convention Against Torture, *supra* note 232.

260. *Id.* art. 4(1).

261. *Id.* art. 4(2).

262. *Id.* art. 14(1).

263. *Id.* art. 2(2).

264. *Id.* art. 8. States that do not extradite offenders are required to establish jurisdiction over such individuals. *See id.* art. 5(2).

265. *Id.* art. 10(1).

Convention To Prevent And Punish Torture.²⁶⁶ Article I of the Inter-American Convention proclaims that "States Parties shall prevent and punish torture."²⁶⁷

The Second Circuit Court of Appeals recognized the universal condemnation of torture in *Filartiga v. Pena-Irala*.²⁶⁸ In *Filartiga*, the court held that federal courts had jurisdiction under the Alien Tort Statute to adjudicate claims arising out of acts of torture perpetrated by officials of foreign governments.²⁶⁹ In ruling that torture constituted a tort in violation of the laws of nations, Judge Irving R. Kaufman concluded:

Having examined the sources from which customary international law is derived — the usage of nations, judicial opinions and the work of jurists — we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens [T]reaties and accords . . . as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments.²⁷⁰

The district court, on remand, was equally strident in its condemnation of torture. The court termed torture "an act so monstrous as to make its perpetrator an outlaw around the globe."²⁷¹

Despite the criminal nature of torture, doctors have rather self-servingly contended that they have a higher ethical duty to moderate the victims' anguish and to preserve their lives. Even when doctors directly inflict pain, they rationalize that their professional skill enables them to temper the victim's pain.²⁷² These arguments, however, have been rejected by the international medical community. Medical intervention must be based on the informed consent of a patient who enjoys the freedom to select a doctor. The medical practitioner also is enjoined from inflicting harm without the expectation of a compensat-

266. Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Ser. No. 67, O.As.S. Doc. OEA/Ser.P, AG/doc. 2023/85 rev. 1, at 46.

267. *Id.* art. 1.

268. 630 F.2d 876 (2d Cir. 1980) (family sues for damages for torture and death of family member growing out of the acts of the defendant, a former Inspector General of Police in Asunción, Paraguay).

269. *Id.* at 880.

270. *Id.* at 884-85.

271. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D. N.Y. 1984) (awarding compensatory and punitive damages).

272. *van Geuns*, *supra* note 248, at 15-16.

ing benefit. Equally as important, physicians must remain independent in their medical judgment and should not permit themselves to become subordinated to the power of the government.²⁷³

C. *The International Condemnation Of Medical Involvement
In Torture*

In 1975, the World Medical Association adopted the Declaration of Tokyo which proclaims that a doctor shall not "countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures."²⁷⁴ This declaration is an absolute prohibition that applies regardless of the suspect's crime, beliefs, or motives.²⁷⁵ Specific prohibitions on the conduct of medical personnel are set forth below.

Paragraph 2 of the Declaration of Tokyo states that a doctor shall not provide any premises, instruments, substances, or knowledge to facilitate the practice of torture or other forms of cruel, inhuman, or degrading treatment or to diminish the ability of the victim to resist such treatment.²⁷⁶ Paragraph 3 provides that the doctor shall not be present during any procedure during which torture or other forms of cruel, inhuman, or degrading treatment is used or threatened.²⁷⁷ A doctor also must have complete clinical independence in treating a person for whom he or she is medically responsible. No motive, whether personal, collective or political, shall interfere with the doctor's fundamental obligation, which is to alleviate the distress of his or her fellow human being.²⁷⁸ The World Medical Association pledged, in paragraph 6, to support and to encourage the international community, national medical associations, and doctors to assist those physicians who face threats and reprisals stemming from their refusal to condone the use of torture or other forms of cruel, inhuman, or degrading treatment.²⁷⁹ The World Medical Association also stressed that the ethical standards during periods of armed conflict are identical to the medical ethics which pertain in times of peace. The primary

