

‘The Continent of Murder: Disability and the Nazi ‘Euthanasia’ Programme in the
Euthanasia Debates of Britain and the United States, 1945-Present’.

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Submitted for the Degree of Doctor of Philosophy.

I, Emmeline Burdett, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

This thesis considers the impact that ideas about disability and disabled people have had on debates about euthanasia in Britain and the United States since the end of the Second World War. I demonstrate that the debate has long been characterized by a deeply paternalistic attitude, in which assumptions and stereotypes about disabled people are held to be of such truth and relevance that the idea of having disabled people contributing to the debate simply does not occur. To this end, the thesis looks at the debates through the prism of Disability Studies, and shows that the stereotypical and outdated ideas about disability and disabled people with which these debates abound are not simply down to a chance shared inclination amongst the participants exhaustively to discuss some aspects of the issue whilst not even acknowledging others, as might easily be assumed. Instead they are based upon the assumption that, when ‘euthanasia’ is debated, the impairment of the individual(s) concerned is the only relevant issue. Though pervasive and often unquestioned, these ideas are now being challenged by such people as disability theorists, campaigners, and academics in the new field of Disability Studies. I will discuss this in greater detail in my Introduction. The thesis begins with the Nuremberg Medical Trial of 1946-47, at which the perpetrators of Nazi medical crimes were prosecuted. These crimes included the ‘euthanasia’ programme. Despite being cruel, systematic and totally non-consensual, the programme was not treated properly as a crime, the judgment stating that a state was perfectly at liberty to *subject* classes of its citizens to euthanasia – in other words to subject them to non-consensual killing.. The thesis then explores the reactions of outsiders to the Nuremberg Medical Trial. This reveals that the judges’ view of the programme was unchallenged by observers in the UK and US press, and by medical and

legal commentators, who saw the Trial as solely concerned with the prosecution of Nazi perpetrators of human vivisection. Chapters Three, Four and Five continue to explore these themes of paternalism and moral inconsistency. This is done by looking at historians' perceptions of the Nazi 'euthanasia' programme (Chapter Three), cases of individual euthanasia and how they are dealt with in English and US law (Chapter Four), and the use of the Nazi analogy in bioethical debates on the subject (Chapter Five). I conclude that, though paternalism and dismissive attitudes are still problematic, things are beginning to change, thanks to such factors as greater civil rights, greater scope for participation in society as a whole, and new academic disciplines such as disability studies and disability history.

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Acknowledgements

My thanks must go firstly to my supervisor, Dr Mark Hewitson, who has not only been helpful and encouraging, but has also forborne from expressing frustration about my speed of work, which would probably have disgraced an arthritic snail! Dr Brian Balmer and Professor Colin Barnes made sterling suggestions, and displayed a truly touching commitment to the thesis, as well as a desire to ensure that it was as good as it could be. Without their assistance, the thesis would have been much poorer (remaining faults are my own, obviously!). My thanks are also due to the seminar participants at Liverpool Hope University's Centre for Culture and Disability Studies, especially Dr Alex Tankard and Dr David Bolt, for their help and enthusiasm. I am also grateful to Ian Dowbiggin, Professor Carol Thomas, Dr Mererid Puw Davies and Professor Mary Fulbrook, for their words of wisdom and encouragement. Thanks also to the staff of University College London Library, the British Library, the Wellcome Library and Senate House Library for their assistance in locating books, and demonstrating how to use databases and search

engines. I would also like to thank my parents for not insisting that I should hurry up and get 'a proper job', and for their support and respect for my privacy.

This thesis is dedicated to Michael Moir Patterson: 'May your soul live. May you spend millions of years, o lover of Thebes, with your face to the north wind and your eyes beholding happiness'.

Introduction

‘Whether or not a state may validly enact legislation which imposes euthanasia upon certain classes of its citizens is a question which does not enter into the issues.

Assuming that it may do so, the Family of Nations is not obligated to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenceless and powerless human beings of other nations’.¹

This statement was made by the United States judges who presided over the Nuremberg Medical Trial (also known as the Nuremberg Doctors’ Trial – or NMT) which began in December 1946 and delivered its judgment in August of the following year. The statement demonstrates – in a very stark way – that those who had been made victims of the ‘euthanasia’ programme had also become victims of the Nuremberg Medical Trial judges, who actually stated that killing them had just been something which a state was entitled to do. It did not constitute a crime, and would not attract international censure, unless the policy were to be applied in a manner which was racist, or threatening to inhabitants of nations other than the one which introduced it. This moral inconsistency regarding the question of non-consensual killing is the enduring theme of my thesis. I demonstrate that the dismissive and paternalistic assumptions and stereotypes about disabled people on display in the Nuremberg Medical Trial judgment are certainly not unique to the time in which the Trial took place, or to the judges presiding over it. Though those who either advocate, or simply remain unperturbed by, the practice of non-

¹ FO 646, Case 1 Medical, (*U.S. v. Karl Brandt et al*), Vol. 23, p.11395.

consensual 'euthanasia' have not always expressed themselves so chillingly, it remains true that there is a widespread assumption that (a) people subjected to non-consensual 'euthanasia' are not in possession of any characteristics bar that of irredeemable suffering; (b) killing such people is simply not the same as the murder of another sort of person would be; and (c) the person or people in question do not suffer from being killed. The various chapters show this in a number of different ways. Chapter One exposes the way in which the prosecution team and the judges at the Nuremberg Medical Trial were trying the perpetrators of the Nazi 'euthanasia' programme whilst clearly not believing that the programme had really been wrong. Chapter Two continues this theme, showing how prominent newspapers, legal journals and medical journals from both countries understood the Trial as being exclusively devoted to the prosecution of Nazis who had performed medical experiments upon concentration camp inmates. Chapter Three looks at how historians have written about the Nazi 'euthanasia' programme, and finds that, until recently, the programme was treated as a dry ethical issue and the victims were rendered invisible by a preoccupation with the protests against the programme. Chapter Four considers the legal situation in both England and Wales and the US, and shows that though the *types* of 'euthanasia' under discussion have widened considerably, the underlying problems of how 'other' lives are perceived have still not been solved. Chapter Five draws similar conclusions with regard to bioethical debates.

All the chapters draw extensively on the contributions of participants in such debates, linking primary sources to the secondary literature on 'euthanasia'. The nature of

the enquiry means that the thesis relies largely on published sources. This is because I am not investigating events as such, but rather how those events have been perceived by other people. The aim of this approach is to show the extremely widespread and tenacious nature of stereotypes and assumptions about disabled people in the distinct but connected debates of lawyers, historians, philosophers, medics and, where it stood in close relationship to academic discourse, the press. Inevitably, such an approach crosses boundaries between disciplines and requires analysis of very different types of discourse. It is justified by the interconnectedness of the different debates. Indeed, it is that very interconnectedness of vision which is so remarkable. As a consequence, my aim is to examine the transfer, reception, convergence and evolution of certain conceptions of disability and ‘euthanasia’ within much broader sets of discourses rather than to do full justice to those discourses as a whole. The juxtaposition and comparison of the debates of lawyers, historians and bio-ethicists reveals a widespread and alarming continuity and acceptance of common and – one would have hoped – outdated stereotypes. These do not simply stand alone, but, as this thesis will show, have served to disseminate and perpetuate flawed and incomplete understandings both of historical events, and of the value and possibilities of the lives of others. This study seeks to investigate such common conceptions. This will be done within a particular framework, which it is now time to outline.

The Standpoint of the Thesis

This thesis has a rather wide scope. Nevertheless, both the thesis as a whole, and the conclusions I have drawn fit snugly into the academic discipline of Disability Studies. This is a relatively new, interdisciplinary subject, which has been defined as ‘an emergent field with intellectual roots in the social sciences, humanities, and rehabilitation sciences’.³ More particularly, disability studies seeks to change the way in which disability is viewed by the public and the academic community. As opposed to the ‘traditional’ view, in which disability is seen as an individual ‘limitation’ or ‘tragedy’, disability studies takes a much more societal approach, with disability understood as encompassing factors which prevent an impaired individual from making the most of his or her life, but which are not caused directly by his or her impairment. This will include the attitudes towards impairment demonstrated by the family, friends, and wider society in which the impaired person lives. They will also include such factors as the accessibility of the built environment, the possibilities for getting ‘out and about’, the related effects upon the impaired person’s opportunities to gain education and employment, and consequent satisfaction with his or her life. Both in disability studies and in the disabled people’s movement more generally, this approach is known as the *social model of disability*.⁵ This term is in many ways the polar opposite of the more traditional ‘medical model’, which predominates in much of mainstream society and mainstream academic discourse, as I will demonstrate throughout the course of this thesis. The medical model has been defined by the World Health Organization as follows:

³ Gary L. Albrecht, Katherine D. Seelman and Michael Bury, (eds.), *The Handbook of Disability Studies* (Thousand Oaks, California; London; New Delhi: Sage Publications, Inc., 2001), p.2.

⁵ Bill Hughes, ‘Disability and the Body’, in Colin Barnes, Mike Oliver and Len Barton, (eds.) *Disability Studies Today* (Cambridge: Polity Press, 2002), p.59.

‘The medical model views disability as a problem of the person, directly caused by disease, trauma, or other health condition, which requires medical care provided in the form of individual treatment by professionals. Management of the disability is aimed at cure or the individual’s adjustment and behaviour change. Medical care is viewed as the main issue, and at the political level the principal response is that of modifying or reforming healthcare policy’.⁶

Throughout this thesis, I will be arguing that, in effect, scholars' reactions to both the Nazi 'euthanasia' programme, and their general ideas and assumptions regarding the potentiality of impaired people, demonstrate that they have failed to take any kind of societal approach at all to the questions which are – or should be – raised when considering this important and topical subject. I will also demonstrate that academics and others involved in both the disabled people’s movement have not only considered these problems, but that their ideas and conclusions differ greatly from the ‘traditional’ view taken by the scholars whose views we will encounter throughout the majority of the thesis. An appreciation of these ideas is vital in order to gain a full understanding of the issues surrounding ‘euthanasia’, but, at present, they are often overlooked. Before we do this, however, we must consider disability studies as an academic discipline. How and why did it originate? Why have disability studies scholars identified a need for their field of study? With regard to this problem within the discipline of sociology, the sociologist Carol Thomas has written that

⁶ World Health Organization (WHO), *ICF: Introduction* (Geneva: World Health Organization, 2001), p.20. Quoted in Sheila A.M. McLean and Laura Williamson, *Impairment and Disability: Law and Ethics at the Beginning and End of Life* (Abingdon, Oxon.: Routledge-Cavendish, 2007) p.12.

‘the development of ideas in disability studies in the 1980s and 1990s amounted to a head-on challenge to medical sociologists’ claim to sole jurisdiction in any sociology of disability. The existence of a disciplinary ‘divide’ soon became apparent, one not characterised by a polite ‘agree-to-disagree’ arrangement’.⁷

Thomas suggests that this situation is particularly acute in medical sociology because of the way in which the discipline has developed, and its tendency to regard illness and disability as not only interchangeable, but also as conscious or unconscious manifestations of social deviance. Thomas has written that ‘that medical sociology has at its heart such a pathologising, victim blaming and problem-infused view of the ‘chronically ill and disabled’ is not generally highlighted in medical sociology textbooks’.⁸ This may be true for sociology, but this thesis will be arguing that the problem is far more widespread. In addition, the more general explanation for this state of affairs is actually rather a lot simpler. The British disability studies scholar Michael Bury has written that

‘As with gender, it should be noted that many mainstream sociologists have paid little or no attention to the implications of disability for their analyses of the body in late modern or postmodern cultures ... ‘the body’ is all too often regarded as self-evident’.⁹

We have here two different explanations for the relative absence of disability as an area of study. Both, however, agree that this is something which has unquestionably occurred.

⁷ Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (Basingstoke: Palgrave Macmillan, 2007), p.4.

⁸ *Ibid.*, p.19.

⁹ Quoted in *ibid.*, p.38.

But we are still left with a fundamental problem: how to explain the simultaneous presence and absence of disability as a term of reference, and of impaired people as equal contributors to debates which undoubtedly concern them? Why is this absence so wide-ranging, and how has it endured for so long? These questions must be addressed before the real business of the thesis can begin.

History is an area of academia in which disability studies has managed to make particularly large strides, as well as proving an intrinsically rewarding research area. Much has been written by disability historians about the reasons why, until they came along, their research had not previously been considered worth doing. As well as telling us about the attitudes which past societies took to impaired people living in their midst, looking at the ways in which historians have written about historical examples of good or bad treatment of impaired people, also shows us the attitudes that those historians themselves take towards impairment. This is what my 'historians' chapter will be devoted to, and I will take a similar approach with regard to my other chapters, looking at the fields of law; philosophy; the Nuremberg Medical Trial itself - as revealed in the transcript; and the reactions of the Press and the wider Anglo-American world, to the revelations emerging from the Trial. I shall be arguing that those studying the Nazi 'euthanasia' programme, and also those within academia who consider wider and more contemporary issues of 'euthanasia' and 'assisted dying' have, and are continuing to demonstrate the attitude described above by Michael Bury – that of 'the body' being 'self-evident'. Essentially, the practical implication of this, for the study of anything to do with disability and impairment, is that, no matter how obvious it should be that an impaired person who is, say, sterilized, murdered, or subjected to some non-lethal but

damaging form of discrimination, is suffering from the actions of members or institutions of his or her society, it will still be widely assumed that the individual's impairment is the sole root cause of his or her sufferings. It is now time to take a brief look at examples of this, taken from the sections of academia I will be looking at. This will help to lay the foundations for the context in which the chapters of my thesis should be read.

The Bourne Identity

The disability historian Douglas Baynton has showed the kind of problems faced by pioneers in the field by demonstrating the case of Paul Longmore, an American academic of whom Baynton says

‘Probably more than anyone, Longmore has been responsible for bringing disability studies into the field of history’.¹⁰

Baynton goes on to explain that, in 1985, Paul Longmore published a revolutionary review of a new book about the early twentieth century US intellectual Randolph Bourne. Bourne had had various impairments which, though they caused him little functional disability, had resulted in a significant amount of facial and bodily disfigurement.¹¹ Longmore's review of the new Bourne biography traced what academics over the years had written about Bourne, concluding that they had got him all wrong, as they had never

¹⁰ Baynton, Douglas, ‘Disability History: No Longer Hidden’, *Reviews in American History* 32 (2004), p.282.

¹¹ *Ibid.*, p.283.

understood his disability in any terms other than that of individual deficit. Indeed, in 1965 a biographer had even written that Bourne's

‘disappointments and frustrations were the inevitable result of [his] deformity ... and they tell us nothing, therefore, about the society in which Bourne lived’.¹²

Longmore's response - that Bourne's whole identity was based upon his experiences as an impaired person in a deeply hostile society - is based upon Bourne's own writings.

Prior to Paul Longmore, biographers had failed utterly to consider this:

‘The problem with it, as with all Bourne biographies, is its fundamental misunderstanding of his experience and identity as a disabled man in a society that intensively stigmatized him’.¹³

Bourne lived at a time when the eugenics movement – both in the US and internationally – was gaining momentum. In addition, institutionalization of disabled people in the US was increasing; discrimination meant that employment opportunities were conspicuous by their absence; cities such as Chicago prevented persons who were ‘diseased, maimed, mutilated, or in any way deformed’ from begging.¹⁴ On top of all this, Longmore points out the casual cruelty and prejudice to which Bourne had been subjected by other people's reactions to his appearance. This did not come solely from people who did not know him, Bourne's instinctive feminism was not repaid in kind by his female friends,

¹² Ibid.

¹³ Paul K. Longmore, ‘The Life of Randolph Bourne and the Need for a History of Disabled People’, *Reviews in American History*, vol.13, no.4 (December, 1985), p.581.

¹⁴ Ibid, p.584.

who were disconcerted that he considered himself entitled to engage in romance.¹⁵ All of this led Longmore to conclude that historians would continue to

‘misunderstand individuals like Randolph Bourne as long as the history of disabled people as a distinct social minority remains largely unwritten and unknown’.¹⁶

Longmore also came across this problem when he wrote about the famous US case of Elizabeth Bouvia, which will be covered more fully in the legal chapter of this thesis. Briefly, Bouvia had severe cerebral palsy and, following a series of devastating personal blows – miscarriage, marriage breakdown, the tragic death of a sibling, and having been forced to abandon her master’s degree due to her university’s refusal to make adaptations required by law - had requested the right to die. The judge hearing the case determined that Bouvia’s request was reasonable, and the California Supreme Court based its decision entirely upon what Bouvia was supposed to be suffering from – her disability:

‘She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless. She cannot be faulted for so concluding ... Her mind and spirit may be free to take great flights, but she herself is imprisoned ... subject to the ignominy, embarrassment, humiliation and the dehumanizing aspects created by her helplessness’.¹⁷

This is not a problem which is pertinent only to the case of Elizabeth Bouvia, or one which is applicable solely to the situation in the United States of America. The legal

¹⁵ Ibid.

¹⁶ Ibid, p.586.

¹⁷ *Bouvia v. Superior Court of State of California, Court of Appeal of the State of California, Second Appellate District, Division Two, 2d Cir. No., BO19134* (1986, April 16), pp.19, 21).

chapter will show the extent to which attitudes similar to the one quoted above are easy to find when one looks at even recent cases of ‘euthanasia’ from England and Wales, such as the killing by his father of ten-year-old Jacob Wragg in 2006. The field of bioethics is possibly even more tainted by such dismissive and prejudicial attitudes. Particularly in recent years, people in the disability movement have become extremely concerned by the way in which their lives, experiences and potential are devalued by philosophers in the field of bioethics.¹⁸ This will be discussed more fully in my ‘philosophy’ chapter, but a flavour of the problem can be seen by taking a brief look at the main grounds for disagreement. The disability studies scholar Adrienne Asch has accused bioethicists of both over-simplifying and failing properly to understand the questions raised by the existence of impairment:

‘Bioethics writing, like the medical model of disability now being replaced by a social model, has failed to question traditional understandings of impairment, illness or disability ... bioethics insists that individuals should be able to determine the situations under which they find life intolerable but has never challenged them to ask themselves what they found intolerable. Nor has bioethics suggested that what was unacceptable might not be inherent in quadriplegia, stroke, or a degenerative neurological condition but instead could result from the social arrangements facing people living with such conditions’.¹⁹

¹⁸ Asch, Adrienne, ‘Disability, Bioethics and Human Rights’, in Albrecht, Seelman and Bury, (eds.), *The Disability Studies Handbook*, (Thousand Oaks, California; London; New Delhi; Sage Publications, Inc., 2001), pp.300-311.

¹⁹ *Ibid.*, p.299.

Bioethicist John Harris, of the University of Manchester, successfully (although presumably unwittingly) exemplifies the attitudes which Asch criticises. In an article written in 2001, Harris repeatedly states that he is committed to equal rights for all, but when discussing ‘disability’, he asks a narrow range of questions which make it difficult to regard the issues involved with any kind of depth. Harris asks:

1. What is disability?
2. Is it better not to have a disability or not to be a person with disabilities?
3. Is it better to avoid bringing people with disabilities into existence where possible?²⁰

The tenor of Harris’s questions leads both him, and anyone with whom he might be debating these ideas, into an assumption that questions of impairment are not at all multi-faceted, but simply involve, as Harris says:

‘Like the loss of the end joint of a little finger, the point is not that life is not worth living without such things but that we have reasons not to start out in life with any unnecessary disadvantages however slight’.²¹

In response to this, one might simply say that it is not very practical. It does not offer any explanation for, say, what a person, who lost ‘the end joint of a little finger’ in an accident when already an adult, might be able to do about his or her changed circumstances. More than this, though, it attempts to squeeze questions about disability and impairment into narrow definitions of whether or not such-and-such a life is ‘worth living’. This not only gives the impression that these are the only relevant questions, but

²⁰ John Harris, ‘One Principle and Three Fallacies of Disability Studies’, *Journal of Medical Ethics* vol. 27, (2001), p.384.

²¹ Ibid.

also makes it very difficult to turn the debate around and demonstrate the wider societal implications of impairment and disability. In many ways the contested ideas between bioethicists and disability studies academics are exemplified by the context in which Harris made his remarks. The *Journal of Medical Ethics* held an ‘Equality and Disability Symposium’, in which a number of Anglophone scholars (including Harris) contributed papers discussing such topics as treatment withdrawal, the definition of a ‘worthwhile life’, and whether or not it was justifiable to prevent disability on the grounds of suffering. Where appropriate, the participants also responded to each other’s remarks. Disability studies and disability theory were well-represented by Tom Koch, a visually-impaired activist and academic bioethicist from the Hospital for Sick Children in Toronto, Canada. Nevertheless, the extremely ‘medicalized’ context of the debate was underlined by the fact that Harris’s fellow contributors to the symposium all hailed from the worlds of medicine or medical law: R.B. Jones is a retired consultant paediatrician; S.D. Edwards is a senior lecturer in the philosophy of health care; Tom Koch is based at a hospital for sick children; and Kate Diesfield is a senior lecturer at the National Centre for Health and Social Ethics in Auckland, New Zealand. Their discussion, and my philosophy chapter, will show that the field is still far away from a properly wide-ranging consideration of the lives and possibilities of impaired people. As Mark Kuczewski, first editor of the *American Journal of Bioethics*, wrote:

‘The profession that was born to give voice to the sick and dying and to thereby empower patients will have the opposite effect. That is, a failure to give a prominent place to the consideration of disability issues does not only mean that that important areas of healthcare go unconsidered; it also means that many issues bioethicists consider will be

distorted. Since many of the fundamental concerns of persons with disabilities are not about medicine at all but about the living of life, they point the way to transcend *medical* ethics and restore the original meaning to *bioethics*'.²²

The 'Social Model of Disability' and its Origins

What these concerns have in common is that they show a deep alarm that the majority of the population – both inside and outside academia - still regard impairment and disability as private, individual matters, which have little or no bearing upon wider society – for example on the way it can or should operate.

Academic disability studies has sought to show that this is not the case, and in so doing it is really a natural progression of the disability rights movement which, from its beginnings in the early 1970s, sought to disseminate this knowledge in terms not of academic argument, but of the needless obstacles which impaired people faced in their daily lives. The activists who advanced the movement's cause did so because they wanted to draw attention to particular physical and attitudinal barriers which meant that they were prevented from making the most of their lives and playing a proper role in society. For example, UPIAS (Union of the Physically Impaired) was the first real political organization of disabled people in the United Kingdom. At the organization's inception, one of its founders, Vic Finkelstein, wrote that

'Oppression takes many forms and I guess that our group will need to discuss the variety of ways so that we will clarify our views on all aspects of our condition. However, we

²² Mark G. Kuczewski, 'Disability: An Agenda for Bioethics', *American Journal of Bioethics*, vol.1, no.3, (Summer, 2001), p.37.

have agreed that the most pressing is the isolation of physically impaired people in institutions. It seems to me that this is no accident. Institutionalization involves a process which typifies our condition. It reveals the nature of our oppression in its most pure form and in struggling to change this we are bound, provided we insist on being thorough, to understand what disability really is. This, I feel, should be an integral part of what we set out to do. That is, while we struggle to change society in such a manner that people will no longer wish to isolate physically impaired people in institutions we should, at the same time, seek to clarify the nature of the condition. Theory and practice should be united'.²³

Finkelstein's statement shows a number of things. Institutionalization of physically disabled people is his primary concern. This is because it is, in his view, the wellspring from which all other societal problems experienced by disabled people flow. Eradicate it, and you will immediately have members of society who must have their needs catered for, not objects of care who are kept safely out of the way. Finkelstein also, it is clear, regards the practice of segregation as one of social control. Institutionalization had begun during the nineteenth century as a result of both increasing interest in scientific explanation and classification, and also of the large-scale exclusion of impaired people from the labour market, which had been a result of Britain's increasing industrialization. Such factors as the speed of factory work meant that many impaired people were now largely excluded from the labour market, leading to concerns that they were a potential problem, and a drain on state resources.²⁴ Continued reliance on institutions well into the twentieth century led to the growth of a whole industry of rehabilitative medicine, as well

²³ Vic Finkelstein, 'Contribution to the Discussion on the Nature of our Organization', extract from UPIAS circular 3, (December, 1972), p.1. Downloaded from <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/Extraction/fromUPIASCircular>.

²⁴ Barnes, Mercer and Shakespeare, (eds.), *Exploring Disability: A Sociological Introduction* (Cambridge: Polity Press, 1999), p.20.

as the unquestioned assumption that an impaired person's life was governed by his or her impairment, not by any interplay between that impairment and the rest of society.²⁵ The importance of this as an explanation for the attitudes we will encounter in this thesis – particularly in the historians' chapter – cannot be underestimated. As the Nazi 'euthanasia' programme targeted those living in institutions, I would argue that historians' attitudes to the programmes victims have, in the main, been significantly coloured by the unquestioned assumption mentioned above.

Impairment versus Disability

One of the results of the paradigm shift in thinking which disability studies has spearheaded and sought to disseminate amongst both the public at large and the wider academic community is that those in the field have drawn attention to the way language is used, and to the descriptive terms employed to elucidate various concepts. This has resulted in a distinction being made between terms which may often have been considered as being largely interchangeable. Pre-eminent amongst these are the terms 'impairment' and 'disability'. The disabled people's movement defines these terms rather differently from the national and international legal documents dealing with the issue. Indeed, to a significant extent, the definition used and favoured by disability academics and activists is entirely at odds with those utilised by people in other fields and in society at large. Disability theorists first drew the distinction in the early 1970s, when the movement was still in its infancy. The Union of the Physically Impaired Against

²⁵ Ibid.

Segregation (UPIAS) published a monograph in which they defined the terms ‘impairment’ and ‘disability’, based upon the lived experience of disabled people.²⁶

According to this monograph, the two terms were quite distinct. ‘Impairment’ meant:

‘the lack of all or part of a limb; or having a defective limb, organ or body mechanism. In other words it tends to emphasize the individual’.²⁷

By contrast, ‘disability’ encompassed the problems with which impaired individuals were presented by the shortcomings of the society in which they lived:

‘the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excluding them from the mainstream of social activities’.²⁸

The perceived need to define these terms in a new and constructive way had come about due to a document issued by the World Health Organization (WHO), in which the terms ‘impairment’, ‘disability’ and ‘handicap’ were defined ‘in the context of health experience’, and in which all problems an impaired individual might face were considered to arise solely from his or her impairment, never from the interaction between the individual and his or her society.²⁹ Definitions of ‘disability’ and related terms which take into account the fact that an impaired individual does not inhabit a societal vacuum have continued to underpin both the disability movement and the ‘social model’ of

²⁶ Ibid.

²⁷ UPIAS 1976, p.14.

²⁸ Ibid.

²⁹ Johnstone, *An Introduction to Disability Studies*, p.10

disability. As far as academic disability studies is concerned, Lennard J. Davis shows that the two terms are defined in the same way:

‘Disability scholars make the distinction between impairment and disability. An impairment involves a loss or diminution of sight, hearing, mobility, mental ability and so on. But an impairment only becomes a disability when the ambient society creates environments with barriers – affective, sensory, cognitive or architectural’.³⁰

In recent years, some disability academics and theorists, such as Liz Crow and Tom Shakespeare, have expressed dissatisfaction with what they see as the limits of the social model, and its inability to take into account bodily limitations and problems which cannot be mitigated by anything the wider society might try to do to alleviate them. Examples given by Shakespeare include a blind person who still cannot see a sunset, and a deaf person who cannot hear birdsong.³¹ Nevertheless, as my thesis will show all too clearly, the view of disability and impairment demonstrated by those in academic fields other than that of disability studies, is in many ways, still light years away from acknowledging that there are any societal considerations at all to be taken into account when the question of ‘euthanasia’ is debated. In addition, national legal documents dealing with disability continue to offer definitions which suggest that disability is wholly a problem of the individual, and that, consequently, an impaired individual’s social circumstances are irrelevant. For the purposes of this thesis, the national legal documents under consideration are, firstly, the Disability Discrimination Act 1995, and secondly, the

³⁰ Lennard J. Davis, ‘Crips Strike Back: The Rise of Disability Studies’, *American Literary History*, vol.11, no.3, (Autumn, 1999), p.507.

³¹ Tom Shakespeare, *Disability Rights and Wrongs*, (Abingdon, Oxon.: Routledge, 2006) p.45.

Americans with Disabilities Act 1990. The former has been decried as a ‘masterpiece of ambiguity’, whilst the latter has been admiringly described as ‘a powerful testimony to the campaigning zeal of disabled people’.³² However, this may have more to do with the ways in which the respective pieces of legislation came into being (as I will show in my legal chapter) rather than any particular clarity of expression, or forward-thinking intent, which characterized the Americans with Disabilities Act, but was absent from the Disability Discrimination Act. This is because the definition of ‘disability’ contained in the two documents is strikingly similar and, unlike the definitions favoured by the disability rights movement, takes no account of the societal circumstances of a person with an impairment. According to the Disability Discrimination Act 1995, a disability is

‘a physical or mental impairment which has a substantial long term adverse effect on his (or her!) ability to carry out normal day to day activities’.³³

The Americans with Disabilities Act takes a similar approach, once again placing the impaired individual in a societal vacuum:

‘a disability is a physical or mental impairment that substantially limits one or more of the individual’s major life activities’.³⁴

³² Johnstone, *An Introduction to Disability Studies*, pages 10 and 23 respectively.

³³ Disability Discrimination Act 1995, p.1, HMSO 1996.

³⁴ The Americans with Disabilities Act 1990, p.1, quoted in Jerome E. Bickenbach, ‘Disability Human Rights, Law and Policy’, in Albrecht, Seelman and Bury, (eds.), *Handbook of Disability Studies* (Thousand Oaks, California; London; New Delhi: Sage Publications Inc., 2001), p.577.

There can be no more significant ‘major life activities’ than that of continuing to remain alive. To this end, it is interesting to note that neither the Disability Discrimination Act 1995 nor the Americans with Disabilities Act have anything to say on the subject of ‘euthanasia’. One might argue that this is not surprising: they are after all documents which aim to set out the rights of impaired persons and facilitate their greater participation in the labour market and in society as a whole. However, it is this assumption, or perhaps one might even call it pretence, that the topic of ‘euthanasia’ exists in isolation from any aspect of societal living, which is significantly more dangerous. It means that, whilst ‘euthanasia’, and latterly, assisted suicide, are officially regarded as individual decisions, there is no legal acknowledgement of the factors that may have a bearing on a person’s decision. I will go into greater detail about this in my legal chapter. For the time being it is sufficient to say that, as my thesis as a whole will demonstrate, it is entirely unsatisfactory for the topic of ‘euthanasia’ to be treated, as it all too often is, as being completely divorced from all areas of human experience save that of individual medical problems.

Disability and Illness

The question of ‘individual medical problems’ leads us back to a distinction between sufferings that can be assuaged by improvements in society’s accommodation of impaired people in everyday life, and those sufferings which may be the direct and unavoidable result of a medical condition. As shown above (footnote 13), some theorists and academics have criticised the social model of disability for a perceived over-focus on

society's shortcomings, which can sometimes culminate in its adherents refusal to acknowledge that some people may be suffering from problems which are entirely biomedical in nature. This distinction is particularly important when considering ethical issues such as that of 'euthanasia'. As should now be quite obvious, my thesis argues that a more societal approach to 'euthanasia' urgently needs to be explored. I also believe, however, that many of the problems experienced by people with chronic and/or life-limiting illnesses can be considered to come under the umbrella of 'disability issues'. This is because a chronic illness, the effects of which may change or worsen over time, is inevitably something that one lives with – it is not a simple matter of living one day and dying the next. This approach is recognized by the Disability Discrimination Act 2005, which contains certain amendments to the 1995 Act. Amongst these amendments is the statement that cancer, HIV and multiple sclerosis are now to be considered 'disabilities' in terms of the Act.³⁵ It is easy to see how this idea can be applied to any chronic illness which, though it affects the life of the person who has it, may not cause death, either at all or for a prolonged period. A person with such an illness might consider death to be preferable to life, but my thesis will demonstrate that such a person does not inhabit a vacuum, and that their potential in whatever span of life remains to them, cannot be entirely divorced from their societal circumstances.

Disability and Euthanasia: Concepts through Time

I have chosen to begin my thesis by showing how the Nazi 'euthanasia' programme was perceived in the immediate post-war period. I made the decision to begin at this point due

³⁵ The Disability Discrimination Act 2005, s. 18(3)(i), downloaded from www.legislation.gov.uk.

both to the enormity of the events under discussion at the Nuremberg Medical Trial, and to the long, but perhaps not very enlightening, shadow which the example of the Nazis casts over contemporary debates. The fact that the Tribunal could not treat the systematic murder of tens of thousands of innocent people with any real degree of seriousness did not bode well for other discussions of ‘euthanasia’ taking place during the same period. A good deal has been written about the history of eugenic thought in Britain and the United States, and there is still no unanimous agreement concerning the extent to which members and institutions of the Allied powers who fought against Nazism can be said to have been receptive to some of the ideas which the ideology espoused. Writers such as Stefan Kühl and Henry Friedlander have, as I will show in my ‘Historians’ chapter, discussed the U.S. responses to Nazi ideas in terms of the wide use that was made of eugenic sterilization in the United States, over a period of several decades. Ian Dowbiggin has also considered the crossover (or otherwise) between eugenic sterilization and ‘euthanasia’, particularly when it is involuntary. He has concluded that

‘The origins of Nazi euthanasia, like those of the American euthanasia movement, predate the Third Reich and were intertwined with the history of eugenics and social Darwinism, and with efforts to discredit traditional morality and ethics.’³⁶

Much has been written about the enthusiasm for eugenics in the United States in the early years of the twentieth century, but a lot of this scholarship has focused on race. It would be ridiculous to deny that race was an important factor, but the relationship which there

³⁶ Ian Dowbiggin, *A Merciful End: The Euthanasia Movement in Modern America* (Oxford/New York: Oxford University Press, 2003), p.65.

was perceived to be between race and disability has often been overlooked. Nevertheless, this link does exist, as can be shown by a survey submitted to Congress in 1924, which purported to show the relative levels of ‘inferior intelligence’ amongst soldiers of different racial groups, and was supposed to be particularly pronounced amongst Negroes and amongst ‘new immigrants’ from Southern and Eastern Europe. This survey helped to implement the 1924 Johnson Act, which restricted immigration from areas found to have high levels of ‘feeble-minded’ inhabitants. Three years later, the U.S. Supreme Court affirmed, in the case of *Buck v. Bell*, that a state had the right to sterilize people with intellectual disabilities.³⁷ This, as we shall see in the next chapter, was a strange harbinger of the pronouncement that the three U.S. judges would make at the close of the Nuremberg Medical Trial, exactly twenty years later, affirming the right of a state to *subject* classes of its citizens to ‘euthanasia’. The high levels of immigration to the United States, consistently conflated with real or manufactured concerns about high levels of hereditary illnesses and disability, plus the lesser timidity exhibited by U.S. politicians vis-à-vis their British counterparts, helps to explain why eugenics and, the idea, at least, of ‘euthanasia’ retained such a tenacious and prolonged hold on U.S. domestic policy.

The situation in the United Kingdom is somewhat more complicated. Though Britain never had state-sanctioned sterilization programmes (on either eugenic or other grounds), this does not mean that there had never been discussion or approval of it, or of the possibility of implementing ‘euthanasia’. The British debate about ‘euthanasia’ really began in earnest in 1870, with the publication of a small book entitled *Essays of the*

³⁷ David L. Braddock and Susan L. Parish, ‘An Institutional History of Disability’, in Albrecht, Seelman and Bury (eds.), *Handbook of Disability Studies*, p.40.

Birmingham Speculative Club. This contained an essay entitled ‘Euthanasia’, written by a schoolteacher, Samuel Williams. Williams advocated quasi-voluntary ‘euthanasia’ for persons suffering from terminal illness. Though his professed concern was the curtailment of futile suffering, Williams also phrased his arguments in Social Darwinist terms, maintaining that modern medicine was counter-selective, endangering society by ensuring the survival of the weak. Williams’ views might not have had much impact, published as they were in an obscure text with no coherent theme. However, the book in which Williams’ essay appeared was reviewed in various influential journals. Though some reacted with alarm to the ideas expressed, Williams’ essay was widely considered to be the most impressive of the collection, and corresponded well to the mood of the times – the sensation caused by Darwin’s recently published theory of evolution, and the associated theory that, if evolution was achieved by the triumph of the strong, society might now be in a sufficient technological position to enable it to determine how it should deal with the weak. In addition, the nineteenth century was a time when Britain had become highly industrialized, as discussed above. In both Britain and the United States, physicians were slower to adopt this way of thinking than were philosophers and other non-medical persons. In the last decades of the nineteenth century, British doctors were still using drugs to achieve ‘euthanasia’ in the classical sense, while, in 1885, fifteen years after its original appearance, the Journal of the American Medical Association was condemning Williams’ article as ‘an attempt to make the physician don the robes of an executioner’. The difference between physicians and non-physicians might be explained by the philosophical tendency to regard problems in abstract terms, contrasted with the realisation amongst physicians that their patients were real human beings, for whom the

physicians ought to try to do the best that they could. An important exception to this, however, is the case of defective infants. Since the 1870s, physicians in both Britain and the United States had been advocating the non-treatment or active killing of defective newborns, and a number of scholarly journals cited ancient and classical precedents for infanticide. In the United States, however, 1915 was the year in which the infanticide of disabled infants really came into its own, at one point being considered more newsworthy than the First World War. This was the year in which Dr. Harry Haiselden, a senior Chicago surgeon, made the decision not to operate upon a newborn baby boy who presented a large number of physical deformities, including the absence of one ear and the neck, deformities to the shoulders and chest, and two correctible intestinal defects, including a membrane blocking the lower bowel. Dr. Haiselden consulted the baby's parents, who agreed that the blockage in the lower bowel should not be removed, and the child died five days later. The story caused an immense national debate. It was revealed that Haiselden had ended the lives of other deformed or disabled babies, and that many other doctors had done likewise. Haiselden received many letters of support from parents of disabled children, and a feature film was made, based loosely on the case, written by and starring...Harry Haiselden. The film was a huge success, and it has been estimated that it was being shown as late as 1942. A huge number of other films recommending the 'safeguarding of the race' through the destruction of the 'unfit' were produced right up until the late 1930s.

1901 saw the first full-scale recommendation of 'mercy-killing' by a British doctor, C.A. Goddard. Goddard recommended that 'euthanasia' should be carried out when requested by terminally ill people but, crucially, he also recommended non-voluntary 'mercy-

killing' for those deemed 'mentally handicapped', an idea that, stemming from concerns about the counter-selectivity of modern society, persisted right up until the Second World War. It has also been suggested that the developing cultural climate for safeguarding one's own health contributed to this, leading to growing concern about 'mentally handicapped' people who might not be able to cope with such responsibility, and would become a disproportionate drain on national resources. A recurring feature of 'euthanasia' and eugenics discussions in Britain before World War II is not race, as in the United States, but utilitarian factors concerning cost-benefit analyses of impaired people, from which they generally emerge rather badly. When race is mentioned, it tends to be in social Darwinist terms as we have seen before, as opposed to being conflated with immigration. Although it is highly probable that such concerns did exist, they were not conflated with other issues to the extent that they were in the United States.

Given the history of eugenicist and Social Darwinist discourse in both Britain and the United States, it is important to ask what the relative⁵⁵ reactions were, in these two countries, to revelations of Nazi 'euthanasia' atrocities which emerged during the war itself. Though these revelations were limited, it is instructive to note the effects that they had when they did appear. By 1941 news was reaching the States of a programme in Nazi Germany to kill those with 'lives not worth living'.⁵⁶ That the revelations had some impact is clear, for the Euthanasia Society of America felt bound to make a public announcement differentiating between its beliefs and the newly-reported Nazi programme. Nevertheless, the Society's president, Dr. Foster Kennedy, made a clear distinction between 'euthanasia' of the terminally ill, of which he did not approve, and

⁵⁵ Peter G. Filene, *In the Arms of Others: A Cultural History of the Right-to-Die Movement in America* (Chicago: Ivan R. Dee, 1998), p.6.

⁵⁶ *Ibid.*

that of disabled people (in particular, ‘mentally disabled’ people), of which he was wholeheartedly in favour: ‘Now my face is set against the legalization of euthanasia for any person who, having been well, has at last become ill ... But I *am* in favour of euthanasia for those hopeless ones who should never have been born ... the completely hopeless defective should be relieved of the burden of living’.⁵⁷ This makes it clear that, for some people at least, the genetic qualities of the person in question are the determining factor in the decision whether or not ‘euthanasia’ is justifiable. This demonstrates concerns in the States about race ‘pollution’, as discussed above.

The British Voluntary Euthanasia Society held its annual general meeting for 1941 in May, seven days after news of the Nazi ‘euthanasia’ programme was first reported of the British press, but made no mention of it.⁵⁸ Five months later, however, the head of the Voluntary Euthanasia Legalisation Society, C. Killick Millard, took a similar step to that of the Euthanasia Society of America. Millick published a pamphlet, entitled *Merciful Release*, designed to demonstrate that the Society believed only in voluntary euthanasia for the terminally ill. However, the Society’s report for 1942 acknowledged the existence of support for the non-voluntary ‘euthanasia’ of ‘mentally handicapped’ people, who were assumed to be ‘poor human derelicts’ for whom life held no possibility of happiness.⁵⁹ The conflation in Britain between the idea that impairment entailed intolerable suffering, and the theory that other, perfectly solvable problems were an inevitable result of the impairment in question, will recur regularly throughout the whole of this thesis. This is particularly important, because the following chapters will all show that the ‘euthanasia’ debate is so very often advanced on supposedly compassionate

⁵⁷ Ibid.

⁵⁸ Kemp, p.129.

⁵⁹ Ibid.

grounds, but with a paternalistic failure to involve those on whose behalf the ‘compassion’ is supposedly being expressed.

In both Britain and the United States, in the period just prior to the Second World War, a number of public opinion polls were taken to try to gauge the public’s attitude to the question of ‘euthanasia’. The polls taken in the States were conducted on November 13, 1936, and January 20, 1939. They both asked the question: ‘Do you favour mercy deaths under government supervision for hopeless invalids?’⁶⁰ In both cases, forty-six per cent of the respondents answered yes, with fifty-four per cent answering no.⁶¹ In the first British poll, taken on January 14, 1937, the respondents were asked to consider the following question: ‘Do you consider that doctors should be given the power to end the life of a person incurably ill?’ In this instance, sixty per cent answered yes, thirty-one per cent answered no, and two per cent had no opinion.⁶² In the second British poll, taken in April of 1939, the question had changed yet again: ‘Should those suffering from an incurable disease be allowed the option, under proper medical safeguards, of a voluntary death?’ Seventy-four per cent of those questioned answered in the affirmative, twenty-six per cent in the negative, and a further sixteen per cent had no opinion.⁶³

Though these polls all revolve around the subject of ‘euthanasia’, it is no easy task to evaluate them all together, as the differences between the questions are so marked. Both of the polls from the United States speak of ‘mercy deaths’ as involving some kind of ‘government supervision’, whereas the first British poll emphasizes doctors’ rights and the second, the wishes of patients themselves. Consequently, it is not really possible to

⁶⁰ *Journal of Criminal Law and Criminology*, Vol. 39, No.1, May-June 1948, pp.75-6.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.* I realise this makes 116%, but I am just quoting figures given by others!

use these polls to make sweeping statements about differing attitudes to ‘euthanasia’ in Britain and the United States in the pre-war period. In addition, the polls referred to all suggest that ‘euthanasia’ would only be a consideration in the case of a formerly healthy person who had become seriously, and, usually, terminally ill. Nevertheless, in relation to this enquiry, the question does arise of whether attitudes to ‘euthanasia’ changed markedly (or at all) in the immediate post-war period and, crucially, the period during and after the Nuremberg Medical Trial. A poll conducted by the American Institute of Public Opinion on June 21, 1947, asked the following question: ‘When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end the patient’s life by some painless means if the patient and his family request it?’. In this instance, thirty-seven per cent of respondents answered yes, whilst fifty-four per cent answered no. Nine per cent did not know. When the respondents were grouped by age, the proportion of respondents answering yes dropped from forty-six per cent amongst those aged from twenty-one to twenty-nine, to only thirty-three per cent amongst those aged fifty and over. The proportion of those answering no rose correspondingly, from forty-seven per cent amongst the twenty-one to twenty-nine age group, to fifty-eight per cent amongst those respondents aged fifty and over.⁶⁴ Three years later, a report published in the medical journal *The Lancet* stated that ‘Public opinion, it is clear, has not yet reached that certainty which is indispensable to the success of the campaign to change the law’,⁶⁵ though no sources or statistics are provided for this.

Opinion polls do not quite tell the whole story, however. Whilst they do give a reliable indication of the views of a cross-section of the population of a particular country

⁶⁴ *The Public Opinion Quarterly*, Vol. 11, Fall, 1947, p. 477 (Harvard: Harvard University Press, 1947).

⁶⁵ *The Lancet*, Vol. 255, Issue 6611, (May 13, 1950), p. 915. The ‘public opinion’ in question is, of course, British public opinion.

upon a certain issue, they do not indicate any reasons why such opinions may have been held. Nonetheless, it is startling to note, particularly in relation to the polls conducted in the United States, that pre- and post-war opinions on ‘euthanasia’ did not differ nearly as markedly as one might expect, given the Nazi atrocities and the revelations thereof which had occurred in the intervening period. This strongly suggests that, though ‘euthanasia’ as an interesting moral problem was a topic worth discussing in opinion polls, it was not seen as a subject upon which discussion and reform might urgently be required.

I hope that, by opening up discussions about the history of disability, and about the possibilities of living, we will be able to bring the whole debate into a more humane, less blinkered state. The following chapters establish that there is an alarmingly widespread and persistent willingness to assume that a disability leads directly to irremediable suffering (experienced of course in a societal vacuum), as well as that, not having been properly alive, a disabled person does not suffer from being murdered. By making this deliberate differentiation, I am also echoing a view expressed by the medical ethicist D. D. Raphael in his 1988 article ‘Handicapped infants: Medical Ethics and the Law’.⁶⁶ According to Raphael, ‘the dilemma [about whether or not to prolong life] is more acute in the first type of case [that of severely disabled neonates] than the second [that of terminal illness]. The most important reason for this is that a terminally ill patient may be able and ready to declare his or her choice in the matter, and that should clearly count for more than the opinion of relatives or, often, of doctors. ... Most of the people who are terminally ill have had a fair span of life; the little extra that exceptional measures can procure is like a drop in a pool’.⁶⁷ Of course, a person who is *actually* terminally ill may

⁶⁶ D.D. Raphael. ‘Handicapped infants: Medical ethics and the Law’, *Journal of Medical Ethics*, 14 (1988), p.5.

⁶⁷ Ibid.

feel acutely the unfairness of his or her position, and not agree at all that he or she has had 'a fair span of life'. Nevertheless, I hope this thesis can make a contribution to the possible resolution of what is an increasingly important ethical problem.

Chapter One

‘A Question Which Does Not Enter into the Issues’:

The Nuremberg Medical Trial and the Nazi ‘Euthanasia’ Programme

Introduction

The Nuremberg Medical Trial (NMT) was one of twelve trials held in Nuremberg, by the United States, after the end of the main Nuremberg Trial (the so-called Trial of the Major German War Criminals). The purpose of these twelve trials was to try specific groups of Nazis, such as the industrialists of IG Farben and the physicians convicted of what were termed ‘medical crimes.’⁶⁹ These fell into two categories: the Nazi ‘euthanasia’ programme, and the infliction of brutal medical experimentation upon concentration camp inmates. Paragraph 9 (War Crimes) of the NMT Indictment makes the criminal nature of the ‘euthanasia’ programme clear, accusing the defendants’ of: ‘participation in the so-called euthanasia programme of the German Reich, in the course of which the defendants herein murdered hundreds of thousands of human beings, including nationals of German-occupied countries. This programme involved the systematic and secret execution of the aged, insane, incurably ill, of deformed children and other persons, by gas, lethal injections and divers other means, in nursing homes, hospitals and asylums. Such persons were regarded as ‘useless eaters’ and a burden to the German war machine. The relatives of these victims were informed that they died of natural causes such as heart failure. German doctors involved in the ‘euthanasia’ campaign were also sent to the

⁶⁹ Fred Niebergall, ‘A Brief Survey Concerning the the Records of the War Crimes Trials Held in Nurnberg, Germany’, 42 *Law Library Journal* (1949), pp. 87-90.

Eastern occupied countries to assist in the mass extermination of Jews'.⁷⁰ In 1946, to assist those participating in the prosecution of those Nazis charged with the commission of 'medical crimes', a chart was produced detailing the functions of, and connections between, those who had facilitated and participated in the Nazi 'euthanasia' programme. Though undoubtedly of great value in terms of its elucidation of the participants' respective responsibilities in connection with the programme, the chart may perhaps have been less successful in indicating the criminal nature of the defendants' activities, for it was headed: 'Mercy Killings'. For the purposes of this enquiry, the importance of the Trial lies in the startling mismatch between the enormity of the crimes supposedly being tried, and the abject failure of the prosecution to even recognize their criminal nature. This failure will be fully shown in this chapter. In addition, the Trial's failure to consider enforced and systematic 'euthanasia' to be worthy of criminal sanction if an additional racist motive was not present stored up problems for future debates, as the following chapters will show. It will also be unsurprising that the judges' dismissive attitudes towards the victims of the Nazi 'euthanasia' programme were not some temporary aberration, but reflected the fact that

'the Germans are not 'different' from Americans in any critical sense. ... How they treated their insane, handicapped and retarded was certainly extreme behaviour, but there is no reason to believe ... that the attitudes of the Germans in the 1930s toward the disabled and chronically ill were different in any essential way from the prevailing attitudes elsewhere'.⁷¹

This chapter will demonstrate the truth of this statement.

⁷⁰ See NMT Transcript and also Roger Goodman (ed.), *The First German War Crimes Trial: Chief Judge Walter B. Beals' Desk Notebook of the Doctors Trial, Held in Nuernberg, Germany, December 1946-August 1947*, (1979: Salisbury NC Documentary Publications).

⁷¹ Hugh Gregory Gallagher, *By Trust Betrayed: Patients, Physicians, and the License to Kill in the Third Reich* (New York: Henry Holt and Company, 1990), p.25.

