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MEDICAL ETHICS AND HUMAN RIGHTS: LEGACIES OF NUREMBERG¹

*George J. Annas**
Michael A. Grodin

Many of our most important human rights documents are the product of the world's horror during the carnage of World War II. The broadest and most powerful declaration of human rights, the Universal Declaration of Human Rights, was adopted by the membership of the new United Nations in 1948. But there are also much more specific statements of the world's aspirations for all of its inhabitants. August 1997 marked the 50th anniversary of the conclusion of the trial of Nazi physicians at Nuremberg, a trial which has been variously designated as the "Doctors' Trial" and the "Medical Case."² In addition to documenting atrocities committed by physicians and scientists during the war, the primary product of the trial has come to be known as the "Nuremberg Code," a judicial codification of ten prerequisites for the moral and legal use of human beings in experiments. Anniversaries provide us with an opportunity to reflect on the past, but also to renew our efforts to plan for the future. Have we learned the lessons of the Doctors'

1. Adapted from 2 HEALTH & HUM. RTS. 1, 7-21 (1996) and 276 JAMA 20, 1682-83 (1996).

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2. GEORGE J. ANNAS & MICHAEL A. GRODIN, THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION, (1992); and TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL 10, VOLS. 1 AND 2 (WASHINGTON, D.C.: SUPERINTENDENT OF DOCUMENTS, U.S. GOVERNMENT PRINTING OFFICE, 1951) [HEREINAFTER TRIAL]; MILITARY TRIBUNAL, CASE 1, UNITED STATES V. KARL BRANDT, ET AL., OCTOBER 1946-APRIL 1949.

Trial? What can we do to make those lessons real for physicians and medical researchers 50 years later?

HISTORICAL CONTEXT

The 1946-47 trial of the Nazi doctors documented the most extreme examples of physician participation in human rights abuses, criminal activities, and murder. Hitler called upon physicians not only to help justify his racial hatred policies with a "scientific" rationale (racial hygiene), but also to direct his euthanasia programs, experimentation programs, and ultimately his death camps.³ Almost half of all German physicians joined the Nazi Party.⁴ In his opening statement at the Doctors' Trial, Chief Prosecutor Telford Taylor spoke of the watershed nature of the trial for the history of medical ethics and law:

It is our deep obligation to all peoples of the world to show why and how these things happened. It is incumbent upon us to set forth with conspicuous clarity the ideas and motives which moved these defendants to treat their fellow men as less than beasts. The perverse thoughts and distorted concepts which brought about these savageries are not dead. They cannot be killed by force of arms. They must not become a spreading cancer in the breast of humanity. They must be cut out and exposed, for the reasons so well stated by Mr. Justice Jackson in the courtroom a year ago [before the International War Crimes Tribunal]: "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated."⁵

Sixteen physicians and scientists were found guilty, and seven executed. A universal standard of physician responsibility in human rights abuses involving experimentation on humans, the Nuremberg Code, was articulated and has been widely recognized, if not always followed, by the world community.

3. See generally, ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* (1988); see also ROBERT J. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1986). PROCTOR *supra* note 3, at 66.

4. PROCTOR, *supra* note 3, at 66.

5. See Telford Taylor's Opening Statement to TRIAL, *supra* note 2, at 28.

The Nuremberg Code was a response to the horrors of Nazi experimentation in the death camps — wide scale experimentation, without consent, that often had the death of the prisoner-subject as its planned endpoint. The Code has ten provisions, two designed to protect the rights of subjects of human experimentation (1 and 9), and eight designed to protect their welfare.⁶ The best known is its first, the consent requirement, which states in part:

6. The Nuremberg Code: (from TRIAL, *supra* note 2, in Vol. 2 at 181-85.)

1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment. The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.

2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.

3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment.

4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.

5. No experiment should be conducted where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.

6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.

7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.

8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.

9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible.

10. During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probably cause to believe, in the exercise of the good faith, superior skill, and careful judgment required of him, that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.