273. Jonsen & Sagan, *supra* note 239, at 36.

274. World Medical Association, Declaration of Tokyo (1975), *reprinted in* THE BREAKING OF BODIES AND MINDS, *supra* note 232, at 272, 273.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* A doctor also shall not artificially feed a prisoner who knowingly and rationally refuses nourishment. *Id.*

279. *Id.*

task of the physician remains the preservation of health and salvation of life, and his or her scientific knowledge and expertise may not be employed to imperil health or to destroy life.²⁸⁰

In 1977, the World Psychiatric Association adopted the Declaration of Hawaii, which established ethical guidelines for psychiatrists.²⁸¹ Paragraph 5 states that no procedure shall be performed or treatment given against a patient's will, unless the patient suffers from mental illness and cannot form a judgment as to what is in his or her own interest. Paragraph 7 broadly condemns psychiatric involvement in the torture and abuse of detainees and prisoners:

The psychiatrist must never use his professional possibilities to violate the dignity or human rights of any individual or group and should never let inappropriate personal desires, feelings, prejudices or beliefs interfere with the treatment. The psychiatrist must on no account utilize the tools of his profession, once the absence of psychiatric illness has been established. If a patient or some third party demands actions contrary to scientific knowledge or ethical principles the psychiatrist must refuse to cooperate.²⁸²

The International Council of Nurses also denounced interrogation procedures that harm a detainee's mental and physical health. Nurses who possess knowledge of the physical or mental mistreatment of a detainee or prisoner also are to take appropriate action, including reporting the matter to appropriate national and international bodies. A nurse's "first responsibility is towards her patients, notwithstanding considerations of national security and interest."²⁸³

These documents formed the foundation for the 1983 United Nations resolution on Principles of Medical Ethics.²⁸⁴ The Annex to the resolution sets forth six principles which prohibit any participation by health personnel and physicians in the infliction of torture and other cruel, inhuman, or degrading treatment or punishment.²⁸⁵ Principle 1

280. See World Medical Association, *Regulations in Time of Armed Conflict* (1983), reprinted in *THE BREAKING OF BODIES AND MINDS*, *supra* note 232, at 271.

281. World Psychiatric Association, *Declaration Of Hawaii* (1977, revised 1983) reprinted in *Stover & Nightingale*, *supra* note 233, para. 5.

282. *Id.* para. 7.

283. International Council of Nurses, *Resolution of Singapore: Role of the Nurse in the Care of Detainees and Prisoners* (1975), reprinted in *THE BREAKING OF BODIES AND MINDS*, *supra* note 232, at 276.

284. G.A. Res. 37/194, U.N. GAOR, 37th Sess., Supp. No. 51, at 210, U.N. Doc A/37/727 (1983). Torture is defined in accordance with the *Convention Against Torture*, *supra* note 232, art. 1. para. 276. See G.A. Res. 37/194, *supra*, at 211 n.154.

285. G.A. Res. 37/194, *supra* note 284, at 211.

requires that health professionals provide prisoners and detainees with the same quality and standards of treatment as is afforded to those who are not incarcerated.²⁸⁶ This appears to be designed to forbid doctors from neglecting and failing to treat those who have undergone torture and abuse. Principle 2 emphasizes that health personnel are not immune from international criminal liability for participation in torture. This provision clarifies that the requirements of law and medical ethics are coextensive with one another:

It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.²⁸⁷

Thus, it is clear that the international criminal liability imposed on German physicians in the Doctors Trial extends to all acts of torture conducted under the guise of medical science. Principle 3, for example, emphasizes that physicians must only enter into a professional relationship with a prisoner or detainee in order to evaluate, protect, or improve an inmate's physical or mental health.²⁸⁸ This provision reinforces the role of health personnel to provide medical care and to pledge their primary loyalty to patients rather than the government. Physicians may not abuse the intimacy of the patient-doctor relationship to facilitate torture or interrogation of suspects.

Principle 4(b) states that it is a contravention of medical ethics to certify, or to participate in the certification of, prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with relevant international instruments. It is also an ethical violation to participate in the infliction of any such treatment or punishment which is not in accordance with international instruments.²⁸⁹

Principle 5 declares that it is a violation of medical ethics for health personnel to participate in restraining a prisoner or detainee.