The Nuremberg Medical Trial was a US trial, its official title being United States of America *versus* Karl Brandt.⁷² Despite this, it is unwise to see the Nuremberg Medical Trial (NMT) as a purely US affair, in which nationals of other Allied countries took no part. There are a number of reasons for this. In my view, one of the most important of these is the concern, shared by the British and American Medical Associations, that knowledge of Nazi medical crimes would serve to make the public suspicious of legitimate medical progress.⁷³ This point will take on particular importance later in the chapter, when we consider the formulation of the Nuremberg Code. Other factors which show greater Allied involvement in the preparations for the Trial include the fact that the twelve post-IMT trials, though run by the US, relied for their legitimacy on the principles of international law developed for the Trial of the Major War Criminals.⁷⁴ In addition, crimes to be prosecuted were recognised by their inclusion under Allied Control Council Law No.10. Based upon the international London Agreement, Law No. 10 recognised four categories of prosecutable crime: war crimes, crimes against humanity, crimes against peace (the invasion and occupation of other countries), and membership of a group or organization (the SS – *Schutzstaffel* or protection echelon, created as Hitler’s personal bodyguard and later given charge of extermination programmes) which had been declared criminal by the International Military Tribunal.⁷⁵ This last point will assume greater relevance later in the chapter, when it is time to consider how, in their discussions of ‘euthanasia’, the Nuremberg Medical Trial tribunal took pains to link ‘euthanasia’ to the waging of an aggressive war. For the moment,

⁷² Ulf Schmidt, *Justice at Nuremberg: Leo Alexander and the Nazi Doctors’ Trial*, (Hampshire/New York: Palgrave Macmillan, 2004), p.3.

⁷³ Paul Julian Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent*, (Hampshire/New York: Palgrave Macmillan), 2004, p.3.

⁷⁴ *Ibid.*

⁷⁵ Schmidt, p.119.

however, the US use of Law No.10 demonstrates their concern that ‘their’ trial should, in many ways, not deviate from the international trial which had recently ended.

Some indication of the importance, or lack thereof, which those who convened the Nuremberg Medical Trial placed upon the issue of ‘euthanasia’, is given by the fact that Hermann Pfannmüller was only appearing as a witness. This was in spite of the fact that Eglfing-Haar, the institution of which Pfannmüller had been the director, had been one of the places in which disabled and mentally ill children and adults were killed by various means. These included starvation, and overdoses of Luminal, a sedative which will induce fatal breathing difficulties if consumed in excessive quantities. The two principle defendants actually charged with implementation of, and participation in, the ‘euthanasia’ programme were Karl Brandt, Hitler’s personal physician; Viktor Brack, the Chief Administrative Officer in the Chancellery and a high-ranking officer in the SS and the Waffen SS. Though undoubtedly instrumental in the implementation and running of the programme, neither of these men were in charge of an institution or of killing its inmates. Leaving Pfannmüller as a mere ‘witness’ was a grave, but sadly telling, error.

This chapter, in which the Trial transcript will be closely analysed, will provide evidence that the ‘euthanasia’ programme was not taken at all seriously by the prosecution. There are four areas that will be considered. Firstly, the defendants’ reliance on the portrayal of themselves as caring medical men wishing to alleviate the suffering of people for whom nothing more could be done. Secondly, the defendants’ insistence that their victims were ‘incurably insane’, and were thus incapable of either giving or withholding consent for ‘euthanasia’ to be performed upon them. Finally, there will be a discussion of the interlinked problems of the Tribunal’s focus on non-German victims,

and their drawing-up of the Nuremberg Code. This document, set out by the trial judges after the verdicts had been given, laid down ten general principles relating to informed consent in human experimentation. Thus, it indicates that the judges regarded this to be an ethical problem with implications far beyond the Medical Trial. Why did they not have similar concerns regarding the issue of euthanasia?

‘A mercy death for terribly sick persons’

The defendants’ efforts to portray themselves as progressive, caring men, motivated solely by their compassion for suffering individuals, are highly consistent. Viktor Brack claims that he was introduced to the problems surrounding chronic suffering and the possibility of ‘euthanasia’ whilst still only a young adult. Brack’s father, a physician, was unable to drive, and this meant that Brack junior would act as his father’s driver when he made his home visits. After visits to various patients, Brack senior made various remarks to his son along the lines of ‘For him it would really be a release if he could die soon’.⁷⁶ During his direct examination, Brack tells his counsel Dr. Froeschmann that ‘the relatives of a chronically sick person were often not able to cope spiritually with the length and extent of the sickness’.⁷⁷ In this way, the ground is being prepared for the consistent portrayal of Brack as a kindly, forward-thinking and disinterested man. Nevertheless, Brack claims not to have given serious thought to the question of euthanasia until 1939, when the Reichsleiter, Philipp Bouhler, asked him to participate in the T4 Programme.⁷⁸

⁷⁶ FO 646 Case 1 Medical (*U.S. v. Karl Brandt et al*), Vol. 15, May 6th-13th 1947, p. 7416.

⁷⁷ Ibid.

⁷⁸ FO 646, No. 16, p. 7565.

Eager to educate himself on the subject in hand, Brack visited various large mental institutions. The ‘cases’ he saw there included

‘[A] child. It was a girl of three or four years of age. It was simply a torso. It had no arms, no legs, a big head, albino, red inflamed eyes...It was a terrible sight – simply a body with a head and no possibility that a human being could develop from this creature’.⁷⁹

Michael Burleigh tells us that nobody in the courtroom asked Brack whether such ‘cases’ were typical of the victims of the ‘euthanasia’ programme.⁸⁰ Judging from the trial transcript, this is quite true. This, for the purposes of this enquiry, is problematic. It means that, at the Nuremberg Medical Trial, what may have been allowed to happen is that defendants and defence witnesses may merely have demonstrated the existence of people who differed luridly from the norm, used this as a basis for a lengthy discussion of their own allegedly compassionate motives, and remained relatively unchallenged thereon. It is, as we shall see, undeniable that the ‘compassionate’ motives of the defendants – and of others, such as Hermann Pfannmüller, do take up a very large part of the relevant sections of the trial transcript, and it is this that we shall consider next.

The first part of the direct examination of Viktor Brack is contained in Vol. 15 of the trial transcript. At one point here, Dr. Froeschmann announces that he will ‘leave aside the question of euthanasia’,⁸¹ and he does, before returning to it right at the beginning of Volume 16. Here, Brack is being questioned concerning the connections between the T4 Programme and the extermination of the Jews – not so much regarding

⁷⁹ Ibid.

⁸⁰ Burleigh, *Death and Deliverance*, p. 262.

⁸¹ FO 646, No. 15, p. 7456.

any ideological connection, but rather about the transfer of personnel between the two operations. However, Brack does make it clear that as far as he is concerned, the motives behind the two programmes were as different as could be: ‘The one was euthanasia, mercy death for people whose existence could not be called living any longer, and the other meant the murder of hundreds of thousands of Jews’.⁸²

Unfortunately for the purposes of this study, Brack’s counsel does not challenge him on this alleged distinction, although this is perhaps something which is more likely to occur under cross-examination. It does seem, however, that this is consistent with the problem that we have identified already – namely, the simplistic assumption that the victims of the ‘euthanasia’ programme were suffering intolerably, and a consequent reluctance, by the Tribunal and the prosecution, to mount particularly strong challenges to the claims of people such as Brack that their motives for involvement in T4 were altruistic.

A short time later, Brack is yet again telling the court about the purity and disinterestedness of his motives. The subject under discussion in this case is the question of whether or not the term ‘euthanasia’ was merely a smokescreen to enable the Nazis to rid themselves of all political and ideological opponents, as well as racial ‘undesirables’. Brack denies this, stating:

‘This assumption ... is definitely mistaken ... When euthanasia was introduced, we welcomed it, because it was based on the ethical principle of sympathy, and had humane considerations in its favour, of the same sort that opponents of euthanasia claim for their

⁸² FO 646, No. 16, p.7511.

own ideas. I admit there were imperfections in its execution, but that does not change the decency of the original idea, as Bouhler, Brandt and myself saw it'.⁸³

Again, no attempt is made here to challenge the distinction that Brack has made between, on the one hand, the killing of innocent people in general, and on the other, the killing of people who were disabled or mentally ill.

Reading this, one might legitimately begin to wonder about the question of consent. This will be discussed in greater detail later, in relation to the defendants' claim that many of the victims were 'incurably insane'. However, towards the end of his direct examination, Brack's counsel suggests to him that the 'will to live' of an insane person is broken by the doctor's actions in committing 'euthanasia'. Unsurprisingly, Brack denies this, stating:

'When one saw these sick persons one could readily see that there was no will to live in them, but one had to remember that at one time these people had been healthy and had a will of their own and this, their former will, had to be the basis for the decision...No healthy person, when he sees these wretched creatures, would wish to become such a person himself, and what we want for ourselves I believe we can assume is a wish also on the part of the sick person...'.⁸⁴

Here, we can see that Brack is arguing to the effect that "There was no point my asking these people whether or not they wished to die. I, in my infinite wisdom, could see perfectly well that they did wish it, and so felt under no obligation to trouble them with

⁸³ FO 646, Vol. 16, p. 7532.

⁸⁴ FO 646, Vol. 16, p. 7640.

the question”. As we saw, it was suggested to Brack that a doctor who commits ‘euthanasia’ may be breaking a patient’s will to live, but there is very little in the way of in-depth discussion of the problem.

After Brack’s cross-examination finally begins, on page 7684, Dr. Hochwald, for the prosecution, asks Brack whether he does not believe it to be possible that some insane people are not, in fact, suffering. This follows on from Brack’s implied assertion that insanity and torment are, of necessity, synonymous.⁸⁵ Surprisingly, Brack, having waxed so very lyrical in his descriptions of the torments of insanity, replies tersely: ‘Well, I really cannot judge that. Please ask a physician’.⁸⁶ One does not have to:

‘The wildest scenes imaginable are reported to have taken place then, as some of those people ... did not board the bus voluntarily and were therefore forced to do so by the accompanying personnel’.⁸⁷

This quotation is a report – possibly from the town of Absberg - of a group of patients from an institution boarding a bus which would take them to one of the extermination centres. In relation to this report, Dr. Hochwald asks Brack if he does not agree that this would appear to indicate that the potential victims (or beneficiaries, if you are Viktor Brack) of T4 did not want to die, and that they could and did resist when they knew what was going to befall them. Brack retorts that the report is either an ‘exaggeration’, or an example of patients who ‘had been locked into those so-called strong-houses and who

⁸⁵ FO 646, Vol. 16, p. 7695.

⁸⁶ FO 646, Vol. 16, p. 7696.

⁸⁷ FO 646, Vol. 16, pp. 7701-2.

constituted severe danger for entire humanity’.⁸⁸ Dr. Hochwald then proceed to ask a number of nuts-and-bolts questions regarding such matters as the selection of the doctors to carry out the killings, and the question of who had the last judgement on whether ‘mercy death’ should be administered.

Dr. Froeschmann’s final submission on behalf of his client, following his direct and cross-examinations was as follows:

‘I have tried to establish that the defendant Brack ... was not involved in the murder of 50-60,000 insane persons, but that it could only have been- and was – euthanasia’.⁸⁹

As his direct examination gets underway, Pfanmüller is asked by Dr. Froeschmann to explain to the court what exactly is meant by the term ‘children with serious hereditary and congenital diseases’.⁹⁰ He replies:

‘This means children who are completely incapable of taking a place in human society... who are so ill that any social care of the child outside of a specialist in an institution is quite impossible. That these children have a lifespan which is limited, and may I add something else, this includes serious physical deformities, for example the lack of members ... I had a child with an open heart, and a deformity of the bones so that the brain is exposed, and spinal deformities with paralysis as a result; of congenital blindness and deafness and dumbness’.⁹¹

⁸⁸ Ibid.

⁸⁹ FO 646, Vol. 16, p. 7774.

⁹⁰ Begins FO 646, Vol. 15, p. 7291, 9 May, 1947.

⁹¹ FO 646, Vol. 15, p. 7304.

Having elucidated this term, Pfanmüller answers questions concerning the public tours of Eglfing-Haar that he conducted in his capacity as director of the institution. In Pfanmüller's own words, the purpose of these tours was to educate and

‘inform the public about the necessity of preventing various diseases ... and the misfortune which falls upon humanity when such children are born ... I showed conditions and I told the people how important it is to pass a law like the hereditary health law to carry it out thoroughly and openly...I only pointed out the horror of this condition and the necessity of relieving those poor creatures and their relatives of pain and the child of suffering’.⁹²

One can see here that, in many ways, Pfanmüller is portraying himself in a very similar way to Brack. While both men refer to the victims of T4 as ‘creatures’, they both do so in terms of expressing pity and sorrow for the supposed physical and mental state of institutionalised people. In addition, both Brack and Pfanmüller give lurid examples of very severely disabled people, and then jump straight into a discussion of their own, supposedly altruistic motives. At this point with Pfanmüller, there is, again, no discussion of the actual victims of the T4 programme – no-one enquires of Pfanmüller how typical these seriously disabled children were, whether they really were experiencing intolerable suffering which could not be alleviated except by killing them, or indeed whether they had any distinguishing features other than their impairments. Very much of the remainder of Pfanmüller's direct examination is taken up with the kind of nuts-and-

⁹² FO 646, Vol. 15, pp. 7305-6.

bolts questioning that we saw with Brack – about the organisation of the killing, for example, and about the questions which had to be filled out about patients in institutions.

During the cross-examination of Hermann Pfanmüller, the prosecutor, Mr Hardy asks Pfanmüller a great many questions concerning the meetings he had with Philipp Bouhler, and with other people, concerning the beginnings of, and motivation for, the T4 programme. Mr. Hardy then questions Pfanmüller concerning a statement he made during an interrogation on 21st September 1946, claiming that the aim of the programme was to create beds for wounded soldiers. Pfanmüller has no recollection of having said this.⁹³

Extensive questioning ensues regarding the aforementioned questionnaires, the meetings that were held to facilitate the inception of the T4 programme, and the question of how Pfanmüller became an ‘expert’ with the right to give medical opinions on the people to be killed (he had been asked to do so by the Ministry of the Interior).⁹⁴ Towards the end of his cross-examination, Mr. Hardy finally turns his attention to the killing of children which took place at Eglfing-Haar, during Pfanmüller’s directorship. In particular, Mr. Hardy’s questions relate to the killing of children by means of overdoses of the sedative Luminal. On page 7391 of the transcript, Pfanmüller is asked by Mr. Hardy how he would ‘be able to afford these sick children a mercy death without too much suffering’, to which Pfanmüller replies that this would be done by administering Luminal. Asked how much Luminal would actually be required to give ‘one of these terribly sick persons a mercy death’, Pfanmüller replies that the dosage would vary, but that ‘after a few days the child just quietly goes to sleep, the child simply dies of a certain

⁹³ FO 646, Vol. 15, p. 7338.

⁹⁴ FO 646, Vol. 15, p. 7377.

congestion in the lungs ... if there is anything such as putting a person to sleep gently then this is certainly it, to accord a mercy death'.⁹⁵ It should be emphasized here that the person referring to Pfanmüller's 'giving one of these terribly sick persons a mercy death' is Mr. Hardy, the *prosecutor*. Michael Burleigh has remarked that Mr. Hardy's use of irony and understatement was presumably lost on Hermann Pfanmüller. I must say that, if Mr. Hardy was being ironic in the passage quoted above, his efforts were lost on me as well. He seems merely to have failed rather badly to mount any kind of effective challenge to Pfanmüller's repeated assertions that his actions were merciful.

As Pfanmüller was a witness and not a defendant - a fact that speaks for itself - his case is not 'summed-up' in the same way that Viktor Brack's was by Dr. Froeschmann. Nevertheless, before Pfanmüller leaves the witness box, Dr. Froeschmann conducts a short redirect examination, which he concludes with the following eloquent passage:

You were specifically instructed to refuse to answer questions that might incriminate you. You have made no use of that right ... as to how many of these children there were whose lives you shortened by the use of Luminal, and ... answered in a most credible way that you gave a mercy death to 100 or 120 of these wretched creatures.⁹⁶

At least for the time being, Hermann Pfanmüller did not have to worry that his pronouncements would incriminate him. Despite having admitted, at the Nuremberg Medical Trial, that he had killed a large number of people, Pfanmüller was convicted only in 1951, by a West German court. Viktor Brack was hanged, although one may infer

⁹⁵ FO 646, Vol. 15, p. 7391.

⁹⁶ FO 646, Vol. 15, p. 7404.

from the Trial judgement that his role in T4 may not have had a great deal to do with this. The historian Michael Marrus has described the following statement as ‘forthright, if chilling’:⁹⁷

Whether or not a state may validly enact legislation which *imposes* [my italics] euthanasia upon certain classes of its citizens is a question which does not enter into the issues. Assuming that it may do so, the Family of Nations is not obligated to give recognition to such legislation when it manifestly gives legality to plain murder and torture of defenceless and powerless human beings of other nations.⁹⁸

This reference to ‘beings of other nations’ will be discussed in greater detail presently. For now, it is to be hoped that the present writer has successfully demonstrated that the Nuremberg Medical Trial defendants charged in connection with T4 were steadfast in their insistence that they had acted out of compassion. It is also to be hoped that the prosecution’s effectual failure to challenge these arguments has been demonstrated, showing that in terms of offering an in-depth analysis of what may or may not be considered ‘intolerable suffering’, the Nuremberg Medical Trial was sadly lacking.

‘The patient cannot decide about himself’

This section will demonstrate that the definition of ‘incurable insanity’ for the victims of the Nazi ‘euthanasia’ programme was of great importance, as it allowed the defendants

⁹⁷ Marrus, Michael, ‘The Nuremberg Doctors’ Trial in Historical Context’, *Bull. Hist. Med.*, 1999, 73, 106-123, 117.

⁹⁸ FO 646, Vol. 23, p. 11395.

ample opportunity to demonstrate their ‘altruism’, as discussed above. However, the definition also permitted the NMT defendants to at least attempt to bypass the problem of the non-consensual nature of the ‘euthanasia’ killings, by arguing that the victims did not know what they wanted or what was best for them, rendering it necessary that decisions about their future should be made for them. One might argue that the claim that patients who were killed were all insane does sit rather awkwardly alongside such things as Nazi propaganda against the ‘hereditarily ill’, the text of the Law for the Prevention of Hereditarily Diseased Offspring, and the children’s ‘euthanasia’ programme, none of which confined themselves solely to discussions of people with mental disorders.⁹⁹ In addition, the children mentioned by Hermann Pfannmüller clearly had physical impairments, as discussed above (page 30).

As might be expected from what has been seen so far, the NMT defendants preface their discussions of ‘incurable mental patients’ with extreme descriptions of institutionalised people whom they had allegedly encountered, either in a professional capacity or whilst ‘educating themselves’ about the ‘problem’ of chronically ill people. This is a subject upon which Viktor Brack waxes particularly lyrical. Asked by his counsel, Dr. Froeschmann, to explain the development of his own ideas on the subject, Brack responds as follows:

‘Immediately after the Reichsleiter [Philipp Bouhler] told me he had received this order I visited some of the big mental institutions in Berlin and in the neighbourhood of Berlin to find out what these people looked like who were to be relieved from suffering...In the institution Buch I saw a woman who...bared her teeth at people when they came near and

⁹⁹ For a full discussion of this, see for example Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945*, (Cambridge: Cambridge University Press, 1994).

was absolutely incapable of any contact. She took her food like an animal. She did indecent things with her excrement'.¹⁰⁰

When asked by Dr. Froeschmann to give his reaction to the charge that his participation in 'euthanasia' amounted to a crime against humanity, Brack responds that: 'in my actions and my attitude the definitive consideration was pity for the sick person'.¹⁰¹ Similarly, Karl Brandt, Hitler's personal physician, uses the picture he has already painted of the lives of hypothetical psychiatric patients to underline what he claims were his own compassionate motives. Asked by the prosecuting counsel, Mr. McHaney, whether it is true that an insane person may not, in fact, be suffering pain, Brandt replies: 'We weren't concerned with pain in the case of these insane patients. We were concerned with their condition, their entire condition, their mental condition'.¹⁰²

It is worth mentioning that it is at this point that Mr. McHaney questions Brandt about his insistence that it was 'only' people who were incurably insane who were murdered under the adult 'euthanasia' programme, and that "other persons were always exceptions".¹⁰³ Mr. McHaney notes Brandt's repeated insistence on this point, which is, he says, in stark contrast to the Hitler decree, which makes reference only to 'incurable persons'. He then asks Brandt: 'The programme was not limited to insane persons, was it?'.¹⁰⁴ Brandt replies that

¹⁰⁰ FO 646, No. 16, p. 7565.

¹⁰¹ FO 646, No. 16, p. 7643.

¹⁰² FO 646, No. 6, p. 2472.

¹⁰³ FO 646 No. 6, p. 2397.

¹⁰⁴ FO 646, No. 6, p. 2471.

“Individual cases of individual patients who were not insane did occur, and did actually come to my knowledge. It did not come to my notice on the other hand that they were subjected to euthanasia’.¹⁰⁵

Pressed on the subject, and asked by Mr. McHaney if he is ready to swear that ‘only’ insane persons were included, Brandt replies that this is ‘exactly what he wishes to express’.¹⁰⁶

Thus far, Brandt and Brack’s reliance on the description of their victims as ‘mental patients’ has been established, as has the prosecution’s degree of scepticism about the term. Nevertheless, we have not really discovered *why* the claim was so important to the defence. After all, if Brandt and Brack wished to demonstrate their alleged altruism, could they not have done so just as effectively by giving lurid descriptions of, say, physically disabled people? Does not their emphasis upon the mentally ill mean merely that most of the adult victims of T4 *were* mentally ill?

Perhaps the answers to these questions can be provided most adequately by further investigation into the reasons for Brandt and Brack’s emphasis on the T4 victims’ alleged insanity. Following on from the ‘descriptions’ given by Brandt and Brack of the conditions of the insane people they had allegedly encountered, come claims from both defendants that people who were insane had no will to live. Closely connected with these are allegations that this was easy to see, and that there was, consequently, no need to question the potential victims about their own feelings on the subject, or about any objections they might have had concerning the possibility of being killed without their

¹⁰⁵ FO 646, No. 6, p. 2472.

¹⁰⁶ *Ibid.*

consent. Finally, this leads on to perhaps the most egregious use, by Brandt and Brack, of the term ‘mental patient’ - the two defendants will argue both that the victims’ alleged mental conditions meant that they had no understanding of concepts of life and death, and that they did not suffer any terror prior to being gassed, as they were simply too insane to understand what was happening to them. First, however, we must look at Brandt and Brack’s discussion of the T4 victims ‘loss’ of the will to live on the basis of their ‘insanity’.

A good example of this comes during Viktor Brack’s direct examination. Dr. Froeschmann asks why the decree mentions ‘incurably ill’ but not, specifically, ‘incurably insane’ people. Brack replies:

‘I never received any instruction about incurably sick persons being included in euthanasia, only incurably insane. Only cases where the mental condition had led to a complete destruction of personality and the life expectation – physical life of the insane is not of any importance in that connection’.¹⁰⁷

Similar comments are made by Karl Brandt. Being questioned by his counsel, Dr. Servatius, about the ‘euthanasia question’ and how Hitler viewed it. Brandt says that ‘He [Hitler] gave me general directives of how he imagined it, and the fundamental, insane persons, who were in such a condition that they could no longer take any conscious part in life’.¹⁰⁸

Following almost naturally on from this is the opinion, voiced by both Brandt and Brack, that the condition of the ‘insane’ people in question was so self-evidently hopeless

¹⁰⁷ FO 646, No. 16, p. 7582.

¹⁰⁸ FO 646, No. 6, p. 2396.

that it was quite justifiable for someone else to take the initiative and ‘put them out of their misery’. Brandt gives a good example of this when he says, in reply to a question from Dr. Servatius:

‘If anybody wants to judge the question of euthanasia he must go into an insane asylum and he should stay there with the sick people for a few days. Then we can ask him two questions: the first would be whether he himself would like to live like that, and the second, whether he would ask one of his relatives to live that way – perhaps his child or his parents. The answer cannot be connected with the concept of demonic order but it will be deeply felt gratitude for his own health and the question of whether it is more humane to help such a being find a peaceful end or to care for it further’.¹⁰⁹

Brack makes a number of similar remarks. For example, he is asked by his counsel, Dr. Froeschmann, whether an insane person might not still have some will to live, and whether the physician does not break this by undertaking euthanasia? Brack replies:

‘...what we want for ourselves, I believe we can assume is a wish on the part of the sick person were he as he was formerly, healthy, so that he could form a healthy judgement. If the sick person was in a position to recognise the situation in which he finds himself, he himself would beg to have that condition shortened ... I decided that these people should be released from their tormented condition’.¹¹⁰

¹⁰⁹ FO 646, No.16, pp. 2434-2438. This passage forms part of Brandt’s four-page (!) answer to Dr. Servatius’ question: “If you consider this whole Euthanasia programme as a whole, is there not something horrible about it?” Unsurprisingly, Brandt does not think so, and launches into a long and completely abstract discussion of the ‘issues’ involved.

¹¹⁰ FO 646, No. 16, p. 7640.

One can see here that Brack's aims are twofold. Firstly, he is attempting to demonstrate that the sight of the 'pitiful creatures' he allegedly encountered in mental hospitals convinced him that killing them was the correct thing to do. Secondly, he is claiming that if the patients were to see themselves as they had become, they would also beg for euthanasia to be carried out upon them. This leads us on to the final and, perhaps, most important use by Brack and Brandt of their victims' alleged insanity.

I demonstrated above how Viktor Brack argued that, if a mental patient could see himself as he had become, he would beg to be 'put out of his misery'. Under cross-examination (carried out by Mr. McHaney), Karl Brandt goes even further, and argues that this decision must be taken by somebody knowledgeable and competent – somebody rather like Karl Brandt, in fact. Asked by Mr. McHaney whether he believes that all the patients who were killed wanted to die, Brandt is not lost for words:

'That is a question which I cannot answer in this form. I am of the conviction that the patients did not have a clear concept of their actual condition because they were insane and among them were certainly cases which, in excess of that, certainly were suffering. It is quite possible that a human being, who might be described by the simple word 'crazy' might under such circumstances not even realise the difference between life and death. In this form you cannot even include such people as to the question if they want to die or if they do not want to die'.¹¹¹

¹¹¹ FO 646, No. 6, p. 2525.

This is a theme that Brandt also pursues in his direct examination by Dr. Servatius. Asked about the approval of the insane (regarding their imminent destruction), Brandt states:

‘The question of the approval of the insane was disregarded. The point of view was that the insane person himself is in no condition to judge his situation...For this reason, since the patient lacked understanding of his own situation, there could be no question of approval. If one were to say that the patient gave his approval, that means exactly if one says he did not approve...the patient cannot decide about himself...for one can judge only on the basis of the diagnosis, and considering the condition and the prognosis, only the doctor can reach the decision. It cannot be left to the patient himself’.¹¹²

This demonstrates eloquently the great importance to the defendants of the claim that their adult victims were insane, and thus, supposedly, incapable of understanding anything about their condition or what was in their ‘best interests’.

Perhaps the final words should be left to Viktor Brack. Asked by Dr. Froeschmann to describe the reactions of ‘insane’ people being led to the gas chambers, Brack says: ‘I don’t believe they had any idea where they were going at all’.¹¹³ Dr. Froeschmann, requiring further elucidation as to why this was so, asks: ‘Do you mean because they were insane or incapable of having an idea or simply if they had some degree of intelligence they did not know what was going to happen?’ Brack: ‘I meant the former’.¹¹⁴ Brack’s aim in this instance could hardly be much more explicit – by

¹¹² FO 646, No. 6, p. 2427.

¹¹³ FO 646, No. 16, p. 7769.

¹¹⁴ Ibid.

highlighting the alleged insanity of the victims, he essentially sought to absolve the perpetrators from any possibility of blame, not by claiming innocence, but by alleging that the condition of the victims was such that they could neither make decisions about their own lives, nor understand that those lives were about to be ended.

The aim of this section was to demonstrate that the claim that the victims of T4 were ‘incurably insane’ was of great importance to the defence, and most especially to Brandt and Brack. Given the importance placed on it, versus its incongruity with other aspects of the Nazis’ opinions on the ‘hereditarily ill, there is room for at least some doubt that all the adult victims of T4 *were* insane. This question will be considered in greater depth in the chapter dealing with historians.

‘The dereliction of the defendant contributed to their extermination’

The final problem which this chapter will consider is that of why, when they formulated the Nuremberg Code to govern future medical experiments upon human beings, the Nuremberg Medical Trial judges manifestly refused to countenance the possibility that ‘euthanasia’ was a similarly difficult ethical problem, requiring the formation of similar general guidelines. Intimately connected with this is the attention which the Tribunal paid to non-German victims. This section will argue that, in this regard, the Nuremberg Medical Trial was utterly inconsistent in its pronouncements. As we saw above, the judges declared that they would not consider the question of whether a state might legitimately *impose* ‘euthanasia’ upon certain classes of its own citizens. This would

become a matter of international concern only if a state began to attempt to impose ‘euthanasia’ upon nationals of other sovereign states.

This approach – the claim that the Tribunal were not entitled (or did not want to) – consider crimes committed by the Nazis against their own citizens, should never have arisen. It had already been solved by the inclusion of ‘crimes against humanity’ in the IMT indictment.¹¹⁵ This inclusion was the result of lobbying by Jewish and other anti-Nazi émigrés who were concerned that their suffering might come to be overlooked.¹¹⁶ Though the US Chief Prosecutor Robert Jackson insisted that all crimes must be linked to the waging of an aggressive war, the text of the definition of ‘crimes against humanity’ was not qualified.¹¹⁷ Even if it had been, linking ‘euthanasia’ with this would have been easy – if the Tribunal had wanted to do it.

The NMT Tribunal were, not surprisingly, extremely concerned that a person participating in a medical experiment should not only consent to it, but should have been thoroughly informed about all aspects of the experiment to allow his or her choice to be a fully enlightened one. Furthermore, the Tribunal stipulated that a subject of such an experiment must be free from coercion, and that the experiment should be such as to yield fruitful results for the good of society [which are] inprocurable by other means or methods of study”.¹¹⁸

One can see from this that the Tribunal is greatly concerned with promoting the principle of ‘informed consent’, and this aim becomes even more apparent when we see that this is, in fact, the very first of the ten principles comprising the Nuremberg Code. Of

¹¹⁵ Marrus, ‘The Nuremberg Doctors’ Trial in Historical Context’, p. 115.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ FO 646, No. 23, p. 11374.

course, the Tribunal's reasons for accentuating this requirement were more than apparent. In the Tribunal's own words, 'In every single instance appearing in the record, subjects were used who did not consent to the experiments'.¹¹⁹

I showed above that, during the course of the Medical Trial, the issue of the consent of people subjected to 'euthanasia' was occasionally touched upon. Though the defendants persistently argued that the victims were incapable of consenting to anything, but would have consented had they been able to do so, the prosecution did attempt to highlight the victims' lack of consent, albeit on only one or two occasions. Consequently, as regards those sections of the judgement relating to 'euthanasia', we shall now see the degree of importance which the Tribunal attaches to the question of consent under these circumstances. The Judgement mentions 'euthanasia' particularly as regards Karl Brandt and Viktor Brack. The question of consent in relation to euthanasia, however, is discussed in two passages, all of which are contained within the judgement relating to Karl Brandt. Firstly, the Tribunal states that 'the consent of the *relatives* [my italics] of the 'incurables' was not even obtained; the question of secrecy being so important'.¹²⁰ The fact that the word 'incurables' appears in inverted commas does suggest that the Tribunal was not entirely convinced by the defendants' assertions regarding the pitiful state, complete incapacity, and bleak prognosis of the victims. Nevertheless, why was no mention made of the victims' own lack of consent? It had not been established that they were incapable of giving (or of refusing) consent, merely that their consent was not sought.

¹¹⁹ FO 646, No. 23, p. 11376.

¹²⁰ FO 646, No. 23, p. 11394.

The second example appears a little further on, when the Tribunal is considering the inclusion in the programme of non-German nationals. The Tribunal states that ‘The evidence is conclusive that...non-German nationals were selected for euthanasia and exterminated. Needless to say, *these persons did not voluntarily consent* to become the subjects of this procedure’.¹²¹ [My italics]. One can see here that a remarkable transformation has occurred. When the Tribunal were speaking in more general terms of the (overwhelmingly German) victims of the T4 Programme, it was noted that the consent of their *relations* had not been sought. By contrast, when making reference to the non-German victims, the Tribunal is careful to note that the victims *own* consent was not sought. In addition, it was shown that Karl Brandt and Viktor Brack were adamant that ‘only’ adults who were incurably insane (whatever this means), were subjected to ‘euthanasia’. We also saw that Brandt claimed that their alleged insanity was the reason why their consent was not sought.¹²² While it is unwise to regard Brandt’s pronouncements as constituting the unvarnished truth, one may infer from them that consent was not sought from *anybody* subjected to ‘euthanasia’.

As well as the question of the importance of consent, the Tribunal’s previous remark concerning the consent of non-German nationals also points to another problem. Namely, throughout the judgement, the Tribunal repeatedly stresses the suffering of non-German nationals, even though the victims of the T4 programme, for example, were overwhelmingly German. This emphasis upon non-German victims weakens the impact of the Nuremberg Code, and, of course, how this emphasis affects the Tribunal’s view of ‘euthanasia’. Above, a quotation was given from Michael Marrus’ article on the

¹²¹ Ibid.

¹²² See, for example, FO 646, No. 6, p. 2427.

Nuremberg Medical Trial, and he has also identified this emphasis on non-German victims, regarding it as one of the Trial's major failings.¹²³ He has argued that, due partly to a desire on the part of the Allies to punish crimes which could be connected with the waging of an aggressive war,¹²⁴ the focus was deliberately shifted away from crimes committed against German civilians. This meant that “the Trial suffered grievously as a chronicle of the medical crimes of the Third Reich”.¹²⁵

In terms of ‘euthanasia’, Marrus is largely correct in his assertions. When giving judgement upon Karl Brandt, the NMT judges make one particularly telling comment, aside from those already given concerning non-German victims of ‘euthanasia’. When criticising Brandt for his desertion of the T4 programme after its inception, the judges remark:

“The evidence is conclusive that persons were included in the programme who were not German nationals. The dereliction of the defendant contributed to their extermination. That is enough to require this Tribunal to find that he is criminally responsible in the programme ... whatever may have been the original aim of the program, its purposes were prostituted by men for whom Brandt was responsible, and great numbers of non-German nationals were exterminated under its authority”.¹²⁶

One can see in this bizarre accusation a clear concentration by the Tribunal on the sufferings of non-Germans. This supports earlier comments made by the Tribunal, which demonstrate a deep reluctance to consider the potential moral and ethical implications of

¹²³ Marrus, p. 116.

¹²⁴ Although one would think that this would include the ‘euthanasia’ programme, at least judging by the description of it given in the indictment.

¹²⁵ Marrus, p. 116.

¹²⁶ FO 646, No. 23, p. 11395.

the T4 programme fully, except when the programme resulted in the killing of non-Germans.

It is now time to look again at the Nuremberg Code, and see if its principles seem similarly circumscribed by a desire on the part of the Tribunal to protect foreign nationals, but not a state's own citizens. Upon reading the ten principles forming the Nuremberg Code, it is obvious that they are intended to be of general applicability, and not for the sole benefit of foreign nationals undergoing medical experiments. The Tribunal does state very frequently that many of the victims of medical experiments in concentration camps were non-German nationals.¹²⁷ Nevertheless, it is also very anxious to condemn the extreme cruelty of the experiments, and their totally non-consensual nature. In addition, the Code's concern to promote 'informed consent' for those taking part in medical experiments makes it appear that its primary purpose was, as was claimed, the advancement of the doctrine of informed consent.

In relation to this, one final question needs to be answered. Namely, to what extent was the Nuremberg Code drawn from already existing laws and principles? Might the extensive, but wholly inadequate discussion of 'euthanasia' at the Nuremberg Medical Trial be explained by saying that the Tribunal, whilst being willing to base new principles upon existing practises, was reluctant to lay down completely new guidelines? Although few concrete sources are given, the NMT judgement does state that, if conducted properly, certain medical experiments will "conform to ethics of the medical profession generally, when carried out on human beings."¹²⁸ Those performed in concentration camps, by contrast, were performed in 'complete disregard of international

¹²⁷ FO 646, No. 23, p. 11376.

¹²⁸ FO 646, No. 23, p. 11373.

conventions, the laws and customs of war, the general principles of criminal law... and Control Council Law No. 10'.¹²⁹

But what of 'euthanasia'? The subject of existing laws is mentioned once in this regard, concerning Hitler's decree of September 1939. This authorised Brandt and Bouhler to "grant a mercy death to incurably ill persons", and is generally regarded as being the 'authorisation' for the T4 programme. In relation to this decree, the Tribunal states: 'The foregoing order was not based on any previously existing German law, and the only authority for the execution of euthanasia was the secret order issued by Hitler'.¹³⁰ This would suggest that currently existing legislation was of great importance to the Tribunal. The problem, for the purposes of this enquiry, is twofold. Firstly, the discrepancy between 'being granted a mercy death', and being subjected to a non-consensual killing programme for which one's consent was neither sought nor desired. Secondly, there is the whole problem of consent itself. Even if the decree *had* been based on existing German law, that does not alter the fact that the patient's consent to the 'mercy death' is not actually mentioned in the decree.¹³¹ In addition, the creation of new safeguards in response to recent crimes does not, in this regard, appear to be of any concern to the Tribunal. This means that, despite the creation of much new post-war human rights legislation, there was no desire to offer guidance of any kind on what, if anything, constitutes real euthanasia, or, equally importantly, to protect vulnerable people from lethal decisions made on their behalf, but without their consent.

In relation to its formation of the Nuremberg Code, the Tribunal states that its concerns are purely legal, and the requirements it has laid down are those which will be

¹²⁹ FO 646, No. 23, p. 11376.

¹³⁰ FO 646, No. 23, p. 11393.

¹³¹ See the English translation of the decree, quoted in *ibid.*

of service in determining criminal culpability.¹³² To go beyond this would, the judgement states, be beyond the judges sphere of competence.¹³³ The Tribunal exhibited, it seems, both a general unwillingness to consider crimes committed against German civilians and a strong feeling that, while it was acceptable to draw general principles from existing legislation, inventing new laws on the basis of what had gone wrong was a step too far.

Conclusion

If the Nuremberg Medical Trial judges had been a little bolder, it is more than possible that less controversy over euthanasia might exist today. This may be too dramatic a statement, as there are (one would hope), many differences between the Nazi ‘euthanasia’ programme, and euthanasia debates and legislation which exist today. Nevertheless, future chapters will demonstrate that, for good or ill, the Nazi experience casts a very long shadow. As this chapter has demonstrated, many of the arguments employed by the perpetrators would not be out of place in *any* defence of euthanasia, no matter how well-meaning. Of course, the NMT defendants may have used such arguments disingenuously, but in view of their relevance to other debates about euthanasia, it is unwise to proceed without taking the Nuremberg Medical Trial into account. The following chapters will show that this is just what many scholars have failed to do. They will also show the ways in which scholars *have* attempted to solve these problems. Among the issues to be discussed will be that of ‘race’. As mentioned above, there is not complete agreement amongst historians concerning the extent to which the ‘euthanasia’ programme was utilitarian, versus its connection with ‘racial biology’. The following chapters will

¹³² FO 646, No. 23, p. 11375.

¹³³ *Ibid.*

consider both what implications this has for study of the ‘euthanasia’ programme itself, and the effect that this problem has had on later debates. First, however, we need to discover how the Nuremberg Medical Trial was portrayed in the British and U.S. media, and also how it was viewed by professionals in various relevant academic fields, such as medicine and law. This is very important, as this chapter has shown that the Nazi ‘euthanasia’ programme was not taken seriously by anyone at the Nuremberg Medical Trial. The defendants’ claims to have been motivated by ‘compassion’ met with little or no resistance and the Tribunal actually announced that the prospect of a state *imposing* ‘euthanasia’ upon classes of its citizens (as had already happened in Germany) did not concern them. We need to discover if this attitude was unusual, or if it was widespread in Britain and the United States. Was the Tribunal’s chilling indifference to the victims of the Nazi ‘euthanasia’ programme condemned, or even commented upon, by anyone outside the Tribunal? If not, can we gain any insights as to why this was so? The next chapter will show that no such comments were made. In both countries, the press, as well as journals in the fields of law and medicine persistently described the Trial as one solely concerned with the prosecution of Nazis who had subjected concentration camp inmates to brutal medical experiments. In one sense, this leaves us none the wiser as to how the wider societies in the United States and Britain regarded the Nazi ‘euthanasia’ programme. However, I will argue that the silence speaks for itself. Given the dismissive attitude to victims of systematic murder which has been catalogued in this chapter, this should not be entirely surprising.

This chapter has demonstrated the toxic mixture of expediency, indifference and paternalism with which both prosecution and defence at the Nuremberg Medical Trial

treated the Nazi ‘euthanasia’ programme and its victims. Four different but intimately connected matters were discussed. The chapter opened with evidence to show that Viktor Brack, Karl Brandt, and the defendant Hermann Pfannmüller were consistent in their portrayals of themselves as caring medical men whose sole motivation was the amelioration of suffering. At the same time, I also showed that this portrayal was inadequately challenged by the prosecution. The chapter then moved on to consider Brandt and Brack’s insistence that the victims of the ‘euthanasia’ programme were incurably insane, a claim which they relied upon to allow them to sidestep the issue of consent – an issue which could hardly be said to have been rigorously pursued by the prosecution anyway. The third section of the chapter dealt with the Nuremberg Code and the fact that the Tribunal did not consider the possibility of implementing any similar guidelines with regard to ‘euthanasia’. The final section of the chapter considered the prosecution’s focus on non-German victims of ‘euthanasia’. While this was clearly explicable in terms of the aims and basis of the Trial, it does mean that the Trial failed to shed a great deal of light on the Nazi ‘euthanasia’ programme. What the Trial did, as anybody who cares to read the transcript can clearly see, is to show with dismaying clarity the pre-existing ideas of the Court with regard to ‘euthanasia’. Above all, it reveals the paternalistic assumption that the problem could be solved without any attempt to solicit the views of those who would be subjected to ‘euthanasia’, and certainly without recognising them as full human beings, individuals or indeed as any thing very much. This chapter has shown that in this particular instance, the victims of ‘euthanasia’ were dismissed because they were German, and dismissed because of their impairments. As further chapters will show, this egregious paternalism has continued in different forms,

into discussions of 'euthanasia' in many fields. The next chapter, however, will consider how, in both the United States and the United Kingdom, public discussion of the case focused overwhelmingly on the medical experiments carried out by the defendants, and the 'euthanasia' programme was virtually ignored. Although one might argue that such an absence of discussion leaves us none the wiser with regard to the prevailing societal attitudes of the time, it is in fact extremely telling, particularly when considered in conjunction with individual 'euthanasia' cases of the time.

Chapter Two

‘German Doctors Accused of Atrocities’: How the Outside World Saw the Nuremberg Medical Trial

Introduction

This chapter will consider the reception of the Nuremberg Medical Trial in both the United States and Britain. This consideration will begin with the reception of the Trial in US and British legal journals, during and shortly after it had taken place. This section will show that there was very little discussion in either country of the Nuremberg Medical Trial itself – in contrast to the earlier Trial of the Major German War Criminals. Such discussions as did take place portrayed the NMT as having been convened for the exclusive purpose of prosecuting Nazis accused of medical experimentation upon inmates of concentration camps. These journals do debate non-Nazi ‘euthanasia’, particularly with regard to legal cases which occur, but it is striking that the revelations concerning the Nazi ‘euthanasia’ programme do not impinge in the slightest upon these debates. This shows that the chilling indifference to the ‘euthanasia’ revealed in the last chapter cannot be merely explained away by making reference to, for example, the NMT tribunal’s lack of sympathy for German victims of Nazi atrocities, or their need to link the crimes they tried to the waging of an aggressive war. On the contrary; this section will show that this dismissive attitude pervaded both societies. This theme will be pursued in the second section of the chapter, which will provide an overview of the reactions to the NMT which

are to be found in medical journals of the time from both the United States and Britain. These journals also portray the Nuremberg Medical Trial as a trial in which the sole crime of the defendants was that of human vivisection. Probably as a result of this, there is much discussion of the ethics of using data obtained in such experiments. This discussion is particularly prevalent in the *Lancet*, and it is quite clear that, though medical professionals of both countries identify that the medical crimes of the Nazis give rise to ethical problems which need to be considered by the worldwide medical community, ‘euthanasia’ is emphatically not one of these problems. The final section of the chapter will demonstrate how the Trial was reported in newspapers and news magazines.¹³⁴ I will show that, although some reports of Nazi ‘euthanasia’ are to be found, the Trial was reported overwhelmingly as being solely concerned with the prosecution of perpetrators of medical experiments upon human beings in concentration camps. Brief reference will also be made to a number of pre- and post-war opinion polls from both countries, the existence of which indicates that there was interest in ‘euthanasia’ as a hypothetical moral problem. The message of the chapter as a whole is, however, that, influenced in part by the portrayal of the Trial in the popular press, the post-war period is notable for its failure to consider the relationship between Nazi ‘euthanasia’, and wider debates on the issue. Whatever interest was taken in the discussion of largely hypothetical ethical problems did not translate into either a desire for law reform, or a sea-change in attitudes towards ‘euthanasia’ and the people who might be subjected to it.

¹³⁴ The newspapers consulted are *The New York Times*, the *Washington Post*, the *London Times*, the *Daily Telegraph*, and the *Manchester Guardian*. News magazines consulted are *Time*, *Newsweek*, *The Economist*, and the *Spectator*. As these last two contain no real discussion of the Nuremberg Medical Trial, they have not been discussed in this chapter. They do contain numerous discussions pertaining to the post-war situation, and these can be found by consulting the 1946 and 1947 volumes of the two periodicals. Similarly, the *Manchester Guardian*’s main report of the Trial came on the day the sentences were announced, with no announcement of the Trial’s commencement.

There were, as we shall see, a number of hotly debated cases of ‘mercy-killing’ in both Britain and the States in the immediate post-war period, Nazi ‘euthanasia’ appears to have had surprisingly little impact on discourse in either country. There may have been a number of reasons for this, such as the sheer number of reports of Nazi atrocities which were received by the British and United States authorities and public in the post-war period, as a recent book has argued.¹³⁵ However, I do not believe that this alone is an adequate explanation of why the Nazi ‘euthanasia’ programme received so little attention in the British and U.S., particularly during the period in which the Nuremberg Medical Trial was taking place. It is at this time when one would have expected the topic of ‘euthanasia’ to have occupied at least a relatively important place in British and U.S. public discourse. As this chapter will show, this did not happen. Why was this?

There would appear to be two main reasons. The previous chapter showed the Nuremberg Medical Trial Tribunal’s distinct unwillingness to acknowledge the fact that the overwhelming majority of the victims of the ‘euthanasia’ programme were Germans. As discussed in the previous chapter, there were a number of reasons for this. In their judgement against Karl Brandt, the Tribunal even made the bizarre statement that, by deserting the ‘euthanasia’ programme after its inception, Brandt had allowed ‘abuses’ (the killing of non-Germans) to occur. This demonstrates very strongly that the Tribunal failed to view the ‘euthanasia’ programme in its entirety as ‘an abuse’. So, one might argue that the programme received little attention in the United States and Britain because there was simply little or no public sympathy for German victims of Nazi atrocities. Whether there is truth in this assertion is difficult to establish, as the dearth of

¹³⁵ N.D.A. Kemp, *Merciful Release: The History of the British Euthanasia Movement*, (Manchester: Manchester University Press, 2002).

newspaper references to ‘euthanasia’ during the period of the Nuremberg Medical Trial does not point to any particular antipathy towards the victims of the programme; rather, a lack of interest in them. The reasons for this lack of interest remain elusive, but a number may be suggested. Firstly, many writers have suggested that, in the immediate post-war period, there were simply so many reports of Nazi atrocities of varying kinds that some of these simply failed to have much impact upon the public imagination in either Britain or the United States.¹³⁶ Further, it has been suggested that, over time, the public grew increasingly accustomed to the apparently endless tide of ‘atrocious stories’ and began to develop some degree of compassion fatigue, particularly when, as in the case of Britain, they were grappling with the massive reconstruction needed in their own country.¹³⁷

There is, however, a somewhat darker explanation for the general silence on the subject of Nazi ‘euthanasia’, and it will be a task of this chapter to demonstrate this. Two recent books have discussed the post-war perceptions of disabled people, and it has been remarked that they were viewed in a paternalistic way - seen as helpless recipients of care, not as possessors of rights, or as people who had the potential to achieve at least some degree of autonomy, success and happiness.¹³⁸ Of course, ‘rights talk’ in relation to any minority group would be somewhat anachronistic when applied to the late 1940s, as civil rights movements did not really begin until two decades afterwards.¹³⁹ Nevertheless, it is clear from histories of the various eugenics and ‘euthanasia’ movements of the earlier decades of the twentieth century that debates about disabled people and their future took place both without their input, and without any consciousness that their

¹³⁶ Ibid, p.132.

¹³⁷ Michael Burleigh, *The Third Reich: A New History* (London: Macmillan, 2000), pp.805-6.

¹³⁸ Kemp, p.119.

¹³⁹ Peter Novick, *The Holocaust and Collective Memory* (London: Bloomsbury, 2001), p.173.

opinions should be sought, or even that they might have opinions. One of the most remarkable examples of this was seen in the previous chapter, in the total absence of institution inmates called as witnesses to the trials of perpetrators of the Nazi ‘euthanasia’ programme at the Nuremberg Medical Trial. This problem has been little identified by historians, who have tended to discuss eugenics and ‘euthanasia’ movements in terms of the effects which they produced (numbers of people sterilised, for example), as opposed to the attitudes which may have made them possible. One historian who has considered this problem, however, is Stefan Kühl. He has written that, in the immediate pre-war period, international criticism of the Nazis’ racial policies focused upon concerns that they might be ‘misapplied’ to groups such as political opponents and ethnic minorities. There was little or no criticism of measures such as the Law for the Prevention of Congenitally Diseased Offspring in their entirety.¹⁴⁰ This does demonstrate that, whilst different countries had differing legal frameworks, and differing attitudes to the extent to which this perceived problem ought to be dealt with, there was, internationally, a widespread perception that ‘different rules apply’ when considering what ought to be done about impairments and people with them. Again, this attitude was demonstrated in the previous chapter. The Tribunal, in a rare moment of condemnation of Karl Brandt’s participation in the ‘euthanasia’ programme, commented that the consent of the victims’ *relatives* had not been sought prior to the killings. This indicates that there was no appreciation that any of the potential victims had opinions to which it might have been worthwhile to listen.¹⁴¹ Such an attitude does at least partially explain why disabled people were regarded so much as a problem to be dealt with (in whatever way) as

¹⁴⁰ Stefan Kühl, *The Nazi Connection: Eugenics, American Racism and German National Socialism* (New York: Oxford University Press, 1994), pp. 89-91.