The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. . . .⁷

Although the Nuremberg Code has never been formally adopted as a whole by the United Nations, a statement related to torture appears as Article 5 of the Universal Declaration of Human Rights. A second sentence added to the text of Article 5, which further reflects the concerns of the Nuremberg Code, appears as Article 7 in the United Nations International Covenant on Civil and Political Rights.⁸ Article 7 of the Covenant states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Most physicians would, of course, be shocked at having anything they do to patients be considered "torture or cruel, inhuman or degrading treatment."⁹ They would thus view the Covenant's provisions much the same way many physicians view the Nuremberg Code: as a legal document not applicable to anything done by today's physicians. But this is a mistake, and only helps to protect aberrant physicians by marginalizing their actions as nonmedical in nature and therefore of no concern to the medical profession. When a person's bodily integrity is disregarded, torture and involuntary human experimentation become virtually indistinguishable.¹⁰

7. *Id.*

8. United Nations International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the U.N. General Assembly in 1966, entered into force in 1976.

9. George J. Annas, *The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and Beyond*, 2 HEALTH MATRIX 119, 136 (1992).

10. Jay Katz, *Human Experimentation and Human Rights*, 38 ST. LOUIS U. L. J. 22 (1993).

THE WORLD MEDICAL ASSOCIATION

In late 1946, 100 delegates from 32 national medical associations met in London to form the world's first international medical organization. The World Medical Association (WMA) was created to promote ties between national medical organizations and doctors of the world. Its objectives were:

- To promote closer ties among the national medical organizations and among the doctors of the world by personal contact and all other means available.
- To maintain the honour and protect the interests of the medical profession.
- To study and report on the professional problems which confront the medical profession in the different countries.
- To organize an exchange of information on matters of interest to the medical profession.
- To establish relations with, and to present the views of the medical profession to the World Health Organization, U.N.E.S.C.O., and other appropriate bodies.
- To assist all peoples of the world to attain the highest possible level of health.
- To promote world peace.¹¹

In September, 1947, shortly after the final judgment at the Doctors' Trial, the first official meeting of the WMA was held in Paris. The WMA formulated a new physician oath to promote and serve the health of humanity. This was followed by a discussion of the "principles of social security." Key principles adopted included:

- Freedom of physician to choose his [sic] location and type of practice.
- All medical services to be controlled by physicians.
- That it is not in the public interest that doctors should be full-time salaried servants of government or social security bodies.
- Remuneration of medical services ought not to depend directly on the financial condition of the insurance organization.

11. T.C. Routley, *Aims and Objects of the World Medical Association*, WORLD MED. ASS'N BULL. 18 (1949).

- Freedom of choice of patient by doctor except in cases of emergency or humanitarian considerations.¹²

To the WMA's credit, however, one of the first issues discussed by the 1947 general assembly was the "betrayal of the traditions of medicine" which occurred in Germany. The assembly asked, "why did these doctors lack moral or professional conscience and forget or ignore the humanitarian motives and ideals of medical service? . . . How can a repetition of such crimes be averted?" The assembly acknowledged the "widespread criminal conduct of the German medical profession since 1933."¹³ The WMA endorsed "the judicial action taken to punish those members of the medical profession who shared in the crimes, and it solemnly condemned the crimes and inhumanity committed by doctors in Germany and elsewhere against human beings."¹⁴ The assembly continued: "We undertake to expel from our organization those members who have been personally guilty of the crimes. We will exact from all our members a standard of conduct that recognizes the sanctity, moral liberty and personal dignity of every human being."¹⁵

Nonetheless, consistent with its physician-protection goals, the WMA focused more on physicians' rights than patients' rights. Through its Declaration of Helsinki in 1964, for example, it endorsed shifting the focus of protection of the human subjects in medical research from the protection of human rights through informed consent to the protection of patient welfare through physician responsibility. The 1964 Declaration, for example, divided research into two types: research combined with professional care, and nontherapeutic research. Consent was required for the latter. But as to the former, the subject was transformed into a patient, and consent was simply urged: "If at all possible, consistent with patient psychology, the doctor *should* obtain the patient's freely given consent after the patient has been given a full explanation."¹⁶ The Declaration of Helsinki thus attempted to undermine the primacy of subject consent in the Nuremberg Code and displace it with the paternalistic values of the traditional doctor-patient relation-