286. *Id.* princ. 1 at 211.

287. *Id.* princ. 2 at 211.

288. *Id.* princ. 3 at 211.

289. *Id.* princ. 4 at 211. Principle 4(a) specifically states that doctors are to not assist in the interrogation of prisoners and detainees. It is a contravention of medical ethics "[t]o apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments." *Id.*

This procedure can only be carried out if it is medically necessary for the physical or mental health, or the safety, of a prisoner or detainee or other prisoners or detainees, and if it presents no hazard to the individual's physical or mental health.²⁹⁰ This provision prohibits doctors from using restraints or drugs to immobilize or to punish prisoners or detainees. The Principles of Medical Ethics stress that "[t]here may be no derogation from the foregoing principles on any ground whatsoever, including public emergency."²⁹¹

The General Assembly declared that the resolution be circulated among medical and paramedical organizations and intergovernmental and non-governmental organizations. Professional associations and states were granted primary responsibility for enforcing the ethical strictures.²⁹² Unfortunately, these entities have not yet proven that they are able to deter medical involvement in torture. Thus, a stronger enforcement mechanism is required. The resolution also should have recommended that the ethical prohibition on medical involvement in torture should be included in medical education and training. Enforcement also may be strengthened by placing a duty on medical personnel to protest acts of torture and to work on behalf of those doctors imprisoned or punished for failing to engage in the practice of torture.²⁹³

Nevertheless, the resolution recognizes that professional ethics and responsibilities take precedence over the dictates of regimes. There is no longer any question that all individuals, not merely doctors, owe their primary loyalty to the welfare of their fellow human beings rather than to the demands of domestic law.

VII. CONCLUSION

A significant number of prominent medical professionals during the Third Reich devoted their efforts to harming rather than healing those who were institutionalized. The medical professionals chose to follow the demands of a dictator rather than the ethical requirements of medicine. The so-called Doctors Trial clearly affirmed that these ethical requirements are part of international law and take precedence over domestic law. Therefore, those who grossly flaunt medical mo-

290. *Id.* princ. 5 at 211.

291. *Id.* princ. 6 at 211.

292. *Id.* pmb. at 211.

293. *See supra* note 279 and accompanying text.

rality risk the imposition of criminal sanctions.²⁹⁴

The Doctors Trial, however, did not deter various contemporary doctors from involving themselves in torture despite the international community's affirmance that doctors have a special responsibility to refrain from involving themselves in the abuse and torture of prisoners and detainees.²⁹⁵ In fact, doctors have too often played a prominent role in the process of torture. Their refusal to engage in this activity may impede and further delegitimize such abhorrent activity.²⁹⁶

Most importantly, the human rights revolution of the twentieth century has clearly established that doctors, like other professionals, owe their primary loyalty to the requirements of international law, rather than to the dictates of domestic codes. The United Nations should commemorate the fiftieth anniversary of the Universal Declaration of Human Rights by adopting a binding Declaration on the responsibility of doctors and other professionals to protect universal human rights and to refrain from involvement in international criminal activity, such as the practice of torture.²⁹⁷ The world community should make clear, as Albert Camus has written, that "on this earth there are pestilences and there are victims, and it is up to us, so far as possible, not to join forces with the pestilences."²⁹⁸

294. See *supra* notes 188-231 and accompanying text.

295. See *supra* notes 274-93 and accompanying text.

296. See *supra* notes 232-49 and accompanying text.

297. Amnesty International has proposed that regimes should be required to insure the independence of medical personnel who are working in prison and that health professionals should be provided continual access to detainees and prisoners. There is no question that these proposals are meritorious. As a first step, however, doctors must be prepared and sufficiently secure to assert their professional autonomy. See AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES 82-83 (1984).

298. ALBERT CAMUS, THE PLAGUE 236 (Stuart Gilbert trans., 1972).