¹⁴¹ See previous chapter.

opposed to people with something to contribute. Consequently, the parts of this chapter concerning cases of the commission of ‘euthanasia’ will demonstrate how, once the existence of an impairment had been established in someone who had been subjected to ‘euthanasia’, the conclusion was quickly reached that the person in question must be suffering intolerably (and irredeemably) and would, as a consequence, be better off dead. In addition, such people were held to exert an intolerable strain upon their relatives, who might understandably reach the end of their tether. It will be shown that these assumptions cannot easily be disentangled from the mood of the time, in which, in Britain and the United States as well as in Germany, saw large-scale institutionalization of disabled people, and helped to foster a sense of their ‘otherness’. This was manifested in a number of different ways.

The use made by the Nazis of propaganda films, for example, is well-known, and those of the propaganda films which portray institutions and their patients make it clear that ‘defectives’, who are unable to appreciate their surroundings, are living in virtual palaces whilst ‘normal’ children languish in slums.¹⁴² However, the existence of similar films making similar points regarding asylums in the United States is not so well known.¹⁴³ In addition, in both the United States and Britain, poor conditions in institutions (which would seem to conflict with the complaint that ‘defective’ people were living in virtual palaces) were often used as a justification for the acceptability of ‘euthanasia’.¹⁴⁴ Aside from the economic rationale regarding the cost-benefit analysis of patients in institutions, on which a wide literature exists, one can also see how

¹⁴² Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge: Cambridge University Press, 1994), p.183.

¹⁴³ Martin S. Pernick: *The Black Stork: Eugenics and the Death of Defective Babies in American Medicine and Motion Pictures since 1915* (New York: Oxford University Press, 1996), p.95.

¹⁴⁴ For an example of this in the United States, see Pernick, *The Black Stork*, p.95, p.10. For a British example, see Kemp, *Merciful Release*, pp.131-2.

institutionalization helped to create a sense of how the difficulties experienced by disabled people were irredeemable and attributable entirely to their impairments. This chapter will show that large-scale institutionalization, involving containment of disabled people as opposed to involvement in society, is likely to have been instrumental in the perception that they were unable to enjoy life to any appreciable degree and that killing - even non-consensual killing - was a quite understandable reaction to them. For example, a woman visiting a British institution in 1943 wrote to the Minister of Health expressing her support for 'euthanasia' on the basis of the many distressing 'cases' which she had seen there, including 'a little child who would not be normal if she lived for years'.¹⁴⁵ Similar remarks are easy to find, and will be demonstrated in this next section, when legal cases concerning defendants accused of committing 'euthanasia' are discussed, particularly the case of *Repouille*, a man accused of the murder of his disabled son. Firstly, it is time to see the limited view, and limited interest, with which legal professionals in both the United States and Britain regarded the Nuremberg Medical Trial.

'Criminal responsibility for cruel and murderous experiments'

In the Nuremberg Medical Trial judgement, the illegality of the 'euthanasia' programme was briefly referred to, and the Tribunal noted that Hitler's famous order of September 1, 1939, was the only authority for it, and it 'was not based on any previously existing

¹⁴⁵ Kemp, *Merciful Release*, p.132.

German law'.¹⁴⁶ There is, of course, an abundance of literature discussing the legality of the trials themselves, and the attempts made by those organizing them to ensure that the crimes prosecuted were within the jurisdiction of those who were prosecuting them.¹⁴⁷ In this section, however, the focus will not be on the legal basis of the charges, but on the question of how 'euthanasia' was viewed at the time by its respective practitioners in Britain and America. It will be shown that, whilst there certainly *were* debates about euthanasia during the period in which the Nuremberg Medical Trial was taking place, it was often the case that the Nazi experience did not seem to impinge greatly on these. Though very few legal journals of the day discussed the Nuremberg Medical Trial (as opposed to the Trial of the Major War Criminals), those which did so were unanimous in describing the Trial as one concerned with the prosecution of Nazis who had carried out medical experiments upon concentration camp inmates. An example of this can be seen in the extensive article 'War Crimes Trials and the Laws of War', which appeared in the *British Yearbook of International Law* in 1949. This was not an article devoted to a discussion of the legal issues arising from the Nuremberg Medical Trial, but a comprehensive view of the laws of war, their foundation and their use in the varied and numerous trials of those accused of war crimes committed between 1939 and 1945. This article mentions the Nuremberg Medical Trial only once, in a short paragraph discussing the extent to which the defendants should have attempted to discover whether the actions of their subordinates were legal.¹⁴⁸ For the purposes of this chapter, it is particularly interesting to note that this requirement concerns the commission of medical experiments

¹⁴⁶ Case 1 Medical (*U.S. v. Karl Brandt et al*), vol. 23, p. 11393.

¹⁴⁷ See for example Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (London: Bloomsbury, 1993) and Donald Bloxham *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001).

¹⁴⁸ G. Brand, 'The Nuremberg Trials and the Laws of War', 26 *British Yearbook of International Law* 425 (1949).

performed in concentration camps by subordinates of Karl Brandt, the principle defendant.¹⁴⁹ The previous chapter showed that the Tribunal at the Nuremberg Medical Trial did make reference to a very limited number of legal issues which they identified as arising from the Nazis' 'euthanasia' programme. The most notable of these apparently was that, save for the authorization from Hitler authorizing Brandt and Bouhler to grant a 'mercy death' to people deemed 'incurably ill', 'euthanasia' was not legal in Germany. This view of the legal issues surrounding the 'euthanasia' programme is highly inadequate, as discussed in the previous chapter. Nevertheless, the fact that the article in the *British Yearbook of International Law* makes no reference at all to discussions of 'euthanasia' at the Nuremberg Medical Trial indicates that either the writer (one G. Brandt) did not himself consider the issue at all, or that he did not mention it as he felt that it was not an important topic of legal discussion, or one that raised any questions to which answers were badly needed. In any event, it is clear that this writer does not view the Nazi 'euthanasia' programme as a topic in need of discussion. It is also interesting to note that no mention is made of the inadequate way in which the subject was handled by the Tribunal. This may perhaps be explained by the fact that this is a dry, descriptive article in which the writer confines himself to an identification of the various legal issues encountered by Allied courts in their prosecution of Nazis accused of war crimes. It is in no way intended to be a critique of the decisions reached by these various courts.

A rather more comprehensive discussion of the Nuremberg Medical Trial was published in the journal *International Reconciliation* in 1947. This article states that 'the principle count of the indictment charged the defendants with criminal responsibility for cruel and frequently murderous 'medical experiments' performed, without the victims'

¹⁴⁹ Ibid.

consent, on concentration camp inmates, prisoners of war, and others'.¹⁵⁰ The Nazi 'euthanasia' programme is mentioned, and the article quotes the description of it given in the Nuremberg Medical Trial indictment (see previous chapter and page seven of this chapter). However, nothing is made of the description, save for a mention that, amongst the various defences employed by the defendants and their counsel, was the claim that 'euthanasia has strong advocates in all countries'. For anyone who had any knowledge of the discussions of 'euthanasia' at the Nuremberg Medical Trial, this remark is surely insufficient. It seemingly fails to take into account the totally non-consensual nature of the killings and, by definition, ignores the problem that while 'mercy' was certainly the perpetrators' given reason for their participation in the programme, there was nothing at all merciful about it in reality. This article also makes reference to the judgement, stating that the Tribunal 'dealt wisely with the fundamental issues'.¹⁵¹ Though much of the judgement, in particular the formation of the Nuremberg Code, may rightly be considered 'wise', the last chapter showed that the Tribunal's handling of the issue of 'euthanasia' was woefully deficient, to the extent that they implicitly refused to consider even a state's imposition of non-consensual 'euthanasia' as a moral or legal issue, except if it was used as an excuse for killing 'beings of other nations'. The remark by the writer of this article indicates that he does not regard 'euthanasia' as *being* 'one of the fundamental issues or, that he is unconcerned by the Tribunal's chilling indifference to the plight of those whose governments might (and in the case of Germany, already had) subjected them to 'euthanasia' without their consent.

¹⁵⁰ Telford Taylor, 'The Nuremberg War Crimes Trials', 27 *International Conciliation* 281 (1949)

¹⁵¹ *Ibid.*, p.284.

This trend, now firmly established, continues in the other legal journals in which the subject of the Nuremberg Medical Trial is discussed. The *North Carolina Law Review* published an article in which it was explained that, following the Trial of the Major War Criminals, indictments had been filed against specific groups of Nazis involved in ‘carrying out Hitler’s programme of world conquest’.¹⁵² These ‘specific groups of Nazis’ included industrialists and physicians. Physicians, states the article, were accused of ‘war crimes and crimes against humanity committed in the performance of so-called medical ‘experiments’ upon human beings’.¹⁵³ This again shows that, as we have seen throughout this chapter, the sole crime with which the Nuremberg Medical Trial defendants were perceived to have been charged was that of committing human vivisection upon concentration camp inmates.

The scarcity of legal discussion of the Nuremberg Medical Trial may appear rather odd. It may simply be the case that the Nuremberg Medical Trial was less major than the first Nuremberg Trial, and so attracted less attention. It might also be that there was a perception that, being a *medical* Trial, the Nuremberg Medical Trial raised more questions for physicians than for persons of other professions. As we shall now see in this section, much legal discussion of ‘euthanasia’ in both the United States and Britain seems to be centred around a strong feeling that this is a moral question which should be based upon medical assessments of the condition and prognosis of the person who has been killed, as opposed to being a strictly legal matter.

Strange as it may seem, an important indication of the state of the ‘euthanasia’ debate in the United States in the late 1940s, can be gained from a case involving the

¹⁵² William Allen Zeck, ‘Nuremberg: Proceedings Subsequent to Goering *et al*’, 26 *North Carolina Law Review* 353 (1947-48).

¹⁵³ *Ibid.*

interpretation of ‘good moral character’ under the Nationality Act 1940. The case in question is that of a man named Repouille, a Frenchman who, on October 12, 1939, took the life of his disabled thirteen- year- old son by administering chloroform to him.¹⁵⁴ In the first instance, the jury found Repouille guilty of second-degree manslaughter, (which presupposes that the killing was unintentional),¹⁵⁵ but recommended that he should be treated with ‘utmost clemency’.¹⁵⁶ On September 22, 1944, Repouille applied for citizenship, which was granted, but the decision was reversed on appeal. The court held that a petitioner for citizenship could not be held to be of ‘good moral character’ if some aspect of his conduct failed to conform to ‘the generally accepted moral conventions current at the time’.¹⁵⁷ The appeal judge lamented what he claimed was the absence of any kind of useful document which would give him greater insight into the opinions of the general public on the subject of euthanasia.¹⁵⁸

As we saw in the introductory chapter, such polls *did* exist, and the results of the 1947 *Public Opinion Quarterly* poll would have been released in time for them to be of assistance in the Repouille case.¹⁵⁹ The question that now needs to be addressed is that of whether, in the legal discussion of the Repouille case, any reference was made to the question of ‘euthanasia’ under the Nazis, and any alarm bells that this should sound for Americans who were considering the question.

¹⁵⁴ *Repouille v. United States* 165 F. 2d 152 (C.C.A. 2d 1947). There is also a reference to this case in Martin S. Pernick *The Black Stork*, chapter 9, note seven.

¹⁵⁵ *Am. J. Int. Law* vol. 42 No.2, (April 1948), p. 485.

¹⁵⁶ 1949 *Wis. L. Review* 383.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ 48 *Colum. L. Rev* 627 (1948).

The judges who refused Repouille's application for citizenship did demonstrate an awareness of the potentially wider moral implications of the Repouille case. Judge Learned Hand, one of the judges in the majority, proclaimed:

“...a test...whether ‘the moral feelings, now prevalent generally in this country, would be outraged by the conduct in question...[I]n the case at bar itself the answer is not wholly certain; for all we know there are great numbers of people of the most unimpeachable virtue, who think it morally justifiable to put an end to a life so inexorably destined to be a burden to others, and – so far as any possible interest of its own is concerned – condemned to a brutish existence, lower indeed than any but the lowest forms of sentient life. Nor is it inevitably an answer to say that it must be immoral to do this, until the law provides security against the abuses which would inevitably follow, unless the practice were regulated’.¹⁶⁰

It may be argued that there would have been no justification here for any mention of ‘euthanasia’ under the Nazis to have been made, as the Repouille case was that of a man who had independently elected to end the life of his disabled son, not of any kind of state policy to this effect. Nevertheless, it does seem likely that, had the issue been of concern to the judges in the case, they might have made some mention of it during their consideration of the ethical and societal dimensions of ‘euthanasia’. In addition, with regard to legal commentaries on the case, it is interesting to note that, whilst all of these referred to the ethical problems of ‘euthanasia’ and the importance of trying to discover and then paying attention to current public attitudes to the subject, none gave any

¹⁶⁰ 15 *Brooklyn Law Review* 154, (1948), p. 485.

indication that the attitudes in question had been at all influenced by the reports of the Nazi ‘euthanasia’ programme.¹⁶¹ Furthermore, since, as we have seen, the Nuremberg Medical Trial was portrayed so overwhelmingly as being devoted to the prosecution of perpetrators of medical experiments, this may have contributed to a lack of awareness, amongst the British and American public, of the potential risks of justifying ‘euthanasia’ on the basis of ‘compassion’. Despite this, it is extremely important to highlight the fact that, in the Repouille case in particular, the murdered child was discussed very much in terms which portrayed him not as an individual, but as the physical manifestations of various defects. This is a continuation of the depressing trend seen particularly in the last chapter, but often, too, in this chapter. In other words, those confronted with cases of ‘euthanasia’ seem universally to have fallen into the trap of reducing the problem to an overly simplistic calculation. After it has been established that the person who has been killed had an illness or a impairment, ‘because’ of which the perpetrator killed him or her, the conclusion is leapt to that the person must have been suffering intolerably. Since the allegedly intolerable suffering was caused entirely by the impairment or illness in question, further enquiries into the possibility of non-lethal amelioration of the victim’s circumstances were rendered unnecessary. Of course, both Long and Repouille were convicted, indicating that their actions were regarded with some degree of seriousness. Nevertheless, it is clear from recent literature that, in both Britain and the United States, there was no appreciable change in the compassion with which those who claimed to have killed for reasons of mercy were treated.¹⁶² In some of these cases it would appear that what should have been called for is not so much a harsher sentence for the

¹⁶¹ 15 *Brooklyn Law Review* 154-156 (1948-49); *Am. J. Int. Law*, Vol. 42, No.2, (April, 1948), pp.484-486; 48 *Col. L. Review* 627 (1948); *Michigan Law Review* Vol. 49, No.2, (December 1950), pp. 270-1; 1949 *Wisconsin Law Review*, pp. 382-6.

¹⁶² See for example Kemp, *Merciful Release*, p.108, p.120. For the United States see Filene, *In the Arms of Others*, p.7.

perpetrator of the killing, rather, a questioning of the all-pervasive assumption that problems caused to the family of a disabled person could be solved quickly and easily by killing the disabled person – who, rather conveniently, was incapable of deriving enjoyment from life in any case.

Much of the literature on the history of eugenics in the United States,¹⁶³ and the vexed question of possible parallels between this and aspects of National Socialism, has not really concerned itself greatly with the possible connection between eugenics and ‘euthanasia’. This was discussed at the beginning of the chapter, and the subject is given further prominence by our next source. This is a book published in London in 1946, entitled *Criminal Justice and Social Reconstruction*, by Hermann Mannheim, a refugee from Nazism who became a lecturer in criminology at the University of London.¹⁶⁴

Though extensive searches have been carried out, there was little legal discussion of the Nuremberg Medical Trial in the post-war period, with only Mannheim making any specific mention of it. In addition, legal discussion of ‘euthanasia’ as an abstract issue, and the bearing that recent events might have had on it, is largely unforthcoming. This being so, it is often the case that more insight can be gained into contemporary (to the period) attitudes to ‘euthanasia’ and disabled people from legal cases (such as those of *Repouille* and *Long*, discussed above. Nevertheless, legal texts are important because, in many ways, they give further evidence of discussions which did *not* occur, and of ethical problems which did *not* cause concern, when it seems quite clear that they ought to have done.

¹⁶³ For example, Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina), 1995; Stefan Kuehl, *The Nazi Connection: Eugenics, American Racism and National Socialism* (New York: Oxford University Press, 1994).

¹⁶⁴ Hermann Mannheim, *Criminal Justice and Social Reconstruction*, (London: Keegan Paul, Trench, Trubner and Co.), 1946.

Mannheim's book is an interesting one, as it is not a straightforward legal textbook, but, as one reviewer described it, 'its purpose is to examine whether the present criminal law offers the necessary legal protection to the fundamental values of human society as these exist today'.¹⁶⁵ It has been described as being 'rightly recognized as his most influential and widely-read work'.¹⁶⁶ In his preface, Mannheim himself writes: 'I am not optimistic enough to believe that these views will, in the near future, gain widespread approval. It is well-known that...the legal world is the slowest in making the necessary adjustments in changes in society'.¹⁶⁷ Mannheim argues that the post-war period is the ideal time to address the 'crisis in values' which, he claims, exists in society:

'The crisis in values which confronts the criminal law today is by no means of recent origin. Like the present rise in crime, it has not been produced by the war, though the war may have aggravated certain pre-existing tendencies...To a greater or smaller extent, in every country the criminal law has in essential parts become out of date. Instead of being a living organism, supported by the confidence of all sections of the community and developing according to the practical and ideological needs of the time, it presents itself as a petrified body, unable to cope with the endless variety of problems created by an ever-changing world and kept alive mainly by tradition, habit and inertia'.¹⁶⁸

In terms of euthanasia and the Nazi analogy, Mannheim's book is unusual for this period in that some mention is made of the Nazi policy of 'large-scale extermination of

¹⁶⁵ Curtis Bok, Review of *Criminal Justice and Social Reconstruction*, in the *Virginia Law Review*, Vol. 33, No.5, (September 1947), p.669.

¹⁶⁶ Leon Radzinowicz, 'Mannheim, Hermann (1889-1974)', rev. *Oxford Dictionary of National Biography*, (Oxford: Oxford University Press), 2004.

¹⁶⁷ *Criminal Justice and Social Reconstruction*, p. viii.

¹⁶⁸ *Ibid*, p. 3.

politically or racially ‘undesirables’’,¹⁶⁹ and this is described as the ‘collectivistic analogue to euthanasia...to rid the community of a member who is not an asset but only a burden or a danger’.¹⁷⁰ Mannheim comments that the Nazis, by their extermination of these ‘politically or racially ‘undesirables’’, have ‘probably stifled any tendencies of this kind amongst other nations’.¹⁷¹ Mannheim then goes on to advocate that what he calls the ‘shaping of human material’¹⁷² should be carried out via the use of sterilization, birth control and abortion.¹⁷³ He also discusses possible differences between infanticide and euthanasia, a topic which is interesting to consider in the light of the early history of the ‘euthanasia’ movement, and will become important in later chapters, particularly in relation to the philosopher Peter Singer.

Much can be gained by scrutinizing the reactions of Mannheim’s contemporaries to this book. It was reviewed in both the *Virginia Law Review* (in September, 1947),¹⁷⁴ and the *Modern Law Review* (in April, 1949).¹⁷⁵ Though both reviewers mention Mannheim’s focus on euthanasia, neither do so in a critical way, and neither mention anything about ‘euthanasia’ under the Nazis.¹⁷⁶ Nevertheless, the reviewer in the *Virginia Law Review* does appear to be somewhat alarmed by some of Mannheim’s suggestions. In response to Mannheim’s approval of the introduction of identity cards, the reviewer writes,

¹⁶⁹ Ibid, pp. 19-20.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid, p. 18.

¹⁷⁴ *The Virginia Law Review*, Vol. 33, No.5, September, 1947, pp. 669-671.

¹⁷⁵ *The Modern Law Review*, Vol. 12, No.2, (April, 1949), pp.257-259.

¹⁷⁶ Ibid. See notes 102 and 103 for details.

‘[T]his is what the world has just spent six years of war to suppress. The litmus paper of tyranny turns quickly, and it is best to label this sort of suggestion the dangerous nonsense that it is – at least until mankind has added another spiritual cubit to its stature’.¹⁷⁷

In the post-war climate, the introduction of identity cards might well have seemed an alarming prospect. This does underline, however, the reviewer’s apparent assumption that an issue like ‘euthanasia’ – even though it involved active killing - was *not* one which, given recent history, perhaps ought to be approached with a degree of caution. Similar sentiments may be found in the *Modern Law Review*, with the reviewer mentioning in passing Mannheim’s approval of ‘euthanasia, sterilisation and birth control’,¹⁷⁸ but remarking that his views on criminal procedure are ‘more controversial’.¹⁷⁹ This would, of course, imply that Mannheim’s views on ‘euthanasia’ are *not* controversial.

Jerome Hall’s book *General Principles of Criminal Law* was published in 1947 and reissued in 1960.¹⁸⁰ Hall was a Professor of Law at the University of Indiana. He argued that a perpetrator’s motive for killing was irrelevant, even if professed to be laudable, as in a case of ‘euthanasia’. This was because the perpetrator in question voluntarily committed a penal harm – the taking of a life.¹⁸¹ It is clear from this that Hall himself is not an advocate of euthanasia, but also that he is not particularly exercised by any specific concerns which recent events might have brought into relief. In addition, the reviewer of his book in the *Harvard Law Review*, does not remark upon Hall’s discussion

¹⁷⁷ *The Virginia Law Review*, p. 671.

¹⁷⁸ *The Modern Law Review*, p. 257.

¹⁷⁹ *Ibid.*

¹⁸⁰ Jerome Hall, *General Principles of Criminal Law*, (Indianapolis: The Bobbs-Merrill Co., 1947).

¹⁸¹ *Ibid.*, p. 159.

of ‘euthanasia’, merely mentioning it in passing.¹⁸² This may have been due to a desire to avoid sensationalising the issue; however, one would suggest that, as the review appeared during the penultimate stages of the Nuremberg Medical Trial, a failure to mention this ‘euthanasia’ connection would indicate that it did not occupy the reviewer’s thoughts to any real extent. All-in-all, this chapter has shown that the Nuremberg Medical Trial did not greatly interest lawyers. It was suggested earlier in the chapter that this might have been because questions raised by the Trial were perceived as being medical and ethical in nature, as opposed to strictly legal.

‘The veriest ignorance of the lay public’

This chapter began with a discussion of the descriptions and discussions of the Trial in professional journals. One of the most protracted of these discussions occurred in the British medical periodical *The Lancet*, and it serves to demonstrate that there appears to have been, in the British medical profession at least, very little concern or awareness of the discussion of ‘euthanasia’ at the Nuremberg Medical Trial or, as we shall see presently, of the possibility that Nazi ‘euthanasia’ might add another dimension to debates on the subject in other Western countries. Reports of the Medical Trial, and discussions of its significance, also appeared in the *British Medical Journal*, and in the *Journal of the American Medical Association*.

The *British Medical Journal*’s coverage of the Nuremberg Medical Trial was not exhaustive, but an article and an editorial on the subject appeared in one issue of the

¹⁸² *The Harvard Law Review*, Vol. 60, No.5, (May, 1947), pp.846-850.

journal in January, 1947. The article is entitled ‘Medical Experiments on Human Beings in Concentration Camps in Nazi Germany’ and, indeed, the article is largely devoted to descriptions of the experiments carried out, the perpetrators thereof, and to the question of whether or not the data obtained in these experiments is of any use to medical science.¹⁸³ A section on the Trial indictment, however, mentions that other crimes with which the Medical Trial defendants were charged “...the various ‘euthanasia’ programmes for removing scores of thousands of Poles with tuberculosis and millions of ‘useless eaters’”.¹⁸⁴ On reading through the article and the accompanying editorial, however, it does become clear that the reader’s attention is called particularly to the medical experiments. These are portrayed as the Nazis’ principal medical crime, and the discussion of the potential use of the data obtained in them is highlighted. This certainly shows an awareness of the potential ethical problems caused by the Nazis’ medical crimes.¹⁸⁵ In addition, this is similar to the attitude demonstrated by the Tribunal at the Nuremberg Medical Trial, who, while being perfectly able to envisage future potential ethical problems concerning the use of human beings in medical experiments, did not feel bound to implement any measures to protect people from being subjected to ‘euthanasia’ against their will.

The *British Medical Journal*’s editorial on the Nuremberg Medical Trial makes it very clear how important the Trial was considered to be, by that journal. For example, it is stated that

¹⁸³ *The British Medical Journal*, January 25, 1947, pp. 148-150.

¹⁸⁴ *Ibid.*, p. 149.

¹⁸⁵ *Ibid.*

‘It is a commonplace to say that medicine knows no frontiers, but behind this statement lies the recognition that medicine as it is practised in the civilized world is a product of Western civilization and therefore inspired by Christian ethics and Greek thought. The code of the civilized doctor is the Hippocratic oath... When, therefore, any group of medical men in a country claiming to be civilized offends against the spirit and tradition of Western medicine the offence becomes the concern of all doctors who follow the same tradition and try to live up to the same spirit. To ignore the infamy of these German doctors who have betrayed their trust and their profession would in part be to condone it’.¹⁸⁶

It might appear from this paragraph that it is the whole of Nazi medical crimes which are being condemned here, but the statement that ‘[I]t is probably impossible for the British doctor to understand the mentality of the German doctors accused of *brutal experimentation on fellow human beings*’ [my italics] demonstrates once again that it is the Nazis’ experimentation upon human beings which is being condemned here, showing a clear link between this source and those which have previously been discussed.

In the United States, the *Journal of the American Medical Association* also contained a number of reports from, and discussions of, the Nuremberg Medical Trial. Amongst these are several references to the report on Nazi medical crimes which Dr. Andrew Ivy, an ‘expert witness’ at the Trial, submitted to the American Medical Association. Partly due to the fact that Ivy has generally been associated with the reporting of Nazi medical experimentation, as opposed to that of other Nazi medical crimes,¹⁸⁷ it is difficult to tell how much, if any, of his report was devoted to the issue of ‘euthanasia’. It would, however, appear that any mention he did make of ‘euthanasia’

¹⁸⁶ Ibid, p. 143.

¹⁸⁷ See for example Michael Marrus, ‘The Nuremberg Doctors’ Trial in Historical Context’, in *Bull. Hist. Med.*, 1999, 73: 106-123.

went unnoticed, and that it was the issue of medical experimentation which the American Medical Association regarded as being the important one, and the one with far-reaching ethical ramifications. For example, just before the opening of the Medical Trial, an editorial was published in the *Journal of the American Medical Association* on the subject of the Nazi medical crimes and the forthcoming Trial. This editorial makes what may be a brief reference to ‘euthanasia’: ‘[T]he nonexperimental crimes included mass killings of persons who were about to die from disease, malnutrition and old age’, but this is merely a comment in passing, and no ethical dimensions of the problem are discussed.¹⁸⁸ Despite this, it is quite clear that the editor of the *Journal* wishes to show that the conduct of ‘these German physicians’¹⁸⁹ represented a total departure from ethical medicine as it had ever been understood.¹⁹⁰ From this, it may be argued that the *Journal* was issuing a wholesale condemnation of Nazi medical crimes, and this may very well be the case. Nevertheless, the majority of the editorial is devoted to a discussion of the experiments, which are all listed in detail, whereas the other medical crimes are referred to briefly, in passing.¹⁹¹ In addition, all other references to Ivy’s report and the American Medical Association’s response to it refer to Nazi medical experimentation and its failure to meet the ethical requirements of the American Medical Association’s guidelines on human experimentation.¹⁹²

Ivy himself submitted an interesting article on Nazi medical crimes to a book of essays entitled *Symposium on Medicolegal Problems: Series Two*, which was published

¹⁸⁸ ‘The Brutalities of Nazi Physicians’ in *Journal of the American Medical Association*, Vol. 132, No. 12, November 12, 1946, pp.714-5.

¹⁸⁹ *Ibid.*, p. 715.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, p. 714.

¹⁹² See the following issues of the *Journal of the American Medical Association*: Vol. 133, No. 1, January 4, 1947, p. 35; Vol. 133, No. 9, March 1947, p. 645; and Vol. 134, No.2, May 10, 1947, p. 178. A report contained in Vol. 135, No. 13, November 29, 1947, pp. 886-7 is very similar to the editorial mentioned above in that a brief mention of ‘euthanasia’ and other medical crimes is made, in an article in which the main discussion is of medical experimentation in concentration camps.

in 1949, the first volume having appeared the previous year. Judging from the book's preface, the rationale behind its publication does not seem to have been any specific perceived need to promote wider public discussion of medical ethics in response to abuses which occurred under Nazism [find quote]. The symposium was interdisciplinary in scope, having been co-sponsored by the Institute of Medicine of Chicago, the Chicago Bar Council and the Chicago Medical Society. The convener of the symposium, Dr. Samuel A. Levinson of the University Of Illinois College Of Medicine, requested that Ivy should consider the question 'Were the Nazi physicians who experimented upon the prisoners in the German concentration camps psychopathic and/or criminal?'¹⁹³ It is, of course, obvious that this question in itself shows a concern with human experimentation as opposed to other Nazi medical crimes, but Ivy does make one reference to 'euthanasia' during the course of his speech, when he states:

'Under the German criminal code, reviewed as late as 1944 by the Minister of Justice, they [medical experiments in concentration camps] were crimes, because it was criminal in Germany, just as it is in every civilized nation, to experiment on a person without his consent. In fact, any sort of *euthanasia* [my italics] was criminal under the German law'.¹⁹⁴

In this peculiar statement, Ivy strongly implies that medical experimentation is a form of euthanasia, which it clearly is not. Consequently, it is somewhat difficult to see exactly how Ivy's remarks relate to this enquiry. The point he wished to make, at this stage of his speech, was that the Nazis were committing acts which were even illegal under the

¹⁹³ Andrew C. Ivy, 'The Guilt of the German Physicians', in Dr. Samuel A. Levinson (ed.), *Symposium on Medicolegal Problems: Series Two* (Philadelphia: The J.B. Lippencott Company, 1949), pp. 177-181, 176.

¹⁹⁴ *Ibid.*, p. 179.

German law of the time,¹⁹⁵ and he did remark that one of these illegal acts was ‘euthanasia’, but did not refer to it as the murder of people who were, allegedly, incurably ill, but as a medical procedure such as human experimentation.

The discussion of the Nuremberg Medical Trial in the *Lancet* was motivated by an article entitled ‘A Moral Problem’, which was published in that journal on November 30, 1946, just days prior to the commencement of the Trial. This article mentioned that further Nuremberg Trials would shortly commence, and that ‘among the first to answer charges of atrocious conduct will be some doctors who are said to have misused human beings in scientific experiments’.¹⁹⁶ The article goes on to explain that, having incarcerated Jews and members of other groups in concentration camps, the Nazis decided to profit from them by subjecting them to experiments prior to their deaths, so that the Nazis would be able to use the data obtained in these experiments for their own knowledge and future benefit.¹⁹⁷

The writer of the article then asks ‘But supposing facts of real value to medicine were still to emerge from the records of these experiments – should they be published or not?’¹⁹⁸ Over the following two months or so, a number of the *Lancet*’s readers attempted to answer this question. A letter expressing willingness to utilize the data on the basis that ‘If I myself had been a victim...I am sure that I should have preferred to know that this knowledge would have been used and that I had not died entirely for nothing’¹⁹⁹ is swiftly followed by others expressing the opinion that the data should not be used

¹⁹⁵ Ibid.

¹⁹⁶ ‘A Moral Problem’, in *The Lancet*, Vol. 248, Issue 6431, November 30, 1946, p.798.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Letter from Kenneth Mellanby, Dept. of Entomology, London School of Hygiene and Tropical Medicine. *The Lancet*, Vol. 248, Issue 6432, December 7, 1946, p.850.

because of the way in which it had been obtained.²⁰⁰ This debate is important with regard to a discussion of the ethical problems of human experimentation, but it does demonstrate that the British medical profession had an interest in the Nuremberg Medical Trial, and could see the wider ethical problems arising from the defendants' crimes.²⁰¹ It does not, however, appear that they thought about 'euthanasia' in this way, as becomes especially clear from reading the last published letter of the *Lancet's* debate on this subject. The letter in question is from one F.B. Charatan of Calcutta, who writes of the necessity of making one's own decisions with regard to the ethical dilemmas occasioned by the Nazis' human experimentation, and on 'allied problems, such as euthanasia'.²⁰²

One cannot positively say that the writer of this letter was unaware of the discussions of 'euthanasia' which were then taking place at Nuremberg. However, he clearly regards 'euthanasia' as 'an allied problem' in the sense of being an ethical dilemma, not in the sense that it has any specific connection with the Nazis.

A few months later, but still during the Nuremberg Medical Trial, the *Lancet* reported that the Voluntary Euthanasia Society (VES) had plans to reintroduce into the House of Lords a Bill, unsuccessfully introduced in 1936, for the legalization of euthanasia for those in great pain from incurable diseases.²⁰³ The *Lancet* reports that, at

²⁰⁰ For a complete overview of this debate, please consult the 'A Moral Problem' correspondence in the following issues of the *Lancet*: Vol. 248, Issue 6424, October 12, 1946; Vol. 248, Issue 6431, November 30, 1946; Vol. 248, Issue 6432, December 7, 1946; Vol. 248, Issue 6433, December 14, 1946; Vol. 248, Issue 6435, December 28, 1946; Vol. 249, Issue 6436, January 4, 1947; Vol. 249, Issue 6437, January 11, 1947; Vol. 249, Issue 6438, January 18, 1947; and Vol. 249, Issue 6440, February 1, 1947. It can clearly be seen from this debate that the contributing correspondents view human experimentation as the important medical crime committed by the Nazis, and the one with, potentially, implications for medical ethics in the wider world. The letter of December 7, 1946, is from Kenneth Mellanby, who wrote the *British Medical Journal's* article on the Trial, which was discussed above.

²⁰¹ It should not be inferred that this was an issue which was only debated amongst a few physicians who, either read the *Lancet* with particularly close attention, or had particular faith in their own points of view. In December 1946, the *Daily Telegraph* ran a number of reports of the debate in the *Lancet*, including one stating that both Lord Horder, Physician-in-Ordinary to the King, and Sir Alfred Wells-Johnson, President of the Royal College of Surgeons, agreed that data obtained in Nazi medical experiments should not be destroyed. Lord Moran, President of the Royal College of Physicians, said he was not qualified to give an opinion. For an account of this, see *The Daily Telegraph*, December 16, 1946, p.5. This is a further demonstration that, while there were debates on ethical questions raised by the experience of Nazism, 'euthanasia' did not really constitute one of these ethical dilemmas.

²⁰² Letter from F.B. Charatan of Calcutta. *The Lancet*, Vol. 249, Issue 6640, February 1, 1947, p.195.

²⁰³ *The Lancet*, Vol. 249, Issue 6458, June 7, 1947, p. 798.

the Voluntary Euthanasia Society's annual meeting on May 21st, 1947, a doctor named E.A. Barton spoke in favour of the legalisation of euthanasia, on the basis that this would do much to improve the situation of doctors who 'accede to a patient's appeal for release', but who, owing to the state of the law, were obliged to take upon themselves the whole responsibility for this decision and any consequences it might have.²⁰⁴

Barton's views were published, in an extended version, in March, 1947, a few months before the speech at the Voluntary Euthanasia Society's Annual Meeting. The article, entitled 'Death and Euthanasia', gives a very strong indication that, whilst proponents of euthanasia in Britain may often have been confronted with 'slippery slope' arguments, these did not generally have any connection to Nazism. Barton wrote: 'And so we come to the consideration of Euthanasia. [Barton has previously related how, fifty years previously, he had used chloroform to end the life of a terminally ill man who, Barton claims, had repeatedly requested death].

'One might begin by saying how ignorant the lay public are with regard to this subject. They can and do know nothing whatever about such piteous cases... They think that the legalising of Euthanasia would give every doctor the right to wilfully murder whom he would and that countless murders would be committed. All this is the veriest ignorance and hence they are quite unqualified to give any opinion on the matter... We accord to a sick or wounded animal a mercy that we deny to ourselves: on the battlefield a man will take the life of his great friend if hopelessly wounded. I like to think that there are

²⁰⁴ Ibid.

amongst us many who are willing to risk criticism and worse by doing for a patient what they would desire for themselves under similar circumstances'.²⁰⁵

Barton was a proponent of euthanasia, speaking to a sympathetic audience. Consequently, one would not expect him to say anything along the lines of 'I am in favour of the legalisation of euthanasia, but, owing to recent events in Germany, we have to be especially careful that abuses do not occur'. However, his sneering contempt for the 'veriest ignorance' of those who fear that abuses *might* occur indicate that it has not been necessary for proponents of euthanasia to develop a coherent response to opposition of this nature. This is despite the fact that 'euthanasia' societies in both Britain and the United States were shown to have been sufficiently concerned about the first reports of the 'euthanasia' programme to have issued bulletins and pamphlets explaining that they did not support this type of 'euthanasia'. This was discussed earlier in the chapter, and the fact that this flurry of activity had, apparently, been entirely forgotten by proponents of euthanasia, shows that its effects were considerably more transitory than they might have been. Given the other evidence uncovered thus far in the various sections of this chapter, such a dramatic change of emphasis is not nearly as surprising as one might think. In addition, we do not know exactly who Barton means when he condemns the 'lay public', nor is it entirely clear whether the fears of these inconvenient and timid souls are of a general nature or based upon familiarity with recent events. If it is the latter, this is certainly not mentioned. The following issues of the *University College Hospital Magazine* do not carry any letters or articles disagreeing, in the light of recent history, that the implementation of a euthanasia law might carry with it a degree of risk, or be

²⁰⁵ E.A. Barton, 'Death and Euthanasia', in *The University College Hospital Magazine*, Vol. XXXII, No.1, March, 1947, pp.32-4, 33.

undesirable in any way.²⁰⁶ In addition, the *Journal of the American Medical Association* carried a report of Barton's speech in their 'Foreign Letters' section, during June of 1947. This report is, in effect, merely a reworking of the important points of Barton's speech, with no real comment of any kind, or explanation of the *Journal of the American Medical Association's* position on the question of euthanasia and any risks they might have perceived in the legalisation thereof.²⁰⁷

I have shown that, in the period during and after the Nuremberg Medical Trial, there was some awareness amongst physicians in the United States and Britain that the Nazi medical crimes did raise some important ethical questions. Nevertheless, it is also clear that physicians did not, generally speaking, consider that the recent experience of the Nazis should complicate their thinking on the issue of 'euthanasia'. That awareness of Nazi medical crimes was widespread in the medical profession during this period cannot be doubted, however, as the issue was discussed at two important medical conferences – the Bad Nauheim Physicians' Convention of June 14 and 15, 1947, and the First Annual Meeting of the General Assembly of the newly-formed World Medical Association (WMA) , which took place in Paris three months later, from September 17-20, 1947. The dates of these conferences makes them highly relevant to this enquiry, the former having taken place during the course of the Nuremberg Medical Trial and the latter, almost exactly a month after the judgements were passed. These two conferences will be considered in turn, beginning with the Bad Nauheim Convention.

²⁰⁶ See the 1947 issues of the *University College Hospital Magazine* for this.

²⁰⁷ *Journal of the American Medical Association*, June 14, 1947.

This Convention was organized by the Medical Chambers of the three Western Zones of Germany (in other words, Britain, France and the United States).²⁰⁸ It took place at Bad Nauheim in Hesse. Though its main purpose was to address the state of nutrition in Germany, the participants passed a resolution recommending that every German physician be required to take an oath, demonstrating his awareness of his professional obligations towards his patients.²⁰⁹ The fact that the Convention was organized *by* the Allied powers, *for* German physicians, strongly suggests that it was perceived that, in light of recent events, German physicians needed to be re-educated concerning the purposes, duties and ethical requirements of their chosen vocation.

As the proposed oath showed, these duties were wide-ranging, encompassing consideration and respect for patients, the recognition of no other laws than those of humanity, the undertaking ‘never to destroy the power of procreation without compelling reason’, and the refusal to subject a patient ‘against his will or even with his consent,²¹⁰ to means or methods which may become harmful or injurious to his body, his soul or his life’.²¹¹ Crucially for this enquiry, the proposed oath also states that: ‘Awed by the creative powers of nature, and trusting their oftentimes hidden forces, I shall preserve all human life; shall not interfere with its natural course, even at the request of the sick’.²¹²

It is apparent that, at this conference, the issue of ‘euthanasia’ *was* discussed, and that the participants must have regarded the issue as being sufficiently important for a clause rejecting the commission thereof, even when this was requested by a sick person,

²⁰⁸ *Journal of the American Medical Association*, November 29, 1947, p.868.

²⁰⁹ *Ibid.*

²¹⁰ That a patient may not be subjected to medical experimentation even *with* his consent, makes these proposed rules even more stringent than those contained in the Nuremberg Code, in which informed consent must be obtained from the subject prior to the experiment.

²¹¹ *Ibid.*

²¹² *Ibid.*

to be inserted into the proposed oath. However, this draft oath applied only to German doctors. In order to find out whether or not any warning against ‘euthanasia’ was recommended for physicians of other nations, we cannot do better than look at the discussions of the Nazi medical crimes which took place at the first Annual Meeting of the General Assembly of the World Medical Association, which was attended by representatives from both Britain and the United States.

The Minutes of this important meeting record that the first discussion of War Crimes occurred on Friday, September 19, 1947 – the penultimate day of the conference.²¹³ Measures proposed by the Danish Medical Association, and supported by a number of other parties, that a report should be compiled on the crimes of German physicians, and made available to all physicians, were carried.²¹⁴ In addition, it was resolved that a report should be received from the War Crimes Committee, and that the WMA ‘solemnly condemns the crimes against human beings committed by certain members of the medical profession’.²¹⁵ Additionally, it was resolved that every doctor should be required to take an oath to the following effect:

My first duty, above all other duties, written or unwritten, shall be to care to the best of my ability for any person who is entrusted or entrusts himself to me, to respect his moral liberty, to resist any ill-treatment that may be inflicted on him, and, in this connection, to refuse my consent to any authority that requires me to ill-treat him.

Whether my patient be my friend or my enemy, even in time of war or in internal disturbances, and whatever may be his opinions, his race, his party, his social class, his

²¹³ Minutes of the First Annual Meeting of the General Assembly of the World Medical Association, Paris, 17-20 September, 1947, pp.9-10.

²¹⁴ Ibid, p.10.

²¹⁵ Ibid.

country or his religion, my treatment and my respect for his human dignity will be unaffected by such factors.²¹⁶

As regards the *German* medical profession, an additional oath was required, encompassing a declaration of awareness of the ‘very large number of acts of cruelty committed...since 1933, in mental hospitals and concentration camps, and violations of the medical ethic’; an expression of regret that the German medical profession offered no resistance; a condemnation of these crimes which resulted in the ‘death of some millions of people’; and the expulsion from their medical associations of physicians who participated in these crimes’.²¹⁷

Both the Bad Nauheim proposed oath, and the propositions of the World Medical Association make it clear that, unsurprisingly, it was expected that special precautions should be taken by German doctors, and that it was they who were expected to engage in the most open recognition and condemnation of the Nazi medical crimes. Nevertheless, what can be said concerning the general oath for physicians agreed upon by the World Medical Association? How does this oath relate to the subject of ‘euthanasia’?

Upon reading the oath, it is evident that its scope was intended to be as wide as possible. The undertaking not to discriminate against patients on any of a number of grounds could well be seen as a laudable endeavour to ensure that physicians would never again use the skills that should have been placed at the service of humanity, to commit the grossest outrages against people who differed from them in terms of race, religion, or other factors. This is particularly understandable when we remember the

²¹⁶ Ibid, p.11.

²¹⁷ Ibid.

emphasis placed, at the Nuremberg Medical Trial, on the non-German victims of the Nazi medical crimes.

As regards 'euthanasia', the oath is not entirely satisfactory. One could argue that the oath *does* cover 'euthanasia', as it requires the physician to resist attempts by others to ill-treat his patient, and certainly never to engage in such ill-treatment himself. Generally speaking, killing is rightly considered to be the ultimate form of ill-treatment. However, as we saw in the previous chapter, the Nuremberg defendants who participated in 'euthanasia' insisted relentlessly that the killings had been for the victims' own benefit. Furthermore, the prosecution made alarmingly little effort to challenge these assertions. Consequently, it is not entirely clear that the World Medical Association's proposed oath makes any concrete pronouncements on the subject of 'euthanasia'.

A better idea of how this might have worked in practice can be gained from a discussion of examples of 'mercy-killing' in Britain and the United States throughout the period during and shortly after the Nuremberg Medical Trial and the two Physicians' Conventions discussed above. If the WMA oath was widely discussed in relation to the subject of 'euthanasia', one could of course infer from this that the whole issue had galvanized both public, and, specifically, medical opinion. However, we have seen so far that the Nuremberg Medical Trial was, in newspapers and news magazines, reported overwhelmingly as a trial devoted exclusively to the prosecution of perpetrators of medical experiments upon human beings. In addition, it has been shown that discussions of the Trial's ethical dimensions did not tend to focus on 'euthanasia', and that debates about 'euthanasia' did not tend to refer to its abuse under the Nazis. A recent article²¹⁸

²¹⁸ Ian Dowbiggin, "'A Prey on Normal People': C. Killick Millard and the Euthanasia Movement in Great Britain, 1930-55", in the *Journal of Contemporary History*, Vol.36, No.1, (Jan. 2001), pp.59-85.

has shown that the British euthanasia movement was very active indeed in the years following the end of World War II, and that this was largely due to cases of euthanasia which were highlighted in the British press.²¹⁹ The writer of the article identifies two cases involving ‘mercy-killing’ of people discovered to be terminally ill, in the United States, both of which apparently caused widespread debate.²²⁰ I have discovered another, case which might prove instructive. It is an English one, having been brought to trial in London, but the defendant in question was an American citizen, which may explain why the case was reported in the States. On Friday, November 29th, 1946, the *New York Times* reported as follows: ‘Gordon Richard Long, 46-year-old paper mill worker, who pleaded guilty last week to having put his imbecile daughter Jessie to death, and was sentenced to hang, received a reprieve today from Home Secretary Chuter Ede. The death sentence was commuted to life imprisonment’.²²¹

That this case did not pass unnoticed is evident from a short article which appeared about it in *Time* magazine. This article is interesting for two reasons, aside from the additional information which is given concerning the facts of the case. In addition to this, the article in *Time* firstly, identifies ‘euthanasia’ as an important moral problem, and secondly, mentions eugenic practices in Germany, reporting that ‘the Nazis in 1933 legalized compulsory sterilisation of sterilisation of idiots, imbeciles and irredeemable criminals’.²²²

There are two points to be made in relation to this. Firstly, why, when the Nuremberg Medical Trial, prosecuting the perpetrators of Nazi medical crimes, including

²¹⁹ Ibid, p.77.

²²⁰ Ibid.

²²¹ *The New York Times*, Friday, November 29, 1946, p.7.

²²² *Time* magazine, December 2, 1946, p. 32.

‘euthanasia’, was shortly to commence, did the commentator in *Time* magazine choose to highlight Nazi *eugenic* policies, as opposed to Nazi ‘euthanasia’? Secondly, is it possible to relate this statement to the enthusiasm for eugenics in the United States? In addition, it becomes necessary to consider the links, if there are any, between eugenics on the one hand and ‘euthanasia’ on the other? In other words, did the relative prevalence of the former have any implications for tolerance of the latter?

The *Time* magazine article states that ‘no civilized country distinguishes in law between ‘mercy-killing’ and murder.’²²³ The reference to the Nazi sterilisation law, which immediately follows this sentence, may be considered to be an inference that Nazi Germany was *not* a ‘civilized country’, but that the United States is. It is also interesting to note the comment concerning the lack of legal distinction between ‘mercy-killing’ and murder. That ‘mercy-killing’ is *not* murder is the principle argument that the proponents of ‘euthanasia’ use to support it.

The American newspapers also report that, in late 1946, the Euthanasia Society of New York State proposed submitting a bill to the legislature permitting ‘mercy-killings of ‘the incurably ill who are suffering and unwilling to continue to live’.²²⁴ In addition, the Euthanasia Society of America (ESA) announced that fifty-four Protestant clergymen in New York had signed a statement in which they stated their approval of voluntary euthanasia ‘under careful safeguards’.²²⁵ In the United States, the disapproval of this step, and of the proposed Bill in New York State, seems to have been led by Catholics, who condemned the proposals as contrary to Christian teachings.²²⁶ Nevertheless, there is one

²²³ Ibid.

²²⁴ *The Washington Post*, Thursday, December 26, 1946, p.14.

²²⁵ *The New York Times*, Thursday, October 10, 1946, p.25.

²²⁶ Ibid.

report that the Catholic War Veterans Association condemned the proposed New York State Bill in their official publication, recalling that ‘Nazi Germany was charged with using euthanasia to do away with German World War One veterans who were no longer useful to the state’.²²⁷ A report of this bill was also published in *Time* magazine, stating that only those over the age of twenty-one would be eligible to apply, and that ‘the bill would do nothing about imbeciles or children born monstrously deformed’.²²⁸ *Time* also reported that Monsignor Robert McCormick of New York had condemned the proposals as ‘Anti-God, un-American, and a menace to veterans!’²²⁹ This statement is interesting, because, although it makes no specific mention of the Nazis, McCormick’s reference to the ‘menace to veterans’ which the bill would allegedly pose, does demonstrate a possible link with the criticisms of the bill made by the Catholic War Veterans’ Association. It also demonstrates that, in some respects at least, the ‘euthanasia’ programme was understood as having been targeted primarily at veterans of the First World War. Perhaps this can be explained by the fact that the organisation making this link represented war veterans.

As I showed earlier in the chapter (footnote 170) E.A. Barton had a rather bold attitude concerning the legalisation of euthanasia, but we do not really know what the policies of the two organizations were, or how these shaped wider debates about euthanasia. Recent research has suggested that neither C. Killick Millard, honorary secretary of the VELs, nor Mrs. R.L. Mitchell, secretary of the ESA, were entirely opposed to the Nazis ‘euthanasia’ campaign, with Mitchell writing to Millard that the murders by the Nazis of

²²⁷ *The Washington Post*, Thursday, December 26, 1946, p.14.

²²⁸ *Time* magazine, 18 November, 1946, p.70.

²²⁹ *Ibid.*

mentally handicapped Polish children were ‘a great blessing’.²³⁰ As regards the field of medical textbooks, a recent work has highlighted the case of A.F. Tredgold. Tredgold was an eminent British neurologist and believer in eugenics, who was a leading authority on mental defect for much of the first half of the twentieth century, and who had been an expert witness at the Royal Commission on the Care and Control of the Feeble-minded in 1908.²³¹ This was also the year in which Tredgold’s textbook *Mental Deficiency: Amentia* first appeared. Tredgold’s case is a particularly interesting one, as earlier editions of his text - rule out the possibility of ‘euthanasia’ for the ‘mentally handicapped’, but the seventh edition, published in 1947, includes a new section specifically advocating this. In this section, Tredgold states that

‘with the present shortage of institutional accommodation there are thousands of mothers who are literally worn out in caring for these persons at home. In my opinion it would be an economical and humane procedure were their existence to be painlessly terminated, and I have no doubt, from personal experience, this would be welcomed by a large proportion of parents’.²³²

Kemp gives no indication as to the responses to Tredgold’s recommendations, but one assumes that, had such responses been vehemently hostile, this would have been mentioned. Tredgold was also an important figure in his own field of medicine, which would suggest that, had his ideas been viewed as being totally unacceptable, the shock that such a well-respected figure was arguing in favour of them would have been great.