12. *Id.*

13. Editorial, *The Dedication of the Physician*, WORLD MED. ASS'N BULL. 18 (1949).

14. *Id.*

15. *Id.*

16. Declaration of Helsinki (emphasis added).

ship.¹⁷ Although the WMA has also issued a number of statements condemning physician involvement in torture and capital punishment, it has largely acted like other professional trade associations. Its primary interest is the members' welfare, with a secondary objective of issuing lofty "ethical" statements. With the exception of barring membership of the Japanese and German medicine following World War II, the WMA has never sought or exercised any authority to identify, monitor, or punish either physicians or medical societies who violate their ethical principles.¹⁸

BRITISH MEDICAL ASSOCIATION REPORT

The 1992 report of the British Medical Association's working party on the participation of doctors in human rights abuses documents continued physician involvement in crimes against humanity throughout the world.¹⁹ Physicians have been directly involved in the torture of prisoners, as well as involved in indirect activities which facilitate torture. Physician involvement includes the examination and assessment of "fitness" of prisoners to be tortured, the monitoring of victims while being tortured, the resuscitation and medical treatment of prisoners during torture, as well as falsification of medical records and death certificates after torture.

The report documents examples of physician involvement in psychiatric "diagnosis" and commitment of political dissidents, forcible sterilizations, force-feeding of hunger strikers and supervision of amputation and other corporal punishments. Countries implicated span the globe, and include the former Soviet Union, the United States, the United Kingdom, China, India, South Africa, as well as countries in the Middle East, Central and South America. The working party notes the existence of international law and codes of ethics, but it acknowledges the lack of enforcement and the inability to monitor compliance. The theme of the report is that neither medical associations nor international law have been effective in preventing physician involvement in human rights abuses.

17. Annas, *supra* note 9, at 122.

18. On the WMA election of a former member of the Nazi party as president-elect, see Michael A. Grodin, et al., *Medicine and Human Rights: A Proposal for International Action*, 23 HASTINGS CENTER REP. 8 (1993).

19. See generally, BRIT. MED. ASS'N, *MEDICINE BETRAYED: THE PARTICIPATION OF DOCTORS IN HUMAN RIGHTS ABUSES* (1992).

A PERMANENT NUREMBERG

In light of these problems and many other ethical and human rights issues involving physicians, we, along with others, have argued that the world needs an international tribunal with authority to judge and punish the physician violators of international norms of medical conduct, as well as an independent body to conduct ongoing surveillance and develop a rapid response capacity. Without these, the world is as before Nuremberg: international norms of medical conduct relegated solely to the domain of poorly defined medical ethics. In addition, the courts of individual countries, including the United States, for example, have consistently proven incapable of either punishing those engaged in unlawful or unethical human experimentation, or compensating the victims of such experimentation, primarily because such experimentation is often justified on the basis of national security or military necessity.

The International War Crimes Tribunal declared in 1946 that there were such things as war crimes and crimes against humanity, and that those who committed these crimes could be punished for them (the so-called "Nuremberg Principles"). The remaining trials at Nuremberg, including the Doctors' Trial, were based on the legal precedent articulated by the International War Crimes Tribunal, but were held exclusively under the control and jurisdiction of the U.S. Army. M. Cherif Bassiouni, Robert Drinan, Telford Taylor, and others have argued eloquently and persuasively that a permanent international tribunal is needed to judge and punish those accused of war crimes and crimes against humanity.²⁰ Nonetheless, the international political will to form and support such a "permanent Nuremberg" has been lacking. There has even been difficulty in setting up *ad hoc* tribunals regarding Bosnia and Rwanda. The arguments for a permanent international medical tribunal are every bit as compelling as those for a "permanent Nuremberg;" the establishment and support of a medical tribunal could also serve as a model for the broader international tribunal. The courts of individual countries, including the United States, for example, have consistently proven incapable of either punishing those engaged in unlawful or unethical human experimentation, or compensating the

20. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992); see also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992).

victims of such experimentation, primarily because such experimentation is often justified on the basis of national security or military necessity.²¹

The medical profession is perhaps the best candidate to take a leading role here because it has an apolitical history. It has consistently argued for at least some neutrality in wartime to aid the sick and wounded. It has a basic humanitarian purpose for its existence. Physician acts intended to destroy human health and life are a unique betrayal of both societal trust and the profession itself. It is also much easier for governments to adopt inherently evil and destructive policies if they are aided by the patina of legitimacy that physician participation provides.