²³⁰ Ian Dowbiggin, ‘‘A Prey on Normal People’’: C Killick Millard and the Euthanasia Movement in Great Britain, 1930-1955), see note 30 for full citation.

²³¹ Kemp, p.67.

²³² A.F. Tredgold, *Mental Deficiency: Amentia* (7th ed.), quoted in Kemp, pp.134-5.

Kemp also gives the example of Dr. E.W. Barnes, the bishop of Birmingham, who, at the annual conference of the co-operative association in 1947, spoke in favour of the ‘euthanasia’ of defective infants, and claimed, ‘Euthanasia and sterilisation should be discussed without importing anti-Nazi prejudice’.²³³ This could be interpreted as meaning that there is no logical connection between Nazi policies on the one hand, and the termination of the lives of those subjected to severe suffering on the other. Nevertheless, Barnes’ remarks do not indicate that he is aware of, or concerned by, the insistence of the ‘euthanasia’ programme perpetrators that they were motivated by compassion for suffering people. Perhaps this is not surprising, given the dearth of media reporting of this phenomenon. In addition, it is not entirely clear whether Barnes is talking about actual, or merely hypothetical, ‘anti-Nazi prejudice’. It is not even at all easy to know whether Barnes strongly disapproved of the ‘euthanasia’ programme. Kemp rightly points out that Barnes was ‘something of a maverick’²³⁴, but this chapter has revealed that his views were not at all uncommon.

‘Twenty-three doctors charged with experimenting on human beings’

We saw in the last chapter that the prosecution and the tribunal at the Nuremberg Medical Trial, in many ways failed adequately to examine the question of ‘euthanasia’. This failure took a number of forms. Little attempt was made to challenge the defendants’ claims that their actions had been motivated by compassion. Furthermore, the tribunal did not consider it either needful or desirable for them to issue general guidelines concerning

²³³ Dr. E.W. Barnes, quoted in Kemp, p.133.

²³⁴ Kemp, p.133.

the practice of ‘euthanasia’, despite having formulated the Nuremberg Code for the protection of future subjects of human experimentation. All-in-all, the Trial presented a lost opportunity, in its unwillingness to take the issue of ‘euthanasia’ seriously or regard it as a moral problem with far-reaching implications. As previous sections of *this* chapter have made clear, the medical and legal professions of both the US and Britain were unanimous both in their view of the Trial as being solely concerned with medical experiments, and in their ‘blind spot’ regarding ‘euthanasia’. This section will consider the reporting of the Nuremberg Medical in the US and British press. Their reporting of the Trial also focused almost exclusively upon medical experiments, a trend which began to be established even before the commencement of the Trial. For example, on October 25, 1946 (just over a month before the Trial began on December 9), the London *Times* reported that ‘major German war leaders, possibly approaching 1000’, were to be tried at Nuremberg the following month. The newspaper named the American judges of these future trials, and reported that indictments were yet to be served, but gave no indication of the probable scope of the Trials, or of the charges which the indictments were likely to contain when they were served.²³⁵ On the same day, the *New York Times* carried a slightly longer and more informative article on the subject of the forthcoming trial. Like the London *Times*, the *New York Times* reported on the arrival of the judges in Nuremberg, but it also mentioned that the defendants would be ‘23 German physicians accused of atrocities in the form of experiments on concentration camp prisoners’.²³⁶

We can see here that an early description of the Nuremberg Medical Trial, before it had begun, gives an indication that there is at least some expectation that the charges

²³⁵ *The Times*, Friday, October 25, 1946, p.4.

²³⁶ *The New York Times*, Friday, October 25, 1946, p.11.

will relate solely to medical experiments, and that this is the subject to which the Trial will be devoted. Nevertheless, this early description is by no means sufficient to demonstrate any kind of general trend in newspapers' reporting of the Nuremberg Medical Trial.

In the period before the opening of the Trial, however, we gain other hints that the newspapers and news magazines seem generally to view the Trial as the prosecution of perpetrators of medical experiments upon non-consensual human subjects, and nothing else. On Sunday, December 8th, 1946, the *Washington Post* reported that the Trial would begin the following day, and described the crimes with which the defendants were charged as 'the murder and torture of thousands of concentration camp inmates used as human guinea pigs'.²³⁷ The newspaper also gives specific details of the experiments themselves, reporting that 'the defendants...are charged with experimenting with disease, freezing and high-altitude tests on prisoners in various concentration camps. The personal physicians of Hitler and Himmler, and the woman doctor, Gerta Oberheuser, who allegedly performed sterilizations at Ravensbrueck, are among the defendants'.²³⁸ In addition, a report of the forthcoming trial, published in *Newsweek* and entitled 'Herr Dr. Sadist', reported that the twenty-three defendants pleaded not guilty 'to the charge of murdering thousands of persons in brutal medical experiments that have stirred horror and disgust throughout the world'.²³⁹ In its report on the opening of the Trial, the *Daily Telegraph* explained to its readers that the defendants were charged with 'committing

²³⁷ *The Washington Post*, Sunday, December 8, 1946, p.3.

²³⁸ *Ibid.*

²³⁹ *Newsweek*, December 2, 1947, pp. 44-5.

murders, cruelties, brutalities and atrocities by means of medical experiments on helpless inmates of concentration camps'.²⁴⁰

It is fairly clear now that, at the beginning of the Trial, newspapers in both Britain and America generally regarded it as a trial in which medical experimentation was the sole subject of the charges. This does seem odd, given that the newspapers from which we are quoting were (and continue to be) major publications with international readerships, and with correspondents attending the Trial. In addition, these correspondents must, one assumes, have been familiar with the contents of the indictment. If one reads this document, one can see that, whilst much of it *is* devoted to medical experiments, paragraph nine ('war crimes') clearly mentions

'[T]he so-called 'euthanasia' programme of the German Reich, in the course of which the defendants herein murdered hundreds of thousands of human beings, including nationals of German-occupied countries. This programme involved the systematic and secret execution of the aged, insane, incurably ill, of deformed children and other persons, by gas, lethal injections and divers other means, in nursing homes, hospitals and asylums. Such persons were regarded as 'useless eaters' and a burden to the German war machine. The relatives of the victims were informed that they died from natural causes such as heart failure. German doctors involved in the 'euthanasia' campaign were also sent to the Eastern occupied countries to assist in the mass-extermiation of Jews'.

²⁴⁰ *The Daily Telegraph*, December 9, 1946, p.1.

This paragraph is reiterated, at somewhat shorter length, in paragraph fourteen, (‘crimes against humanity’), of the indictment.²⁴¹ The indictment also demonstrates the view that the killings had a purely utilitarian basis.

The above paragraph is interesting for a number of reasons. Of course, in relation to the previous chapter, it does demonstrate that there must originally have been some sort of intention amongst the prosecutors to treat the issue of ‘euthanasia’ seriously. In addition, it does appear to show that those newspaper correspondents who attended the Trial and reported from it would, from the indictment if nothing else, have known that the Trial was not to be wholly taken up with the issue of medical experiments. Nevertheless, it is of course necessary to peruse the newspapers from 1947 to determine whether their reporting of the Trial differs from that seen in 1946. Nevertheless, before moving on to this, there are some other reports of the Trial from December 1946 which deserve consideration.

On December 9, 1946, (the day after the *Washington Post* report quoted above), the *New York Times* reported that the Trial would be commencing that day, and described it as concerning ‘charges of murders and atrocities committed in medical experiments in concentration camps’.²⁴² This newspaper clearly took a great interest in the early stages of the Trial, reporting on it regularly throughout December 1946. On December 10, it carried a long report of the opening of the Trial, and of chief prosecutor, Brig. Gen. Telford Taylor’s comment that the ‘killing of some 275,000 persons in the guise of ‘euthanasia’’ was one of a number of atrocities which were ‘beyond the pale of even the

²⁴¹ Roger Goodman (ed.), *The First German War Crimes Trial: Chief Judge Walter B. Beals’ desk notebook of the Doctors’ Trial, Held in Nuernberg, Germany, December 1946-August 1947*, (North Carolina: Salisbury NC Document Publications, 1979).

²⁴² *The New York Times*, Monday, December 9, 1946, p.8.

most perverted medicine'.²⁴³ This is obviously a quotation from Taylor, rather than something which the reporter independently decided to highlight. Nevertheless, it will be interesting to see whether or not the issue of 'euthanasia' is kept in mind in future reports.

On the same day, the *Washington Post* carried a similar report of Taylor's opening address. The *Post* reports that Taylor 'opened the Trial of the 22 men and one woman with a day-long presentation of charges – wanton killing of victims in dubious experiments, 'mercy slayings', and tortures in concentration camps'.²⁴⁴ The *Daily Telegraph* did not actually describe the scope of the Trial in any particular terms, but its report made reference to experiments involving freezing, simulation of high altitude, mustard gas, sea-water, sterilization and deliberate infection of wounds.²⁴⁵

Two main features of the media reports of the Trial have so far become apparent. Firstly, the description of the Trial as one devoted solely to the prosecution of perpetrators of medical experiments upon inmates of concentration camps. This may be because, as *Newsweek* described above, the medical experiments 'stirred horror and disgust throughout the world'.²⁴⁶ Nevertheless, it does mean that the subject of 'euthanasia' is not mentioned. Secondly, it appears that the *Times*, the *New York Times* and the *Washington Post* all have a specific way of describing the Trial, perhaps designed in some ways to keep it in their readers' minds. This 'device', if such it may be called, appears to involve referring to the Trial, every time it is reported, in roughly similar terms, which focus on its prosecution of those accused of medical experimentation. This differs somewhat from the reportage in the *Daily Telegraph*, which tends to focus on the

²⁴³ *The New York Times*, Tuesday, December 10, 1946.

²⁴⁴ *The Washington Post*, Tuesday, December 10, 1946, p.6.

²⁴⁵ *The Daily Telegraph*, Tuesday, December 10, 1946.

²⁴⁶ *Newsweek*, see note 18 for details.

medical experiments, but avoid describing the Trial in particular terms relating to the charges, merely commenting that the defendants are ‘physicians accused of war crimes’.²⁴⁷ In practice, this would mean that whilst the readers of the *Daily Telegraph* were getting slightly different descriptions of the scope of the Nuremberg Medical Trial, the readers of all these newspapers would gain the impression that, at least, the main focus of the Trial concerned medical experiments in concentration camps. Of course, discussion of this *did* form a large part of the Trial, and most deservedly so, but it does seem odd that the defendants’ constant insistence that their instigation of and participation in, the ‘euthanasia’ programme, did not motivate a greater number of questions amongst commentators about the problem of ‘mercy-killing’.

The following day (Wednesday, 11 December, 1946), an editorial entitled ‘Nightmare at Nuremberg’ appeared in the *New York Times*. The editor at first appears to be making a general condemnation of the defendants’ crimes, writing:

‘Many of these doctors were eminent specialists in the art of healing, all sworn to the Hippocratic Oath of mercy. Trained to serve humanity, they willingly exposed themselves to a moral infection which destroyed their mercy and left only their science to function in the last refinements of physical torture’.²⁴⁸ This sounds as though it might be a condemnation of both the medical experiments and the ‘euthanasia’ campaign, but the following sentence makes it clear that it is the experiments which are being deplored: ‘The details of these *experiments* [my italics] are revolting almost beyond the bounds of

²⁴⁷ See cited articles in the *Daily Telegraph* for details.

²⁴⁸ *The New York Times*, Wednesday, December 11, 1946, p.30.

credibility...It is from the lowest depths to which civilized society has ever fallen that these twenty-two men and one woman have been dredged up for trial at Nuremberg'.²⁴⁹

This does not, of course, mean that the editor of the *New York Times* does not deplore the 'euthanasia' campaign, merely that he has not felt moved to do so at this point.

Nevertheless, one can say that, so far, the newspapers studied seem to have done much to establish in the public mind that the Nuremberg Medical Trial is, to all intents and purposes, a trial concerning the perpetrators of medical experiments alone.

On the same day, the *Daily Telegraph* published another short report of the Trial. Again, this did not describe it in specific terms, but referred to both Karl Brandt's denial that he was Hitler's physician, and the insistence of the defendant Hans Wolfgang Romberg, that he had voiced his objections to high-altitude experiments to his superior, the late Dr. Rascher.²⁵⁰ Other newspaper reports which appeared before the Trial's Christmas recess tend to reinforce this view. On December 14, 1946, the *New York Times* published a photograph of the Nuremberg Medical Trial defendants in the courtroom, bearing the caption 'Nazi Doctors and Scientists on Trial for Criminal Experiments: Defendants before the military tribunal in Nuremberg where they are accused of war crimes against inmates of concentration camps and prisoners of war'.²⁵¹

On December 18, 1946, both the *New York Times* and the *Washington Post* carried a report from the Trial concerning a tailor (Walter Neffe) in Dachau concentration camp, who was handed over for experimentation because he had refused to make a suit

²⁴⁹ Ibid.

²⁵⁰ *The Daily Telegraph*, Wednesday, December 11, 1946, p.5.

²⁵¹ *The New York Times*, Saturday, December 14, 1946, p.3.

for an Elite Guardsman.²⁵² Interestingly, both reports describe the Trial in exactly the same way; as being of '23 Nazi physicians charged with practising cruelties on human beings under the guise of science',²⁵³ a statement which is ambiguous, and could obviously be describing both 'euthanasia' and experimentation. On December 23, *Newsweek* made a further reference to Brig. Gen. Taylor, reporting that 'In words fraught with bitterness, [he] characterized the most brutal of all war crimes in Nuremberg last week. The defendants were twenty-three Nazi doctors and scientists...All were charged with conducting a 'scientific' mass-murder programme in which some 100,000 helpless victims were choked, gassed, bled or frozen to death'.²⁵⁴ This is, of course, ambiguous, and could, like the previous report, be a description of virtually any of the Nazi medical crimes. However, further reading of the report makes it apparent that it is the issue of medical experiments that is being specifically highlighted: 'Dr. Leo Alexander, Duke University psychiatrist, even produced the word 'thanatology' (the science of inducing death) to try to give meaning to the hideous German experiments in which men and women were substituted for monkeys'.²⁵⁵ A further report in the following issue focused on the testimony of Berl Bessing, a Swedish Jew who had been subjected to medical experimentation by the Nazis.²⁵⁶

The London *Times* gave a short report on the Nuremberg Medical Trial at the beginning of January 1947, describing it as 'the resumed trial...of 23 Nazi doctors charged with experiments on human beings'.²⁵⁷ This report is particularly interesting,

²⁵² *The New York Times*, Wednesday, December 18, 1946; *The Washington Post*, same date, p.3.

²⁵³ *Ibid.*

²⁵⁴ *Newsweek*, December 23, 1946, p.54.

²⁵⁵ *Ibid.*

²⁵⁶ *Newsweek*, December 30, 1946, p.48.

²⁵⁷ *The Times*, Saturday, January 4, 1947, p.3.

because the focus so far has been largely on newspapers from the United States. The *Times* report would appear to demonstrate a continuation of the trend we have seen already for describing the Trial as focusing solely on medical experiments, and it is interesting to notice this perception occurring in Britain as well as in the United States. There is, however, one report, from the *New York Times*, which did report briefly on the discussion of ‘euthanasia’ at the Nuremberg Medical Trial, as follows: ‘

Mercy killings charged against four German doctors here were illegal even under Nazi law, the prosecutor, James McHaney told the United States War Crimes Court today. ‘No euthenasia (sic) law was ever promulgated in Germany’, the prosecutor said. ‘Mercy killers have been sentenced to death by German courts and the records of these courts will be offered in evidence’. Adolf Hitler’s personal physician, Karl Brandt, and three others of the twenty-three doctors on the war crimes dock are accused of participating in mercy killings.²⁵⁸

Aside from the unusual spelling of the word ‘euthanasia’, this report is interesting for a number of reasons. Unusually, it does actually mention discussions of the subject at the Nuremberg Medical Trial. In addition, it demonstrates some concern with the legal aspects of the programme, implying that the programme’s illegality was of great importance, but that questions regarding the morality of the programme had not been considered. There is, it will be remembered, a similar trend to be found in the judgement of the Nuremberg Medical Trial, with regard to ‘euthanasia’. In addition, the report

²⁵⁸ *The New York Times*, January 11, 1947, p.2.

demonstrates a depressing resurgence of the tendency to refer to the programme (uncritically) as ‘mercy-killing’.

It is important to note that one other article referring to ‘euthanasia’ is to be found, in the *Daily Telegraph*. In a detailed report, relating to Viktor Brack’s affidavit, the newspaper states that the aim of the programme was to rid Germany of institutionalised people in order to relieve doctors and nurses, and create more free hospital beds for members of the armed forces.²⁵⁹ This report is significant, not only because it refers in detail to the ‘euthanasia’ programme itself, but also because, throughout the report, whilst the word ‘euthanasia’ is used uncritically, without the use of quotation marks, the phrase ‘mercy-killing’ *does* appear in quotation marks. This would certainly indicate awareness on the part of the *Daily Telegraph*’s ‘own correspondent’ that the programme was *not* merciful. However, Brack’s insistence upon his ‘compassionate’ motives is not referred to.²⁶⁰ In addition, a cynic might consider the remarks made by Michael Marrus, to the effect that the understanding of ‘euthanasia’ in such utilitarian terms, echoing the description of the programme given in the indictment, was of inestimable value in separating Nazi ‘euthanasia’ and eugenics from discussions of these subjects in other countries.²⁶¹

As is often the case with long trials, media interest rather waned throughout the first months of 1947, undergoing a resurgence when the judgements were passed and the sentences were announced. By August 1947, when the judgement and sentences were passed, the newspapers were still describing the Nuremberg Medical Trial in terms which

²⁵⁹ *The Daily Telegraph*, Monday, December 16, 1946, p.5. Of course, some modern historians, such as Henry Friedlander, would dispute this description of the programme’s aims.

²⁶⁰ *Ibid.*

²⁶¹ Marrus, *The Nuremberg Doctors’ Trial in Historical Context*, pp. 116 onwards.

strongly suggested that non-consensual human experimentation represented the entire scope of its enquiry. For example, when the judgement was announced, the London *Times* reported that the convicted defendants had been found guilty of participation in ‘sadistic ‘experiments’ on inmates of concentration camps’.²⁶² The following day, the newspaper reported on the sentences handed down by the Tribunal, and used an almost identical description of the atrocities committed, calling them ‘sadistic ‘experiments’ on the inmates of a concentration camp’.²⁶³ The *Manchester Guardian* echoed this, informing its readers that the defendants had been found guilty of ‘crimes against humanity and sadistic experiments on human beings in German concentration camps’.²⁶⁴ Similarly, the *Daily Telegraph* reported that the condemned men were ‘held responsible for ‘sadistic’ experiments in Nazi concentration camps and guilty of war crimes’.²⁶⁵ What these latter two reports have in common is their inference that the charges did not relate entirely to medical experimentation, with the *Manchester Guardian* referring to an additional charge of ‘crimes against humanity’, while the *Daily Telegraph* reported that the defendants who had committed these experiments had also been found guilty of ‘war crimes’. However, neither newspaper comments upon the exact nature of these additional charges, nor is there any discussion of ‘euthanasia’.

This perception of the Trial is mirrored in the United States. On August 20, the day the judgement was reported, the *Washington Post* informed its readers that ‘[Karl] Brandt is eligible for the death sentence. He and 14 other physicians, including one woman, were convicted specifically of complicity in torturous medical experiments on

²⁶² *The Times*, Wednesday, August 20, 1947, p.3.

²⁶³ *The Times*, Thursday, August 21, 1947, p.3.

²⁶⁴ *The Manchester Guardian*, August 21, 1947.

²⁶⁵ *The Daily Telegraph*, August 21, 1947.

‘hundreds of thousands’ of concentration camp inmates – gypsies, Jews, Poles, Russians. Almost all died’.²⁶⁶ The *Post*’s concentration on Brandt is particularly interesting. Firstly, there is no mention of his participation in the ‘euthanasia’ campaign, and, secondly, the reporter was, apparently, not struck by the bizarre accusation which the Tribunal levelled at Brandt, and which was highlighted in the last chapter. Namely, the Tribunal accused Brandt of dereliction of duty for deserting the programme after its inception, and thus allowing ‘abuses’ – the killing of non-Germans – to occur.²⁶⁷ It is also noteworthy that the reporter did not appear to be alarmed by the Tribunal’s pronouncement that they were not interested in ‘the abstract proposition of whether or not a state may *impose* [my italics] euthanasia upon certain classes of its citizens’.²⁶⁸

There could be a number of explanations for this. In the light of the enormity of the defendants’ crimes, the reporter may have been unwilling to criticize the Tribunal in any way. The reporter might also have felt that to criticize an American court abroad could be considered unpatriotic. This last possibility seems unlikely, however, as the *Post* was at the time a liberal newspaper, noted for its opposition to racial segregation.²⁶⁹ This would seem to indicate a willingness to criticize the United States authorities when it was deemed necessary to do so.

This section has made clear that the British and U.S. media’s coverage of the Nuremberg Medical Trial portrayed it overwhelmingly as a trial convened for the sole purpose of prosecuting Nazis accused of carrying out medical experiments upon non-consenting human subjects, who were rendered effectively powerless by their incarceration in

²⁶⁶ *The Washington Post*, Wednesday, August 20, 1947, p. 10B.

²⁶⁷ FO 646, vol. 23, p. 11395, 19 August, 1947.

²⁶⁸ *Ibid.*

²⁶⁹ See *The Washington Post*, editorials and correspondence, 1946, for examples of this.

concentration camps. Though the issue of experiments is, of course, a very important one, it is alarming to see the almost total silence on the subject of Nazi 'euthanasia', which was demonstrated in this section. This silence indicates that the issue failed to strike the media as being worth reporting, even given the scale and cruelty of the killings, and the alarm which, had the issue been properly considered, must surely have arisen from the defendants' claims that the motives of the programme were entirely merciful. This has ramifications for the public's view of the Trial, and also for their perception of the problem of 'euthanasia'. As the later sections of the chapter will show, the perception that disabled people had no possibility of deriving any enjoyment from life, and were often a burden to those caring for them, remained unchallenged in the post-war years. Had the media highlighted the Nazi 'euthanasia' programme in its reporting of the Nuremberg Medical Trial, it is possible that the public may have been motivated to question these assumptions, and that some degree of societal change in this area may have been achieved. Of course, the achievement of societal change would have entailed the involvement of professionals in important relevant fields, such as law and medicine. Consequently, this next section will consider the perception of the Trial in medical circles in Britain and the United States. This section will show that this perception was remarkably similar to that of the press. In other words, the Nuremberg Medical Trial was considered to be one devoted to the prosecution of perpetrators of medical experiments upon human beings in concentration camps. This indicates that lack of concern for the victims of 'euthanasia' murders was a phenomenon not confined to the press, but reflects a deep-seated and wide-ranging societal perception that the issue was of importance when

its practice needed to be defended, but not when it was inflicted upon non-consenting victims.

Conclusion

This chapter tackled the difficult task of, in the words of Martin Pernick, ‘explaining why something didn’t happen’. In other words, it showed that the British and U.S. legal and medical professions, as well as the journalists of prominent newspapers, understood the Nuremberg Medical Trial as a trial for the prosecution of those who experimented upon non-consenting inmates of concentration camps. Though this certainly *was* an important aspect of the Trial, the issue of ‘euthanasia’ was almost totally overlooked. It was suggested that the principle reason for this glaring omission was the overwhelming invisibility of the disabled in both Britain and the United States. Though they were, in some respects, an ever-present consideration, their institutionalization and the overwhelming feeling that they had nothing of any importance to say about themselves, and were a problem to be ‘dealt with’, aided and abetted the perceptions of their ‘otherness’

The important problem of the widespread perception that disabled people suffered intolerably, and that this suffering could only be remedied by death, was brought into sharp relief by the material discussed in the ‘legal’ section. The cases of *Long* and particularly of *Repouille* gave a very strong indication of the widely-held belief that disability was, in many ways, a fate worse than death. Consequently, death was held to be a blessing, rendering its non-consensual nature of no great importance. This attitude was clearly rather ingrained, given that not even something as extreme as the Nazi

‘euthanasia’ programme led the legal profession, or, indeed, anyone else discussed in this chapter, towards an appreciable unwillingness to accept defences of ‘euthanasia’ in criminal cases, or to treat them with greater caution when they did arise.

The ‘medical’ section of the chapter revealed that, while many members of the medical profession were considerably concerned about the ethical implications of the Nazis’ medical crimes, their worries focused on the question of whether or not it was ethical to use data obtained in medical experiments. A notable exception to this was the oath formulated at the Bad Nauheim Physicians’ Conference, although this was only applicable to *German* physicians. The first Annual General Meeting of the World Medical Association may have been less successful as regards ‘euthanasia’. It prohibited physicians from doing ‘harm’ to their patients, but did not consider the possibility that the principle justification for ‘euthanasia’ is the claim that the victim has been killed to spare him or her further suffering.

Our ‘newspapers’ section made clear that British and US media reporting of the Nuremberg Medical Trial portrayed it as being concerned overwhelmingly with the prosecution of perpetrators of medical experiments upon concentration camp prisoners. This did not assist the US/British debates about ‘euthanasia’, nor did it highlight the ways in which the Trial fell short in its discussion of the subject. The overall impression was that the ‘euthanasia’ aspect of the Trial made little impact upon the media or public imagination. This would have meant that the general public would have been largely unaware of the issue, and that an opportunity to bring the issue into the public arena, and discuss it in the light of an extreme and non-consensual example of its use, was completely missed. Such a discussion might have been able to occur if it had been

spearheaded by, for example, either the media or concerned professionals in a relevant field but, as the two preceding sections showed, discussion of the matter by the medical and legal professions virtually paralleled that found in the newspapers.

The question we are left with now is a deceptively simple one: what difference, if any, should we *expect* Nazi ‘euthanasia’ to have made in Britain and the United States? Both this chapter, and the limited amount of secondary literature on this particular subject, clearly contain expectations that the revelations should have had some appreciable effect, quantifiable in terms of a clear demarcation before the reports were received, and afterwards. This clearly did not occur. The truth of this is made particularly clear by the section of this chapter which dealt with actual cases of ‘euthanasia’ in the United States and Britain. Though, in both countries, perpetrators of ‘euthanasia’ were arrested and often convicted, they tended to receive extremely light sentences, and no attention seemed to be paid to any wider societal problems which may have gone some way towards provoking the killings (such as lack of social care facilities; it will be remembered that earlier in the chapter, A.F. Tredgold advocated ‘euthanasia’ on the basis of lack of institutional provision). In addition, the assumption that disability caused intolerable suffering which could only be ended by death was widespread. Just as the previous chapter showed that the Nazi ‘euthanasia’ programme was not taken seriously at the Nuremberg Medical Trial, this chapter has established that not even the revelations about a systematic programme of murder were sufficient to move those who heard them to consider that ‘euthanasia’ involves a real human being who has been murdered (such as Repouille’s son and Long’s daughter), and should be treated accordingly. In the next chapter, we will look at the ways in which historians have written about the Nazi

'euthanasia' programme, and see how early dismissive attitudes have – belatedly – given way to proper study of the programme as an event in its own right, and how it has even started to be used for socio-political purposes.

Chapter Three

‘Usually the Topic Has Been Mentioned Only in Passing’: Historians’ Perceptions of the Nazi ‘Euthanasia’ Programme

Introduction

This chapter will discuss the ways in which English-speaking historians of the Nazi period have viewed the Nazi ‘euthanasia’ programme. Michael Burleigh has claimed that, in the decades immediately following the end of the Second World War, German historians paid no meaningful attention to the Nazis’ ‘euthanasia’ project, the only text dealing with it being Alice Platen Hallermund’s 1948 book *Die Tötung Geisteskranker in Deutschland. Aus der Deutschen Ärztekommision beim amerikanischen Militärgericht*.²⁷⁰ Reading between the lines of Burleigh’s article, however, gives rise to the suspicion that, in the early years at least, the Nazi ‘euthanasia’ programme was not regarded as being a subject of great interest and importance by many *non*-German historians either. But why was this? In his review of Henry Friedlander’s 1995 work, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*, Robert Gellately, then of the University of Western Ontario, remarked that ‘Although we have been aware, at least in broad outline, of the nature and scope of Nazi Germany’s euthanasia program,

²⁷⁰ Michael Burleigh, ‘Surveys of Developments in the Social History of Medicine: III. ‘Euthanasia’ in the Third Reich: Some Recent Literature’, in *Social History of Medicine* (1991), pp.317-327, p.318.

usually the topic has been mentioned only in passing'.²⁷¹ Gellately did not, however, offer any opinions as to why this was so. By contrast, Detlef Mühlberger, of Oxford Brooks' University, suggested that there were two reasons for this. In his review of Michael Burleigh's 1994 book *Death and Deliverance: Euthanasia in Germany 1900-1945*, Mühlberger argued that, firstly, the Nazis had simply committed so many atrocities, that the 'euthanasia' programme had, in terms of being regarded as an important topic, simply fallen by the wayside. Secondly, said Mühlberger, English-speaking historians had tended to pay more attention to the crimes committed by the Nazis against Jews and people of occupied nations, than those against German civilians.²⁷² This was, of course, also a feature of the Nuremberg Trials themselves. Support for the view that the Nazi 'euthanasia' programme had been paid relatively little attention by English-speaking historians also comes from a review of Burleigh's book, which appeared in the journal *Isis* in December, 1995. The reviewer, Sheila Faith Weiss, wrote that 'most of the existing literature explores only facets of the Nazi *Aktion* or provides an overview of the disturbing particulars as part of the broader (if not unrelated) issues of the Nazi 'racial state', medicine under the swastika, or the Holocaust'.²⁷³ As discussed in my introduction, Colin Barnes and others have shown that the institutionalization of impaired people from the nineteenth century onwards has given rise to a widespread and tenacious assumption that the things which befall impaired people are, and can only ever be, the direct result of the impairment itself. In addition, this chapter, like the others, will show that there has been a frightening lack of importance attached to the lives of impaired

²⁷¹ Robert Gellately, review of Henry Friedlander's *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* in *The Journal of Modern History*, (Vol.70, No.1, (March, 1998), pp.243-245, p.245.

²⁷² Detlef Mühlberger, review of Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945*, in the *English Historical Review*, Vol.112, No.446, (April, 1997), pp.553-554, p.553.

²⁷³ Sheila Faith Weiss, review of Burleigh, *Death and Deliverance*, in *Isis*, Vol. 86, No.4, (1995), pp.680-681, p.680.

people, and to the Nazi ‘euthanasia’ programme – the ultimate crime committed against them.

This chapter will show that the relative lack of attention paid to the Nazi ‘euthanasia’ programme by English-speaking historians – at least until the 1980s and, particularly, the 1990s – was caused by a number of factors. Right up until the mid-1980s, when *‘Euthanasie’ im NS-Staat: Die ‘Vernichtung lebensunwerten Lebens’*, by the German journalist Ernst Klee was published, and subsequently reviewed in a number of prominent English-speaking historical journals, the Nazi ‘euthanasia’ programme was, in the main, only discussed briefly, and usually only by historians whose books enjoyed a rather limited readership. Scholarly discussion of the programme was further hampered by the tendency amongst those historians who did consider it, to treat it not primarily as a programme of systematic mass-murder, but as an example of how public opposition to a killing programme could effectively get that programme stopped. Despite the fact that the Nuremberg Medical Trial had established that the programme did *not* end with Hitler’s ‘stop’ order of 1941, historians persistently asserted for decades that it had done so, and books are still being published in which claims to this effect are made. For example, Eric Johnson’s *The Nazi Terror: Gestapo, Jews, and Ordinary Germans* states that the programme ended – and did so immediately following, and largely as a result of, Clemens von Galen’s sermon condemning it.²⁷⁴ Peter Longerich’s 2001 book *The Unwritten Order: Hitler’s Role in the Final Solution* discusses the programme at some length, but still concludes that ‘resistance will have been a significant reason for breaking off the ‘euthanasia’ programme.’²⁷⁵

²⁷⁴ Eric Johnson, *The Nazi Terror: Gestapo, Jews, and Ordinary Germans* (New York: Basic Books, 1999), p.222.

²⁷⁵ Peter Longerich, *The Unwritten Order: Hitler’s Role in the Final Solution* (Stroud: Tempus Publishing, 2001), p.83.

This chapter will also show that historians in recent years have gone a significant way towards repairing the damage done by the dismissive attitudes of earlier scholars towards the ‘euthanasia’ programme. Debates nowadays centre more upon the question of the Nazis’ motivations for the programme, and the disagreements caused by differing interpretations thereof. However, a question-mark remains over how much attention the Nazi ‘euthanasia’ programme, and other mass-murders of non-Jews by the Nazis, should command. For example, in his book *The Nazi Dictatorship: Problems and Perspectives of Interpretation*, Ian Kershaw writes:

‘The wider problem alters in essence, therefore, from an attempt to ‘explain’ the Holocaust specifically through Jewish history or even German-Jewish relations, to the pathology of the modern state and ... the thin veneer of ‘civilization’ in advanced industrial societies...[T]his demands an examination of complex processes of rule, and a readiness to locate the persecution of the Jews in a broader context of escalating racial discrimination and genocidal tendencies directed against various minority groups. This is not to forget the very special place which the Jews occupied in the Nazi doctrine, but to argue that the problem of explaining the Holocaust is part of the wider problem of how the Nazi regime functioned...’²⁷⁶

Kershaw’s peculiar concern – that the study of the Nazi persecution of non-Jews may be something to apologise for, as opposed to being an entirely legitimate undertaking – is echoed by Omer Bartov. In his introduction to a book edited by him, he comments upon

²⁷⁶ Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (Fourth Edition), (London: Arnold, 2000), p.94.

the studies of the Nazi ‘euthanasia’ programme produced by Burleigh and Friedlander, writing:

‘Far from diverting attention from the genocide of the Jews, they argue ... that the so-called ‘euthanasia’ programme set the stage ... for the ... genocide of the Jews, the Roma and Sinti, and other categories of racial, social and political ‘undesirables’.²⁷⁷

In other words, attention may be paid to the Nazi ‘euthanasia’ programme, but only if this sheds light on the Nazi genocide of the Jews. This harks back the Nuremberg Medical Trial, in which the Tribunal stated that, in their view, a state was perfectly entitled to *compel* classes of its citizens to submit to ‘euthanasia’, and that such a measure would only be worthy of international censure if it were to be applied in a racist manner. With specific regard to the Nazi persecution of the Jews, this chapter will show that, for decades, historians’ discussions of the Nazi ‘euthanasia’ programme did ‘shed light’ (or, at least, attention) on the Nazi persecution of the Jews, in the sense that the programme was regarded, by those historians who did discuss it, as an example of the possibility of German resistance to Nazism, and of what could have happened had the Germans not been too rabidly anti-Semitic to protect the Jews in a similar way. This preoccupation successfully obscured every aspect of the ‘euthanasia’ programme itself. It also shows how historians regarded the ‘euthanasia’ programme primarily as an ethical issue – not as the systematic murder of innocent people. During the last ten to fifteen years, however, a significant number of historians have begun to research Nazism from this wider perspective mentioned by Ian Kershaw and Omer Bartov. This has, in many cases, led to

²⁷⁷ Omer Bartov, (ed.), *The Holocaust: Origins, Implementation, Aftermath*, (London: Routledge, 2000), p.3.

greater attention being paid to the ‘euthanasia’ programme. This attention has taken the form of regarding the ‘euthanasia’ programme (and subsequently the Final Solution) as arising from European racism and racial hygiene, or of such ideas as Social Darwinism and eugenics. In the first decade of the twenty-first century, another development has taken place. The new discipline of Disability History has also begun to consider the Nazi ‘euthanasia’ programme, albeit in ways that are at least as much to do with socio-political issues as they are with history. All-in-all, this chapter will show that, whilst there may still be some way to go, study of the Nazi ‘euthanasia’ programme has come an amazingly long way, from unpromising beginnings when it was all too often dismissed, ignored, or noticed only by those who wished to use it to demonstrate the possibilities of German resistance to Nazism.

During the decades immediately following the end of World War Two, no scholarly works dealt specifically with the Nazi ‘euthanasia’ programme. Seminal works on Nazism, such as William Shirer’s bestselling *The Rise and Fall of the Third Reich*²⁷⁸ make no reference to the programme at all. Shirer’s book does contain an extensive discussion of the Nuremberg Medical Trial, and of the crimes which the defendants had committed. However, the Trial is discussed in a section of the book dealing with Nazi medical experiments, and there is no mention that the ‘euthanasia’ programme was one of these crimes, and there are no references to the Nuremberg defendants Karl Brandt and Viktor Brack.²⁷⁹ Other important works, such as Alan Bullock’s *Hitler: A Study in Tyranny*²⁸⁰, and *Hitler’s Table-Talk*²⁸¹, edited by Hugh Trevor-Roper, similarly make no

²⁷⁸ William Shirer, *The Rise and Fall of the Third Reich* (London: Pan Books, 1964). Shirer had, though, referred to the programme in the fourth instalment of his ‘Berlin Diary’, published in the *Daily Express* in 1940.

²⁷⁹ *Ibid.*, pp. 1165, 1166, 1172-5, 1177.

²⁸⁰ Alan Bullock, *Hitler: A Study in Tyranny* (London: 1964).

reference to it. A surprising exception to this is the British historian, William Carr, who refers to the programme briefly in his book *A History of Germany 1815-1945*. His view is that the programme's ostensible demise can be attributed to two factors: protests from church leaders, and the fact that the perpetrators were needed, in mid-1941, to facilitate mass-killings in the east.²⁸² This perspective is particularly interesting, because Carr is virtually the only writer of this period to pay any attention to this transfer of personnel – a theme which would not generally be taken up by scholars for several decades to come, and which will be considered in section two of this chapter. Most scholars of this period who discuss the 'euthanasia' programme conclude that it ended simply because the German public unanimously opposed the killing of 'their own' people, and the Nazis were powerless to resist these protests, despite the fact that the need to transfer the T4 personnel had been specifically mentioned during the course of the Nuremberg Medical Trial. Carr's comments concerning the supposed 'end' of the 'euthanasia' programme are also fitting. They lead into the next section of the chapter. Here, I will show that the most persistent and insidious reaction to the Nazi 'euthanasia' programme has been the insistence by historians that it was only significant because the protests against it established how anti-Semitic the bulk of the German population were, and how they could have prevented the Final Solution if they had made any attempt to do so. This obfuscation had a devastating effect on the academic (and, presumably) public perception of the programme. No attempt was made to establish anything about it or its victims; it was sufficient to remark that it had crumbled in response to pressure from prominent churchmen and the relatives of victims. Then, to complete the effect, all one had to do

²⁸¹ *Hitler's Table-Talk* (London: Wiedenfeld and Nicolson, 1953). Edited with an introductory essay, 'The Mind of Adolf Hitler', by Hugh-Trevor-Roper.

²⁸² William Carr, *A History of Germany 1815-1945*, (London: Edward Arnold Ltd., 1969), p.386.

was make some additional comment (in suitably offended tones) that all this just goes to show what could have happened if the German public had wanted to protect the Jews.

The disability historian Catherine J. Kudlick has written that

‘Unlike racial, ethnic and sexual minorities, disabled people experience attacks cloaked in pity accompanied by a widely held perception that no one wishes them ill’.²⁸³

As this section will show, this is perhaps a partial explanation for the attitude to the Nazi ‘euthanasia’ programme demonstrated by the historians we will encounter here. To me, the emphasis on the protests rather than the programme is probably due to a number of factors. As discussed in the introduction, it has been quite a struggle to get people, both within academia and within society at large, to recognise that the effects of disability are often due to societal factors rather than arising directly from the individual’s impairment.

‘Outraged Human Feelings’: The Protests against the ‘Euthanasia’ Programme

One of the most famous aspects of the Nazi ‘euthanasia’ programme concerns the way in which knowledge of it became public, leading to protests from the relatives of victims, and from prominent churchmen, such as Clemens von Galen, the Archbishop of Münster. These protests led to a publicly announced ‘halt’, and, allegedly, to the complete stop of the programme. As mentioned in the introduction, this is an impression of the ‘euthanasia’ programme which went almost totally unchallenged in Anglo-American historical circles until the late 1980s, when various historians, such as Paul Weindling and Robert Proctor, influenced by the work of German scholars such as Götz Aly and

²⁸³ Catherine J. Kudlick, ‘Disability History: Why We Need Another ‘Other’’, *American Historical Review*, vol. 108, no.3, (June, 2003), p.768.

Ernst Klee, began to study the Nazi ideology, and the resulting Nazi genocide, in terms of a comprehensively racist and eugenicist world-view arising partly from earlier European and Western ideologies such as Social Darwinism and eugenics. The work done by Weindling, Proctor and others was added to in the mid-1990s by the publication of Henry Friedlander's *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*, and Michael Burleigh's *Death and Deliverance: Euthanasia in Germany 1900-1945*.²⁸⁴ These were the first books by English-speaking historians to be devoted specifically to the study of Nazi 'euthanasia', and Friedlander describes the idea that the programme ceased completely as 'based on a postwar myth'.²⁸⁵ However, one thing which the Nuremberg Medical Trial did manage to establish was that the programme was, at most, temporarily suspended, and that the murder of children in particular continued right up until the end of the war.²⁸⁶ Despite this, many books which refer to the Nazi 'euthanasia' programme pay great attention to the public protests, to the extent of implying that their result was that so-called 'wild euthanasia' was decentralised, and thus, that no further discussion of it is required (as it might legitimately be regarded as being an autonomous action by the perpetrators, rather than as an actual part of Nazi policy). Early examples of this approach can be found in Gerald Reitlinger's *The Final Solution*, and in Leon Poliakov's *Harvest of Hate*, originally published in French, but included here because it was published in English in 1954, and reissued in 1956. Also of relevance is Günther Lewy's *The Catholic Church and Nazi Germany*, which was published in 1964.²⁸⁷ Reitlinger's book gives an

²⁸⁴ Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill/London: University of North Carolina Press, 1995), and Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945*, (London: Cambridge University Press, 1994).

²⁸⁵ Friedlander, *The Origins of Nazi Genocide*, p.151.

²⁸⁶ Alexander Mitscherlich and Fred Mielke, *Doctors of Infamy: The Story of the Nazi Medical Crimes* (New York: Henry Schuman, Inc., 1949) p.114.

²⁸⁷ Guenther Lewy, *The Catholic Church and Nazi Germany* (New York: McGraw-Hill Book Co., 1964).

account of the protests against the programme. He identifies these as having been led by the Christian churches, but with the addition of very significant public support.²⁸⁸ The result of the protests, he says, was that ‘in the end public opinion won and Hitler had to be content with his 50,000 or 60,000 German victims’.²⁸⁹ Reitlinger continues,

‘There is some difference of opinion whether German adult mental patients were still killed after Bouhler had suspended operations. According to Viktor Brack, only (!) idiot children were still sent to the death institutes...’²⁹⁰ Furthermore, ‘In Germany the calculated slaughter of lunatics and incurables had just ceased’.²⁹¹

Reitlinger raises the possibility that the killing of adults continued to occur to an extent²⁹², but that this was not the result of adherence to any central policy – and consequently needs no further investigation. This explains Reitlinger’s statement that the *calculated* slaughter of ‘lunatics and incurables’ had just ceased. Furthermore, it is implied that the programme was of little importance to the Nazis and could be stopped without hesitation, and also that public opinion was unanimous in condemning it. The reason for the public objections, writes Reitlinger, was simple: ‘an *asocial* person, although a nuisance, might still be a German. If, however, the *asocial* belonged to a subject race, public opinion was dumb’.²⁹³ Reitlinger’s basis for this statement is the lack of public protest at the establishment of Auschwitz, which, he says, ‘was then part of

²⁸⁸ Reitlinger, *The Final Solution*, pp.131-132.

²⁸⁹ *Ibid.*, p.132.

²⁹⁰ *Ibid.*, pp.132-3.

²⁹¹ *Ibid.*, p.126.

²⁹² *Ibid.*, p.133.

²⁹³ *Ibid.*, p.126.

Germany'.²⁹⁴ This phenomenon is particularly interesting in the light of the Nuremberg Medical Trial. Here, it will be remembered, one of the reasons for *not* taking the issue of 'euthanasia' seriously was that the victims were largely German.

Reitlinger's stance is also taken by Guenther Lewy and Leon Poliakov. After having given an account of the public and church protests against the 'euthanasia' programme, Poliakov writes:

'Here again we must understand what is meant by 'human feelings'. The instructive example of the 'euthanasia program' indicates clearly enough how the 'will of the people', German public opinion, was able to be an active and effective factor... We have seen how this other extermination programme... had to be stopped because of the outcry against it of a population whose 'human feelings' it had outraged. Also, the extermination of the so-called 'useless mouths' concerned German lives that were flesh of their flesh'.²⁹⁵

Similarly, Lewy writes:

'But the large majority of the very people who had been outraged when their sons and daughters, brothers and sisters, had been put to death, failed to react in the same manner when their Jewish neighbours were deported and eventually killed in the very gas chambers designed for and first tried out in the euthanasia program ... There is little doubt that the vigor of the public outcry against the euthanasia program encouraged the Catholic Church to take a strong stand ... That German public opinion and the Church were a force to be

²⁹⁴ Ibid, p.132.

²⁹⁵ Leon Poliakov, *Harvest of Hate* (London: Ereka Books, 1956), pp.282-3.

reckoned with in principle and could have played a role in the Jewish disaster as well – that is the principle lesson to be derived from the fate of Hitler’s euthanasia program’.²⁹⁶

In other words, do not, whatever you do, make the mistake of thinking that the ‘euthanasia’ programme or its victims are important in themselves. Lewy also has some interesting remarks to make concerning the differences between the sterilization law implemented by the Nazis in Germany, and sterilizations carried out in the United States. Writes Lewy,

‘[D]uring the first year of the law’s operation [in Nazi Germany] 32,268 sterilizations were carried out; in 1935, 73,714 persons were sterilized, and 63,547 in 1936. Each of these last figures was higher than the number sterilized in over fifty years in the United States, where from the enactment of the first sterilization law in 1907 until 1958, 60,166 sterilizations took place; furthermore, some of these were voluntary’.²⁹⁷

Lewy does not inform us *how many* of these sterilizations were voluntary, nor does he consider the problem of whether, if one is living in a society in which sterilization is well-established and, apparently, widely accepted, a decision to have oneself sterilized was really entirely voluntary. In addition, Lewy’s remarks indicate that, in his view, the lower number of sterilizations performed in the States is quite sufficient to absolve the United States from any accusation that its own sterilization laws bore any similarity at all to those of Nazi Germany. Though Lewy’s remarks were not taken up at the time he made them, this chapter will show that they form an important link between Lewy

²⁹⁶ Guenther Lewy, *The Catholic Church and Nazi Germany* (New York: McGraw-Hill Book Co., 1964), pp.265-7.

²⁹⁷ *Ibid*, p.262.

himself and later writers, such as Robert Jay Lifton (who broadly endorses Lewy's views), and Henry Friedlander (who does not).

As far as study of the 'euthanasia' programme is concerned, these books disseminate the impression that the programme is important primarily, if not solely, as an exemplar. In other words, its distinguishing feature is taken to be that public opinion allegedly stopped it, not that it occurred in the first place. This may perhaps be partly explained by the fact that both Poliakov and Lewy take very pragmatic views of the motivations for the programme, with Poliakov writing:

'It is significant that the decree activating the program is dated September 1, 1939, that is, the day on which war was declared...at such a time, moreover, one needed all the hospital space, physicians, and medical personnel one could find, and the fewer 'useless mouths' the better. For this reason, from the beginning, the measure aimed less at those on the point of dying than at the feeble-minded and incurably insane'.²⁹⁸

Similarly, Lewy reports that

'On September 1, 1939, Hitler issued an order to kill all persons with incurable diseases. The start of the war seemed the propitious moment for inaugurating this ... program, which ... promised to yield much needed hospital space and to eliminate 'useless eaters'.²⁹⁹

In addition, these writers are not the only ones to draw attention to the programme in terms of the effect that public protests about it were felt to have had. Poliakov himself

²⁹⁸ Poliakov, *Harvest of Hate*, p.184.

²⁹⁹ Lewy, *The Catholic Church and Nazi Germany*, p.263.

quotes from the judgement in the case of Veit Harlan, the director of the viciously anti-Jewish film *Jew Süß*. The judgement in this case stated:

‘If large groups had openly or secretly opposed the persecution of the Jews as...they had opposed the murder of the mentally ill, the development of the terror would have been impossible in the long run, or at least it would have been retarded and made very difficult.’³⁰⁰

A similar train of thought is pursued by William O. Shanahan of the University of Oregon, in his review of Lewy’s *The Catholic Church and Nazi Germany*, which appeared in the *American Historical Review* in January, 1966. The only difference is that, influenced by his reading of Lewy’s book, Shanahan blames lack of courage amongst German bishops for the fact that the genocide of the Jews was allowed to develop and take place unimpeded:

‘...the German bishops underestimated their political strength. Not even a totalitarian government can remain indifferent to public disquiet, or to a show of popular resentment. Effective Catholic remonstrances against the euthanasia program demonstrate this point ... Bishop Galen’s sermon (Aug. 3 1940) appear[s] to have slowed and then stopped euthanasia – at least on the home front. Why, in the face of this success (and some others that Lewy records) did the hierarchy fail to speak out plainly against mass deportations and the ‘Final Solution’?’³⁰¹

³⁰⁰ Judgement in the case of Veit Harlan, German Supreme Court for the British Zone, December 12, 1949, quoted in Poliakov, p.283.

³⁰¹ Review of *The Catholic Church and Nazi Germany*, in *The American Historical Review*, Vol. 71, No.2, (January, 1966), pp.613-615.

The protests to the Nazi ‘euthanasia’ programme were also discussed at length in Richard Grunberger’s *A Social History of the Third Reich*, a book which, like William Shirer’s *The Rise and Fall of the Third Reich*, appears generally to have met with greater popular than scholarly success. This book is divided into chapters, each of which discusses some aspect of normal life under the Nazi regime, *e.g.* ‘Cinema’ and ‘Health’. The Nazi ‘euthanasia’ programme is referred to a significant number of times, and is discussed in a certain amount of detail. Yet again, it becomes depressingly clear that its importance is considered to lie in the German public’s reaction to it (portrayed as one of universal condemnation), rather than in the fact that the programme was implemented and resulted in the murder of at least tens of thousands of people. Grunberger also refers persistently to the programme as ‘mercy-killing’. This take on the programme’s importance is evident from the very first time Grunberger mentions it, when he writes: ‘The realization of what war and occupation meant to the occupied dawned only on a few Germans, and – unlike the euthanasia killings of German incurables and mental defectives – never agitated public opinion’.³⁰² Grunberger’s second reference to the programme comes two hundred pages or so later, and is a reference in passing to what he describes as the ‘wartime mercy-killing of the mentally and physically handicapped’, a description which indicates that Grunberger may be taking his ‘historical objectivity’ to too great a length.³⁰³ Grunberger’s next reference to the programme comes in his section on ‘The Cinema’, in which ‘films purporting to highlight the existence of certain problems currently in the

³⁰² Richard Grunberger: *A Social History of the Third Reich* (London: Weidenfeld and Nicolson, 1971), p.52.