AN INTERNATIONAL MEDICAL TRIBUNAL

Medicine and law are often viewed as opponents, but in the promotion of human rights and health they have a common agenda. In 1992 we urged the world's physicians and lawyers to work together to form and support an International Medical Tribunal.²² Ideally such a body should be established with the sanction and authority of the United Nations. However, given the competing political agendas of the member states, initial failure to win U.N. approval and support should not doom this project. Even if it was unable to punish with criminal sanctions, a tribunal could hear cases, develop an international code, and publicly condemn the actions of individual physicians who violate international standards of medical conduct. The establishment and support of such a tribunal is a worthy project for the world's physicians and lawyers.

To move forward, the establishment of such an International Medical Tribunal could be put on the agenda as an advocacy effort of all medical and legal associations around the world.²³ Since the tribunal must be both authoritative and politically neutral, no one country or political philosophy can be permitted to dominate it, either by having a disproportionate representation on the tribunal, or by disproportionately funding it. The Tribunal itself should be

21. Grodin, et al., *supra* note 18.

22. *Id.*

23. Such international non-governmental organizations as Amnesty International and Physicians for Human Rights may have special roles to play in monitoring, reporting and advocacy. The WMA has proven itself incapable of playing any meaningful role.

composed of a large panel of distinguished judges. Recruiting such judges (without which the court would have little credibility) will require a commitment from governments to permit the selected judges to take time off from their full-time judicial duties to hear these cases. Governments must fund the Tribunal's infrastructure.²⁴

MEDICAL ETHICS AND HUMAN RIGHTS

International human rights law is similar to medical ethics in that both are universal and aspirational, and both have so far been unenforceable. A critical challenge is to make both meaningful, and this may be the most important legacy of the Nuremberg trials. For physicians, the challenge is to articulate and follow a universal medical ethics, based on human rights, and to guard this ethic, for the sake of humanity, against its subversion and corruption by governments and corporations that would use medicine for its own purposes. Examples of use of physicians for governmental purposes include the U.S. military and cold war radiation experiments,²⁵ and the use of investigational drugs on U.S. soldiers in the Gulf War without consent,²⁶ both done in direct violation of the Nuremberg Code. Other examples include the use of physicians in lethal injection executions,²⁷ using psychiatrists to drug prisoners for easier control,²⁸ and using physicians in the military for nonmedical pur-

24. The Tribunal could hear individual cases brought to it, adjudicate these cases based on international law, publicize the proceedings and results widely, and refer decisions for further action to relevant professional organizations and the board or agency responsible for licensing the physician or physicians involved. Accused physicians would be notified and given every opportunity to appear and present a defense. Without an international extradition agreement, however, attendance could not be compelled. The trial should nonetheless proceed with appointed defense counsel, if the defendant chooses not to appear, because a major goal is to deter war crimes and crimes against humanity through publication of their brutality and through international condemnation of them; punishment is not the only goal.

25. Ruth R. Faden, *U.S. Medical Researchers, The Nuremberg Doctors Trial, and the Nuremberg Code: Findings of the Advisory Committee on Human Radiation Experiments*, 276 JAMA 20 (1996).

26. Informed Consent for Human Drugs and Biologies, Determination that Informed Consent is not Feasible, 55 Fed. Reg. 52, 814 (1990); George J. Annas & Michael A. Grodin, *Our Guinea Pigs in the Gulf*, N. Y. TIMES, January 9, 1991, at A21.

27. *Am. Med. Ass'n House of Delegates*, Res.109 (Dec. 1990).

28. BRIT. MED. ASS'N, *supra* note 19.

poses.²⁹ This list could also include government-sanctioned use of physicians for “euthanasia” of incompetent persons.³⁰

Physicians need more than codes that proscribe putting their skills in the service of the nonmedical goals of governments, military establishments, and corporations. Physicians also need support for upholding medical ethics and human rights, and mechanisms to punish those who would violate basic medical ethics and human rights in medicine. International human rights law and codes of medical ethics are necessary, but not sufficient, to prevent human rights abuses by physicians.³¹ Many physician groups are already active in promoting human rights globally, including International Physicians for the Prevention of Nuclear War and its U.S. affiliate Physicians for Social Responsibility, and Physicians for Human Rights. But physicians should not be expected to shoulder the cause of human rights alone.