³⁰³ *Ibid.*, p.283.

process of being solved' are discussed.³⁰⁴ Amongst these is *Ich Klage an*, the famous 1941 film designed to accustom the German public to the idea of 'euthanasia'.

Grunberger reports that the authorities took note of the reactions of audience-members to the film, and includes the following comment: 'Quite interesting, but in this film, the same thing happens as in the asylums where they are finishing off all the lunatics right now. What guarantee have we got that no abuses creep in?'³⁰⁵

Grunberger describes this comment as 'Delphic', and remarks that what he calls 'this sort of boomerang effect' can also be seen in public reactions to other films: 'The SD reported apprehensions in the ethnically mixed eastern provinces that Polish viewers of colonial liberation epics ... might be stimulated into identifying themselves with the rebels on the screen...'³⁰⁶ It is rather difficult to gauge from this what sort of picture Grunberger is attempting to paint here of public reactions to the Nazi 'euthanasia' programme; clearly, what links the comments in the SD reports is a public fear that life might begin to imitate art. However, this explanation is unsatisfactory as far as *Ich Klage an* is concerned, as the audience-member interviewed claims that the sort of killing the film portrays is *the same* as that taking place in asylums, thus his/her fear that abuses might occur would seem to relate only to some possible *extension* of these killings. Of course, we do not know what sort of extension the interviewee might have envisaged and this is possibly why Grunberger describes the comment as 'Delphic'. In any event, unless the SD had managed to uncover the only audience-member at any screening of *Ich Klage an* who was not passionately opposed to what was happening 'in the asylums, where they are finishing off all the lunatics right now', it would seem that this report, so diligently

³⁰⁴ Ibid.

³⁰⁵ S.D. report, quoted in Grunberger, p.486.

³⁰⁶ Ibid.

quoted by Grunberger, provides further evidence that at least one member of the German public must have believed that ‘finishing off all the lunatics’ did not constitute an ‘abuse’ of euthanasia. Grunberger, however, makes no mention of this interpretation.

The problem of interpretation rears its head once more when Grunberger describes some of the events leading to the implementation of the Nazi ‘euthanasia’ programme:

‘In preparation for the euthanasia programme the Nazi authorities summoned leading members of university medical faculties to secret recording sessions for *Assessoren*, i.e. selectors of feeble-minded and incurably ill inmates of institutions for mercy-killing. At one such session a medical luminary (Professor Ewald) walked out in protest – but none of his eight fellow-professors present followed suit’.³⁰⁷

This particular passage is especially important. We have seen so far – and are about to see again – that, in Grunberger’s view, one of the most important aspects of the Nazi ‘euthanasia’ programme was the large part played by the German public in its supposed demise. His interest in German attitudes to Nazi policies having been clearly established, one would expect that Grunberger would also have offered some additional discussion of the apparent acceptance of the programme by Professor Ewald’s eight colleagues. Surely this would indicate that attitudes to the Nazi ‘euthanasia’ programme were rather less simplistic than Grunberger maintains? Disappointingly, however, this is not an avenue which Grunberger sees fit to explore. In addition, this discussion of the programme contains another uncritical use of the phrase ‘mercy-killing’.

³⁰⁷ Ibid, p.397.

Grunberger's final two references to the programme deal specifically with the protests against it. He makes clear that these protests were led by the Church, and contrasts these with the Church's silence regarding the Nazi persecution of the Jews, which was only protested publicly about in March 1943, and the protest was led by the non-Jewish wives of Jewish men rounded up for deportation, not by an official body.³⁰⁸ Though Grunberger does not reveal whether this protest was successful or not, he uses it as a basis for his complaint that

'In the entire history of the Third Reich, no single body – civic, academic, or even religious – ever made use of such opportunities as it had for publicly protesting about the regime's inhumanity. The feasibility of protests of this nature was demonstrated...by Cardinal Galen's denunciation of euthanasia from the pulpit, which evoked a sufficiently strong resonance to halt the regime's 'mercy-killing' programme. But the euthanasia victims were flesh of German flesh, and those affected by their deaths ranged through all classes of society...as far as the great majority were concerned, Jewish suffering affected beings in another galaxy rather than inhabitants of the same planet as themselves'.³⁰⁹

In common with the historians whose works we have already considered in this section, we can see that in his enthusiasm for interpreting the German public reaction to news of the 'euthanasia' programme as one of wholehearted opposition, Grunberger has portrayed the programme as, primarily, an example of German anti-Semitism, not as a programme of systematic murder against people who were, overwhelmingly, not Jewish. As happened with previous scholarly works endorsing this point of view, the forceful

³⁰⁸ Ibid, pp.584-5.

³⁰⁹ Ibid.

insistence that the Nazi ‘euthanasia’ programme was notable only for the circumstances of its supposed demise, will have hampered any attempts that there might have been to study the details of the programme itself.

Peter Stern’s 1975 book *Hitler: The Fuhrer and the People* also considered the Nazi ‘euthanasia’ programme, and Stern’s conclusions were very similar to those reached by those of his scholarly predecessors whose works have been considered during the course of this chapter. In other words, the Nazi ‘euthanasia’ programme was not important in itself; its value for historians lay in the German public reaction to it. Stern gives an account of the various protests against the programme made by Catholic and Protestant churchmen, concluding:

‘Three weeks later most of Aktion T4 was discontinued. The protests on behalf of Aryan Germans had proved to be effective enough. Whether similar protests on behalf of their Jewish fellow citizens would have been equally effective we shall never know. The hypothesis was not tested’.³¹⁰

Ian Kershaw’s well-known *Popular Opinion and Political Dissent* also makes liberal use of the protests against the Nazi ‘euthanasia’ programme, discussing them in a very traditional way, in which the victims of the programme are, as well as its origins, post-1941 continuation, and moral implications are again, totally ignored. They do not, apparently, fit in very well with the tale Kershaw, like many historians before him, wishes to tell, a tale of selective German resistance to Hitler, and of German anti-Semitism, rather than as a programme of mass-killing. The programme is, of course,

³¹⁰ J.P. Stern, *The Fuhrer and the People* (London: Fontana, 1975), p.193.

referred to – we are told that ‘the ‘euthanasia action’ was set in motion by a secret written order of Hitler shortly after the beginning of the war. By the time the ‘action’ was officially halted almost two years later it had accounted for the deaths of more than 70,000 mentally and physically handicapped persons’.³¹¹ Interspersed with Kershaw’s examples of opposition to the ‘euthanasia’ programme are also brief references to the people who were actually killed.³¹² Nevertheless, this is overwhelmingly a tale of German resistance. The few lines describing the programme itself, taken against the twelve-page tale of the resistance towards it, render the victims of Nazi ‘euthanasia’ effectively invisible and irrelevant. It is hardly surprising that Kershaw should conclude that ‘the Churches came, in 1941, to lead a victory without parallel for public opinion in halting the ‘euthanasia action’.³¹³ Kershaw reveals in a footnote that the programme did not end, but it is hard to envisage that this admission would have had much impact upon the reader. It is also important to highlight Kershaw’s complete failure to mention the propaganda against ‘useless eaters’, and his lack of discussion of any possible motives for the instigation of Nazi ‘euthanasia’. It is as though this programme of systematic murder came, in Kershaw’s view, from nowhere, and could be discarded the moment opposition to it began to be heard. As we have seen, this is an attitude which many historians have taken towards the Nazi ‘euthanasia’ programme. In Kershaw’s case, this may be partially explicable by pointing to the fact that his book is largely devoted to a discussion of popular public opposition to Nazi policies. Nevertheless, in the case of the ‘euthanasia’

³¹¹ Ian Kershaw, *Popular Opinion and Political Dissent* (1987, find full reference).

³¹² See, for example, *ibid*, p.338, which tells of the Catholic population of Absberg, who, in February 1941 congregated in the town square, to watch the remaining inmates of the town asylum being loaded onto buses and taken away to be killed. Many townspeople apparently wept, and the local priest brought the doomed people into the church to take communion. Though precisely no lives were saved by any of these actions, the reader is led away from a realisation of this due to Kershaw’s apparent view that the *fact* of the protests is paramount.

³¹³ *Ibid*, p.272.

programme, this is just another instance of the study of Nazi ‘euthanasia’ itself being effectively obscured by historians’ desire to focus on opposition to it, and to regard it as a symbol of the possibility of German resistance to the Nazis, as well as a demonstration of German anti-Semitism.

The following year, (1988), a book was published entitled *Comprehending the Holocaust*, and it was a collection of papers which had been given at a conference on the Nazi genocide, at the University of Haifa two years previously.³¹⁴ One of these essays was by Ian Kershaw, who used the opportunity to revisit the topic of the German protests against the Nazi ‘euthanasia’ programme, with striking results. Kershaw’s contribution to the book was an essay entitled ‘German Popular Opinion During the ‘Final Solution’: Information, Comprehension, Reactions’.³¹⁵ As this essay concerns popular resistance to the Nazis, it is not unsurprising that Kershaw should have written a section focusing on the protests against the ‘euthanasia’ programme. There proves to be, however, a startling disparity between the descriptions of the protests given by Kershaw in the main body of his essay, and those which are given in the related footnote. The text of the essay paints the protests in simple humanitarian terms:

‘In the most celebrated instance [of civil disobedience], the so-called ‘euthanasia action’ – a genuine issue of humanitarian concern – a halt (at least in part) was called to the liquidation of heredity (sic) and incurably sick persons in asylums within Germany itself, as a result of growing popular unease and objections articulated by leading churchmen. The fact that protest could and did take place on a range of issues, even including, as in the

³¹⁴ Asher Coen, Joav Gilber, Charlotte Wardi, (Eds), *Comprehending the Holocaust* (Frankfurt am Main etc.: Verlag Peter Lang, 1988).

³¹⁵ *Ibid*, pp.145-158.

‘euthanasia action’, a directly humanitarian issue, itself indicates the hollowness of the apologetics that the terroristic repression of a totalitarian system was sufficient in itself to deter any dissent’.³¹⁶

This reference to the protests against the Nazi ‘euthanasia’ programme is a confusing one, especially with regard to Kershaw’s repeated references to ‘humanitarian concern’. It is not entirely clear whether he means to say that the *protests* against the programme had a humanitarian basis, or whether, for some reason, this description refers to the programme itself. When one reads the related footnote, however, it becomes clear that Kershaw meant to say that the basis of the protests, not the programme, was humanitarian. The footnote also, however, complicates matters considerably, as it casts considerable doubt on exactly *how* humanitarian the protests were:

‘It should be noted, however: that unrest did not emanate alone or even chiefly from humanitarian concern, but arose in good measure from doubt – reaching into Nazi circles – about the lack of clear legal guidelines and sanctions for the taking of ‘useless life’; that the well-known public protest by Bishop von Galen was voiced only in August, 1941, after the ‘action’ had been in operation for close on two years...that by August 1941 the numbers murdered in the ‘action’ had already exceeded the official target figure for potential victims; that ‘euthanasia’ murders did in fact continue in Germany itself (and even more extensively in the occupied territories)... and that, according to one piece of post-war testimony, the ‘halt’ of August 1941 amounted to a rumor put around by the Propaganda

³¹⁶ Ibid, p.146.

Ministry, suggesting that the Führer had just discovered the truth of what was going on, and had immediately ordered its cessation'.³¹⁷

This might well have been 'noted', but only by a particularly eagle-eyed reader, who was in the habit of giving footnotes and main text equal degrees of attention.

Here, Kershaw seems to have taken footnotes, or rather, endnotes, somewhat beyond their usual function. Traditionally, endnotes and footnotes are repositories for additional information which one has not been able to include in the main body of one's essay or chapter. In this instance, however, the information in Kershaw's endnote directly contradicts that given in his talk. There, Kershaw states twice that the basis of the protests was *solely* humanitarian, when the information in his endnote, taken from Ernst Klee's 1983 book, '*Euthanasie' im NS-Staat: Die 'Vernichtung lebensunwerten Lebens'*' shows that this was not the only reason for the protests, and is unlikely even to have been the principal one.³¹⁸ Perhaps even more importantly, the footnote also shows that, contrary to Kershaw's claim that the protests led to a cessation of the programme 'at least in part', the programme actually continued. Kershaw is, as we have seen, by no means the first historian to assume that the Nazi 'euthanasia' programme was so inconsequential that it could be swiftly abandoned the moment a murmur of protest was raised against it.

As has become evident throughout the course of this chapter, many, many historians have highlighted the protests against the Nazi 'euthanasia' programme, and this focus has generally been at the expense of discussion of the programme itself. As we

³¹⁷ Ibid, p.156, note.

³¹⁸ (Frankfurt: S. Fischer Verlag, 1983).

have seen, the protests against the programme have been seen as being particularly important, because they are taken as proof of the possibility of German resistance, and regarded as clear evidence of German anti-Semitism. One wonders, therefore, if one explanation for the lack of engagement amongst historians with the reality of the programme itself and its cultural and historical context, might sometimes be a fear that such interest would itself appear to be an expression of anti-Semitism. It is, for example, noteworthy that Kershaw neither referred to any of the propaganda against ‘useless eaters’, nor questioned his own assumption that every single person in German society was vehemently opposed to the programme, even though Ernst Klee’s book could have provided him with ample evidence that this was not the case. Such evidence, had Kershaw provided it, would surely also have come under the heading of ‘German Popular Opinion’, which was the title of Kershaw’s talk.

The protests to the Nazi ‘euthanasia’ programme are also discussed at length by Daniel Goldhagen, in his notorious work, *Hitler’s Willing Executioners*. The reliability of this book has been called into question by many scholars who have identified, amongst other things, Goldhagen’s cavalier attitude to his source material. Nevertheless, Goldhagen’s attitude to the Nazi ‘euthanasia’ programme is surprisingly similar to that taken by more respected scholars, such as Ian Kershaw. In common with such scholars, Goldhagen regards the programme as an example of German resistance, and of German anti-Semitism. In his view, the German public were unanimous in their rejection of it, but, luckily, it was of no importance to the Nazis, and could be dropped, like the proverbial hot potato, once the objections to it became troublesome. Goldhagen describes

it as ‘the best-known case of protest that took place in Nazi Germany’.³¹⁹ He lists exactly what he believes the protests indicated about the German population as a whole:

‘Germans (1) recognized the slaughter to be wrong; (2) expressed their views about it; (3) openly protested for an end to the killing; (4) suffered no retribution for having expressed their views and for pressing their demands and (5) succeeded in producing a formal cessation of the killing program, and saving German lives’.³²⁰ In an explanatory footnote,

Goldhagen refers his readers to a number of recent (and not so recent) published works on Nazi euthanasia, namely, Michael Burleigh’s *Death and Deliverance*, Ian Kershaw’s *Popular Opinion and Political Dissent in Nazi Germany*, Guenther Lewy’s *The Catholic Church and Nazi Germany*, and Ernst Klee’s groundbreaking *Euthanasie im NS-Staat*.³²¹

Goldhagen’s reading of Kershaw’s book (and Lewy’s) would, as we have seen, have led him to adopt exactly the attitude towards the ‘euthanasia’ programme which he exhibits. However, Burleigh and Klee’s studies make it absolutely clear that the Nazi ‘euthanasia’ programme is deeply important in its own right, should no longer be ignored because of a preference among scholars for reporting, in offended tones, the opposition to it.

Goldhagen’s footnote continues with his own comments: ‘The regime’s killing of ‘life unworthy of living’, though formally suspended, did continue with greater concealment in a program known as *Aktion 14f13*. Still, Germans’ moral opposition to and political protest against the murders led to the sparing of many Germans’ lives’.³²² As Henry

³¹⁹ Daniel Jonah Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust* (New York: Alfred A. Knopf, 1996), p.119.

³²⁰ *Ibid.*

³²¹ See *ibid.*, p.520.

³²² *Ibid.*

Friedlander has written, *Aktion 14f13* was in fact a different programme, involving the murder of sick and disabled (and Jewish) concentration camp inmates.³²³

At this point, Goldhagen also expresses his views concerning the motives for the protests against the ‘euthanasia’ programme. These were ‘a consequence of their [the German public’s] rejection of important aspects of Nazi biological racism. As far as these Germans were concerned, the victims were German people possessing the right to life and to decent care which such membership brought’.³²⁴ This echoes Grunberger, Lewy and Reitlinger’s remarks concerning the motives for the protests against the programme. It also strikes me that, in some respects, the historians quoted in this section might legitimately be accused of, to paraphrase Richard Grunberger, treating the victims of the ‘euthanasia’ programme as though *they* were ‘beings from another galaxy’.

‘Euthanasia’ and the Final Solution: Technical Evolution of Mass Murder

Gerald Reitlinger’s 1953 work *The Final Solution* is one of the first to consider the links between the ‘euthanasia’ programme and the Final Solution. Reitlinger makes important use of the Nuremberg Medical Trial transcript in his efforts to connect the two by showing that, in many cases, those involved in the former were also actively complicit in the latter.³²⁵ To this end, he makes the rather startling statement that ‘Thus it was brought to light that the ‘mercy-killers’ had served under the mass-murderer Globocnik. The same men, doctors as well as police officers, who had allegedly worked for human welfare, had built up an organisation that tortured and killed millions of *normal beings*’

³²³ Henry Friedlander, review of *Hitler’s Willing Executioners*, in *German Studies Review*, Vol.19, No.3, (Oct., 1996), pp.578-580, p.580.

³²⁴ Daniel Jonah Goldhagen, *Hitler’s Willing Executioners*, p.520.

³²⁵ Gerald Reitlinger, *The Final Solution*, (London, 1953), p.125.

[my italics].³²⁶ As Martin S. Pernick has pointed out, historical sources making liberal use of such terms as ‘lunatics’, ‘imbeciles’, and ‘idiot children’ are not necessarily as viciously pejorative as they would be were they to appear in modern works.³²⁷ Nevertheless, Reitlinger’s reference to ‘normal beings’ does not inspire a great deal of confidence in his views of the ‘euthanasia’ programme.

Other sources of this period do refer to the ‘euthanasia’ programme periodically, and it seems that the majority of these formed a part of what Peter Novick claims was a niche market – books, usually written by Jewish academics, concentrating specifically on the Nazi genocide of the Jews, but tending to make some mention of extermination programmes which had been directed at other groups.³²⁸ A reading of these sources in which the ‘euthanasia’ programme *is* mentioned demonstrates that some of these historians’ understanding of it tallies very much with the portrayal of the programme which emerged from the Nuremberg Medical Trial, particularly with regard to the supposedly compassionate motives of the defendants, and the desire to ensure that the victims ‘did not suffer’. Nevertheless, it is in these sources that we find the first discussions of the origins of the use of gas chambers in the Final Solution. This theme would, as we shall see, come to be discussed in greater detail by historians, but one of the first instances of this train of thought comes in Raul Hilberg’s 1961 book *The Destruction of the European Jews*, in which there is a discussion of the ‘euthanasia’ programme, albeit an extremely brief one.

³²⁶ Ibid.

³²⁷ Martin S. Pernick, *The Black Stork*.

³²⁸ Peter Novick, *The Holocaust and Collective Memory* (London: Bloomsbury: 2000), p.139. Novick’s claims that the books I also used – Leon Poliakov’s *Harvest of Hate*, and Gerald Reitlinger’s *The Final Solution*, made little impact in historical circles seem largely to be borne out by my own investigations. This claim could not be made for Hilberg’s *The Destruction of the European Jews*, and Novick attributes this book’s success to the fact that it was published during the 1961 trial of Adolf Eichmann.

Hilberg's information about the programme does not come from the Nuremberg Medical Trial, but from the 1946 affidavit of Dr. Konrad Morgen who, we are told, was an SS officer brought in to investigate corruption in the SS.³²⁹ Hilberg writes that Hitler's 'euthanasia' order was 'intended for and applied to incurably insane persons only', an insight he gained from Morgen's affidavit. Apparently, from his vantage point investigating SS corruption, Morgen 'gained insight into the killing phase of the destruction process'.³³⁰ The problem is that Morgen had no real connection with the 'euthanasia' programme, save that, in 1943, he had come into contact with Christian Wirth, a major architect of the Final Solution, who had developed the 'technology' of the gas chambers later used in the Aktion Reinhard death camps by conducting 'trial runs' on 'the insane' in an abandoned prison in Brandenburg an der Havel.³³¹ The result of his reliance on Morgen's affidavit is that Hilberg is able to state, confidently, '[Christian] Wirth constructed carbon monoxide gas chambers, a device which overwhelmed its victims without their apprehension and which caused them no pain'.³³²

It is clear that Hilberg did not get his information from anyone involved in the Nuremberg Medical Trial. Indeed, on the evidence of his text it did not occur to him to mention the Trial at all. However, we can see that his reliance on Morgen has led to much the same result as reliance on the Trial transcript might have done. Firstly, Morgen's claim that the victims of the 'euthanasia' programme were all incurably insane was, it will be remembered, an unchallenged defence which allowed the Nuremberg Medical Trial defendants to evade the question of non-consensual killing. Secondly, the claim that

³²⁹ Raul Hilberg, *The Destruction of the European Jews* (London: W.H. Allen, 1961), p.561.

³³⁰ *Ibid.*

³³¹ Reitlinger, *The Final Solution*, pp.124-125.

³³² Hilberg, p.561.

the victims did not suffer whilst being gassed has, as in the Nuremberg Medical Trial, gone unchallenged. Hilberg's focus on the supposedly 'gentle' death of the victims of the 'euthanasia' programme has also helpfully obscured the circumstances surrounding the killings. The impression given by Hilberg is that the motives of the programme *were* merciful, despite the killings being totally non-consensual. As in the Nuremberg Medical Trial, there is no real attempt to establish anything about the victims, other than to parrot Morgen's claim that they were 'incurably insane'. From there, Hilberg leaps to the unstated but very clear conclusion that, as the killing was 'painless', no further discussion of the programme is required. Hilberg's book was reviewed positively in both the *American Historical Review*³³³, and the *Journal of Modern History*.³³⁴ Neither of these publications makes any reference to Hilberg's remarks on the Nazi 'euthanasia' programme, something which is hardly surprising, given both the brevity of Hilberg's description of it, as well as the length of his book, and the amount of information contained therein. Nevertheless, any reader who *did* get an impression of the programme from reading Hilberg's book would be left with a view of it similar to that provided by the Nuremberg Medical Trial. What Hilberg *also* demonstrates, however, is that, in his view, the use of gassing as a method of mass-killing is one factor linking the Nazi 'euthanasia' programme with the subsequent Final Solution.

As we saw in the previous section, for some decades, historians' principle reaction to the 'euthanasia' programme was that of highlighting protests against it, to the complete exclusion of any details about it. Thus perhaps it is not entirely surprising that the theme of links between the 'euthanasia' programme and the Final Solution was not

³³³ Vol. 67, No3 (April, 1962), pp.694-695.

³³⁴ Vol. 34, No.2, (June, 1962), pp.226-227.

taken up again until 1985. In this year, the historian Gerald Fleming published *Hitler and the Final Solution*.³³⁵ This book was intended as a final rebuttal of the controversial historian David Irving, who had claimed (as appears to be his wont) that Hitler was ignorant of the extermination of the Jews until at least 1943.³³⁶ To support this thesis, Fleming points to the example of the ‘euthanasia’ programme. This is only part of his thesis, and pertains rather more to links which Fleming identifies between the methods common to both the ‘euthanasia’ programme, and to the Final Solution. Most prominent amongst these are (a) mass-killing by means of built-in gas chambers and (b) pilfering of gold teeth from corpses.³³⁷ Fleming writes that, at Sobibor, identical liquidation procedures were in place, and that these procedures were identical both in terms of the use of carbon monoxide gas, and as regards the despoliation of corpses.³³⁸

Arno Mayer’s 1988 work *Why Did the Heavens Not Darken?* also considered the question of similarities between the ‘euthanasia’ programme and the Final Solution. It is particularly interesting to compare Mayer’s analysis with that of Fleming. Fleming’s argument centre on clear parallels between the two programmes, which, he claims, make it quite obvious that the one arose out of the ‘trial run’ of the other. Mayer states that though it is tempting to look at the matter from this point of view, the ‘euthanasia’ programme is, in fact, not ‘the ever elusive missing link in the chain of Hitler’s sole and direct responsibility for the Jewish torment’.³³⁹ In Mayer’s view, the similarities between the ‘euthanasia’ programme and the Final Solution, though obvious, are insufficient to allow the former to be regarded as a direct antecedent of the latter. The reason for this is

³³⁵ Gerald Fleming, *Hitler and the Final Solution* (London: Hamish Hamilton, 1985).

³³⁶ *Ibid*, p.vii.

³³⁷ *Ibid*, pp.24-25.

³³⁸ *Ibid*, p.24.

³³⁹ Arno Mayer, *Why Did the Heavens Not Darken? The Final Solution in History* (USA/Canada: Pantheon Books/Random House, 1988), pp.381-382.

that, in Mayer's view, the 'euthanasia' personnel were not sufficiently pivotal in the implementation of the Final Solution: 'Many or most of them were truck drivers, guardsmen, cremators and clerks'. This claim could hardly be made with regard to Viktor Brack, or to Christian Wirth or Franz Stangl (both of whom were former bureau chiefs of Schloss Hartheim, near Linz), but Mayer insists that even these men were relatively small fry who had little contact with one another, thus: 'To fix excessively on them is to obscure the enabling conditions for their actions and to exculpate both the leaders who directed them and the elites who condoned them'.³⁴⁰

Thus, we can see that the discrepancy between Fleming's views on the one hand, and Mayer's views on the other. Fleming sees clear links between the 'euthanasia' programme and the Final Solution, because of the methods of murder common to both, and because of the treatment meted out to the corpses of the victims. Mayer rejects any such link – for him, the important thing is that the 'euthanasia' personnel simply did not play a sufficiently significant role in the subsequent Final Solution. As we will see later in the chapter, this is also a subject investigated by Michael Burleigh and Henry Friedlander, when study of the Nazi 'euthanasia' programme finally 'came of age' in the mid-1990s.

Bedbugs and Black Widows: Holocaust Studies and Nazi 'Euthanasia'

As we saw above, the books of Reitlinger and Hilberg were pioneering at the time they were published, insofar as they focused specifically upon the Nazi genocide, as opposed

³⁴⁰ Ibid, p.387.

to referring to it as part of a wider history of the Third Reich. Now, decades later, the Nazi genocide of the Jews forms the principle part of studies of the Third Reich and interest in it shows few signs of abating.

This section will consider how historians of the Nazi genocide of the Jews have dealt with the Nazi ‘euthanasia’ programme. As we saw at the beginning of this chapter, those early historians who had taken it upon themselves to research in detail the Nazi genocide of the Jews seemed to view the ‘euthanasia’ programme principally as an opportunity to highlight the possibility of German resistance against the Nazis, not as an example of systematic murder. The protests which allegedly led to its demise (and the large-scale absence of such protests in relation to the persecution of the Jews) were considered to provide conclusive proof of widespread German anti-Semitism. As this section will demonstrate, the Nazi ‘euthanasia’ programme is sometimes taken seriously by historians, but it also frequently suffers from attempts to trivialize it, either by, as we have seen, highlighting the protests and all but ignoring the programme at which they were aimed, or by pointing to differences between the respective places occupied by Jews of Jews and by ‘useless eaters’ in the Nazi *Weltanschauung* and, presumably as a consequence, abandoning any attempt to discuss the ‘euthanasia’ programme except to dismiss it as being of no real importance. In this regard, this section provides an interesting comparison with the previous one, as both are, in many ways, preoccupied with identifying similarities and differences between the Nazi ‘euthanasia’ programme and the Final Solution.

1961 saw the publication of Yehuda Bauer's *The Holocaust in Historical Perspective*.³⁴¹ Though there is nothing about the 'euthanasia' programme in this book, Bauer does write at one point that there are 'any number of textbook or lay statements that the Nazis began their destruction with the Jews ...'³⁴² Of course, Bauer only says that such statements exist – he does not actually make the claim himself. Furthermore, he gives no concrete examples of these statements. However, he makes his motive for embarking on the discussion very clear, when he writes that those statements which state that Nazi extermination began with the Jews also claim that 'had the Nazi regime persisted for any length of time, Poles, Czechs, Russians and others would have suffered the same fate'.³⁴³ This is, says Bauer, quite false, as 'there never was a Nazi policy to apply the measures used against the Jews to other national communities'.³⁴⁴ Thus, the purpose of Bauer's discussion is to refer to (and then to dismiss) the idea that, had the Nazis remained in power for longer than they did, they would have broadened their policies against non-Jewish groups (which Bauer describes as 'genocide') into something more akin to their policy towards the Jews ('wholesale, total murder of every one of the members of a community').³⁴⁵ Though these passages are clearly intended to differentiate between Nazi policy towards the Jews, and Nazi policy towards other groups, they belong in this section, because they demonstrate that, by either accident or design, Bauer bypassed the question touched upon by Reitlinger and Hilberg. These two considered, albeit briefly, the question of similarities of technology and personnel between the Nazi

³⁴¹ Yehuda Bauer, *The Holocaust in Historical Perspective* (London: Sheldon Press, 1961).

³⁴² *Ibid.*, p.33.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*, p.35.

³⁴⁵ *Ibid.*

‘euthanasia’ programme and the Final Solution. Bauer, in failing to acknowledge that the Nazis did *not* begin their destruction with the Jews, sidesteps this problem.

A similar approach is taken by Lucy Dawidowicz, in her 1981 book *The Holocaust and the Historians*.³⁴⁶ On two occasions, Dawidowicz claims that the gas chambers were developed and used originally for the murder of Jews, only later being required for others whose continued existence was, the Nazis had decided, surplus to requirement. She writes: ‘The German dictatorship devised two strategies to conduct its war of annihilation against the Jews: mass shooting and mass gassing.’³⁴⁷ A few pages further on, she claims: ‘Auschwitz...was invented by National Socialist Germany to kill its mortal enemy, the Jews. Once its killing facilities were devised and installed, once Auschwitz became an operational enterprise for murdering the Jews, it became convenient for the Germans to use that equipment also to murder those non-Jews who had, for one reason or another, become expendable.’³⁴⁸ Taken together, these two statements are problematic not because of the remarks which Dawidowicz makes about Auschwitz and its function, but because she makes it appear that gassing as a means of mass killing was deigned specifically at Auschwitz, and specifically to annihilate Jews. These claims fail to take into account the use of gas chambers in asylums during the ‘euthanasia’ programme, which had begun in 1939. In her original discussion of the ‘euthanasia’ programme, Dawidowicz writes that it claimed about 100,000 lives within Germany itself, but makes no mention of the methods of murder used. Her only mention of gas chambers in relation to ‘euthanasia’ killings comes in a claim that throughout the

³⁴⁶ Lucy S. Dawidowicz, *The Holocaust and the Historians* (Harvard: Harvard University Press, 1981).

³⁴⁷ *Ibid*, p.12.

³⁴⁸ *Ibid*, pp.15-16.

war, convoys of mental patients (estimated to have included thousands of people in total) from occupied countries were sent to Auschwitz and immediately gassed on arrival.³⁴⁹

Lucy Dawidowicz has considered the topic of the Nazi ‘euthanasia’ programme in two different books; firstly, in *The War Against the Jews*, published in 1975, and secondly, in *The Holocaust and the Historians*, which appeared six years later, in 1981. The contrast between the two books is a striking one, as Dawidowicz’ views on the programme and its importance seem in many respects to be at odds. The former book contains a long and comprehensive discussion of the programme. The latter, despite describing the programme as being one of ‘racially motivated murder, euphemistically called ‘euthanasia’, is very largely concerned with differentiating between the Nazi genocide of the Jews on the one hand, and that of other minority groups on the other.³⁵⁰ Much of this discussion is centred upon the attitudes of the Nazis towards Roma and Slavs, but Dawidowicz also makes a number of statements which are intended to demonstrate the singularity of the Nazi genocide of the Jews, but which are factually inaccurate, as can be seen when they are considered in the light of the Nazi ‘euthanasia’ programme.

Bauer and Dawidowicz have demonstrated an attitude to the Nazi ‘euthanasia’ programme which has not thus far been encountered in this chapter. As we have seen and shall continue to see, it is far from unusual for historians of Nazism to refer to ‘the euthanasia programme’, but to forbear from any discussion or explanation thereof. However, Dawidowicz and Bauer’s attitude is different insofar as they have simply failed to acknowledge it at all.

³⁴⁹ Ibid, p.9.

³⁵⁰ Lucy S. Dawidowicz, *The Holocaust and the Historians* (Harvard: Harvard University Press, 1981), pp.9-17.

From small beginnings in the 1950s and 1960s, the scholarly – and not so scholarly - literature on the Nazi genocide of the Jews has grown immensely. Of course, the concerns of the writers of these books are extremely divergent in focus; whilst many of them seek to elucidate the different stages of, and motivations for, Nazi policies towards the Jews, others have seemed keener to engage in attempts to prove that the Nazi genocide of the Jews was ‘fundamentally different from all crimes that have existed in the past’.³⁵¹ A discussion of this topic is, of course, quite beyond the scope of this enquiry, but, as might be expected, only a limited amount of either of these two strands of literature makes any mention of the Nazi ‘euthanasia’ programme. Seminal works, such as Karl A. Schleunes’ *The Twisted Road to Auschwitz* make no reference to it.³⁵² The various books, however, which consider the Nazi ‘euthanasia’ programme in the light of its connection (or not) with the genocide of the Jews, belong more properly in other sections of this chapter. This section will be confined to a consideration of those works which differentiate between the Nazi genocide of the Jews and the Nazi ‘euthanasia’ programme.

Daniel Goldhagen’s *Hitler’s Willing Executioners* has plenty to say on the subject of the Nazi ‘euthanasia’ programme, and his stridently expressed views will make further appearances in this chapter. His discussion of the programme can justifiably be described as ‘insidious’. Despite dutifully referring to it as the ‘so-called euthanasia programme’, Goldhagen comprehensively and repeatedly trivialises it, emphasizing the protests to it rather than the programme itself, and making unsubstantiated claims regarding its lack of

³⁵¹ The German historian Karl Jaspers quoted in Lucy S. Dawidowicz, *The Holocaust and the Historians* (Harvard: Harvard University Press, 1981), p.14.

³⁵² Karl A. Schleunes, *The Twisted Road to Auschwitz: Nazi Policy Towards German Jews 1933-1939* (Urbana/Chicago/London: University of Illinois Press, 1970).

importance, which fail to explain why it was instigated in the first place. Worst of all, Goldhagen contrasts it with the murder of Jews, in order to make unsupported assertions concerning the lack of attendant cruelty to which the victims of the ‘euthanasia’ programme were supposedly subjected, vis-à-vis murdered Jews. These points will be dealt with in turn.

Part of Goldhagen’s book is also concerned with differentiating between the Nazis’ murder of Jews, and their murder of other groups. As Ruth Bettina Birn and Volker Riess have written, Goldhagen marshals a great deal of often distorted evidence to support his claim that ‘the Germans’ treated Jews in a much crueller way than they did their non-Jewish victims.³⁵³ Nevertheless, it is important to consider Goldhagen’s treatment of the Nazi ‘euthanasia’ programme in this regard, for two reasons. Firstly, many of Goldhagen’s comments concerning the lack of cruelty to which the ‘euthanasia’ victims were supposedly subjected prior to, and whilst being, murdered, echo Raul Hilberg’s claim that these people did not suffer. Secondly, it is remarkable, given the extent to which Goldhagen uses the ‘euthanasia’ programme, how little in the way of comment his usage attracted from reviewers of his book.

Goldhagen begins by making unsupported claims concerning the respective positions occupied by Jews, and by the people who were to become the victims of the ‘euthanasia’ programme, within the Nazi world-view. He writes: ‘[t]hose whom the Nazis marked for slaughter in the ‘Euthanasia’ program ... were nevertheless thought to be far less of a threat to Germany than were the Jews.’³⁵⁴ In terms of the motivations for the programme, Goldhagen cites Robert Proctor’s *Racial Hygiene*, and concludes that the

³⁵³ Ruth Bettina Birn and Volker Riess, ‘Revising the Holocaust’, in *The Historical Journal*, vol.40, no.1, (March, 1997), pp.195-215.

³⁵⁴ Daniel Jonah Goldhagen, *Hitler’s Willing Executioners*, pp.142-3.

‘euthanasia’ programme was the result of a twofold perceived threat from its victims: firstly, that they would pass on their ailments to future generations, thus causing racial degeneration; secondly, that they would consume food and other resources needed for those people who were actually fighting the war.³⁵⁵ This was, however, a much more benign sort of threat than that supposedly represented by the Jews, who ‘unlike the Euthanasia program’s victims – were considered to be wilfully malignant, powerful, bent upon and perhaps capable of destroying the German people *in toto*’.³⁵⁶ Goldhagen quotes one of Hitler’s speeches, in order to show that, as Proctor has also written, Hitler and the Nazis regarded Jewishness as a ‘racial illness’.³⁵⁷ The culmination of this differentiation comes in Goldhagen’s claim that the ‘benign’ nature of the threat from ‘lives unworthy of living’ was reflected in the methods of killing used upon them, which, in comparison to the murders of Jews, were not traumatic for the victims, and were totally lacking in attendant cruelty:

‘Coldly uninvolved were the Germans who killed the mentally ill and the severely handicapped in the so-called Euthanasia program. Most of them were physicians and nurses who dispatched their victims in the dispassionate manner of surgeons, who excise from the body some hideous and hindering excrescence. By contrast, the Germans’ killing of the Jews was often wrathful, preceded and attended by cruelty, degradation, mockery and Mephistophelean laughter. Why? Why did these hangmen of the Jewish people not act

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

as hangmen do? ... The answer to this lies in their conception of the Jews. In their eyes, *der Jude* is not merely a heinous capital criminal. He is a terrestrial demon...'³⁵⁸

Given the amount of discussion generated amongst scholars by Goldhagen's book, it seems somewhat surprising that his comprehensive trivialization of the Nazi 'euthanasia' programme attracted very little comment. It is not mentioned in Ruth Bettina Birn and Norman Finkelstein's book *A Nation on Trial: The Goldhagen Thesis and Historical Truth*, neither is it alluded to in the book edited by Geoff Eley entitled *The 'Goldhagen Effect'. History, Memory, Nazism – Facing the German Past*.³⁵⁹ Unsurprisingly, those who *do* remark on it tend to be those who have actually studied the programme in depth. For example, Henry Friedlander, when reviewing Goldhagen's book, pointedly asked if Goldhagen meant that Irmfried Eberl, who ran two 'euthanasia' centres, had learned to laugh differently by the time he directed gassings at Treblinka?³⁶⁰

Dan Diner pursues this theme of differentiating between the murder of Jews and the murder of non-Jews by the Nazis, by considering the concept of 'collective memory'. This, he claims, is far more potent amongst some groups or collectives than amongst others:

'[I]n Germany, the Jewish victims of Nazism do not dominate the mnemonic hierarchy because of a view that Jewish lives have more inherent worth than those of the Romany or victims of euthanasia. Rather, along with the reality of sheer numbers of

³⁵⁸ Ibid, p.398.

³⁵⁹ Ruth Bettina Birn and Volker Riess, *A Nation on Trial: The Goldhagen Thesis and Historical Truth* (New York: Henry Holt, 1998); Geoff Eley, *The Goldhagen Effect. History, Memory, Nazism – Facing the German Past* (Ann Arbor: The University of Michigan Press, 2000).

³⁶⁰ Henry Friedlander, review of Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*, in *German Studies Review*, vol.19, No.3, (October, 1996), pp.578-580, p.579.

victims, such ranking reflects, in the end, a longer presence and deeper impact of the Jews within the collective German memory. Formed over centuries, Christian Europe's troubled relations with the Jews and Judaism has furnished an imagistic arsenal for coming to terms with the post-Holocaust present ... [A]s a socially stigmatized group of individuals belonging to their own collective, those the Germans murdered on 'medical' grounds have left few traces within German collective memory, when again compared with the Jews or the Romany. The euthanasia victims' fate, though it calls for reflection and description with greatest empathy, simply cannot produce the grounded mnemonic resonance needed for that sort of historical transmission'.³⁶¹

Here, Diner is claiming that, while all human lives (or deaths) are equal, some are more equal than others. The murder of the Jews is of greater significance than the murder of people who are disabled or mentally ill because the Jews, one way or another, have had far more impact over the centuries and have, throughout European history, been subject to persecution. This, in many respects, ties in with Lucy Dawidowicz' comment that '[T]he annihilation of the 6 million Jews brought an end with irrevocable finality to the thousand-year culture and civilization of Ashkenazic Jewry, destroying the continuity of Jewish history'.³⁶² This idea, also to be found in debates concerning the definition of the term 'genocide', advances the view that a cultural loss of some kind, incurred as the result of a mass atrocity perpetrated against a particular people, renders the killing itself even more grievous, as opposed to being regarded as a tragic by-product of some mass atrocities, all of which are in themselves equally abhorrent. The final section of this chapter will challenge this assumption, by looking at the new interest in studying

³⁶¹ Dan Diner, *Beyond the Conceivable: Studies on Germany, Nazism and the Holocaust* (Berkeley/Los Angeles/London: University of California Press, 2005), pp. 192-195.

³⁶² Lucy S. Dawidowicz, *The Holocaust and the Historians* (Harvard: Harvard University Press, 1981).

disability history, and what this interest has meant for understanding of the Nazi ‘euthanasia’ programme. Firstly, though, we need to look at how historians have dealt with the link between illness and disability of the one hand and racism on the other.

The Medicalization of Race

In any discussion of the Nazi genocide, questions of ‘race’ are often intertwined with those concerning health. Though this way of considering Nazism has only really come to particular prominence since the 1980s, there are a small number of early works in which consideration is given to the idea that the Nazis saw Jews, and people of some other races, as being ‘racially ill’. Thus, a link with the ‘euthanasia’ programme has sometimes been identified in this regard. By contrast, other historians have considered the programme to be an aspect of racist thought, insofar as people who are ‘weak’ or ‘ill’ are considered to be a drain on the nation’s resources and a threat to its strength.

An early version of this idea is provided by Gerald Reitlinger’s 1953 work *The Final Solution*. In contrast to Raul Hilberg in *The Destruction of the European Jews*, Reitlinger makes significant use of the Nuremberg Medical Trial transcript. As Reitlinger’s book was published eight years before Hilberg’s, this does indicate that Hilberg’s dismissive views of the ‘euthanasia’ programme would seem to arise partly from a less-than-wholehearted attempt to familiarise himself with the programme in its entirety. Of course, a previous chapter showed that, had Hilberg done this, his

conclusions would probably have been substantially the same, but his knowledge might at least have been greater.

By contrast, Reitlinger has clearly read the Nuremberg Medical Trial transcript closely, in order to establish the stages in the evolution of the Nazis choice of gassing as a method of mass-murder.³⁶³ In this, he can be compared to Raul Hilberg. Hilberg's reference to the 'euthanasia' programme, though extremely brief, demonstrates that, in his view, the 'euthanasia programme and the Final Solution are linked, in terms of their common use of gas chambers as a method of mass-killing. As to the question of 'mercy-killing' itself, Reitlinger describes it as 'undoubtedly one of the problems which modern society has created for itself by becoming increasingly institutional'.³⁶⁴ Reitlinger's meaning here is that 'it was left to institutions to decide that a person was a mental defective, an incurable bearer of disease, or simply an asocial type', and that this was particularly important in Nazi Germany, where 'even in peacetime, National Socialism, with its morbid insistence on youth and health, had almost made illness a crime'.³⁶⁵ We can see here that Reitlinger, unlike other historians of this period, does identify some importance attached by the Nazis to the idea of health.

Other chapters of this study (most notably the legal chapter) make it clear that one oft-expressed concern about 'euthanasia' is that its legalisation might lead to increased toleration of the killing of other innocent people. In essence, Reitlinger claims that a version of this train of thought explains the Nazi genocide of the Jews. He writes,

³⁶³ Reitlinger, pp.123-131.

³⁶⁴ Ibid, p. 126.

³⁶⁵ Ibid.

‘The plea of *bouches inutiles* [‘useless mouths’] which justified every massacre of Jews had its roots in notions of national economy and even of social welfare. Thus the language of welfare workers found its way into the reports of the Security Police, who combed out the Jewish settlements in Russia in the autumn of 1941’.³⁶⁶ As evidence for this, Reitlinger quotes from a police report which stated that on one day in October 1941, when the town of Janowici was in the grip of contagious diseases (or so it was claimed), 1025 Jews were shot to ‘prevent contagion’, and a ‘special treatment’ (i.e., death) was ‘applied’ to a further 812 non-Jews.³⁶⁷

Though this is an appalling story, it is unclear why Reitlinger is connecting it with the Nazi ‘euthanasia’ programme. From the report, the Security Police evidently either believed, or claimed to believe, that the killing, particularly of the Jews, would prevent the spread of disease. As far as one can tell, this does seem to tally with Reitlinger’s interpretation of the motives of the ‘euthanasia’ programme, judging by his comment that ‘it was left to institutions to decide that a person was a mental defective, an incurable bearer of disease, or simply an *asocial* type, definitions that the least wave of popular or engineered panic could expand’.³⁶⁸ This does suggest that Reitlinger views the Nazi ‘euthanasia’ programme as a response to an irrational panic about the spread of, say, mental disorders, amongst the general population. As we can see, this interpretation is entirely different from that which emerged from the Nuremberg Medical Trial.

³⁶⁶ Reitlinger, *The Final Solution*, p.126.

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

1978 saw the publication of *Towards the Final Solution: A History of European Racism*, by the American historian George Mosse.³⁶⁹ As the title indicates, this is not a book about the Nazi ‘euthanasia’ programme as such, being instead a chronicle of European racism from the Enlightenment to the Nazi genocide, and with a few concluding remarks on post-war racism. However, Mosse does embark on a fairly wide-ranging discussion of Nazi ‘euthanasia’, which he views, one might say, as a step along the road towards the Final Solution.

The ‘euthanasia’ programme is viewed by Mosse as being linked to the Nazis’ overall project for, as he describes it, ‘the victory of the Aryan’.³⁷⁰ He also links the programme with earlier racist and eugenic thought, citing the importance which racists attached to the idea that ‘superior’ races were productive, whilst ‘inferior’ races were not. Consequently, it was important to eradicate ‘the congenitally sick’ in order that the community could be ‘freed from the burden of caring for its useless members’.³⁷¹

One interesting facet of Mosse’s discussion of ‘euthanasia’ is his concentration upon the work of Karl Binding and Alfred Hoche. These two men, a lawyer and a psychiatrist respectively, published a tract in 1920 entitled *Die Freigabe der Vernichtung lebensunwerten Lebens. Ihr Mass und ihre Form* [The Granting of Permission for the Destruction of Worthless Life. Its Extent and Form]. Though, as we shall see, it has become commonplace for historians of the Nazi ‘euthanasia’ programme to refer to Binding and Hoche, and to argue over the importance which the Nazis attached to their book, earlier historians such as Reitlinger did not do this. Mosse identifies no trace of racist thought in Binding and Hoche’s book, but rather considers that the characteristics

³⁶⁹ George L. Mosse, *Towards the Final Solution: A History of European Racism*, (London: J.M. Dent & Sons, 1978).

³⁷⁰ *Ibid.*, p.216.

³⁷¹ *Ibid.*

approved of by them were held to be those which characterised the ‘master race,’ and: ‘Euthanasia thus became the necessary consequence of attempts to improve the race by doing away with its parasites...Euthanasia and the war were interrelated as closely as the war and the final solution’.³⁷²

From this point of view, Mosse’s thesis is significantly different from those advanced by the earlier scholars whose books have been considered in this chapter. It is particularly noteworthy that Mosse considers the ‘euthanasia’ programme to be an integral part of the overall Nazi ‘master plan’. This is quite different from the purely pragmatic measure described by Lewy and Poliakov. Nevertheless, his views of the programme, and most particularly, his views regarding its cessation, also bear great similarities to those of former historians. For example, Mosse indicates that, in his view, the public protests against the programme occurred because the whole population felt potentially threatened by it, either through fear that a frail family member might fall victim to it, or concern amongst protesters that they themselves might meet such an end.³⁷³

Here, Mosse is falling into line with historians of the 1950s and 1960s, when he implies that the only reaction which the German people showed the ‘euthanasia’ programme was the most vigorous opposition. As we shall see presently, it would be a further decade before the multiplicity of reaction to the programme even began to be considered by English-speaking historians.

³⁷² Ibid, pp.216-217.

³⁷³ Ibid, p.218.

In their reactions to his book, Mosse's fellow historians made little mention of his discussion of the 'euthanasia' programme.³⁷⁴ The exception to this is Eugen Weber of the University of California, who wrote, in the *American Historical Review* that, whatever the pre-Nazi prevalence of eugenic and biologically racist doctrines:

'It would be left to German National Socialists to put such conclusions into practice, first in the 1933 law for the prevention of hereditary sickness and in the euthanasia program of 1939-41 that killed some 70,000 incurably sick, then in the massacre of 'degenerate' and 'anti-social' elements like the gypsies and, above all, the Jews'.

In the same year, the British historian William Carr returned to the theme of the Nazi 'euthanasia' programme in his book *Hitler: A Study in Personality and Politics*. Carr, like Mosse, points out that some of the ideas underlying Nazism were actually quite commonplace in pre-war Europe. However, while Mosse asserts that the most important and most dangerous of these ideas was that of racial ideology, which could be allied with Social Darwinism when it was expedient to do so, Carr believes that it is Social Darwinism itself which is at the root of Nazi evil. In his view, Nazism arose out of an extreme Social Darwinist position which argued that

'[P]ity was out of place in a world governed by the inexorable operation of biological laws beyond human control. To feel concern for concentration camp inmates, the old and sick

³⁷⁴ Mosse's book was reviewed in *The Journal of Modern History*, vol.52, no.2, (June, 1980), pp. 284-285, as well as in the *German Studies Review*, vol.10, no.1, (Feb, 1987), pp.155-156. Neither of these make any mention of Mosse's view of the 'euthanasia' programme.

being put to sleep in euthanasia centres, subject peoples suffering under the heel of the oppressor or enemy soldiers dying on the battlefield was sheer sentimentalism, the corrupting legacy of a Christian-humanitarian past'.³⁷⁵

The difficulty with Carr's explanation is that it would appear to work only where certain actions of the Nazis are concerned. Most notable amongst these is the invasion of other countries, as 'expansion at the expense of weaker neighbours was a 'right' bestowed on the strong by the laws of evolution and a categorical imperative for the leaders of these peoples'.³⁷⁶ However, to say that it is 'sheer sentimentalism' to feel concern for the plight of concentration camp inmates or for the victims of 'euthanasia' murders offers no explanation for why 'euthanasia' murders were committed or for why concentration camps were brought into existence. Carr accounts for these developments in the following manner: Social Darwinist thought adhered to the belief that traditional moral values are a perversion of the evolutionary process, and thus called for the abandonment of these traditional values. The abandonment of these values meant that 'in the long run the door was open, logically, to the sterilization of the unfit, euthanasia of the old, and the physical extermination of anyone deemed by the rulers to be 'socially undesirable''.³⁷⁷ Carr gives various examples of Hitler's concern that society should not be 'dragged down' by the weak: 'Nature knows nothing of the notion of humanitarianism which signifies that the weak must at all costs be surrounded and preserved even at the expense of the strong', and 'War is therefore the unalterable law of the whole of life – the prerequisite for the natural selection of the strong and the precedent for the elimination of

³⁷⁵ William Carr, *Hitler: A Study in Personality and Politics* (London: Edward Arnold Ltd., 1978), p.114.

³⁷⁶ *Ibid.*, p.113.

³⁷⁷ *Ibid.*

the weak ... A people that cannot assert itself must disappear and another must take its place'.³⁷⁸

The 1980s saw the publication of a number of scholarly works concerning the broad topic of 'the Nazi doctors'. Though explanations for this apparently rather sudden development are not widely given, it does seem that the work of German historians may have had a significant part to play. This is particularly evident in Robert Proctor's 1989 work *Racial Hygiene: Medicine under the Nazis*.³⁷⁹ In this work, Proctor discusses the Nazi 'euthanasia' programme at some length, and frequently demonstrates the insights he has gained from studying the research of contemporary West German historians, most notably Goetz Aly and Ernst Klee. For example, Proctor credited Götz Aly with showing that the 'euthanasia' programme was not unpopular, and actually received a broad level of public support. In addition, Aly showed that many parents of disabled children in Nazi Germany were keen to rid themselves of the stigma which they felt this entailed.³⁸⁰ In terms of his understanding of the Nazi 'euthanasia' programme itself, and its place in the whole scheme of the Nazi genocide, Proctor's thesis is one which is now more associated with Henry Friedlander. Namely, Proctor asserted that there were clear links between 'euthanasia' programme on the one hand, and the Final Solution on the other, for two reasons. Firstly, Jews were described as cancers or parasites upon the body of the *Volk*; secondly, the Nazis argued (partly on the basis of pre-Nazi research which had often been published in Jewish journals) that Jews had higher incidences of mental illness than non-Jews, as well as higher incidences of ailments such as nervous disorders, gallstones,

³⁷⁸ Ibid, p.114. Both these remarks are taken from a speech which Hitler made to officer cadets on June 22, 1944).

³⁷⁹ Robert Proctor, *Racial Hygiene: Medicine under the Nazis* (Cambridge, Massachusetts/London: 1989).

³⁸⁰ Proctor, *Racial Hygiene*, p.194. Information taken from a paper given by Goetz Aly to the Institute for the History of Medicine, Free University of Berlin, July 1985.

bladder and kidney stones, neuralgia, chronic rheumatism and brain malfunction.³⁸¹

Proctor argues that whilst the ‘euthanasia’ programme was held to be justifiable due to the cost of keeping institution inmates alive, as well as their lack of productivity, it was linked to extermination of other minorities by way of Nazi and pre-Nazi theories about the racial specificity of certain diseases.³⁸²

Proctor’s book was widely and positively reviewed in a number of major historical journals, but it is interesting to note that out of these reviews, only two refer to the ‘euthanasia’ programme specifically, and of these two, only one mentions it in terms of Proctor’s assertions concerning the link between the ‘euthanasia’ programme and the rest of the Nazi genocide.³⁸³ It may perhaps not be very surprising that *this* review, which appeared in the *American Historical Review*, was written by Henry Friedlander, whose own book would, a few years later, be entirely devoted to a similar thesis. One of the most notorious of these was Robert Jay Lifton’s *The Nazi Doctors*, which has been variously subtitled *Medical Killings and the Psychology of Genocide*, and *A Study in the Psychology of Evil*, published in 1986. Though not universally admired by historians, it has been very widely read, and was even the inspiration for Martin Amis’s novel *Time’s Arrow*.³⁸⁴ As another chapter showed, Lifton’s book was highly instrumental in motivating renewed discussion of the relevance (or not) of the Nazi analogy to contemporary U.S. debates about the legalization of ‘euthanasia’ – such debates having

³⁸¹ Proctor, *Racial Hygiene*, pp.194-195.

³⁸² *Ibid.*, and pp.212-215.

³⁸³ Robert Proctor’s book was reviewed in various sociological and scientific journals, as well as in the following historical journals: *German Studies Review*, Vol.12, No.2 (May, 1989), pp.391-2; *German Studies Review*, Vol.14, No.1, (February, 1991), pp.191-2; *American Historical Review*, Vol. .95, No. 2. (April, 1990), pp.530-531; *English Historical Review*, Vol. 107, No.423 (April, 1992), pp.545-546.

³⁸⁴ Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge: Cambridge University Press, 1994), p.285.

previously relied largely upon endless discussion of Leo Alexander's 1949 article 'Medical Science Under Dictatorship'.

Lifton's work is important for two particular reasons. Firstly and most obviously, we must consider the interpretation which he gives of the Nazi 'euthanasia' programme itself. Secondly, the ways in which he rejects links between Nazi 'euthanasia' and Nazi sterilization policies on the one hand, and contemporaneous U.S. sterilization policies on the other, are revealing. In addition, they help to link his ideas with those of past historians, such as Guenther Lewy, and also with those of historians whose works would be published some years later than his own – for example those of Friedlander and Burleigh, as well as Stefan Kuehl's *The Nazi Connection*, a study of eugenicists in the United States and their connections with members of the Nazi party. With regard to the origins of the Nazi 'euthanasia' programme, Lifton contrasts the United States very positively with Germany:

'Anyone trained in American medicine has personal experience of doctors, nurses, and medical attendants colluding in the death of patients...But those practises have been restrained by legal limits and strong public reaction, and have not developed into a systematic programme of killing those designated as unworthy of living. In Germany, however, such a project had been discussed from the time of the impact of 'scientific racism' in intellectual circles during the last decades of the nineteenth century. That kind of focus, as with any intense nationalism, takes on a biological cast. One views one's group as an 'organism' whose 'life' one must preserve, and whose 'death' one must combat, in ways that transcend individual fate'.³⁸⁵

³⁸⁵ Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide* (New York: Basic Books, 1986).

In advancing this interpretation, Lifton is interpreting the ‘euthanasia’ programme quite differently from early historians (such as Poliakov and Lewy, who, as was demonstrated earlier, saw the programme as a rather ruthlessly utilitarian response to the shortage of hospital beds caused by the wartime situation. To some extent, one could say that Gerald Reitlinger believed that the ‘euthanasia’ programme had a biological (or at least semi-biological) basis, but, given the limited readership achieved by Reitlinger’s book, and the lack of discussion of the ‘euthanasia’ programme amongst historians when it was published, the theories of Reitlinger, Poliakov and Lewy did not, in their own times, have much effect. Interestingly, Lifton’s views to some extent pre-empt those of Henry Friedlander, which we shall consider presently.

In his 1989 book *Health, Race and German Politics between National Unification and Nazism 1870-1945*, Paul Weindling states expressly that medical killing ‘became a pilot scheme for the holocaust’.³⁸⁶ As far as the link between medicine, biology and racial ideology is concerned, Weindling writes that, on the one hand, genetic defects were viewed as a serious threat to the national community, but that once the Nazis took power, they widened considerably the ranks of those considered ‘degenerate’, to encompass all sorts of different groups, e.g., racial groups such as Jews, Slavs and Gypsies, and social ‘problem’ groups, such as criminals, homosexuals, and feeble-minded people.³⁸⁷ ‘Euthanasia’, though an ‘extreme form of racial hygiene’, was a secret measure (unlike sterilization), and, consequently was facilitated by a number of diffuse factors, such as

³⁸⁶ Paul Julian Weindling, *Health, Race and German Politics Between National Unification and Nazism 1870-1945*, (Cambridge: Cambridge University Press, 1989), p.548.

³⁸⁷ *Ibid*, pp.9-10.

the wartime situation, subordination to Hitler, and professionalism taken to extreme.³⁸⁸ A similar emphasis on the importance and history of racial hygiene is given by Richard Breitman, who echoes Weindling's point about 'purifying the gene pool', and extending the categories of those considered a threat to it.³⁸⁹

One of the most striking aspects of the scholarly interest in Nazi ideology as, in a sense, an aspect of the history of medicine, is the decrease in emphasis upon the protests against the Nazi 'euthanasia' programme. For example, Weindling mentions them, but only in passing. His interest is in the motivations for the implementation of different aspects of Nazi 'health' policies, and in the interplay between prominent individuals and groups therein. This is an aspect of the 'euthanasia' programme which was, as we saw, completely obscured by those historians who insisted on highlighting the protests to the programme whilst studiously ignoring every other aspect of it.

Michael Burleigh, Henry Friedlander, and after

We saw in the previous section that the Nazi 'euthanasia' programme was discussed in a significant number of books focusing on 'the Nazi doctors'. Prominent amongst these was Robert Jay Lifton's *The Nazi Doctors: A Study in the Psychology of Evil*, which, as the legal chapter will show, did so much to stimulate discussion of 'euthanasia' and the relevance (or not) of the Nazi analogy amongst members of the U.S. legal profession.] However, these books concentrated on the 'euthanasia' programme as part of wider studies of Nazi medical crimes. It was not until the 1990s that full-length books

³⁸⁸ Ibid, p.550-551.

³⁸⁹ Richard Breitman, *The Architect of Genocide: Himmler and the Final Solution* (London: Bodley Head: 1991), p.91.

concentrating on Nazi ‘euthanasia’ began to appear in English. The journal *Isis* described Michael Burleigh’s *Death and Deliverance: Euthanasia in Germany 1900-1945*³⁹⁰ as ‘the first full-length examination of what its author rightly terms ‘a bleak subject’’.³⁹¹ Indeed, Burleigh’s extensive bibliography of secondary literature contains no English-language books on the ‘euthanasia’ programme, although there are several concerning wider topics, such as racism in Nazi and Weimar Germany, psychotherapy in Nazi Germany, eugenics and genetics, as well as several books on the Nazi doctors, such as those by Weindling, Lifton, Proctor, and George J. Annas, which we encountered in the previous section.³⁹² Burleigh’s book was joined the following year by Henry Friedlander’s *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*³⁹³. The principal difference between Burleigh and Friedlander concerns their respective explanations for the decision to implement the programme. In Burleigh’s view, one’s ‘intellectual predilections have a role to play, concerning the explanations one considers important.’³⁹⁴ Nevertheless, he considers the programme to be largely a result of what he calls ‘crude collectivist materialism’ coupled with the oft-expressed view that the programme’s intended targets functioned only on the ‘lowest animal level’ – and, presumably, would not be deprived of anything if a decision was taken to kill them.³⁹⁵ The impetus for the programme’s final implementation was, in Burleigh’s view, the case of the Knauer baby, an infant apparently born in Leipzig in 1938, who was, it was claimed, blind, missing a

³⁹⁰ Cambridge: Cambridge University Press, 1994.

³⁹¹ Sheila Faith Weiss, review of Michael Burleigh’s *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge: Cambridge University Press, 1994), in *Isis*, Volume 86, Issue 4, December, 1995, pp. 680-681, p.680.

³⁹² For Burleigh’s impressive secondary bibliography, see *Death and Deliverance*, pp.361-377.

³⁹³ (Chapel Hill: University of North Carolina Press, 1995).

³⁹⁴ Burleigh, *Death and Deliverance*, p.98.

³⁹⁵ *Ibid*, pp.101-102.

leg and part of an arm, and was, in addition, an ‘idiot’.³⁹⁶ To the extent that he identifies some pragmatic considerations for the Nazi ‘euthanasia’ programme, Burleigh allies himself with much earlier historians, such as Richard Grunberger. Though Grunberger does not go so far as to suggest what the motivation might have been for the Nazi ‘euthanasia’ programme, he does refer in passing to its role in lessening the shortage of hospital beds caused by the wartime situation:

‘The war of necessity modified the health pattern quite fundamentally. Of an available stock of half a million hospital beds, 185,000 were diverted to military use, but the resultant shortage was partly made good by means of the Euthanasia Programme, which exterminated an estimated 100,000 inmates of institutions. Another – far more innocuous – wartime campaign centred on the dental health of boys aged fourteen to eighteen...’³⁹⁷

It is noteworthy that Grunberger tacitly acknowledges that the ‘euthanasia’ programme was far less ‘innocuous’ than a programme promoting dental health, but it is clear that – to some degree at least – Grunberger has followed earlier historians in failing to consider his own use of the term ‘euthanasia’; an approach which is distinctly alarming. Thus, Grunberger’s explanation for the programme is that it was motivated purely by practical, rather than ideological considerations. Burleigh recognizes that such practical considerations had a part to play, but, having investigated the programme itself to an infinitely greater extent than had Grunberger, Burleigh has concluded that this is very far from the whole story, writing that ‘Nazi Germany was unique in attempting to

³⁹⁶ Ibid, pp.98-99.

³⁹⁷ Richard Grunberger, *A Social History of Nazi Germany* (London: Weidenfeld and Nicolson, 1971), p.295.

exterminate the chronically mentally ill and physically disabled in the interests of economy and physical fitness'.³⁹⁸

By contrast, Friedlander's explanation for the programme stresses motivations somewhat different from those outlined by Burleigh:

'Nor were these patients murdered to free hospital space or to save money; the killers were motivated by an ideological obsession to create a homogenous and robust nation based on race. They wanted to purge the handicapped from the national gene pool'.³⁹⁹

This difference in emphasis upon the motives of the programme is not the only dichotomy between the views of Burleigh and Friedlander. The chapter concerning the Nuremberg Medical Trial demonstrated that Viktor Brack and Karl Brandt, the Trial defendants discussed, attached great importance to the idea that the victims were all 'incurable mental patients' – a device which, if nothing else, allowed them to sidestep the question of why they had subjected adults to non-consensual killing. Burleigh and Friedlander deal with this problem in entirely different ways. On the one hand, Burleigh reveals his conviction of the essential irrelevance of this question when he writes:

'Very little has been done to study those who were killed, which is a sad comment upon how we all think and operate. Such studies of patients as do exist tend to use computers to

³⁹⁸ Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge: Cambridge University Press, 1994), p.8.

³⁹⁹ Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*, p.xii.

tot up the proportions of epileptics to schizophrenics among the murdered, an approach I find depressing and worrying'.⁴⁰⁰

By contrast, Friedlander highlights the inadequacy of the term 'mental patients', writing:

'[A]s I read through the evidence, I realized that the traditional description of the victims of euthanasia as 'mental patients [*Geistesranke*]' was inaccurate. Of course, I had always known that the use of the term 'euthanasia' was a euphemism to camouflage their murder of human beings they had designated as 'life unworthy of life'; that their aim was not to shorten the lives of persons with painful terminal diseases but to kill human beings they considered inferior, who could otherwise have lived for many years. Although the victims were institutionalized in state hospitals and nursing homes, only some suffered from mental illness. Many were hospitalized only because they were retarded, blind, deaf, or epileptic, or because they had a physical deformity. They were handicapped patients, persons who in the United States today are covered by the Act for Disabled Americans'.⁴⁰¹

To support his assertions that the victims were not brain-dead or lacking a desire to live, Friedlander cites a 1967 judgement by the District Court of Frankfurt, which concluded that one per cent of victims lacked 'a natural desire to live'.⁴⁰² Friedlander does not identify why the description 'mental patient' should have gained so much currency but, as I suggested in Chapter One, it is likely that the Nuremberg Medical Trial was at least partly responsible for this state of affairs. In addition, this chapter has tried to show that, at least prior to the mid-1980s, this term was used unquestioningly by most historians.

⁴⁰⁰ Burleigh, *Death and Deliverance*, pp.285-286.

⁴⁰¹ Friedlander, *The Origins of Nazi Genocide*, p.xi.

⁴⁰² *Ibid*, p.170.

Though these two books were published one year apart, historical journals often seemed to review them at roughly the same time. For example, the *American Historical Review* published its verdict on *The Origins of Nazi Genocide* in February of 1997, whilst the *English Historical Review* did the same for *Death and Deliverance* in April of the same year.⁴⁰³ Aside from this, both books seem to have been broadly welcomed, and the remark that they covered ground which had hitherto been largely unexplored was expressed with some frequency. This phenomenon is most notable in relation to Henry Friedlander's book, and this is likely to have been because Friedlander's thesis was, in many ways, more radical than Burleigh's. In other words, as was shown above, the former's stated intention was, in part, the redefinition of the word 'Holocaust' to include the Nazis' murder of Sinti and Roma people on the one hand, and of disabled people on the other. This was a development neither considered nor attempted by Burleigh.

One of the most striking developments in this area following these publications has been the number of subsequent books to which Burleigh and/or Friedlander have contributed. These books tend to have a number of contributors, generally all eminent historians, each of whom write a chapter on an aspect of the Nazi dictatorship. One positive result that a number of these books have had concerns the extent to which the Nazi persecution of non-Jewish groups is now regarded as a legitimate area of scholarly interest. Their publication also demonstrates the impact which Burleigh and Friedlander's researches have had on other scholars' understanding of the Nazi genocide.

One of the earliest of these books was *The Final Solution: Origins and Implementations*, which was edited by David Cesarani and was published in 1994. It

⁴⁰³ Review of *Death and Deliverance: Euthanasia in Germany 1900-1945*, in the *English Historical Review*, Vol.112, No.446 (April, 1997), pp.533-534; review of *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*, in the *American Historical Review*, Vol.102, No.1, (February, 1997), pp.128-129.

includes a chapter from Henry Friedlander's *The Origins of Nazi Genocide*. It has been followed by a number of others. Amongst these is *The Holocaust: Origins, Implementation, Aftermath*, which includes chapters from both *Death and Deliverance* and *The Origins of Nazi Genocide*.⁴⁰⁴ This is a book which, as its title implies, comprises essays and chapters from other books by a large number of eminent historians, in which aspects of the Nazi genocide, as well as its origins and legacies, are considered. We saw earlier in the chapter that, in his introduction to this volume, Bartov felt compelled to remark that, apparently to his surprise, the study of the Nazi 'euthanasia' programme did not divert attention from the Nazi genocide of the Jews.⁴⁰⁵ In his introduction he also comments that Burleigh and Friedlander's studies of Nazi 'euthanasia' have played an important role in furthering historical understanding of Nazism as a whole, by highlighting both the role of science (and pseudo-science) in the theories which led ultimately to the Nazi genocide, but also their historical specificity.⁴⁰⁶

The following year produced another book of essays on aspects of Nazism, this time incorporating an essay by Henry Friedlander, using material from *The Origins of Nazi Genocide*. *Social Outsiders in Nazi Germany*, edited by Robert Gellately and Nathan Stolfus, was, as its title suggests, devoted to studies of many of the groups (not only Jews) who were, in the Nazi mindset, surplus to requirements. The rationale behind this approach was to provide a comprehensive overview of how, after coming to power, the Nazis had set about establishing a 'racially pure community of the people', in the editors' words.⁴⁰⁷ As regards the question of how Nazi 'euthanasia' fits into this

⁴⁰⁴ Omer Bartov, (ed.), *The Holocaust: Origins, Implementations, Aftermath* (New York/London: Routledge, 2000).

⁴⁰⁵ See also *ibid.*, p.3.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Robert Gellately and Nathan Stolfus, (eds.), *Social Outsiders in Nazi Germany* (Princeton: Princeton University Press, 2001), p.3.

discussion, the editors consider, as Omer Bartov did, that Henry Friedlander's attention to pre-Nazi theories of eugenics, race, and heredity is of significant value in showing exactly how the Nazis advanced such theories and gave them a murderous twist.⁴⁰⁸ The two (American) editors describe such theories as 'German and European', but it is noteworthy that Friedlander's own book does not shirk from showing the pre-Nazi *American* enthusiasm for eugenics. Still, the editors' omission is a striking one, in some ways harking back to Guenther Lewy's claim, earlier in this chapter, that American and Nazi sterilization were fundamentally opposed because those in the U.S. occurred on a smaller scale and were, apparently, sometimes voluntary. The editorial discussion of Nazi 'euthanasia' in this volume is also important, in the light of the number of historians in this chapter who have claimed that the German public were unanimous in their opposition to the programme:

'When the public got wind of what was happening there was some unrest, but no open protest. Some, but not all, local residents near the killing sites were appalled. One woman wrote to the hospital where her two siblings reportedly died within a few days of each other. She said she accepted the Third Reich, and 'hoped to find peace again' if doctors could assure her that her siblings had been killed by virtue of some law that made it possible to 'relieve people from their chronic suffering'.⁴⁰⁹

This is a deeply significant passage, because it demonstrates that, at least for some scholars, Burleigh and Friedlander's researches have yielded at least one very important result: they have managed to begin the process of dispelling the simplistic assumption by

⁴⁰⁸ Ibid, p.10.

⁴⁰⁹ Ibid, p.11.

other historians that the Nazi ‘euthanasia’ programme was noteworthy only in terms of the protests against it, which were, supposedly, the sole public reaction it provoked.

In contrast to Gellately and Stolfus’ comments concerning the apparently wholly European nature of theories of eugenics and scientific racism, the editors of *Medical Ethics in Nazi Germany: Origins, Practices, Legacies* are concerned with what they regard as the universal, still relevant questions which the Nazi use of medicine continues to pose.⁴¹⁰ In their opinion:

‘even as we are compelled to demystify and demythologize the Nazi past, so too are we called upon to consider the applicability of the controversies and policies in past and present democratic societies. Regardless of our own national or institutional contexts, the questions raised in this volume bear an immediate relevance to current controversies ... Are we in danger of witnessing the evolution of a new eugenics that could have similar or even more murderous consequences than those effected by eugenic thinking and its co-optation of science and medicine in the Third Reich? Does a reflexive and restrictive focus on the evils of medicine under the Nazi regime eclipse our view of the history and practice of eugenics in our own societies, and if so, what are the potential outcomes?’⁴¹¹

These are questions which the final chapter will consider, focusing on how the subject has been dealt with in moral philosophy - primarily in the relatively new field of Bioethics. The questions asked by Huener and Nicosia will be brought into practical focus when we discuss the so-called ‘Singer Affair’, in which the historian Michael Burleigh was an important, if rather unwilling, participant. *This* chapter has certainly

⁴¹⁰ Francis R. Nicosia and Jonathan Huener, (eds.), *Medicine and Medical Ethics in Nazi Germany* (New York/Oxford: Berghahn Books, 2002).

⁴¹¹ *Ibid.*, p.10.

shown that historians' perceptions of the Nazi 'euthanasia' programme have changed fundamentally in recent years. Motivated by the pioneering work of German historians, English-speaking scholars have begun to realise that the 'euthanasia' programme is deeply important and worthy of study in its own right. The situation is not yet entirely ideal, with some historians continuing to state that the programme ended in 1941 and that the circumstances of its alleged demise is its only relevant feature. In the main, however, it is becoming well-integrated into the study of Nazism as a whole, and also in its own right. There are, however, still disagreements about what its legacy should be. Some of these have been covered by previous chapters; others will be considered now.

The very recent past has seen two additional important contributions to the literature in this area. Paul Julian Weindling's *Nazi Medicine and the Nuremberg Trials* discusses Nazi medical crimes and the Allies' prosecution of the perpetrators (as one might expect, given the book's title!). Ulf Schmidt's *Justice at Nuremberg: Leo Alexander and the Nazi Doctors' Trial* is a biography, partly of Alexander's life up to the time of the Nuremberg Trials, and partly of his participation in them. There is also a concluding chapter dealing with the subject of post-war medical ethics. Weindling's short but informative section on Nazi 'euthanasia' discusses its development as a policy, but also its prosecution at the Nuremberg Medical Trial. He argues that the origins of the programme are to be found in German racial hygiene, but that this was not explored at the Nuremberg Medical Trial due to a measure of reluctance to scrutinize the accounts given by Karl Brandt.⁴¹²

Weindling highlights the individualistic and humane justifications given by both Brandt and other defendants – we saw these in Chapter One. Weindling also remarks upon the

⁴¹² Paul Julian Weindling, *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent*, (Basingstoke/New York: Palgrave Macmillan, 2004), p.251.

‘deep and at times perplexing contrast between the brutality of euthanasia as actually implemented and the retrospective moral legitimations the accused presented’⁴¹³. He concludes however that ‘the prosecution saw euthanasia as the cruel culmination of racial medicine.’⁴¹⁴ As was made clear in Chapter One, the prosecution saw no such thing. An explanation for Weindling’s view might be that his aim was to investigate the genesis of, and condemn the perpetrators of the ‘euthanasia’ programme, not those who were prosecuting them. In any event, a similar attitude to the Trial was shown by Ulf Schmidt. Again, he obviously condemns the programme and his intention is to show how the defendants themselves justified it. This is particularly the case with Karl Brandt. Schmidt writes that ‘Brandt’s closing speech made it clear that he had genuinely believed in the righteousness of the killing operation. His arguments were nevertheless unconvincing ... It may not have been envisioned as murder, but for the court it was de facto murder beyond any reasonable doubt’.⁴¹⁵ As stated above, Chapter One showed that this was in no way true. Like Weindling, Schmidt rather circumvents the problem of how the Tribunal at the Doctors’ Trial showed, at best, a chillingly dismissive attitude to the victims of the ‘euthanasia’ programme – he does not discuss the Judgement or the Nuremberg Code in relation to it. Nevertheless, he himself condemns it. When we think back to how the programme was trivialized by earlier historians – who, for example, used it as a tool to ‘demonstrate’ that protests would have stopped the Final Solution, but afforded it no significance in its own right – we can see how very far removed Weindling and Schmidt are from such an attitude.

⁴¹³ Ibid, pp.253-254.

⁴¹⁴ Ibid, p.256.

⁴¹⁵ Ulf Schmidt, *Justice at Nuremberg: Leo Alexander and the Nazi Doctors’ Trial* (Basingstoke/New York: Palgrave Macmillan, 2004), p.243.

Another ‘Other’?

This chapter has so far shown what huge progress has been made in the ways in which the Nazi ‘euthanasia’ programme is treated by historians. Still, one might argue that these changes in emphasis – dramatic though they undoubtedly are – do comparatively little to move the victims of the ‘euthanasia’ programme from where they have all too often been placed – as subjects of discussion by others, but invisible with regard to what they themselves thought or felt. Catherine J Kudlick’s 2003 article ‘Disability History: Why We Need Another ‘Other’’ included a brief survey of the literature on the Nazi ‘euthanasia’ programme, and made the point that most studies of it have placed it in a broader medical context.⁴¹⁶ Kudlick argues that this approach does not work for disability history, as the field ‘desperately needs people to tell their own stories’.⁴¹⁷ The criticism that one might immediately make of this is that ‘dead men tell no tales’, and that victims of the Nazi ‘euthanasia’ programme are, by definition, no longer able to tell their own stories. However this is also a reaction to the problem I identified in the introduction to this thesis, in other words the practice of trying to solve a problem without any input from those affected.

Hugh Gregory Gallagher’s *By Trust Betrayed: Patients, Physicians and the License to Kill in the Third Reich* was published in 1990. In this regard, his book predates Catherine J. Kudlick’s call for ‘another other’ by over a decade. Despite this, Kudlick

⁴¹⁶ Catherine J. Kudlick, ‘Disability History: Why We Need Another ‘Other’’, *The American Historical Review*, vol.108, no.3, (June, 2003), pp.763-793.

⁴¹⁷ *Ibid*, p.786.

does not mention it, concentrating instead on Horst Biesold's 1999 *Crying Hands: Eugenics and Deaf People in Nazi Germany*. However, there are significant grounds for comparison between these two books, particularly when considered in the light of Kudlick's desire for 'people to tell their own stories' to advance the field of Disability History. Biesold's book allows deaf Germans, sterilized under the Nazis, to speak about their experiences. Many of them had never done this before; a combination of misplaced shame and the fact that enforced sterilization had robbed them of descendants who might have given them a richly-deserved sympathetic hearing ensured that the stories Biesold coaxed out of them were ones which had never been heard before.

Another way of injecting some humanity into the history of a programme which has been treated like a sterile ethical issue comes from Hugh Gregory Gallagher's *By Trust Betrayed: Patients, Physicians and the License to Kill in the Third Reich*. Though this was published in 1990, and thus predates both Burleigh and Friedlander, it is included in this section because it contains a chapter in which the reader is encouraged to think about the experiences of victims of the Nazi 'euthanasia' programme from their own point of view. Gallagher, who uses a wheelchair after having contracted polio in early adulthood, does this not by, for example, producing letters or diaries from institution patients, but by looking at the ways in which disability has been defined and regarded in a multiplicity of societies - ancient and modern, advanced and primitive. The reason for this is that there 'can be no doubt that the way a society perceives and deals with a handicap is a major

factor in determining just how disabling – in a real sense – the handicap will be’.⁴¹⁸

Gallagher explains the Nazi ‘euthanasia’ programme in purely utilitarian terms:

‘During the Nazi era, the Germans were out to build a new society, a Super Race. They saw themselves as the strong in triumph over the weak. How annoying the presence in their midst of seemingly helpless disabled and elderly people must have been’.⁴¹⁹

Thus, Gallagher’s explanation for the programme fits in with his thesis that the various reactions to disabled people are largely dependent on the societal norms and values of the societies in which they live. Gallagher’s argument is expanded by Suzanne E. Evans in her book *Hitler’s Forgotten Victims: The Holocaust and the Disabled*, which was published in 2007. Evans’ book offers a new way of looking at the ‘euthanasia’ programme, not through providing new evidence but by bringing together all the relevant material, both for a wider audience, and for a clear socio-political purpose. The aim of her book and of the Disability Holocaust Project from which it results is to ‘utilize the shared history of the Holocaust as a vehicle for building greater co-operation between organizations of people with disabilities and to relate pre-Holocaust concepts to pernicious contemporary attitudes and enhance awareness of the existing stigmatization of people with disabilities’. There has been much criticism of the use of historical injustices and worse as vehicles for fostering a contemporary sense of ‘identity through victimhood’.⁴²⁰ However, as this chapter – and this whole enquiry – demonstrates, there is in this case a great practical need to redress the balance of widespread misconceptions

⁴¹⁸ Hugh Gregory Gallagher, *By Trust Betrayed: Patients, Physicians, and the License to Kill in the Third Reich* (New York: Henry Holt and Co., Inc., 1990), p.25.

⁴¹⁹ *Ibid.*, p.38.

⁴²⁰ See for example Peter Novick’s contentious book *The Holocaust and Collective Memory* (London: Bloomsbury, 2001).

about 'euthanasia', which such disciplines as disability history are in an excellent position to assist with.

Chapter Four

The 'Law in Action' versus the 'Law on the Books':

Legal Issues Relating to 'Euthanasia' and Disability in English and U.S. Law since 1947

Introduction: The Law on the Books

It is now over fifty years since the US legal scholar Yale Kamisar wrote his famous rebuttal of Professor Glanville Williams' proposals for legalising voluntary euthanasia.⁴²¹ Nevertheless, his assertion that the law in theory differs substantially from the law in practice still has a high degree of applicability today. Kamisar's article makes no particularly strong distinctions between 'mercy-killing' in the United States and in Britain. As he himself says, 'The Law on the Books condemns all mercy-killings'. This holds true in both countries: the perpetrator's motive for committing murder is irrelevant.⁴²² This is also one of the reasons why this chapter will consider the legal situation in both countries, rather than devoting a separate chapter to each of them. The legal situation in the two countries is by no means identical, but the similarity in issues, events, and levels of technology means that comparisons are not particularly onerous. Neither jurisdiction recognizes a specific defence of 'mercy killing'. The law in this area in England and Wales is governed by a number of statutes, depending upon the nature of

⁴²¹ Yale Kamisar, 'Some Non-Religious Views Against Proposed 'Mercy-Killing Legislation'', *Minnesota Law Review*, vol.42, no.6, (May, 1958), pp.969-1042.

⁴²² *Ibid*, p.970.

the killing. Murder is the most serious, and involves ‘intentional causation of death’.⁴²³ A layperson who commits a ‘mercy killing’ can, by virtue of an offence introduced in the Homicide Act 1957, claim a defence of ‘diminished responsibility’. If successful, this will reduce the conviction from murder to manslaughter.⁴²⁴ The law on assisted suicide in England and Wales has recently been clarified. Family members who assist the suicide of a terminally ill person will not generally face the threat of prosecution. This clarification occurred as a result of legal action taken by Debbie Purdy. Ms. Purdy, who has multiple sclerosis, won the right to be provided with guidance from the Director of Public Prosecutions as to how he would exercise his discretion in relation to Article 2(4) of the Suicide Act 1961. This provides that no prosecutions should be brought against persons who ‘aid, abet, counsel or procure’ another’s suicide, except by the Director of Public Prosecutions, or with his consent.⁴²⁵ Furthermore, the case of Ms. Purdy (*R. (on the application of Purdy) v. D.P.P.* [2009] UKHL 45) held that Ms. Purdy’s rights under Article 8 of the European Convention on Human Rights, which enshrines respect for private and family life, entitled her to be provided with such guidance.⁴²⁶ She wished to know if ending her life with assistance would leave her husband, Omar Puente, in danger of prosecution for assisting a suicide. Starmer’s remarks, however, identify another problem, and one which will be a primary focus of this chapter. Starmer was quoted in a Crown Prosecution Service press release as emphasizing that ‘this policy does not, in any way, permit euthanasia. The taking of life by another person is murder or manslaughter –

⁴²³ Richard Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise*, (Abingdon – New York: Routledge-Cavendish, 2007), p.35.

⁴²⁴ *Ibid*, pp.37-38.

⁴²⁵ Richard H.S. Tur, ‘Legislative Technique and Human Rights: The Sad Case of Assisted Suicide’, *Criminal Law Review*, 2003.

⁴²⁶ *R. (on the application of Purdy) v. Director of Public Prosecutions* [2009] UKHL 45, p.43.

which are among the most serious criminal offences'.⁴²⁷ Finally, a physician who kills a patient who has, for example, a terminal illness, will usually face a murder charge but may plead 'double effect'. This defence, introduced by the *Bodkin Adams* case of 1957, will provide that a physician is not guilty of murder provided he or she can demonstrate that drugs administered to the dying patient were given with the sole aim of relieving suffering, even if they eventually caused death.⁴²⁸ The law in the United States is somewhat more complicated. It has grown over the years to take into account 'living wills', assisted dying, persistent vegetative state, and other matters. Not all laws apply in all states. Nevertheless, what still holds true is that active 'euthanasia' is a crime in every single US state.⁴²⁹ In some ways, the treatment options for neonates which he discussed are of less relevance now than they were then, having been largely replaced by sophisticated pre-natal tests and the resulting opportunity to dispose of a disabled baby before it has the chance to see the light of day. For example, figures released show that pre-natal diagnosis of the two congenital impairments mentioned by Raphael and others (namely, Down's syndrome and spina bifida) resulted in termination in 90 and 92 per cent of cases respectively.⁴³⁰ In addition, though abortions are generally prohibited after twenty-four weeks, section 1 (1) (d) of the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) does provide for abortion at any time up to birth, if there is a 'significant risk that the baby will be born seriously disabled'.⁴³¹ The

⁴²⁷ Downloaded from http://www.cps.gov.uk/news/press_releases/144_09/.

⁴²⁸ *Ibid.*, p.87.

⁴²⁹ Ian Dowbiggin, *A Concise History of Euthanasia: Life, Death, God and Medicine* (Lanham, Maryland: Rowman and Littlefield, 2005), p.2.

⁴³⁰ The quoted statistics for Down's syndrome may be found in the *British Medical Journal*, 'Trends in pre-natal screening for Down's syndrome in England and Wales 1989-1997', 3rd October, 1998. The figures for spina bifida appear in *Link* magazine, a publication of the Association for Spina Bifida and Hydrocephalus, September/October 2002.

⁴³¹ The literature on this subject is huge. Good introductions are Rosamund Scott, 'Prenatal Testing, Reproductive Autonomy and Disability Interests', *Cambridge Quarterly of Healthcare Ethics* (vol.14 (1), 2005), pp.65-82, and Raanan Gillon, 'Is there a new ethics of abortion?', *Journal of Medical Ethics*, (vol.14, 2001).

Office for National Statistics shows that, in 2009, only 1% of abortions took place because of foetal disability.⁴³² Although, as the above statistics of 90 and 92 per cent terminations for Down's syndrome and spina bifida showed, it may be that the percentage of abortions for *types* of disability is significantly higher. It would be difficult to demonstrate conclusively that the disparate ethical problems of disability-related abortion on the one hand, and euthanasia on the other, are connected, but I do feel that, if there were less eagerness to regard abortion as a way of 'solving' disability, then people who become disabled, say in adulthood, might be more aware that there were steps that they might take, which did not involve campaigning vociferously for their 'right to die'. It is noticeable that the debates in this area are often led by previously healthy people, now facing terminal or degenerative illness, and who want the opportunity to die at a time and in a manner of their own choosing. This phenomenon has led to a number of important developments: some U.S. states now have 'living wills'; Jack Kevorkian has served time in prison for 'helping his clients to die', and legal ramifications are also being felt in the United Kingdom. As this chapter will show, and as writers such as Richard Huxtable have identified, the above statement of Mr Starmer's contains more than an element of wishful thinking. This chapter will demonstrate that cases of 'euthanasia' occupy – and have done for decades – a separate but largely unacknowledged category of British criminal law. Though they come before the courts in a whole variety of guises, this chapter will argue – as this whole enquiry has done – that the courts have proceeded without any real attempt to solve the underlying problems which cases of 'euthanasia' represent. The comprehensive challenges to the unspoken assumption that some lives may be extinguished with no real consequences have come

⁴³² Downloaded from <http://www.dh.gov.uk>.

from the disability community but, particularly in England and Wales, have really not been adequately taken up by the courts. In addition, the ‘right to die’ is not nearly as straightforward as high-profile campaigners like Debbie Purdy and Terry Pratchett appear to imagine. Not only is it a debate with a long history, but it also raises questions about such things as the value of different lives, and provision for people with complex needs. These extremely important topics will simply not be addressed if the current trend continues – that of articulate, previously healthy individuals who assert that, now their lives have become challenging, it should be their inalienable right to end them. Maybe in some cases this is correct, but as this chapter will show, the tenor of the debate has for so long been hostile to the idea of a life which may contain many difficulties being as worthy of preservation as a ‘normal’ life, that the situation has arisen in which the least-noticed areas of the debate are the ones which stand in greatest need of consideration. This is what will happen in this chapter. It will also become apparent that the cases highlighted here are ones which focus overwhelmingly on disability, as opposed to terminal illness – and the public debate does focus very much on the death of terminally ill people.

The case of Debbie Purdy, like that of Diane Pretty in 2001-2, caught the public imagination, and focused attention and debate on ‘end-of-life’ issues. Both these cases involved adults who had independently decided that they wished to die, but who required assistance in doing so. Because of this, an impression may have arisen that the problems of euthanasia and assisted suicide are relatively few and easy to solve. In common with the preceding chapters, this chapter will demonstrate that is not the case. Not only do debates about ‘euthanasia’ have a long and, sometimes, unsavoury history, but there are

also very many different problems which have entered the discussion over the years. As far as the British legal debate is concerned, the period of the 1940s to the 1960s is perhaps the most straightforward, focusing as it does on active killing, either of patients by their physicians, or of sick or disabled people by their relatives. In addition, medical technology was not at this point sufficiently advanced to enable catastrophically injured people (such as Tony Bland in 1993) to be kept alive. Thus, some of the questions which would, in later years, become almost emblematic of the ‘euthanasia’ debate did not even arise. Other questions, such as that of selective infanticide by physicians, were often a response to advances in surgical techniques, which enabled more babies to survive but left many with chronic health problems which physicians and parents decided, made their lives ‘not worth living’. Most recently, debates have focused on assisted suicide and termination of life support. However, the continued occurrence of cases of the killing of sick and disabled people by members of their own families – cases which might appear to belong to an earlier era – show that the problems underpinning the subject of ‘euthanasia’ are as far from being truly solved as they ever were.

‘Idiots and People of That Sort’:

The ‘Euthanasia’ Debates of the 1950s and 1960s

During this period, the cases of ‘euthanasia’ which one encounters are what might be described as ‘classic’ cases of ‘euthanasia’ – the active killing of a sick or disabled person, allegedly to spare that person further suffering. Both countries sought ways of both avoiding the problems such cases represented, and of demonstrating solidarity with the perpetrator – particularly when he or she was a layperson. England and Wales introduced a new defence of diminished responsibility, which continues to be used by lay

defendants accused of ‘mercy-killing’.⁴³³ The United States also saw attempts such as refusing to indict defendants in the first place, trying them for manslaughter rather than murder despite evidence of obvious premeditation, or finding them not guilty by reason of, for example, temporary insanity.⁴³⁴ Contemporary attitudes to such cases and issues are highly revealing. The actions of the courts make it clear that they wished to protect the perpetrator from the full force of the law, and to express their sympathy for him or her. At the same time, they wished to make it appear that they regarded ‘mercy-killing’ as a crime like any other. They would do this both by making pronouncements to the effect and by imposing a penalty (invariably extremely light) on the perpetrator. Current attitudes towards disability and disabled people can also be gleaned from passing remarks during debates about ‘euthanasia’. Such attitudes are clearly to be seen in the 1950 House of Lords debate over the (unsuccessful) attempt to implement a bill to legalise voluntary euthanasia. The Voluntary Euthanasia (Legalisation) Bill was, in essence, an amended version of a Bill which had been placed, without success, before the Lords in 1936. It was debated in the House of Lords on November 28, 1950. An important motivation for the Bill’s reintroduction at this time is likely to have been the prominence in British public discourse of a number of cases of ‘euthanasia’ in the States, which were sympathetically discussed in the British press.⁴³⁵ Despite this, the Bill failed, and the Lords’ debates demonstrate clearly that one reason for this was that many of the peers who spoke against it feared that it might prove to be the ‘thin end of the wedge’. In particular, many Lords expressed concerns about this on the basis of the ‘small beginnings’ of the relatively

⁴³³ Richard Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Abingdon/New York: Routledge-Cavendish, 2007), p.44.

⁴³⁴ Helen Silving, ‘Euthanasia: A Study in Comparative Criminal Law’, *University of Pennsylvania Law Review*, vol. 103 (1954-1955), p.350.

⁴³⁵ Ian Dowbiggin, ‘“A Prey on Normal People”: C. Killick Millard and the Euthanasia Movement in Great Britain, 1930-55’, in *Journal of Contemporary History*, Vol. 36, No.1, (2001), pp.59-85, p.78.

recent Nazi ‘euthanasia’ programme, which had then grown to encompass a much wider circle of victims. The Bill’s advocate in the Lords, Lord Chorley of Kendal, was a vice-president of the Voluntary Euthanasia Legalisation Society.⁴³⁶ He hastened to assure the House that his proposed Bill would only grant the possibility of ‘euthanasia’ to *compos mentis* adults: ‘only a person who is able to come to a decision for himself ... should be granted this method of leaving his life’.⁴³⁷ This reassurance failed to allay the concerns of many members of the House of Lords. Early on in the debate, the Archbishop of York remarked that while the programme had had small beginnings, it had during the war transformed into a large operation for the destruction of those who, the Archbishop said, were considered ‘useless mouths in a time of emergency’.⁴³⁸ The Archbishop expressed deep concern that any attempt to introduce ‘euthanasia’ legislation in Britain would undermine the value attached to human life.⁴³⁹ With regard to the Nazi ‘euthanasia’ programme itself, the Archbishop advanced what has come to be known as the ‘slippery slope’ argument, asking:

‘If we once begin to allow this, where are we to stop? Now it is proposed that this right should be granted in connection with excessive pain. Why not also to those who are born feeble-minded? Why not also to those who are physically so crippled that they can be of no service to the nation? Why also should it not be applied to those who are in our mental asylums? It has to be remembered that Germany placed its feet on the slippery slope, and euthanasia, which was at first applied only to a very few, was eventually, under the stress

⁴³⁶ N.D.A. Kemp, ‘Merciful release’: *The History of the British Euthanasia Movement*, (Manchester: Manchester University Press, 2002), p.117.

⁴³⁷ Lord Chorley quoted in Kemp, p. 140.

⁴³⁸ Quoted in Kemp, p.141.

⁴³⁹ *Ibid.*

of war especially, applied to a large number of people who were regarded as useless mouths in a time of emergency. I feel that there is a real danger that...imperceptibly and gradually this value in human life will be reduced if by law it is possible year by year to kill a large number of people'.⁴⁴⁰

It is clear from these statements that the Archbishop of York was not really considering the particular situations for which Lord Chorley had expressly designed his Bill. Instead, he was concerned about where it might lead. He clearly believed that unwelcome consequences were almost inevitable if the Bill were to become law. In addition, his remarks show that he considered the example of the Nazi 'euthanasia' programme an instructive one for his own society; as we have seen (and shall see again) those who believe that the example of the Nazi 'euthanasia' programme has no useful role to play in debates about euthanasia, are apt to point out the enormous differences between Nazi Germany on the one hand and Britain (or the United States) on the other. The concerns put forward by the Archbishop of York were echoed by other members of the Lords, such as Lords Amulree and Haden-Guest, as well as by the Lord Chancellor, Viscount Jowitt. In fact, these gentlemen agonized so exhaustively about the possible 'slippery-slope' effects of any legalisation of voluntary euthanasia, that it is doubtful whether they actually considered the proposals which Lord Chorley attempted to place before them. Lord Amulree, for example, stated:

'once we legally broke down that principle [of the sanctity of human life] there would occur what occurred in Germany before the war, when mental defectives

⁴⁴⁰ House of Lords Parliamentary Debates Official Report, Fifth Series, 1950-51, Vol. 169, (Oct.31, 1950-Jan. 24, 1951), c.563-4.

were put out of their misery, mad people were destroyed and people suffering from all sorts of incurable diseases were given release. It is much better to encourage the medical profession to find out forms of treatment and to alleviate pain rather than to encourage them ...to kill people because they are in so much pain'.⁴⁴¹

Such concerns were repudiated by the Earl of Huntingdon, thus:

'if a Hitler, or some other dictator...ever came to this country, a man who has probably waded through violence and bloodshed, and who holds down the country with an army of secret police, does anybody seriously consider that he would be stopped from doing away with his enemies because we had or we had not practised voluntary euthanasia? If we consider the implications of that argument, your Lordships will see that it is not one which we need take very seriously'.⁴⁴²

We have spent a significant amount of time discussing this debate. Why is this, if the Bill that the Lords were supposed to be considering did not even become law? The answer is, because it gives a vivid impression of the views that many of the Lords took of the both the victims of the Nazi 'euthanasia' programme, and of persons who might come under the scope of proposed British legislation. In the first place, we have seen how the Lords' preoccupation with the Nazi 'euthanasia' programme could almost be considered to be a pretext for failing to examine their own ideas. These are characterised by the implication that the killing of such people is not really murder, and by the assumption that the 'slippery-slope' argument would only begin to be of general concern once the

⁴⁴¹ Ibid.

⁴⁴² Ibid.

intended victims thereof had already been killed. Consider, for example, the contributions made to the House of Lords debate by Lord Jowitt, the Lord Chancellor. Towards the end of the debate, the Lord Chancellor spoke against the proposed Bill, partly to advise their Lordships that it was far too abstract for any government to consider supporting it, and partly to voice his own opposition to the legalisation of ‘euthanasia’. Referring to earlier remarks by Lord Chorley in which Chorley justified ‘euthanasia’ on the grounds that nobody hesitates to put a suffering animal out of its misery, Viscount Jowitt argued:

‘Does he not realise that the very arguments he used are arguments which tell much more powerfully in favour of exterminating idiots and people of that sort, than they bear upon the question of euthanasia? We have all seen what dreadful consequences spring from that doctrine. We have seen the thin end of the wedge introduced under Hitler; we have seen centres where killing took place, centres which started by being places where idiots were put away and which finally became places where political undesirables were put away. Most of us here, no doubt, would have qualified for that.’⁴⁴³

It would be a step too far to suggest that Lord Jowitt is in any way *advocating* the killing of ‘idiots and people of that sort’, but he is clearly suggesting that their non-consensual killing is of less concern than its later consequences might be, particularly if those consequences were to involve the killing of persons who reminded Lord Jowitt of himself.

⁴⁴³ House of Lords Parliamentary Debates, vol. 169, cc.594-5.

As mentioned above, the Bill's promoter in the Lords, Lord Chorley of Kendal, was vice-president of the Voluntary Euthanasia Legalisation Society. If one pays attention to his speeches during the course of the debate, one can see clearly that his belief in 'mercy-killing' was so great that it did not encompass only the envisaged 'beneficiaries' of his Bill. . Suggesting that the Bill might be criticized for not going far enough, Chorley stated that 'it applies only to adults and does not apply to children who have come into the world deaf, dumb and crippled, and who have a much better case than those for whom the Bill provides. That may be so, but we must go step by step'.⁴⁴⁴ Nick Kemp has suggested that this was a major reason for the Bill's failure.⁴⁴⁵ It is true that, for example, opposition to Lord Chorley's Bill was most strenuous from Lords Amulree and Haden-Guest, and from Viscount Jowitt. It is, however, difficult to avoid remarking upon the assumption by a number of the noble members that the killing of someone whom they had decided was already suffering was not quite the same as the murder of an ordinary person. For example, consider Lord Amulree's comments above regarding the victims of the Nazi 'euthanasia' programme. He describes them as being 'destroyed', 'put out of their misery', and 'given release'. Although he states clearly that the role of the medical profession is to alleviate the suffering of patients (and thus that 'euthanasia' is wrong), he describes the victims as not possessing any characteristics other than their apparent suffering. In this regard, his attitude towards them is strikingly similar to that taken by the Nuremberg Medical Trial tribunal. Indeed, this attitude would seem to underpin the whole 'right-to-die' movement.

⁴⁴⁴ House of Lords Parliamentary Debates, vol. 169, c.559.

⁴⁴⁵ Kemp, pp.140-142.