Judges and lawyers were also tried separately at Nuremberg at “The Justice Case,” for engaging in “an unholy masquerade of brutish tyranny disguised as justice, and converting the German judicial system to an engine of despotism, conquest, pillage, and slaughter.”³² As Lon Fuller has described the rise of the Nazi state, “The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.”³³ Just as it took lawyers and physicians working together to bring the Nazi physicians to justice at Nuremberg, it will take the world’s lawyers and physicians working together not only to prevent wholesale violations of human rights, but also to proactively support the growth of human rights worldwide. The world’s physicians and lawyers, both because of their moral authority in defending life and justice, and

29. See, e.g., *VETERANS AT RISK: THE HEALTH EFFECTS OF MUSTARD GAS AND LEWISITE* (Constance M. Pechura & David P. Hall eds. 1993); E. G. Howe, *Ethical Issues Regarding Mixed Agency of Military Physicians*, 23 *SOC. SCI. & MED.* 803-15 (1986).

30. Van der Mass, et al., *Euthanasia and Other Medical Decisions Concerning the End of Life*, 338 *LANCET* 669-72 (1991).

31. Gerhard O. W. Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, 2 *CONN. J. INT’L L.* 499, 499-532 (1987).

32. Telford Taylor, Opening statement in the “Justice Case,” *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. III, p. 30, U.S. Gov. Print Office, Washington, D.C., 1951.

33. L. Fuller, *Positivism and Fidelity to Law—A Response to Professor Hart*, 71 *HARV. L. REV.* 138, 138-180 (1958).

their privileged positions in society, have special obligations to humanity. To exercise these obligations more effectively, we propose that they join together to promote and defend human rights through a new organization, Global Lawyers & Physicians (GLP)³⁴ with the purpose of working together for human rights in all countries.³⁵

The world's physicians and lawyers can work together transnationally to identify, publicize and isolate physicians, lawyers, and judges involved in human rights abuses. Even if these abuses are tolerated in the country in which the professional works, the professional can be effectively isolated and "imprisoned" within their own outlaw country. This can be done by refusing to license the outlaw physician or lawyer in any other country, by refusing to provide specialty or other training or access to professional meetings in any other country, and by refusing to publish any articles or research done by the outlaw professional physician in the world's professional literature. Lawyers should also work with and defend physicians who resist subversion of their medical skills by representing them in court and other settings, including employment settings. Lawyers should also work to enact laws that protect physician autonomy in all cases in which physicians follow acceptable principles of medical ethics and protect and promote human rights, whether they act as healers or researchers.

The mission of GLP is to work collaboratively toward the global implementation of the health-related provisions of the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights, with a focus on health care ethics, patients' rights, medical research, and human experimentation. Specific goals of the organization include the providing of information and resources about human rights in health, serving as a network and referral source for professionals working on health-related human rights issues, and providing support and assistance in developing, implementing, and advocating public policies and legal remedies which protect and enhance human rights in health.

34. Information on GLP can be obtained at the organization's website: www.glpH.R.org; see also healthandhumanrights.org.

35. Grodin et al., *supra* note 18, at 8-12.

CONCLUSION

What lessons have we learned from the Doctors' Trial? Three stand out: (1) Statements, even authoritative statements, of medical ethics are not self-enforcing and require active promulgating, education, and enforcement; (2) human experimentation and torture are important areas where violations of human rights and medical practice occur, but are too narrow in themselves to provide guidance for physicians and the public on the broad range of physician involvement in human rights abuses around the world; and (3) there is no effective mechanism to promulgate and enforce basic medical ethics and human rights principles in the world, and there should be.

It is our obligation to study how and why physicians dedicated to health and healing can turn to torture and murder in the service of their country. Whenever war, politics, or ideology treat humans as objects, we all lose our humanity. It is the legacy of Nuremberg and the Doctors' Trial that physicians and lawyers have special obligations to use their power to protect human rights, and that medical ethics devoid of human rights become no more than hollow words.