The year 1957 saw two particular occurrences, both of which have considerable bearing on the law relating to ‘mercy-killings’, at least in England and Wales. As we shall see in the following section, soon after its inception, the Homicide Act 1957 began to be used as a means of dealing with laypeople (generally parents) that had ended the lives of their disabled children. As far as case-law is concerned, 1957 was also the year of the famous case of Dr John Bodkin Adams, tried for and subsequently acquitted of the killing of his terminally ill patient, Mrs Gladys Morrell. The Bodkin Adams case is perhaps most well-known for its recognition of the doctrine of double effect – the acceptance by the courts that if a physician used drugs to relieve a terminally ill person’s sufferings (for example, morphine for pain relief) but the drug coincidentally shortened the patient’s life, he would not be guilty of causing the patient’s death, provided that amelioration of suffering had been his sole objective.⁴⁴⁶ Ever since, there has been considerable debate over whether the heavy use of such drugs as opiates really have the effects which have been attributed to them – most notably that of respiratory suppression, which for obvious reasons has been considered the principle type of situation in which the doctrine of double effect would be likely to apply.⁴⁴⁷ For the purposes of this chapter, however, the importance of the case lies in the remarks made by the trial judge, Patrick (later Lord) Devlin, about the place of ‘mercy-killing’ in English law. In his book on the trial, *Easing the Passing*, Lord Devlin claims that

‘[D]egrees of murder are unknown in English law. The taking of life is all that matters; the manner of taking is not considered. The law draws no distinction between fighters, robbers,

⁴⁴⁶ Huxtable, p.87.

⁴⁴⁷ See for example J.C. Smith ‘Case Comment: A Comment on Moor’s Case’, *Criminal Law Review* (2000), pp.42-43.

sadists and mercy killers. In 1922 the continent of murder was diminished by the detachment of infanticide, a statutory crime created in that year. Some day perhaps euthanasia will be treated likewise. But in 1957 euthanasia was, and still is, murder'.⁴⁴⁸

Furthermore,

'[T]he so-called malice that that is the chief legal ingredient of murder is as much at home with benevolence as with malevolence. My direction to the jury would have to be that, if they were satisfied that there was an intent to kill, it was immaterial whether the intent was merciful or diabolic'.⁴⁴⁹

These statements are strikingly similar to that of Kier Starmer, quoted at the beginning of this chapter. Both men, though writing over thirty years apart, express their earnest belief that motive and manner are irrelevant under English law: the only relevant fact is that a human being has been unlawfully killed. It would, however, be unwise to draw this conclusion. Throughout his account of the trial, Devlin draws frequent comparisons between 'mercy-killing' and other types of murder. The first of these is a practical remark, designed to show the lay reader of Devlin's book how a prosecuting barrister opens his case by painting for the court a coherent portrait of the defendant, his character and motives:

'The opening speech in a murder case must present a convincing portrait of a murderer. He can be one of many types ranging from the sadist to the mercy-killer. Usually the facts of

⁴⁴⁸ Ibid, p.124.

⁴⁴⁹ Ibid, p.125.

the case are themselves sufficient to portray him. Here they were not. Many of the public thought that the doctor's offence lay in the gift of death to the dying. ... There lay in the facts of the case a character somewhere between the mercy-killer and the coldblooded villain who poisoned for paltry sums. A picture could have been painted of a doctor who used heroin to keep his patient happy, who in return expected baksheesh, a chest of silver or the like, who found himself having to drug more and more until it was too late to wean, and who saw at the end that he had to increase to kill. Could such a death be proved as murder? Very difficult: increasing the dosage has not the suddenness of the bullet nor the sharpness of a knife wound.⁴⁵⁰

This explanation has a clear objective, but it also casts light on the views of Lord Devlin, and of English law in general, upon the question of 'mercy-killing'. The view that 'mercy-killing' and sadistic murder occupy entirely opposite ends of a rather wide spectrum is clearly taken for granted. Lord Devlin also makes the interesting and rather important statement that 'usually the facts of the case are themselves sufficient to portray him' [the defendant]. The cases that will be considered in this section will demonstrate that, in cases of 'euthanasia', the 'facts of the case' will often relate largely to the victim's supposedly irremediable suffering, rather than to a consideration of the victim as a full human being.

Lord Devlin's additional remarks concerning the status of 'mercy-killing' in English law serve to cement this impression. Some of these remarks, like the one quoted above, relate specifically to the portrayal of the defendant by the prosecution. In this

⁴⁵⁰ Ibid, p.69.

regard, the chief prosecutor, Sir Reginald Manningham-Buller, is criticised by Devlin for the apparent ‘lack of imagination’ in the picture he painted of the defendant as a base and grasping man, who had used the honour of his profession to conceal his covetous motives.⁴⁵¹ Despite the fact that both this device, and Devlin’s criticism of it, was specific to the trial and defendant in question, it does serve to demonstrate the fundamental problem identified in this chapter and in this whole enquiry: despite the protestations of such illustrious persons as Kier Starmer and Lord Devlin, ‘mercy-killing’ is not seen as murder – it never has been.

The U.S. legal profession were also debating the issue of ‘euthanasia’ and the legalisation thereof during this time. In this instance, a change in law was not directly envisaged. What provoked this U.S. was the publication, in 1957, of a book by an eminent English scholar. The scholar’s name was Glanville Williams, a fellow of Jesus College, Cambridge, and his book was entitled *The Sanctity of Life and the Criminal Law*. Three years previously, in 1954, a somewhat similar book, *Morals and Medicine* by Dr. Joseph Fletcher, a theologian, Episcopalian minister, and important member of what would become known as the ‘right to die’ movement in the United States, had appeared. This book too gave rise to discussion of the problem of ‘euthanasia’. In the words of Ian Dowbiggin, it ‘inspired legal scholars to join the debate over euthanasia’.⁴⁵²

The Sanctity of Life and the Criminal Law advanced the opinion that the doctrine of the ‘sanctity of life’ was defensible only on religious grounds.⁴⁵³ With respect to the argument about ‘euthanasia’, Williams was distinctly reminiscent of a 1950s Peter Singer. He argued that it was time to replace the outdated idea that life was ‘sacred’ with

⁴⁵¹ Ibid, pp.69-70.

⁴⁵² Dowbiggin, *A Merciful End*, pp.103-4.

⁴⁵³ Dowbiggin, *A Merciful End*, p.105.

something a little more realistic. He also claimed that, as courts had long been in the practise of acquitting parents who had killed their disabled children, it was high time for the law to respond to this by granting legal (rather than merely tacit) protection to such parents, by legalising ‘euthanasia’ for such children.⁴⁵⁴

If Glanville Williams had opinions of any kind regarding the Nazi ‘euthanasia’ programme, and any bearings which it might have upon his own views, he did not state them specifically. Indeed, even when such associations were made by his opponents, Williams responded to them by ignoring them completely. It is certainly the case that no references to the Nazis are to be found either in *The Sanctity of Life and the Criminal Law*, or in the speech which Williams made to the Euthanasia Society’s Annual General Meeting in 1955. More tellingly, Williams made no mention of the Nazi ‘euthanasia’ programme even after he had been specifically accused of having given insufficient consideration to its importance, because ‘the parade of horrors *has* taken place in our time and the order of procession has been headed by the killing of the ‘incurables’ and the ‘useless’.⁴⁵⁵ Williams’ accuser here was Yale Kamisar, an associate professor of law at the University of Minnesota Law School. Kamisar’s objections to Williams’ views, in the light of the Nazi ‘euthanasia’ programme, were basically two-fold: the problem of the ‘wedge’ or ‘slippery slope’ argument, and the question of the ‘euthanasia’ of disabled children and infants which, as Kamisar shrewdly observed, enjoyed significant public support, but was generally sidelined in discussions of ‘euthanasia’, whose proponents

⁴⁵⁴ Glanville Williams, *The Sanctity of Life and the Criminal Law* (London: Faber and Faber, 1958), pp.311-312.

⁴⁵⁵ Yale Kamisar, ‘Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation’, *42 Minnesota Law Review* (1957-1958), pp. 969-1042, p.1031. For Glanville Williams’ reply to the concerns raised by Kamisar, see Glanville Williams, ‘Mercy-Killing Legislation – A Rejoinder’, *University of Minnesota Law Review* 43 (1958) pp.1-12.

considered it more prudent to focus the debate upon incurably ill adults, who could usually give consent of a kind and, in addition, were actually dying.⁴⁵⁶

Kamisar advances the ‘slippery-slope’ argument for two reasons, both of which are based upon his understanding of the Nazi ‘euthanasia’ programme. Firstly, he claims that the German public’s opposition to the programme (which, Kamisar claims, had the desired result) was centred solely on the programme for the ‘euthanasia’ of *adults*.⁴⁵⁷ By contrast, the ‘euthanasia’ programme against children continued until the end of the war.⁴⁵⁸ Secondly, Kamisar uses his reading of Leo Alexander’s ‘Medical Science Under Dictatorship’ to support the idea that once ‘euthanasia’ has been legalized, it is a relatively simple matter to apply it to groups or individuals who are not dying, but may simply be unpopular or inconvenient.⁴⁵⁹

With regard to the Nazi ‘euthanasia’ of children and the supposed ‘success’ of the public protests against the adult ‘euthanasia’ programme, much can be said. It has become clear that the adult ‘euthanasia’ programme was, at most, subjected to a temporary halt in mid-1941, after which it became decentralised and, in all probability, claimed even more victims than it had done in its original incarnation.⁴⁶⁰ Kamisar does make some reference to this. Using Alexander Mitscherlich and Fred Mielke’s *Doctors of Infamy*⁴⁶¹ as his source, Kamisar states that gas chambers from Hadamar and the other ‘euthanasia’ centres were shipped out to the East to be used in the extermination of Polish

⁴⁵⁶ Kamisar, ‘Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation’, pp. 1027-1033.

⁴⁵⁷ Kamisar, p.1029.

⁴⁵⁸ Kamisar, *ibid*.

⁴⁵⁹ Kamisar, pp.1031-3.

⁴⁶⁰ Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945* (Cambridge: Cambridge University Press, 1994), p.227.

⁴⁶¹ Mitscherlich and Mielke attended the Nuremberg Medical Trial as representatives of the German medical profession. They produced a report on Nazi medical crimes, entitled ‘Medicine without Humanity’, ten thousand copies of which were allegedly pulped by the West German Medical Association. Their book, ‘Doctors of Infamy’ was largely composed of ‘edited highlights’ from the Nuremberg Medical Trial transcript, and was published in English in 1949.

Jews.⁴⁶² In addition, Dr. Andrew C. Ivy's *Nazi War Crimes of a Medical Nature* is used to show that by 1943, 'the wind had become a whirlwind', and concentration camp prisoners were enthusiastically being done to death under the guise of 'euthanasia' in order to create more space for new arrivals in concentration camps. As Michael Marrus has shown, this perceived widening of the scope of Nazi 'euthanasia' had proved something of a distraction for those involved in prosecuting the Nuremberg defendants, with it often being stated that the term 'euthanasia' was essentially meaningless and was merely a convenient blanket term for the killing of the Nazis' political and racial enemies.⁴⁶³ As was demonstrated in previous chapters, this, together with the fact that the overwhelming majority of victims of Nazi 'euthanasia' were German, and the problem of the Nuremberg Medical Trial prosecutors' chilling lack of concern with 'euthanasia' as a concrete ethical problem, meant that discussion of Nazi 'euthanasia' and its more general ethical implications was, at the Nuremberg Medical Trial, woefully deficient. A somewhat similar argument can be made regarding Kamisar's principle objection to Glanville Williams' proposals for the legalization of 'euthanasia'. This objection comes from Kamisar's reading of Leo Alexander's 'Medical Science under Dictatorship'. As stated above, this so-called 'wedge' or 'slippery-slope' argument warns that once 'euthanasia' has been legalized, it would be extremely difficult to check its potential effects. In Kamisar's view, the relevance of the example of Nazi Germany here is twofold: firstly, the exclusion of German Jews (at least at first) from the Nazi 'euthanasia' programme indicated to Kamisar that a prerequisite for the later stages of the Nazi genocide was that the German public should have been encouraged to disregard

⁴⁶² Kamisar, p.1036.

⁴⁶³ Michael Marrus, 'The Nuremberg Doctors' Trial in Historical Context', *Bull. Hist. Med* 73 (1999), pp.106-123, p.117.

traditional ideas of the ‘sanctity of life’ by being introduced to the possibility that there were some people who were suffering so acutely and hopelessly that their lives were ‘not worth living’. Kamisar’s argument, taken from Alexander’s article, is that this approach made the eventual idea of killing on ideological grounds more palatable, because it had been introduced in incremental stages.⁴⁶⁴ Though these arguments concern the Nazi ‘euthanasia’ programme, and scholars’ interpretations thereof, they do not really have a great deal to do with the rights and wrongs of ‘euthanasia’ as such. This is an accusation which could also be levelled at Leo Alexander’s ‘Medical Science under Dictatorship’. Warning, as Alexander does, that the entire Nazi genocide sprang from ‘small beginnings’, does not necessarily indicate a strong condemnation, or even a deep consideration, of the ‘small beginnings’ themselves.

It has been difficult to track down responses to Yale Kamisar’s article, save for a rejoinder, by Glanville Williams himself, which did not deal at all with Kamisar’s remarks concerning the Nazi ‘euthanasia’ programme. In addition, other reviewers tended to refer to the Nazi experience in passing, if at all.⁴⁶⁵ This makes it hard to determine why exactly it was so little-discussed. Nevertheless, one can find some references to the Nazis amongst these legal journals, and those that do exist are quite telling. Richard C. Donnelly, a professor of law at Yale, reviewed Williams’ book, and commented upon the example of the Nazis not with regard to ‘euthanasia’, but sterilization. He noted that compulsory sterilization did not have its origins in Nazi Germany, but in the United

⁴⁶⁴ Quote from Leo Alexander, in Kamisar, ‘Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation’, p.1034.

⁴⁶⁵ For example, the book was reviewed in the *Harvard Law Review* by William G. Curran, Professor of Legal Medicine at Harvard and at Boston University School of Law, *71 Harvard Law Review* (1957), pp.585-589. See also the review by Bertrand Russell, *10 Stanford Law Review* (1957-1958), pp.382-385. Neither of these make any reference to Nazism.

States, the first sterilization law having been passed there in 1907.⁴⁶⁶ Donnelly writes that it is ‘perhaps not superfluous’ to mention this.⁴⁶⁷ However, it is not entirely clear from Donnelly’s review why he *does* mention it, as the point does not go anywhere, except insofar as Donnelly makes a number of rather general observations concerning the question of whether voluntary consent can ever really *be* voluntary.⁴⁶⁸ It is striking that Donnelly does not make any points similar to those made by Yale Kamisar – concerning, perhaps, a perceived danger that the scope of application of these laws could be widened indefinitely.

The debates about ‘euthanasia’ which did take place were occasioned by the publication of important texts by influential figures. It was also shown that, while memories and conceptions of the Nazi ‘euthanasia’ programme played an important role in these debates, it often seemed that arguments which used the programme as an exemplar of why ‘euthanasia’ should not be made legal in the States, were not actually concerned with the problem of whether or not ‘euthanasia’ could potentially be a ‘good thing’, but whether it might have undesirable consequences for a wider (and, possibly, ever-expanding) circle of people than that for whom it was originally intended.

Glanville Williams was an ardent supporter of the ‘euthanasia’ movement, being a prominent member of both the Euthanasia Society of America and the Voluntary Euthanasia Legalisation Society (VELS) in the United Kingdom. The thesis of his book was essentially that opposition to ‘euthanasia’ could be justified only on religious

⁴⁶⁶ Richard C. Donnelly, review of ‘The Sanctity of Life and the Criminal Law’, *67 Yale Law Journal* (1957-1958), pp.753-763, p.756.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ Donnelly, pp.756-7.

grounds.⁴⁶⁹ The publication of Williams' book led Yale Kamisar to produce a lengthy article refuting and criticizing the view of 'euthanasia' contained therein, and this rejoinder was published in the *Minnesota Law Review*. Joseph Fletcher's work also aroused considerable debate in legal circles. Before we consider the debates themselves, we must discover what exactly Fletcher and Williams proposed in the way of the legalisation of 'euthanasia'. Fletcher proposed that 'euthanasia' should be legalised in the United States, provided certain conditions were fulfilled.⁴⁷⁰ These 'conditions' would appear to include the consent of the subject, who would be suffering from an incurable, hopeless and painful condition. Furthermore, the object of the killing would have to be a pure and unselfish desire to relieve the patient's suffering for his or her own sake.⁴⁷¹

Unfortunately, Fletcher's avowed support in his *Morals and Medicine* for compulsory sterilization made it apparent that he was not concerned exclusively with relieving suffering. Whilst advancing the theory that the solutions to health-related ethical dilemmas depended solely upon the wishes and circumstances of the individual patient, Fletcher had very clear-cut ideas concerning the type of person society should not want, recommending the involuntary sterilization of people considered to be 'mentally disabled'. In common with other eugenics enthusiasts, Fletcher believed in the limitless fertility and sexual urges of 'mentally disabled' people, which could only be curbed by means of compulsory sterilization.⁴⁷²

The issue of sterilization is an important one in this regard. Ian Dowbiggin has written that few people agreed with Fletcher, despite the debate over his book, but the

⁴⁶⁹ Dowbiggin, *A Merciful End*, p. 104.

⁴⁷⁰ Harry Kalven Jr., 'A Special Corner of Civil Liberties: A Legal View', *31 New York University Law Review* (1956), pp. 1223-1237.

⁴⁷¹ Kalven, p.1236.

⁴⁷² Dowbiggin, *A Merciful End*, p.103.

actual extent of this disagreement is somewhat questionable. Harry Kalven Jr, a member of the Illinois Bar and professor of law at the University of Chicago Law School, wrote that:

‘There is some merit in the claim to a merciful death for the monstrously disfigured or the degradingly senile. To legalize euthanasia in this narrow area may well complicate and perplex the problem of equitable treatment of the many marginal cases near it. In the end and with no great conviction in my conclusion, I would favor leaving things as they are and trusting for awhile yet to the imperfect but elastic quality in the administration of the law as written’.⁴⁷³

In his article on Fletcher’s *Morals and Medicine*, Kalven cites both the Nazi ‘euthanasia’ programme and the famous Repouille case, which was referred to in chapter two. His remarks concerning the Repouille case lend further credence to the suspicion, gained from scrutiny of his remarks of the undesirability of legalising ‘euthanasia’ (above), that Kalven saw nothing wrong in ‘euthanasia’ of those unable to consent, but fought shy of advocating that the practise be legalised because of the consequences it might have. Kalven describes Repouille as ‘having mercifully killed his horribly deformed child after years of patient care’, and refers to his actions as a “crime”, in other words, indicating that in killing his child, Repouille had not done anything remotely reprehensible. Kalven, in addition, described Repouille’s actions as ‘merciful’ due to his child having been ‘horribly deformed’: there is no attempt to establish that the child was suffering intolerably and/or irredeemably. In addition, as stated previously, Fletcher’s views on

⁴⁷³ Kalven, ‘A Special Corner of Civil Liberties’, p. 1237.

sterilization were questionable to say the least, and they were shared, to a large degree, by Kalven. Kalven states in his article that compulsory sterilization of the ‘mentally ill’ and ‘mentally disabled’, at the time of writing (1956) existed in some form in ‘about 26’ of the U.S. states, with thirteen of these also requiring the sterilization of criminals.⁴⁷⁴ That more of these laws targeted the mentally ill and disabled than they did criminals, demonstrates strikingly that the purpose of the laws must have been eugenic, as opposed to punitive. Though little has been written on this, it beggars belief that such obviously widespread fear that illnesses and impairments could be transmitted to future generations had no bearing upon the way in which living people with these illnesses and impairments were regarded. Kalven himself cites the inefficacy of sterilization laws, and their lack of impact upon the gene pool, as the chief reason why they are not of great eugenic importance.⁴⁷⁵ It is disturbing that the effects of sterilization upon the people who have actually *been* sterilized go unmentioned.⁴⁷⁶

As regards memories of the Nazi genocide, it is unclear whether Fletcher’s book concerns itself with these or not. Kalven does, and his comments, though brief, are telling. He remarks, ‘Euthanasia for a social purpose is the easiest to reject flatly, even if we did not have the benefit of the Nazi example’.⁴⁷⁷ Clearly, the ‘example’ of the Nazi ‘euthanasia’ programme should sound a note of caution, but what, precisely? For those seeking further information about the Nazi ‘euthanasia’ programme, Kalven recommends the article ‘Euthanasia in the Hadamar Sanatorium and International Law’. The author, Maximilian Koessler, was a member of the Vienna Bar until 1938, and joined the New

⁴⁷⁴ Kalven, p.1231.

⁴⁷⁵ Kalven, p. 1232.

⁴⁷⁶ Ibid.

⁴⁷⁷ Kalven, p.1237.

York Bar in 1946.⁴⁷⁸ Knoessler's article concerns the trial of *Alfons Klein et al* (the Hadamar Trial), which heard the case of Russian and Polish workers, supposedly suffering from incurable tuberculosis, who had been taken to Hadamar by the Nazis and killed – where the Nazis had previously killed disabled people.

As stated above, Kalven uses his reading of Knoessler's article to support his opinion that the Nazi example makes it easy to reject any possibility of 'euthanasia for a social purpose', but it is not at all clear what such a thing would mean. One can infer, from Kalven's article, that he is alluding to the hypothetical widening of the boundaries of 'euthanasia' towards persons who are not dying, and who may not themselves be suffering – or, in other words, to the deleterious effects upon society which this might potentially have.⁴⁷⁹ However, as Kalven himself remarks, many of the most important cases of 'mercy-killing' in the United States, most notably that of *Repouille*, involve the killing of a person who did not and could not consent, and who was not even dying.⁴⁸⁰ It seems probable that Kalven's reference to 'euthanasia for a social purpose' is derived from a short passage in Knoessler's article in which the motivation of the Hadamar staff for the killing of the supposedly tubercular Eastern workers is discussed:

'It is more plausible that the desire to abate the nuisance of an unproductive burden, rather than any humanitarian idea, was instrumental in the application of 'euthanasia' to Eastern workers who had become physically unfit for work. After all, this was the leading idea of Hitler's euthanasia policy even in its application to Germans'.⁴⁸¹

⁴⁷⁸ Maximilian Knoessler, 'Euthanasia in the Hadamar Sanatorium and International Law', *43 J. Crim. Law, C. and P.S.*, (1953), pp.735-755.

⁴⁷⁹ Kalven, p.1236-7.

⁴⁸⁰ Kalven, p.1237.

⁴⁸¹ Knoessler, p.742.

From this passage, it may be seen that, based upon his reading of Knoessler, Kalven had decided that the Nazi ‘euthanasia’ policies were founded upon a utilitarian desire to dispose of those who cost society money whilst failing to make any meaningful contribution towards it. It will be remembered that Leo Alexander’s interpretation of the Nazis’ motives was strikingly similar.

This section has dealt with relatively early post-war debates about ‘euthanasia’ in both England and Wales, and the United States. I have shown that, at this period, direct ‘mercy-killings’ were really the only form of ‘euthanasia’ which the respective legal systems encountered, medical technology not having progressed sufficiently far to have resulted in problems such as the ethics of keeping alive patients who were in irreversible comas or persistent vegetative states. As we shall see, these matters would result in the acknowledged opening-out of the ‘euthanasia’ debate, to the point where any member of society might come to be affected by them. At the same time, other cases, which invariably attract less attention, demonstrate that the underlying questions which the topic of ‘euthanasia’ presents – the value of different lives, and the possibilities for making them fulfilling – are circumvented rather than solved.

The 1960s and 1970s: A Different Form of ‘Euthanasia’

The U.S. ‘euthanasia’ movement itself was actually going rather badly by the early 1960s, and membership of the Euthanasia Society of America had dwindled to only 325

by 1962.⁴⁸² Ian Dowbiggin states that one reason for this was that, by the late 1950s, the arguments of people like Yale Kamisar – equating the decision to legalize ‘euthanasia’ with the first step on the slippery slope down to the entire Nazi genocide - had caused the U.S. ‘euthanasia’ movement to become very defensive.⁴⁸³ As has been discussed previously, this may not have been because there was any great feeling that ‘euthanasia’ in itself could be alarming, but rather due to fears that, once legalized, it could snowball, having potentially disastrous effects which would be very difficult to check. In addition, 1962 saw the indictment in Germany of three ex-Nazis for their participation in the Nazi ‘euthanasia’ programme – an event which was widely reported in the United States press.⁴⁸⁴ In terms of debates about ‘euthanasia’ in the United States, the most fertile time during this period was the very end of the 1960s, until the mid-1970s. Part of the reason for this was that during the period 1969-1976, thirty-six bills for the legalization of ‘euthanasia’ were introduced into the legislatures of twenty-two states.⁴⁸⁵ Of these, thirty dealt with passive ‘euthanasia’ (such methods as the withdrawal of food and fluids, and of artificial means of sustaining life), and the remaining three (Montana, Wisconsin and Idaho) also contained provisions for the active (voluntary) termination of life.⁴⁸⁶

Through the mere fact that terms such as ‘active’ and ‘passive’ have now crept into the discussion of ‘euthanasia’, we can see that the scope of the problem has become considerably wider than it had been in the 1950s. I have said that when Yale Kamisar wrote his article criticising Glanville Williams’ *The Sanctity of Life and the Criminal Law*, there was no need for him to spend time on an exhaustive clarification of what

⁴⁸² Ian Dowbiggin, *A Merciful End*, p.107.

⁴⁸³ Dowbiggin, *A Merciful End*, p.106.

⁴⁸⁴ *Ibid.*

⁴⁸⁵ Dowbiggin, *A Merciful End*, p.123.

⁴⁸⁶ *Ibid.*

‘mercy-killing’ meant, for, at the time he was writing, it was not possible to use medical technology to keep alive a person who would previously have died. Thus, ‘mercy-killing’ or ‘euthanasia’ could only have meant active curtailment of life on the grounds of suffering.⁴⁸⁷ The 1960s was really the first decade in which the situation became markedly less clear-cut. By 1970, those who discussed ‘euthanasia’ were pointing out that cases could be divided into three categories:

‘The first group (Group 1) is composed of individuals suffering from painful and incurable terminal illnesses such as cancer and multiple sclerosis, who, by definition, have at best months, weeks, or perhaps only days to live ... Group II includes those diagnosed as defective or degenerate persons ... the mentally ill, the retarded, those with gross physical defects, and elderly individuals suffering from senility ... some ... are often being sustained by artificial means alone. Group III would include infants and young children who suffer from gross mental or physical defects, or perhaps from a combination of the two.’⁴⁸⁸

It is this ‘Group III’ which will be considered now.

The types of ‘euthanasia’ considered thus far have not been entirely uniform. They have encompassed persons who are terminally ill, as well as persons who are disabled in some way and will always be so. Nevertheless, what these have had in common is that they concern people whose lives have not just begun. This section will differ somewhat in that the potential candidates for ‘euthanasia’ are not in a position to

⁴⁸⁷ Koop and Grant, ‘The ‘Small Beginnings’ of Euthanasia: Examining the Erosion in Legal Prohibition Against Mercy-Killing’, 2 *Notre Dame Journal of Law, Ethics and Public Policy* (1985-1987), pp.585-634, p.591.

⁴⁸⁸ Philip Small, ‘Euthanasia – The Individual’s Right to Freedom of Choice’, 5 *Suffolk University Law Review*, (1970-1971), p. 192.

give or withhold consent for the simple reason that they are too young. By the late 1960s, advances in medical technology meant that, increasingly, it was possible to save the lives of infants born with severe medical problems. Of course, this was not entirely new, having been debated in the United States as early as 1915, in the famous case of the ‘Bollinger baby’. Nevertheless, the surgery that the ‘Bollinger baby’ would have needed to keep him alive was not especially complex, but the issue was that, as he would have had serious medical problems even after the surgery was complete, it was decided not to perform the surgery at all.⁴⁸⁹ As this section will show, this was still a debatable issue decades later, but advances in surgical techniques had ensured that the potential scope of infants deemed to have a life ‘not worth living’ was much wider than it had been at the time of the Bollinger case.⁴⁹⁰ As we will see further in the chapter dealing with philosophy, it has been suggested that one way of deciding which deformed infants should be granted medical help might be a redefinition of the boundaries of personhood. For example, one might conclude that infants whose ‘physical and mental defects are so severe that they will never know anything but a vegetative existence, with no discernable personality, sense of self, or capacity to interact with others’ should not be considered to be persons.⁴⁹¹ In relation to this possibility, John A. Robertson, an Assistant Professor of Law at the University of Wisconsin, considered the possible relevance of the Nazi denial of personhood to non-Aryans.⁴⁹² It is noticeable that this is somewhat different to many of the analogies with the Nazi experience which we have encountered in earlier sections of this chapter, in that it does not consider Nazi ‘euthanasia’ in the light of such phrases

⁴⁸⁹ Martin S. Pernick, *The Black Stork*.

⁴⁹⁰ John A. Robertson, ‘Involuntary Euthanasia of Defective Newborns: A Legal Analysis’, in *27 Stanford Law Review* (1974-1975), pp.213-269, p.214.

⁴⁹¹ *Ibid*, p.246.

⁴⁹² *Ibid*, p.247.

as ‘life not worth living’ – in fact, the article contains a long section on this topic in which the example of the Nazis is not mentioned once.⁴⁹³ The author makes the point that the Nazis used *their* denial of personhood against groups on the basis of their race, which may be considered to be substantially different from denying the personhood of infants who may be unable to develop the potential to assume any personal characteristics of their own.⁴⁹⁴

It is unclear what Robertson makes of his comment regarding the Nazi denial of personhood. Having raised the possibility of its relevance to selective non-treatment of disabled infants, he concludes that it would, in practise, be far too difficult to determine *which* infants fulfil the criteria for non-personhood. However, the example of the Nazis appears to have been considered in passing, but was not a deciding factor in his conclusion. It is, however, clear from other sources of the same period that selective non-treatment of disabled infants was a widespread phenomenon during this time.⁴⁹⁵ As shown in note 55, this was described as a ‘major social taboo’. Presumably, the meaning of this phrase is that selective non-treatment of disabled newborns was widely accepted and practised by the medical profession, but did not happen in the public eye and did not generally form the subject of widespread public debate. This situation changed, however, in the early 1980s. In 1982, an infant who became known as ‘Baby Doe’ was born in Bloomington, Indiana, with Down’s syndrome and an obstructed oesophagus. On the basis that they did not want a child with Down’s syndrome, ‘Baby Doe’s’ parents refused

⁴⁹³ Ibid, p.251 onwards.

⁴⁹⁴ Ibid, p.247.

⁴⁹⁵ See, for example, Freeman, ‘Is there a Right to Die – Quickly?’ 80 *Journal of Paediatrics* 904 (1972); Shaw, ‘Dilemmas of ‘Informed Consent’ in Children’, 289 *New England Journal of Medicine* 885 (1973); Luis Kutner, ‘Due Process for Death with Dignity: The Living Will’, 54 *Indiana Law Journal* 223, (1978-1979). Kutner, a Chief Justice at the World Court, cites the example of physicians at the Yale University School of Medicine who announced that, after obtaining parental agreement that the infants in question had little chance of ‘a meaningful life’, they withheld treatment from several dozen ‘severely deformed infants’. The lack of treatment resulted in the deaths of the infants. According to Kutner, the physicians announced this in the hope of breaking down what they described as a ‘major social taboo’.

to consent to surgery to remove the blockage from his oesophagus, as a result of which the child died six days later from dehydration and starvation.⁴⁹⁶

The reason this case is appearing in a chapter concerned with medical, as opposed to legal, debates about ‘euthanasia’ is simple. An attempt was made to make ‘Baby Doe’ a ward of court, thus bypassing his parents’ refusal to countenance either surgery or intravenous feeding. Ultimately, however, this attempt was unsuccessful, as the Supreme Court of Indiana declined to rule in the case.⁴⁹⁷ Less than two years later, a similar case occurred in Long Island, New York. This time, the child in question was a little girl, who became known as ‘Baby Jane Doe’, and who was born with spina bifida and hydrocephalus, in addition to which she had microcephaly and a prolapsed rectum.⁴⁹⁸ The case reached the courts due to the actions of a ‘right-to-life’ advocate, who sued the hospital in order to force them to operate, even though consent had been refused by the infant’s parents.⁴⁹⁹

These cases were extensively debated by legal professionals and academics in the United States, and these persons’ understanding of the Nazi ‘euthanasia’ programme played a role in these discussions. It will be remembered that, on the previous page, selective non-treatment of disabled infants was described as a ‘major social taboo’. It was largely the ‘Baby Doe’ and ‘Baby Jane Doe’ cases which brought this ‘taboo’ into the public arena, and which, for a time at least, saw widely publicized efforts to curb the practice.⁵⁰⁰ Some legal commentators disapproved of this, and warned that shying away

⁴⁹⁶ Ian Dowbiggin, *A Merciful End*, p.158.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Michael Vitiello, ‘The Baby Jane Doe Litigation and Section 504: An Exercise in Raw Executive Power’, *17 Connecticut Law Review*, 1984-1985, p.97.

⁵⁰⁰ Ibid, pp.97-102. After hearing of the ‘Baby Doe’ case, President Reagan circulated a memo to the Attorney-General and the Secretary of Health and Human Services, suggesting that denying Baby Doe treatment had been a violation of s.504 of the

from non-treatment decisions on the basis that they might harm infants who *could* have benefited from treatment if it had been given, represented ‘the other side of the slippery slope’. In other words, keeping one child alive on the basis that another might benefit was ‘a side disturbingly reminiscent of Nazi experimentation’. The argument here is that, just as victims of human vivisection by the Nazis were subjected to experiments from which it was never envisaged that they should derive any benefit, infants with little prospect of ‘meaningful lives’ were being denied ‘death with dignity’ due to a fear that non-treatment decisions could cause the deaths of infants whose prospects, after treatment, were likely to have been promising.⁵⁰¹

Not all legal scholars were in agreement with this point of view. H. Rutherford Turnbull of the University of Kansas was amongst those of the opinion that selective infanticide represented the dangers of the well-known slippery slope, not its’ reverse side. He wrote that the ‘small beginnings’ of mass-murder in Nazi Germany began with the murder of mentally ill and mentally disabled people.⁵⁰² His reference to ‘small beginnings’, one of the most famous phrases in Leo Alexander’s famous article, clearly denotes at least some level of familiarity with Alexander’s arguments. Turnbull also mentioned the ‘nazification of some aspects of American medicine’, although he did not explain which particular aspects he had in mind.⁵⁰³ He further wrote that ‘One may

Rehabilitation Act 1973, which stipulated: ‘No otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any programme or activity receiving Federal financial assistance’. This was also the tone of rules issued by the Dept. of Health and Human Services between July 1983 and January 1984. These warned that s.504 concerns would arise if physicians made a non-treatment decision based on a subjective judgement to the effect that an unrelated handicap means the patient’s life is considered ‘not worth living’. In fact, in the ten years which it had been in existence, s.504 had never previously been used for this purpose, with non-treatment decisions being, effectively, entirely discretionary. However, in response to the ‘Baby Doe’ case, Congress also passed an amendment to the Child Abuse Prevention and Treatment Act, prohibiting the withholding of ‘medically indicated treatment’ from disabled infants, and the enforcement of this amendment is largely a matter for individual states.

⁵⁰¹ Ibid, p.104.

⁵⁰² H. Rutherford Turnbull III, J.D., ‘Incidence of Infanticide in America: Public and Professional Attitudes’, *1 Issues in Law and Medicine* (1985-1986), p.388.

⁵⁰³ Ibid.

choose to recognize our common vulnerability in the line-drawing effort of some physicians and ethicists, knowing that, if force against one of us is not cabined, it can roam loose against others of us'.⁵⁰⁴

The 'slippery slope' argument was also considered by Norman Lund, of the U.S. Court of Appeal. Lund noted that, in the light of the Nazi experience and of revelations concerning selective infanticide in the United States, what he termed the *argumentum ad hitlerem* has been a particularly tenacious one in the ongoing debates about 'euthanasia'.⁵⁰⁵ Although Lund's sole source for his information about the Nazi 'euthanasia' programme is, of course, Leo Alexander, he does give more consideration than most writers we have encountered to what the 'slippery slope' might really mean. According to him, there are two interpretations which are used. Firstly, some commentators announce that as some policy or other was used by the Nazis, and as the Nazis were evil incarnate, other societies must avoid at all costs the implementation of similar policies.⁵⁰⁶ As we shall see particularly in the philosophy chapter, this accusation is rebutted by showing that the Nazi policy was significantly different from the modern policy under discussion. The second use of the *argumentum ad hitlerem*, in Lund's view, is to warn that 'Policy X was adopted by the Nazis, and we should reject the policy in order to avoid taking what could be the first step towards Nazism'.⁵⁰⁷ As has been shown, this second approach is the one which has primarily been taken by U.S. legal scholars and legal professionals in their discussions of the 'euthanasia' problem.

⁵⁰⁴ Ibid.

⁵⁰⁵ Norman Lund, 'Infanticide, Physicians and the Law': The Baby Doe Amendments to the Child Abuse Prevention and Treatment Act', *11 Am. J. Law and Medicine* (1985), pp.20-21.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid, p.20.

The truth of this is shown by the 1981 case of Dr Leonard Arthur. Dr Arthur was accused of the attempted murder of a newborn baby boy, John Pearson. The baby had been rejected by his parents on the basis that they did not want a child with Down's syndrome. Though there have been quite a number of subsequent cases of doctors put on trial for killing their patients, Dr Leonard Arthur was the first physician since John Bodkin Adams to have faced such a charge. The two cases are superficially similar, in that both involved eminent physicians who faced charges of causing fatal harm to their patients. In some respects, though, these cases could not have been more different. For example, as indicated above, the Bodkin Adams case caused widespread fascination, and as lurid rumours circulated about the supposed extent of the defendant's activities, and the trial judge expressed fears about the possibility of the jury's being biased by hostile media coverage, it may be said that there was not a groundswell of support for John Bodkin Adams. In some respects he was regarded as a Harold Shipman-type figure.⁵⁰⁸ By contrast, the most famous statement of the *R .v. Arthur* case may very well be that which appeared on the front page of *The Times* on Friday, November 6, 1981, when Leonard Arthur was acquitted: 'Women cry 'Thank God' as Dr Arthur is cleared'.⁵⁰⁹

As is so often the case in this area, the *Arthur* and *Adams* cases both revolved around the question of duty of care, and of the doctrine of acts and omissions. In the former case, the John Pearson's right to life was found to be limited by the extent of the duty of his parents and doctors not to kill him or allow him to die.⁵¹⁰ Leonard Arthur was

⁵⁰⁸ See for example, Percy Hoskins, *Two Men Were Acquitted* (London: Secker and Warburg, 1984,) p.2. See also Patrick Devlin, *Easing the Passing*, pp.36-37. General practitioner Harold Shipman was convicted in 2000 of murdering fifteen of his patients, although the true figure is probably well over two hundred. He hanged himself in his cell at Wakefield Prison, West Yorkshire, on January 13, 2004.

⁵⁰⁹ *The Times*, Friday, November 6, 1981, p.1.

⁵¹⁰ M.J. Gunn and C.J. Smith, 'Arthur's Case and the Right to Life of a Down's syndrome Child', *Criminal Law Review* (1985), p.705.

originally accused of murder - to prove this it would have to be shown that he intended to cause John Pearson grievous bodily harm. It was, however, clear from Arthur's case notes that the sole outcome he had intended was the death of the child.⁵¹¹ During the trial, however, the defence's pathologist was able to show that the victim, John Pearson, died from inherent birth defects, such as congenital defects of the lungs, and not as a result of the defendant's actions. Thus the charge against Arthur was changed from that of murder to one of attempted murder.⁵¹² After a deliberation of some two hours, Dr Arthur was unanimously acquitted.⁵¹³

The reason for the acquittal is the subject of some speculation. The presiding judge, Farquharson J, instructed the jury that they needed to answer two questions: Firstly, were they convinced that Dr Arthur's prescription for John Pearson amounted to the taking of active steps to ensure that the latter would die, with the intention of bringing that about? Secondly, if they were sure of this, were they also convinced that the steps taken by Dr Arthur amounted to attempted murder?⁵¹⁴ Clearly, in view of the acquittal, the jury chose to answer both of these questions in the negative. In so doing, they returned a verdict which left accepted medical practices effectively unquestioned.⁵¹⁵ It also gave rise to some legal inconsistencies.⁵¹⁶ The almost exact contemporary of the *Arthur* case was *Re. B (A Minor)* [1981] 1 W.L.R. 1421, CA, in which Alexandra, another baby born with Down's syndrome, was made a ward of court

⁵¹¹ Depending upon which account of the case you read, Dr Arthur wrote either 'Parents do not wish the baby to survive. Nursing care only' or 'Parents do not wish *it* [my italics] to survive. Nursing care only.' See M.J. Gunn and C.J. Smith, 'Arthur's Case and the Right to Life of a Down's Syndrome Child', referenced above. Also Diana and Malcolm Brahams, 'Symposium 1: The *Arthur* case - a proposal for legislation', *Journal of Medical Ethics*, (1983) (vol.9), pp.12-15. This article was first published in the *Law Society Gazette*.

⁵¹² Gunn and Smith, p.706.

⁵¹³ *Ibid*, p.13.

⁵¹⁴ *Ibid*.

⁵¹⁵ Luke Gormally, (ed.) *Euthanasia, Clinical Practice and the Law*, (London: The Linacre Centre for Healthcare Ethics), 1994, p.22.

⁵¹⁶ *Ibid*, p.14.

after her parents, refused their consent to an operation to remove an internal blockage – the operation being necessary to save Alexandra’s life.⁵¹⁷ One important similarity between the cases, however, is the unquestioning respect which the respective courts afford to the parents’ decision that their child should not live. The decision of John Pearson’s parents was obviously accepted, but in *Re. B.*, the Court of Appeal judge, Lord Justice Dunn, described Alexandra’s parents’ choice as ‘one which everyone accepted as entirely responsible’.⁵¹⁸ It seems from these cases that the one constant is the unquestioning acceptance of a decision made by new parents who may well be very upset, in shock, lacking in knowledge of the impairment with which their new baby has been diagnosed, and in no real position to lay their hands on a great deal more. Evidence of the continuance of this trend is somewhat anecdotal, but I quoted figures at the beginning of this chapter showing the extremely high incidence of termination when pre-natal diagnosis of Down’s syndrome or spina bifida has taken place. It would be important to be able to discover the full circumstances around all these decisions. How much information about the ‘condition’ did parents receive? Did such information come in part from relevant organisations (e.g. Mencap), or was it provided by the parents’ doctor? How did members of the medical profession treat the parents? How were their questions handled? Of course, new parents today will have access to all sorts of online support and information which would simply have been unthinkable in the early 1980s. Nevertheless, were the parents of John Pearson and baby Alexandra made aware of such support as was available? If not, would its presence have made a difference? All these

⁵¹⁷ Gunn and Smith, p.708.

⁵¹⁸ *Ibid.*

questions will be equally valid when we come to our next section, in which the killing of disabled children by their parents will be considered.

The mid-1980s saw the pivotal U.S. case of Elizabeth Bouvia, which I referred to in my introductory chapter. Though this says nothing about the Nazi ‘euthanasia’ programme, it does, as I remarked in my introduction, speak volumes about the attitudes to impairment current at the time. Paul Longmore has shown how Bouvia’s request to die was treated as a rational response to her quadriplegia, despite the fact that the personal blows she had sustained would have resulted in any non-disabled person being swiftly treated for understandable depression.⁵¹⁹ Even more importantly, Bouvia had made a great deal of progress in establishing a productive and fulfilling life for herself: her efforts were scuppered by an illegal refusal to assist her to achieve her goals, as well as the very real threat that she would lose much-needed benefits by marrying, or by gaining even a poorly-paid job.⁵²⁰

At the time of the Bouvia case, voices such as that of Paul Longmore were very much in the minority. As Adrienne Asch has written:

‘in a world that asserted the value of life for everyone, regardless of health status, people with disabilities might be no more likely than any other segment of the population to consider ending their lives’.⁵²¹

⁵¹⁹ Paul K. Longmore, ‘Elizabeth Bouvia, Assisted Suicide and Social Prejudice’, *Issues in Law and Medicine*, vol.3, no.2, (1987) pp.155-158.

⁵²⁰ *Ibid.*

⁵²¹ Adrienne Asch, ‘Disability, Bioethics and Human Rights’, in Albrecht, Seelman and Bury (eds.), *The Disability Studies Handbook*, (Thousand Oaks, California; London; New Delhi: Sage Publications, Inc., 2001) p.315.

The 1990s

The 1990s saw changes in the way U.S. legal scholars thought about the relevance or otherwise of the Nazi ‘euthanasia’ programme. This next section will demonstrate that, while warnings of involuntary slides down the ‘slippery slope’ were very much in evidence, this period saw the first real attempts by legal scholars to investigate recent historical research into the Nazi ‘euthanasia’ programme, as opposed to relying unquestioningly upon sources which had been produced decades earlier.

In the earliest part of the 1990s, the book which had a great deal of influence upon these debates was Robert Jay Lifton’s *The Nazi Doctors: A Study in the Psychology of Evil*, first published in 1986. This book has been disparagingly described by Michael Burleigh as ‘Psychohistory over coffee and cake with mass-murderers’.⁵²² Nevertheless, the reliance placed upon it by United States legal scholars considering the problem of ‘euthanasia’ is clear. For example, Stephen A. Newman, professor of Law at New York Law School, made use of it in an article entitled ‘Euthanasia: Orchestrating the Last Syllable of Time’.⁵²³ In this article, Newman considers, amongst other things, the question of whether or not the legalisation of ‘euthanasia’ would have ‘untoward consequences that society ought to avoid by means of a blanket prohibition’.⁵²⁴ This is, of course, exactly the question which other U.S. legal scholars have been asking for decades. As has been shown, this is very much due to their reliance upon Leo Alexander. Newman, however, injects something new into the debate. His use of Lifton’s work

⁵²² Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945*, (Cambridge: Cambridge University Press, 1994), p.285.

⁵²³ *University of Pittsburgh Law Review* (1991-1992).

⁵²⁴ *Ibid*, p.167.

means that he is equipped with a greater degree of knowledge of the Nazi ‘euthanasia’ programme than was possessed by many of his predecessors. In particular, it is striking that we have previously encountered, from U.S. legal scholars, no mention or discussion of the racial elements of the Nazis’ policies. Newman, however, uses Lifton’s book to demonstrate that the Nazi ‘euthanasia’ programme was part of a ‘biomedical vision’, and its rejection of individual rights in favour of those of the collective was just part of the Nazi vision of Aryan superiority and racial purity.⁵²⁵ This interpretation is refreshing, but it does give rise to a new problem. Namely, whereas previous commentators had considered ‘euthanasia’ and the ‘slippery slope’ argument to be a question of whether or not ‘euthanasia’ might lead to undesirable consequences for originally unintended targets, focusing upon Nazi racism does, as we shall see later with Peter Singer, give rise to a disinclination to consider the Nazi ‘euthanasia’ programme as having any relevance to current debates, when ‘euthanasia’ is being advocated, but with no obvious racial connotations.

Lifton’s book was also made use of by legal scholars discussing the withdrawal of hydration and nutrition from incompetent (adult) patients. Withdrawal of vital sustenance, whether it be nutrition and hydration, respiration or all three, was clearly a by-product of the advances in medical technology which allowed physicians to keep alive patients who would previously have died, and who still might never regain consciousness. Such cases were first brought to public attention in the United States in the mid-1970s, with the famous case of Karen Quinlan, who fell into a coma, and whose parents successfully petitioned the New Jersey Supreme Court to rule that their daughter should be taken off the respirator which was thought to be keeping her alive. At the time,

⁵²⁵ Ibid, p.168.

discussions of the case of *Re. Quinlan*, in which any possible connection with Nazi policies was discussed, were very traditional in scope. In other words, a legal commentator would raise the issue of Nazism and the ‘slippery slope’, and then proceed to take his or her position on either the side of those who were concerned about the possibility of a slide down such a slope, or on the side of those who had no such worries.⁵²⁶

By the early 1990s, however, it seems that many legal scholars were relying upon Lifton’s book, rather than Alexander’s article, for their understanding of the Nazi ‘euthanasia’ programme. For example, in 1990, the case of Nancy Cruzan came before the Supreme Court of Missouri. Like Karen Quinlan, Nancy Cruzan was in persistent vegetative state, having sustained very severe brain damage as a result of a car crash. Unlike Quinlan, Nancy Cruzan did not need a respirator, requiring only artificial hydration and nutrition.⁵²⁷ There has, however, been disagreement amongst legal scholars as to whether decisions to withdraw nutrition and/or artificial respiration in some way make memories of the Nazi experience particularly pertinent, or whether differences between contemporary U.S. society and Nazi Germany are sufficiently strong to render such concerns superfluous. For example, writing about the Nancy Cruzan case, Professors Susan R. Martyn and Henry J. Borguignon of the University of Toledo College of Law, used Robert Jay Lifton’s book to support their view that allowing Nancy Cruzan to die was an ethical decision, and one which, on the basis of previous U.S. case law, should not give rise to fears of a slide down the ‘slippery slope’. According to

⁵²⁶ See for example, Norman L. Cantor, (Professor of Law, Rutgers Law School), ‘*Quinlan*, Privacy and the Handling of Incompetent Dying Patients’, *30 Rutgers Law Review* (1976-1977).

⁵²⁷ For the Karen Quinlan case, see Dowbiggin, *A Merciful End*, pp.145-147. For the case of Nancy Cruzan, see same book, pp.164-165.

Martyn and Bourguignon, ‘the ultimate worry that a surrogate decision-maker might end another’s life too soon carries with it is the weight of the ‘Nazi Albatross’: the fact that mass executions of Jews by Germany were preceded by Nazi euthanasia programs designed to end ‘life unworthy of life’.⁵²⁸

It is not entirely clear what the authors mean by this. Do they, in common with most of the legal commentators previously discussed, mean that no-one must ever be allowed to choose the time at which someone else should die, when that person is not competent to make such a decision for him or herself, as this might have alarming consequences for members of other societal groups? In a footnote, the authors include information from Lifton’s book concerning the Nazi ‘euthanasia’ programme, but it is unclear what purpose this is intended to serve. The authors then cite a large number of U.S. legal cases purporting to show that the difference between refusal of treatment and direct killing is well-established in U.S. law.⁵²⁹

The beginning of this chapter contained a remark concerning the relative simplicity of cases of ‘euthanasia’ in the period prior to the great advances in medical technology which made it possible to prolong the lives of people who would otherwise have died. One of the most influential of these developments was that of artificial respiration, hydration and nutrition. Though this development did not result in a legal case until 1993, British legal scholars had been discussing the problem ever since the seminal US case of *in re Quinlan* in 1976.⁵³⁰ In the early years, it would seem that such discussions centred on the *Quinlan* case itself, as opposed to consideration of how English law might resolve

⁵²⁸ Susan R. Martyn and Henry J. Bourguignon, ‘Coming to Terms with Death: The *Cruzan* Case’, 42 *Hastings Law Journal* (1990-1991), p.844.

⁵²⁹ *Ibid*, pp.144-145.

⁵³⁰ Huxtable, p.117.

similar problems.⁵³¹ One article that did address this question stated that ‘there is now general agreement that a doctor need not provide, or continue to provide, artificial ventilation for a patient whose brain is damaged to an extent which prevents a return to consciousness’.⁵³² Furthermore, ‘there is no good reason for the courts to differ from this consensus’.⁵³³ Not only that, but it is evident from Skegg’s article that, in 1978, this had already been established medical practice for over a decade.⁵³⁴ Indeed, the term ‘persistent vegetative state’ was coined in 1972.⁵³⁵ Given the existence of such a simple consensus, and one apparently of such long standing, one might ask why it was considered necessary, in 1993, to bring to court the case of a PVS patient on the point of having his artificial sustenance withdrawn. Why was the case not resolved in what had clearly become a customary manner? One possible answer may be that the patient’s physician, Dr Howe, was advised by a coroner to whom he mentioned the possibility of withdrawal of treatment that he would be at risk of prosecution if he withdrew artificial hydration and nutrition from his patient. That patient’s name was Tony Bland.

Tony Bland was a seventeen-year-old football fan who had sustained catastrophic injuries in the Hillsborough Stadium disaster of 1989. His lungs were crushed and punctured, interrupting the flow of oxygen to his brain and leaving him in a persistent vegetative state.⁵³⁶ Bland’s immediate family (his parents and sister), wished to terminate his life support, having heard numerous medical opinions stating that no improvement in his condition was possible (as his higher brain had effectively liquefied), and feeling

⁵³¹ P.D.G. Skegg, ‘The Termination of Life-Support Measures and the Law of Murder’, *Modern Law Review*, vol.14, (1978), pp.423-436, p.423.

⁵³² *Ibid*, p.425. Skegg cites a number of authorities for this assertion.

⁵³³ *Ibid*.

⁵³⁴ *Ibid*.

⁵³⁵ *Airedale N.H.S. Trust v. Bland*, [1993] 1 A.C. 797.

⁵³⁶ *Ibid*, at. 789.

instinctively that he would not wish to be kept alive in his current state. By 1993, when the case reached the House of Lords, the Court of Appeal had held that Airedale N.H.S Trust, which brought the case, might lawfully (a) discontinue all life-sustaining treatment, including artificial hydration, nutrition and ventilation, and might (b) ‘lawfully discontinue and thereafter need not furnish medical treatment to the patient except for the sole purpose of enabling the patient to end his life and die peacefully with the greatest of dignity and the least of pain, suffering and distress’.⁵³⁷ The case reached the Lords because this decision was appealed against by the Official Solicitor, Bland’s *guardian ad litem*, who ‘in doing so fulfils his traditional role as the voice of those who, for reasons of incapacity, cannot speak for themselves, ensuring that their interests do not go by default because of their involuntary silence’.⁵³⁸

The legal discussion of the Tony Bland case makes it clear that, although this particular problem had not previously come before the English courts, it was seen as an extension and test of the law relating to acts and omissions. Thus, it was in some respects a decision in keeping with the cases that had gone before it. Some of these cases were not from the English courts, but from other common-law jurisdictions such as the United States. For example, lacking English precedents concerning a physician’s legal position were he or she to discontinue life-sustaining treatment, the Law Lords used the U.S. case of *Barber v. Superior Court of State of California* (1983) 195 Cal. Rptr. 484 as the basis for their decision that as Tony Bland could no longer benefit from his treatment (though

⁵³⁷ Ibid.

⁵³⁸ Ibid, at 808.

technically alive, he was totally insensate) the doctors could not breach the duty of care which they had previously owed him by discontinuing his treatment.⁵³⁹

Practice also differed from theory, however. In his 1978 article, P.D.G. Skegg asserted that while the withholding of artificial respiration would be an omission, the withdrawing thereof once it had been started would be an act, because the switching-off of the ventilator would require voluntary physical movement.⁵⁴⁰ In the *Bland* case, by contrast, the withdrawal of artificial nutrition and hydration was considered to be an omission. It was compared with the administering of a lethal injection, which Lady Justice Butler-Sloss described as ‘an external and intrusive act committed by an outsider’. The distinction between acts and omissions is of great importance in English law. An omission can only give rise to criminal responsibility if there is a duty not to omit the act in question.⁵⁴¹

The House of Lords in *Bland* resolved this problem in the following way: it was decided that Bland’s doctors no longer had a duty of care towards him. Further, he was being kept alive artificially, as without the treatment he was given, he would long ago have died of the injuries he sustained at Hillsborough.⁵⁴² Finally, the court held that Bland’s human dignity was being violated by his treatment: ‘in the extraordinary case of Anthony Bland, we think it more likely that he would choose to put an end to the humiliation of his being and the distress of his family. ... Anthony Bland is a person to

⁵³⁹ Ibid, at 823.

⁵⁴⁰ P.D.G. Skegg, ‘The Termination of Life-Support Measures and the Law of Murder’, p.428.

⁵⁴¹ Ibid, p.424.

⁵⁴² *Airedale N.H.S. Trust v. Bland*, p.823.

whom respect is owed and we think it would show greater respect to allow him to die and be mourned by his family than to keep him grotesquely alive'.⁵⁴³

In some respects it would be difficult to dispute Lord Justice Hoffman's description of Anthony Bland's situation as 'extraordinary', although the continuing march of medical technology would presumably mean that such cases would become less unusual. Where, however, does this leave cases which, as even cursory reading shows, continue to be so common that they could clearly not be regarded as 'extraordinary'? In the *Bland* case, Lord Justice Hoffmann expressed the view that Tony Bland's situation was entirely separate from that of a conscious person: 'There is no question of his [Bland's] life being worth living or not worth living because the stark reality is that Anthony Bland is not living a life at all. None of the things that one says about the way people live their lives – well or ill, with courage or fortitude, happily or sadly – have any meaning in relation to him. This in my view represents a difference in kind from the conscious but severely handicapped person'.⁵⁴⁴ This remark would suggest that in the case of such a person, the legal profession would spare no effort in showing their commitment to the inherent value of human life. This is, however, not the case.

A significantly different use is made of Lifton's text, by John M. Dolan, of the University of Minnesota. He recounts the case of an elderly man with Alzheimer's, whose son instructed the attending physician that 'no heroic measures' should be used to save his father. The physician interpreted this as an instruction to withdraw artificial nutrition and hydration, an action which led to the death of the patient.⁵⁴⁵ Dolan makes

⁵⁴³ Ibid, p.830.

⁵⁴⁴ Ibid, pp.830-831.

⁵⁴⁵ John M. Dolan, 'Death by Deliberate Dehydration and Starvation: Silent Echoes of the Hungerhauser', *7 Issues in Law and Medicine* (1991-1992).

clear that this is, in his view, not just a ‘first step’ onto the ‘slippery slope’, but in fact something which might have occurred in Nazi Germany: ‘It tells us a great deal about the physician that he regards providing food and water to a severely disabled person a ‘heroic measure’... which found its natural home in the Third Reich, where it was routine to refer to severely disabled and chronically ill persons as ‘ballast lives’, ‘husks’, and useless eaters’.⁵⁴⁶ Using Lifton as his source, Dolan points to the so-called ‘starvation-houses’ established by Hermann Pfannmueller at Eglfing-Haar for the eradication of numbers of his patients. He states that Pfannmueller’s murderous ‘initiative’ was both more and less radical than the withdrawal of nutrition and fluids from comatose patients. It was more radical, since Pfannmueller’s victims were conscious, and almost all of them were capable of feeding themselves. It was also less radical, because ‘inmates at the Hungerhauser did receive some nutrition in the form of potatoes, yellow turnips, and cabbages cooked in water. The motto of the Hungerhauser was, ‘we give them no fat, then they go on their own’’.⁵⁴⁷

Whatever one may personally make of this argument, there is no denying that it is a particularly interesting one. It is really the first time that those in the U.S. legal profession debating this issue have focused at all on the experiences of the victims of the Nazi ‘euthanasia’ programme, instead of simply writing in abstract terms about ‘small beginnings’ and ‘slippery slopes’. It could, in addition, hardly be denied that those who have used Lifton as their source have succeeded in gaining more information about the programme than those who used sources such as Alexander and Ivy. Dolan is clearly appalled that a physician should be willing to allow a patient to die of starvation and

⁵⁴⁶ Ibid, p.182.

⁵⁴⁷ Ibid.

dehydration, and equates this with what he has read of ‘euthanasia’ under the Nazis. The question of whether inflicting this upon conscious human beings in pursuance of a state policy of annihilation, is morally equivalent to a case by case decision made for incompetent patients who may be unaware of what is happening, is an extremely pertinent and important one. In any event, Dolan’s concerns inject a much-needed reminder of the human effects of ‘euthanasia’ which has, it seems, often been obscured by more abstract issues.

Dolan brings us to our next section; namely, the interest which was paid, in the mid-to-late 1990s, to the book *Die Freigabe der Vernichtung lebensunwerten Lebens*, or, *The Permission to Destroy Life Unworthy of Life*. Originally published in Leipzig in the 1920s, this book was written by Karl Binding, a distinguished lawyer, and Alfred Hoche, a professor of psychiatry. It is widely considered to have been instrumental in Hitler’s interest in the implementation of ‘euthanasia’.⁵⁴⁸ In 1995, an English translation of this book was produced and published by two professors of philosophy at Clark University. During the next two years or so, it was widely promoted and discussed in the journal *Issues in Law and Medicine*. Frustratingly, however, there is no explanation of what motivated the translators’ decision to translate and publish the book when they did. Perhaps more importantly, the editor-in-chief of the journal *Issues in Law and Medicine* contains no explanation of his decision to publish the entire text in an issue of his journal.⁵⁴⁹

⁵⁴⁸ See Michael Burleigh, *Death and Deliverance: Euthanasia in Germany 1900-1945*, though Burleigh claims that Hitler was more influenced by Ewald Meizer, whose opposition to Binding and Hoche’s ideas merely served to demonstrate how *little* opposition there really was to them.

⁵⁴⁹ The translation was published in *8 Issues in Law and Medicine* (1992). Though this is mentioned in the preface (pp.ix-x) to that issue, there is no explanation of why it has been included.

Nevertheless, it is safe to assume, from the attention which the book received in this journal, that it was considered to have some bearing on current discussions about ‘euthanasia’ in the United States. But what sort of bearing might this be? A couple of years previously, the above-mentioned John Dolan referred to Binding and Hoche’s tract in his article on the withdrawal of nutrition and hydration from comatose patients. In particular, he regards with alarm the attempts by some in the United States of the 1990s to redefine the concept of ‘personhood’, in order to justify the legal decisions to withdraw life-sustaining treatment from patients such as Karen Quinlan and Nancy Cruzan. In this regard, he states that Binding and Hoche took the same approach, ‘assuring us that the individuals whose destruction they advocate are not persons’.⁵⁵⁰

Interest in Binding and Hoche amongst U.S. legal scholars does not appear to have been particularly long-lasting, petering out after 1997. Nevertheless, it does demonstrate that the 1990s was the decade in which these commentators started really trying to learn more about the Nazi ‘euthanasia’ programme, and relying more upon recent research, as well as investigating texts which were considered to be amongst the most important of those by the Nazis’ ideological forebears.

Interest in the Nazi ‘euthanasia’ programme amongst U.S. legal scholars grew, rather than waned, during the course of the twentieth and early twenty-first centuries. This may be regarded as being due, in no small degree, to the greater complexity of the debates, particularly since the 1960s. This ‘greater complexity’ has been occasioned very much by developments and advances in medical technology. Despite this greater interest, it was not until the 1990s that the debates began to receive injections of new perspectives based upon a familiarity with new research into the Nazi ‘euthanasia’ programme. It is

⁵⁵⁰ John M. Dolan, ‘Death by Deliberate Dehydration and Starvation’, see note 76 for full details.

still not entirely clear what the impetus actually was for this greater degree of interest, and this desire for new, more modern insights into the Nazi programme.

This chapter also showed that, generally speaking, case-law occasioned a far greater degree of debate than abstract legal developments, whose influence was seen as being rather more hypothetical. Cases of ‘mercy-killing’ seemed to engage the minds and imaginations of legal scholars in a way that more abstract issues could rarely achieve. This phenomenon was probably aided by the tendency of famous cases, such as those of Karen Quinlan and Baby Doe, to become large-scale national debates.

One of the most striking findings of this chapter was how limited U.S. legal scholars were in their choice of sources regarding the Nazi ‘euthanasia’ programme. Despite staggering developments in medical technology, and thus in the scope of possible candidates for ‘euthanasia’, the legal commentators remained stuck, until the 1990s, in arguments motivated by their reading of Leo Alexander’s ‘Medical Science Under Dictatorship’. This meant that, whatever happened to move the ‘euthanasia’ question forward, legal commentators approached the problem in terms of asking whether or not some development or other could be considered to be the first step on the ‘slide down the slippery slope’. The drawback of this was that it prevented the scholars from considering the wisdom or otherwise of the steps themselves. Perhaps even more crucially, this approach discouraged real discussion of what the ‘lessons’ of the Nazi experience (if there were any) should be. Was contemporary U.S. society so different from Nazi Germany that there were no realistic grounds for believing that the Nazi experience was at all useful in contemporary discussions of ‘euthanasia’? Or should all society’s be, in the light of the Nazi experience, scrupulous about regulating their own conduct to ensure

that nothing they do could possibly have any connection, however slight, to what took place in Nazi Germany? This chapter has shown that one of the effects of their reliance upon Leo Alexander's views was that U.S. legal commentators regarded the Nazi 'euthanasia' programme in worryingly abstract terms. It was only when they began to rely on more recent sources that this attitude began to change.

The killing of sick or disabled people by their own relatives is not a post-war (and probably not even a modern) phenomenon. However, the problem came to the attention of the legal profession during the formulation of what was to become The Homicide Act of 1957. This Bill, which was not blessed with universal approbation, provided for the first time for a defence of diminished responsibility to a charge of murder. The reason for this, explained the legal scholar Glanville Williams, was 'to save the judge from having to pass a formal sentence of death in a case of insanity outside the M'Naughton Rules... and to give a measure of recognition to mental abnormality short of insanity' – a sentence of death by hanging being at this time the result of most convictions for murder in England and Wales.⁵⁵¹ A verdict of diminished responsibility would turn a charge of murder into a conviction for manslaughter, enabling the judge to impose the punishment that he regards as being most appropriate.⁵⁵² Though this defence was not designed specifically for cases of so-called mercy-killing, legal journals and subsequent newspaper reports make clear that the defence was used liberally in this type of case.⁵⁵³ Williams cites 'a sad case where an affectionate father killed his idiot son' and was sentenced to

⁵⁵¹ Glanville Williams, 'Diminished Responsibility', journal details to be confirmed. In her article 'Diminished Responsibility: A Layman's View' (*The Law Quarterly Review*, vol. 76, April 1960, pp.224-239), Baroness Wootton of Abinger makes a distinction between capital and non-capital murder. Though she does not expand upon the distinction, it is clear that a murder conviction was not always followed by a death sentence.

⁵⁵² Williams, p.41.

⁵⁵³ For example, Glanville Williams' article cited above mentions that 'where the facts invoke the sympathy of the jury, as in mercy-killing, a verdict of diminished responsibility may be returned with little assistance from the experts' (page 46).

twelve months imprisonment, his plea of diminished responsibility having been accepted by the judge.⁵⁵⁴ Richard Huxtable tells us that the defence of diminished responsibility is still being used for cases of ‘mercy-killing’. It would appear, however, to be nothing quite so much as a smokescreen, enabling judges to demonstrate ‘compassion’ for the perpetrator of a ‘mercy-killing’, whilst not really confronting the problems which such cases do, or rather should, expose. The ‘Nuremberg Medical Trial and the Wider World’ chapter showed that Glanville Williams’ book *The Sanctity of Life and the Criminal Law* was openly supportive of involuntary ‘mercy-killing’ for ‘defective’ children. The case referred to by Williams is paralleled by the 1960 case of Major George Ernest Johnson, who gassed to death his infant son, who had Down’s syndrome, referred to at the time as ‘mongolism’. It is clear from the judgement in this case that the victim’s impairment was regarded by the judge as an irreversible tragedy which entirely explained his father’s decision to take his life:

‘No right-thinking person could feel other than the greatest sympathy when you and your wife found that she had the misfortune to give birth to a mongol child. I accept that what you did was done without thought for yourself but out of compassion for the child and the fact that you were solicitous for your wife’s welfare’.⁵⁵⁵

One of the most striking features of this case is the way in which it was reported, based on the words of the prosecuting barrister, Mr John MacGregor. Here, the victim of the crime, three-month-old David Ernest James Johnson, is referred to overwhelmingly as

⁵⁵⁴ Ibid, p.53.

⁵⁵⁵ *The Times*, Saturday, July 2, 1960, page three.

‘it’: ‘A mongol was a child destined all *its* life to be to all intents and purposes an idiot. *It* might be able to clean and feed *itself*, and perhaps read or write in a limited way, but that was the most that could be hoped for’. Despite the child’s apparently questionable human attributes, Major Johnson very kindly ‘baptized *it* himself’, as this had not previously been done.⁵⁵⁶ A case the following year, in which a prison officer killed his mentally disabled eleven-year-old daughter, Patricia, reports the defendant’s motive as ‘‘Trishie’ was destined for a mental hospital – unable to talk or feed herself, poor little soul’.⁵⁵⁷

As Richard Huxtable has pointed out, cases of this nature are routinely described as ‘unique’, (or sometimes, for good measure, as ‘uniquely tragic’).⁵⁵⁸ In addition, as in the case of Bernard Heginbotham, the trial judge will also state explicitly that the verdict does not set a precedent. However, it is clear from even a cursory glance at these cases that an unspoken precedent *is* being set. Courts are clearly anxious to show that they are considering each case as ‘an individual tragedy’, but in doing this in such a formulaic and predictable way, they are in fact simply burying their heads in the sand. Issues that should, and, indeed, must be aired are buried under a heap of platitudes. Such issues would include, for example, the views of the victim about his or her own life (as opposed to merely leaping to the conclusion that the case requires tacit endorsement of the perpetrator’s conduct). Also of importance would be questions about how both the victim and the perpetrator interacted with the wider society: could the perpetrator access sufficient support (e.g. respite care)? What exactly was the perpetrator’s attitude to the victim, and to his or her particular circumstances? For example, as we will see now, over the years there have been a significant number of cases of ‘euthanasia’ of persons – in

⁵⁵⁶ *The Times*, Thursday, June 30, 1960, page seven.

⁵⁵⁷ *The Times*, Tuesday, October 28, page four.

⁵⁵⁸ *Ibid.*

particular children - with various impairments. One of the most recent of these is the killing by his father of Jacob Wragg, a ten-year-old with Hunter syndrome in 2005.

This type of familial homicide is, as we have seen, persistent. Despite this, it is little discussed in legal debates, and I have not managed to locate any mention of it in legal journals. It was, however, widely reported in the newspapers, and gave rise to a considerable amount of public discussion. The facts of the case were that Jacob's father, a former soldier, suffocated him with a pillow. There was never any question that Wragg senior had carried out this act – he telephoned the emergency services afterwards and told them what he had done.⁵⁵⁹ Despite this, he was cleared of murder and found guilty of manslaughter on the grounds of diminished responsibility – as the alert reader will recall, the same approach to such cases was taken as far back as the 1960s. Like other cases of this nature that have been considered in this chapter, this was described by the judge, Mrs Justice Rafferty, as 'exceptional'. What a lot of 'exceptional' cases there have been over the years. Mrs Justice Rafferty highlights two important aspects of the reaction of legal professionals to such cases. Firstly, the rather vaguely expressed view that Jacob must have been suffering acutely and/or his condition put an intolerable strain on his parents – making their decision to kill him entirely understandable: 'I have no doubt she [Mrs Wragg] was complicit. Had I concluded otherwise I should have formed a harsher view. I accept that you would not have taken Jacob's life had you, for a moment, thought that she disagreed with what you were to do. All who listened must have wondered at the remorseless strain Mary bore lovingly and bravely during the ten years she dedicated to Jacob – as you concede you did not so consistently do'.⁵⁶⁰ It is easy to see that Mrs

⁵⁵⁹ <http://www.guardian.co.uk/society/2005/dec/13/health.crime/print>.

⁵⁶⁰ Ibid.

Justice Rafferty believes that the ‘strain’ of caring for Jacob (practical examples of which are not given) was enough to make the killing an understandable, logical decision.

Despite this, Mrs Justice Rafferty also wants to assure the court that, despite being a logical decision agreed upon by both parents, this decision was not logical at all: ‘This was not a mercy-killing but a deed done by a man suffering from diminished responsibility. The sentence is two years imprisonment suspended for two years. One begins to wonder if Mrs Justice Rafferty is familiar with George Orwell’s novel *1984*. That work contains a phenomenon called ‘doublethink’ – the ability to hold two completely contradictory views at exactly the same time.

The case of Jacob Wragg fails to work even on a logical level. Far more importantly, it is far from being ‘exceptional’. Instead it falls into line behind other, similar cases, stretching back decades. In doing so it, like them, fails to recognize that the victim of the crime is a human being who has been murdered, instead sympathizing with the perpetrator and endorsing his conduct. In taking this approach it also ignores wider social factors without which the crime might not have happened at all.

My aim in this chapter was not to provide an exhaustive survey of important legal developments in ‘euthanasia’ law. Instead, I wished to prove a point. As this chapter has shown, the public face of this debate has moved on a great deal throughout the decades – from relatively straightforward questions concerning the ethics of direct killing, to debates over ending the lives of comatose persons and those in a persistent vegetative state, and more recently, to the ‘assisted suicide’ of *compos mentis* adults. Despite this apparent progress, this chapter has shown that many of the most fundamental questions – which would surely have a bearing on the rest of the debate – still go unanswered. This

led on to questions concerning the faith which is placed by the courts in the rectitude of decisions made by parents or other family members who may stand sorely in need of – but may not have received – emotional support and practical help. In addition, this chapter has shown that the Nazi ‘euthanasia’ programme has had considerable bearing upon legal discussions of ‘euthanasia’ in the United States, but that this has not been the case to nearly such an extent in England and Wales, It is also clear that the situation as regards killing by laypeople is significantly different in the two jurisdictions. Whilst early US cases such as Repouille do involve victims who lived at home with their families, this quickly changes to debates which take place in a much more medicalized environment. By contrast, England and Wales still sees cases of purely domestic ‘euthanasia’. Of course, US cases like Cruzan and Quinlan are mirrored by English law examples such as the case of Tony Bland. However, as this chapter has demonstrated, the ethical-legal problems and the ways of dealing with them are relatively similar in both countries.

Chapter Five

‘The Expression of a Rational Moral Principle’: ‘Euthanasia’ and Disability in Bioethical Debates

Introduction

In his book *The End of Life: Euthanasia and Morality*⁵⁶¹ the U.S. philosopher James Rachels mounted a refutation of remarks made by one Patrick J. Buchanan, a speechwriter to President Reagan. Speaking about the case of Baby Jane Doe, which will be discussed later in the chapter, Buchanan stated that, once the decision had been made that some lives were, in his words, ‘unworthy of legal protection’, we would have ‘boarded a passenger train on which there are no scheduled stops between here and Birkenau’. Buchanan further asked:

‘Once we accept that there are certain classes...whose lives are unworthy of legal protection, upon what moral ground do we stand to decry when Dr Himmler slaps us on the back, and asks us if he can include Gypsies and Jews?’⁵⁶²

Rachels’ criticism of Buchanan’s remarks was robust, and he stated bluntly that ‘Any distinction between Baby Jane Doe’s ‘life’ (or lack of it), expresses a rational moral principle, whereas Dr Himmler’s prejudices do not’. Particularly in recent years,

⁵⁶¹ James Rachels, *The End of Life: Euthanasia and Morality* (Oxford/New York: Oxford University Press, 1986).

⁵⁶² Quoted in Rachels, *The End of Life*, p.63.

individuals and groups from within the disability movement have challenged the idea that these ideas about ‘life-worthiness’ *are* actually rational. As outlined in the introduction, and as exemplified throughout this study, disability studies scholars have identified two closely interconnected reasons for the entrenched and gloomy views of life with impairment which are so frequently on display. As discussed, these are, Michael Bury’s theory that questions involving ‘the body’ are seen as being self-explanatory, and the view advanced by Colin Barnes and others, that the history of institutionalization has created a persistent gulf between impaired and non-impaired people’s perceptions of life. As we will see as the chapter progresses, bioethicists often support their case (for selective infanticide, for example) by referring to out-of-date sources regarding the difficulties of life for an impaired person. I argue that this enthusiasm for discounting the effects of helpful assistive technologies is part of this phenomenon – an unwillingness to consider that they could really make a difference.

Rachels’ comment above exemplifies both the central issue of this chapter (and of this whole enquiry), and harks back to the views expressed by the Tribunal in the Nuremberg Medical Trial Judgement. As will be remembered, the NMT judges’ only concern was that – even when it was totally non-consensual – ‘euthanasia’ should not be used as a euphemism for *racial* murder. The Tribunal’s forthright willingness to make this point made it clear that, in their view, this was the only danger which ‘euthanasia’ could present. In this chapter, we will see a similar enthusiasm amongst ethicists for asking – and giving answers to – fundamental questions about the value of different lives. As we shall discover, many ethicists are – for one reason or another – prepared to state openly that no-one really believes that all lives have the same value, and that shying away

from this fact is an example of contemptuous intellectual timidity. Perhaps the most well-known example of the conflict between ethicists, who feel free to discuss these topics, and the general public, who may in a sense sometimes be accused of ‘shooting the messenger’ when such problems are raised – is the case of Peter Singer, and the so-called ‘Singer Affair’. This is what we shall discuss first, and it will be shown that the widespread public alarm which Singer’s views often cause amongst the general population was in no way mirrored in philosophical circles, where Singer’s views are not particularly controversial. It will be shown that there has been little discussion of Singer’s views as such, with philosophers evincing far more interest in comparative side-issues, such as whether or not Singer’s expectation that he should enjoy totally unlimited freedom of speech was a legitimate one. Having laid the groundwork in this way, the rest of the chapter will show how well-established discussion of life-and-death problems has been in philosophy for a number of decades. This in itself may help to explain Singer’s anger at the protests he encountered from people outside his academic field. Perhaps most importantly, we will also see that, although philosophers were not interested in discussing the question of the Nazi analogy in relation to Peter Singer’s views, they have in fact discussed it extensively amongst themselves. These discussions began decades ago, and, though they have grown in scope as new medical technologies make different forms of ‘euthanasia’ possible, but the concerns expressed in the arguments themselves have, in some respects, not really altered a great deal. Such differences as *are* apparent relate largely to such questions as: is killing still wrong when the end of biographical life precedes the end of physical life? What implications does this have with regard to newborns that are considered to have no prospect of living a biographical life? Why does

the public tend to regard infanticide with revulsion, whilst clearly condoning abortion for the same congenital conditions for which some philosophers advocate selective infanticide? This chapter will focus primarily on the use which ethicists have made of ‘the Nazi analogy’ in relation to cases which have actually occurred, whether they be cases of infanticide, of the killing of older, terminally ill people, or of patients in comas or in persistent vegetative states. Nevertheless, a significant number of thinkers have considered the use of the Nazi analogy in relation to general questions concerning the ethics of artificially ending life, rather than expressing views on how (in)applicable the analogy might be to one or other particular types of ‘euthanasia’. We shall begin with an overview of these debates, as the issues they raise can often be illuminating, and will provide a valuable introduction to the various problems which will, in later sections of the chapter, be taken up by other scholars and applied to particular themes or cases.

It should be emphasized here that the question of the ‘euthanasia’ of people with terminal illnesses which do not affect their cognitive ability (for example, motor neurone disease or cognitive ability) has not simply been ignored by me. As will become apparent, the overwhelming majority of philosophers who have considered this issue – in particular, the utilitarians, by whom these debates have generally been led – have attached great importance to the question of the actual or potential cognitive abilities of persons subjected to what the philosopher James Rachels refers to as ‘non-voluntary euthanasia’. We will see that Rachels and Peter Singer in particular state that there is simply no point preserving someone’s biological life once the capacity for what Rachels refers to as a ‘biographical life’ has been irretrievably lost, or alternatively is held to stand little chance of ever developing at all.

Another important issue, as far as the philosophers we will meet in this chapter are concerned, is that of benignity versus malignity of intention. We will be considering the so-called ‘Singer affair’, and we will see that, though Peter Singer had a number of reasons for objecting to the accusation that he was a ‘Nazi’, one of these was his insistence that his ideas would, if put into practice, serve to prevent needless suffering. Thus, he argues, my ideas are benign, where the Nazis’ clearly were not. This is a point echoed both by Singer’s supporters, and by other utilitarian philosophers. It is an argument rejected by the non-utilitarian philosopher Philippa Foot.

As we have identified a point of contention between utilitarian and non-utilitarian philosophers, the next sections will discuss the question of why *utilitarians* hold such radical views on questions of life and death, and also why they are so prominent in the field of bioethics.

Utilitarianism, Individual Sacrifice, and Selective Infanticide

Willingness to sacrifice the innocent for the ‘greater good’ is an accusation which has long been made against utilitarian philosophers by those who do not share their beliefs.⁵⁶³ It has also been said that, unlike other branches of moral philosophy, utilitarianism views as praiseworthy a (supposedly) self-evidently wrong act, if that wrong act will increase the sum total of happiness.⁵⁶⁴ This distinguishes utilitarianism from, say, Kantian ethics, in which, even though clashes between the requirements of different duties may sometimes lead to wrongful acts, those acts are not, in themselves, condoned. They are

⁵⁶³ Robin Barrow, *Utilitarianism: A Contemporary Statement* (Vermont/Aldershot: Edward Elgar Publishing Company Ltd., 1991), p. 154.

⁵⁶⁴ *Ibid.*, p.156.

certainly not praised.⁵⁶⁵ The preceding section of this chapter, which dealt with the so-called ‘Singer Affair’, hinted that there might be some correlation between Singer’s specifically *utilitarian* stance on the one hand, and his willingness to countenance selective infanticide on the other. This correlation is particularly evident when Singer is considering infanticide on the grounds of a mild or correctible disability. This section will now demonstrate that this type of attitude is particularly prevalent amongst utilitarian philosophers. Particularly as regards selective infanticide, this is the case even when such philosophers have stated that they share the disquiet of non-utilitarian philosophers when confronted with cases of killings carried out for motives which are solely or largely utilitarian in nature. For example, the utilitarian philosopher and bioethicist Jonathan Glover has written: ‘In *Crime and Punishment*, Dostoevsky gives Raskolnikov’s reasons for murdering an old moneylender. Among these are that she is a blight on the lives of others and that she is not particularly happy herself. When reading the novel (or when thinking in real life), few of us can be comfortable with the apparently utilitarian view that such considerations may make it permissible (or even obligatory) to kill someone’.⁵⁶⁶ This statement is very much at odds with the discussion of infanticide which is to be found in the relevant chapter of Glover’s book *Causing Death and Saving Lives*.⁵⁶⁷ Here, Glover writes that

‘The parents, especially the mother, are likely to be greatly distressed by the killing of their baby...But, where the abnormality is sufficiently serious, this may be less terrible than having to live with their child and bring him up. It is an unpalatable truth that appeals to

⁵⁶⁵ The most obvious example of this is probably Immanuel Kant’s essay *On A Supposed Right to Lie Because of Philanthropic Concerns* [check title] in which the reader is instructed never to tell a lie.[expand].

⁵⁶⁶ Jonathan Glover (ed.), *Utilitarianism and Its Critics* (New York/London: Macmillan Publishing Co.), 1990, p.120.

⁵⁶⁷ London, Pelican Books, 1977.

side-effects can sometimes be among the strongest arguments *for* infanticide. And this can be further increased by taking into consideration the interests of any other children in the family, either those already in existence or those who will be born later... Where the handicap is sufficiently serious, the killing of a baby may benefit the family to an extent that is sufficient to outweigh the unpleasantness of the killing (or the slower process of ‘not striving to keep alive’).⁵⁶⁸

The chapter opens with a number of quotations from newspapers, books and journals published between 1970 and 1975. These quotations, in their different ways, serve to illustrate how widespread Lorber’s views were during this period. In addition, they show the widespread public and professional acceptance that genuine difficulties could best be ‘solved’ by the killing of the person considered to be causing them.⁵⁶⁹ These quotations also lay the foundations for Glover’s own support for infanticide under certain circumstances, which in turn is also based upon his position as a utilitarian philosopher. Glover believes that infanticide should be a viable option in the case of infants whose impairment is ‘sufficiently serious’ – although the only attempt he makes to define the term is to refer to Dr Lorber’s descriptions of his spina bifida patients and his motivations for developing his ‘selective treatment’ policy.⁵⁷⁰ Glover believes that the perceived effects of a disabled child upon its family are of particular importance because, unlike an adult, a baby can neither understand the concept of death nor express a desire to continue living.⁵⁷¹ So, this is Glover’s justification for taking ‘side-effects’ into account.

⁵⁶⁸ Ibid, pp.163-164.

⁵⁶⁹ Jonathan Glover, *Causing Death and Saving Lives*, (London: Pelican Books, 1977), pp.150-154.

⁵⁷⁰ Ibid, pp.60-61.

⁵⁷¹ Ibid, pp.156-163.

The most vociferous supporters of the selective infanticide of disabled infants have been those whose philosophy is explicitly utilitarian – namely, Singer, Glover, Harris and Rachels. These four philosophers are not linked solely by their utilitarian beliefs, but also by the fact that they may be regarded as being amongst the principal actors in the relatively new field of bioethics. In fact, it has been argued that bioethics can be defined as ‘medical ethics as conceived and practised by philosophers working in the utilitarian tradition’.⁵⁷² Surprisingly, perhaps, writers who are themselves both utilitarian philosophers and bioethicists in fact make little or no mention of the importance of utilitarianism to their chosen field of study. For example, John Harris describes bioethics in far more general philosophical terms: ‘In short, bioethics investigates ethical issues arising in the life science (medicine, health care, genetics, biology, research, etc.) by applying the principles and methods of moral philosophy to these problems’.⁵⁷³ This statement makes it clear that bioethics as a discipline has, potentially, a very wide-ranging applicability. It is not concerned solely with debates about ‘euthanasia’ (including infanticide). Nevertheless, such questions of life and death understandably preoccupy many writers. Those opposed to utilitarianism identify the denial of personhood which utilitarian bioethicists such as Glover, Singer and James Rachels use to justify their support for infanticide (and also for the killing of some older people) as one of utilitarian bioethics’ most dangerous, and most worrying, aspects.

Nazism, Utilitarianism, and the Slippery Slope

⁵⁷² Anne Maclean, *The Elimination of Morality: Reflections on Utilitarianism and Bioethics* (London/New York: Routledge, 1993), p.1.

⁵⁷³ John Harris (ed.), *Bioethics*, (Oxford: Oxford University Press, 2001), p.4.

It will probably not be very surprising that these general discussions centre on the well-known ‘slippery slope’ argument, and the philosophers we will encounter in this section generally confine themselves to asking whether or not it is true that a path which begins with ‘euthanasia’ will inevitably slide into genocide. Whilst not all philosophers dealing with ‘slippery slope’ arguments are expressly concerned that the end result would be behaviour which the Nazis would recognize and approve of, it is rare that these philosophers make no mention of the Nazis at all, particularly when discussing the ‘slippery slope in conjunction with ‘euthanasia’.⁵⁷⁴ For example, in a book published in 1974, Marvin Kohl, a professor of medical ethics at the University of Virginia, questioned the rectitude of Yale Kamisar’s famous endorsement of Leo Alexander. Kamisar had written:

‘The apparent innocuousness of Germany’s ‘small beginnings’ is perhaps best shown by the fact that German Jews were at first excluded from the programme. For it was originally conceived that ‘the blessing of euthanasia should be granted only to [true] Germans’.

This statement appeared in Kamisar’s famous 1958 article arguing against ‘euthanasia’.⁵⁷⁵

Kohl must attach some degree of importance to Kamisar’s article – had he not done so, it is unlikely that he would have discussed it at all. However, he profoundly

⁵⁷⁴ A rare exception is Gregory W. Trianosky, ‘Rule-Utilitarianism and the Slippery Slope’, *The Journal of Philosophy*, Vol.75, No.8, (August, 1978), pp.414-424. Here, the ‘slippery slope’ argument is described as ‘an inevitable and progressive deterioration of motivations and inhibitions...once we take the first step by releasing our hold on a strict moral code and accepting instead some weaker set of moral rules and prohibitions’ (p.414).

⁵⁷⁵ In other words, it appeared in Yale Kamisar, ‘Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation’, *Minnesota Law Review* 42, (1958), pp.969-1042.

disagrees with Kamisar's conclusions. The basic reason for his disagreement is one which we will encounter many times during this chapter: namely, the Nazis' actions were malevolent, whereas in Kohl's view, latter-day advocates of 'euthanasia' are overwhelmingly motivated by a desire to minimize suffering and maximize kindness.⁵⁷⁶ Moreover, writes Kohl, to speak of a 'slippery slope' in relation to 'euthanasia' as practiced by the Nazis, is to misunderstand the nature of the programme. In Kohl's view, it

'was not the result of a slide, but was rather the direct consequence of the Nazis' political ideology – an ideology which rested upon the principle that if proper political authorities believed killing could serve the greater good of a true Germany, then those in question not only were expendable but ought to have been sacrificed for the greater good'.⁵⁷⁷

Here, we can see that Kohl understands the Nazis' 'euthanasia' programme as forming part of a brutally utilitarian, national political project requiring the sacrifice of anyone whose death would profit the state.⁵⁷⁸ This leads Kohl into a discussion of two potentially interrelated topics – utilitarianism and benevolence, which will be discussed in more detail throughout the course of the chapter. As the following section of the chapter will show, support for the selective infanticide of disabled infants is particularly strong amongst utilitarian philosophers, such as Peter Singer, Jonathan Glover, and James Rachels. Kohl points out that there are various different theories of utilitarianism, and

⁵⁷⁶ Marvin Kohl, *The Morality of Killing: Sanctity of Life, Abortion and Euthanasia*, (London: Peter Owen, 1974), p.100.

⁵⁷⁷ *Ibid.*, p.98.

⁵⁷⁸ We will see shortly that the word 'utilitarian' as I have used it here differs somewhat from the use of it as understood by many utilitarian philosophers.

remarks that, in this regard, reference to the Nazis carries validity only when ‘euthanasia’ is advocated solely or largely upon economic grounds by those who

‘[A]rgue that there is a need to save the young from the great cost of those who are irremediably ill and to save the general public from staggering and unnecessary medical expense, adding that euthanasia legislation ‘might save the country a few billion dollars a year’’.⁵⁷⁹

To Kohl, ‘this approach generates fear and, to a degree, warrants the parade of Nazi horrors’.⁵⁸⁰ Though Kohl does not say exactly why he believes that utilitarian justifications for euthanasia are particularly deserving of comparisons with Nazism, one may assume that his opinion is, at least in part, based on well-known Nazi propaganda posters, films, and even school mathematics questions, in which attention is drawn to the amount of money spent on the ‘congenitally ill’, and to the lack of any return which society can supposedly expect as a reward for its expenditure. For Kohl to view matters in these terms makes him in many ways diametrically opposed to James Rachels, whose views on the case of ‘Baby Jane Doe’ opened this chapter. Rachels’ comments were not specifically directed towards the amount of money which would be needed to treat ‘Baby Jane Doe’, but he was quite clear that his assertion that ‘Baby Jane Doe’ had no life, and no possibility of one, expressed, as he put it, a ‘rational moral principle’, and that no further discussion of the matter was required.

⁵⁷⁹ Ibid, p.99.

⁵⁸⁰ Ibid.

Rachels' confidence in the 'rationality' of his views makes one suspect that he is not overly concerned with whether or not his ideas about 'Baby Jane Doe's' future (or about 'euthanasia' in general) were particularly benevolent. As we shall see later in the chapter, this suspicion is borne out by closer investigation. Nevertheless, the need to support 'euthanasia' when it is done out of kindness *is* of concern to Kohl, who argues that it would be entirely wrong completely to prohibit 'euthanasia' on the basis that, even if recommended for the best and kindest of reasons, 'merciful killing must somehow slide into political and ethnic savagery'.⁵⁸¹ Instead, Kohl argues that truly benevolent euthanasia, which aims to make society a kinder place, should be encouraged, as it is the exact opposite of what the Nazis, 'who were neither kind nor merciful' did.⁵⁸²

The philosopher Anthony Flew broadly concurs with Kohl's ideas on the general inapplicability of the Nazi analogy in relation to contemporary debates about 'euthanasia'. Like Kohl, Flew believes firmly that most of its contemporary proponents are motivated overwhelmingly by benevolence, and by the desire that people should be able to avoid unnecessary suffering.⁵⁸³ In addition, Flew asserts that

'the Nazi atrocities... were in fact not the result of any such reform, but were the work of people who consciously repudiated the whole approach to ethics represented in the argument of this present essay'.⁵⁸⁴

This is essentially the same argument as that advanced by Marvin Kohl – namely that the Nazis were concerned only with sacrificing 'useless' people for the benefit of the *Volk*,

⁵⁸¹ Ibid, p.100.

⁵⁸² Ibid.

⁵⁸³ Anthony Flew, in A.B. Downing and Barbara Smoker (eds.), *Voluntary Euthanasia*, (London: Peter Owen, 1986), pp.56-57.

⁵⁸⁴ Ibid.

whereas contemporary advocates of ‘euthanasia’ are not concerned with benefiting the state, but, out of respect and compassion for individual people, wish to build a society in which no-one who is suffering without hope of recovery need simply carry on until death finally arrives, but can be helped to take his or her own life when he or she feels that the time has come to do so.

It is rather disappointing that the many other contributors to this book did not actually respond to each other’s essays; nevertheless, Flew was by no means the only contributor to consider the use of the Nazi analogy in relation to debates about ‘euthanasia’. A physician, David A. Clark, was able to remember the Nuremberg Medical Trial and its aftermath. Clark describes that

‘there it was shown that men with medical degrees had co-operated in mass extermination of the mentally handicapped, in sterilization of the mentally ill, in obscene and indefensible lethal experiments on human beings and, later, in the mass extermination of those deemed by the Nazis as unworthy to live.’⁵⁸⁵

The effect of these revelations upon the international medical community was that ‘all of us were reminded how necessary restraints were, and there was a widespread tightening-up of medical ethical codes’.⁵⁸⁶ We saw in a previous chapter that the post-war years did see a significant reassessment of medical agreements, as well as the drawing-up of the Nuremberg Code. We also saw that these various documents (most notably the Nuremberg Code) did little or nothing to tackle the issue of ‘euthanasia’.

⁵⁸⁵ David H. Clark, ‘The Doctor’s Dilemma Today’ in Downing and Smoker, (eds.), *Voluntary Euthanasia*, p.198.

⁵⁸⁶ *Ibid.*

None of the other contributors to the volume in question mention having a particular link to the Nuremberg Medical Trial in the way that Clark does. Neither do they claim to have any personal reason to be particularly mindful of the Nazi medical crimes and their legacies. Nevertheless, one other contributor, Raanan Gillon, made an interesting contribution to the various views expressed in this particular book when he listed the Nazi ‘euthanasia’ programme as one among many images which might be conjured up by the word ‘euthanasia’: ‘Hitler’s hospitals for incurables, human ‘vegetables’, heart transplantation, thalidomide babies, mentally deficient children, the old, the senile and the dying – visions of all these may be evoked by the word ‘euthanasia’’.⁵⁸⁷ Though not overtly expressive of any particular view of Nazi ‘euthanasia’, this approach is markedly different from that taken by many commentators referred to in this chapter (particularly, as we have seen, by utilitarian philosophers such as Peter Singer and Jonathan Glover.) Whilst they insisted vehemently that their approval of some types of ‘euthanasia’ was entirely different from that practised by the Nazis, Gillon clearly suggests that Nazi ‘euthanasia’ is just as likely as any other form of ‘euthanasia’ to be borne in mind by people to whom the word ‘euthanasia’ is mentioned. Gillon draws a clear distinction between euthanasia which has truly been requested by a suffering person, and may therefore be assumed to be broadly voluntary, and various types of what he refers to as imposed or compulsory euthanasia, which ‘involves killing someone without his desire or request (and often without his knowledge) for reasons

⁵⁸⁷ Raanan Gillon, ‘Suicide and Voluntary Euthanasia: Historical Perspective’ in Downing and Smoker, (eds.), *Voluntary Euthanasia*, p.210.

which those who do the killing call merciful'.⁵⁸⁸ *This* type of killing, in Gillon's view, encompasses the Nazi 'euthanasia' programme, but also includes

'a wide spectrum of euthanasia ranging from...the killing of deformed babies or incurably sick children, to stopping the special treatment of and drugs for a human being whose heart is beating but whose brain is dead, or increasing the dose of painkillers to improve, but shorten, the lives of dying patients'.⁵⁸⁹

The final two contributions from this volume demonstrate both its wide scope, and also the complexity of the issues considered therein. (Arguably, they also show how the book might have benefited from giving the contributors a chance to respond to each other's arguments!) Neither the philosopher Luke Gormally nor the organ transplantation pioneer Christaan Barnard make any specific mention of the Nazi 'euthanasia' programme, but their diametrically opposed views are nevertheless instructive. On the one hand, Luke Gormally questions the distinction which proponents of 'euthanasia' often make between 'voluntary' and 'non-voluntary' 'euthanasia' – making claims to justify the former which – in Gormally's view – *obviously* goes some considerable way towards making judgements which justify the latter:

'But if it is possible to make such a judgement' [regarding whether or not life is worthwhile] 'and if such a judgement justifies the killing of a human being, what *logically* is to stop the claim that non-voluntary euthanasia is justifiable? If the value of a human life

⁵⁸⁸ Ibid.

⁵⁸⁹ Ibid.

can truly be assessed in terms of function and utility, why should we not kill those whom we judge to be useless?’

We will see later in this chapter that it is *utilitarian* philosophers who are amongst those most keen to advocate non-consensual ‘euthanasia’, particularly when it takes the form of infanticide. Advocating the killing of ‘those whom *he* judges to be useless’ is something which clearly makes perfect sense to Gormally’s co-contributor, Christiaan Barnard, who states:

‘What makes this [warfare] even worse is that it is not the old people or the cripples or the social deviants who are chosen to kill and risk being killed. It is those who are young and medically fit...Is it not strange that society should accept this mass killing of healthy young people, but if the doctor actively hastens the death of an individual who has reached the end of his enjoyable life ... people throw up their hands in horror?’⁵⁹⁰

This paper was a version of the speech given by Barnard to the Fifth Biennial Conference of Right-to-Die Societies, in September, 1984. What is particularly striking about it is that, according to many *historians* both of the Nazi ‘euthanasia’ programme and of the Nazi genocide as a whole, one of the reasons for the growing support for ‘euthanasia’ in the inter-war period (both in Germany and in other countries) had been the loss of so many fit young men in the First World War. [Was Barnard thinking of one particular war or of wars in general?]. Such findings by historians would tend to suggest that Barnard’s views might have been scrutinized a little more closely had he made them in a different

⁵⁹⁰ Christiaan Barnard, ‘The Need for Euthanasia’, in Downing and Smoker, (eds.), *Voluntary Euthanasia*, p.179.

context. Barnard further states that doctors have a ‘moral duty’ to carry out ‘euthanasia’, which should not be discussed with the patient provided he has signed a declaration on admission ‘giving doctors the right to terminate his life should he become distressingly and incurably ill and all the medical resources available to try to alleviate his condition have been exhausted’.⁵⁹¹ Thus there is a clear correlation between war and social usefulness in Barnard’s justification for ‘euthanasia’. Though he supports what might be described as ‘living wills’, it is clear that Barnard is also strongly in favour of subjecting ‘the old people or the cripples or the social deviants’ to ‘euthanasia’, whether they have ever requested it or not. The line between supporting ‘voluntary euthanasia’ on the one hand and unilateral decisions that certain types of people are of no value and derive no enjoyment from life on the other is often rather obscure. Many opponents of ‘euthanasia’ cite this as a reason for their opposition. This is what happened in 1989, when the philosopher Peter Singer visited Germany, to speak about his support for selective infanticide. Infants clearly can neither form nor express a desire to continue living (or a wish to die), and Peter Singer’s opponents recognised that, in supporting their selective killing, Singer was clearly arguing that others’ views of the infants’ capabilities and potential was considerably more important than the views of themselves which the infants might take, if they were allowed to live.

The ‘Singer Affair’:

⁵⁹¹ Ibid, pp.182-183.

The ‘affair’ in question began when, in 1989, this controversial utilitarian philosopher visited Germany; where he was due to speak at various conferences, on the subject of his support for the selective infanticide of some disabled newborns. This invitation followed a number of unsuccessful attempts by German professors to teach ethics courses featuring Singer’s book *Practical Ethics* which, in the event, were so disrupted by protesters that they had to be cancelled. A similar fate befell a planned lecture at the University of Vienna by Singer’s colleague (and frequent co-author), the bioethicist Helga Kuhse. The 1991 International Wittgenstein Symposium, due to be held in Kirchberg, Austria, was cancelled in the face of threats that it would be disrupted unless the invitations issued to Singer and another participant were withdrawn. Another of the conferences at which Singer had been invited to speak was also cancelled. Though Singer managed to speak once, at the University of Saarbruecken in summer 1989, this speech also attracted a considerable amount of noisy protest.⁵⁹² As regards Singer’s own attitude towards impaired people, one of his most telling remarks is his refusal to countenance the idea that the impaired people protesting against him were actually doing so because they disagreed with him:

‘[S]ome of the able-bodied demonstrators ... urgently remonstrated with them not to talk to me. The disabled, however, clearly had no power to do anything about the chanting’.⁵⁹³

This enquiry is not concerned with the reasons that the German public might give for choosing to protest against Singer. We are at present only concerned with Singer’s

⁵⁹² For an account of all this, see Singer’s article ‘On Being Silenced in Germany’, in the *New York Review of Books*, August 15, 1991.

⁵⁹³ *Ibid.*

own justifications for the views he holds. Fortunately, Singer has offered various explanations of the ways in which he believes his views differ fundamentally from those of the Nazis. Firstly, Singer claims that the Nazis put to death those who they saw as worthless to the state; his own ideas involve simple agreements between physicians and parents of disabled newborns – a move which would dramatically lessen state involvement in such life-and-death decisions.⁵⁹⁴ This theme will be important later in this chapter, and it is discussed by many other ethicists, as we shall see. Singer has also used a quotation from the historian Michael Burleigh’s book *Death and Deliverance* to support his assertion that ‘the Nazi ‘euthanasia’ programme was not euthanasia at all’, being instead a rather ruthlessly pragmatic measure concerned with the wartime freeing up of beds in hospitals by eliminating people who were of no use to the *Volk*.⁵⁹⁵ Burleigh has, in turn, commented on the Singer Affair, and indicated that, though he might consider Singer’s views to be less than savoury, and though he believes that his attempts to redefine the concept of personhood contain worrying echoes of some of the Nazis’ intellectual forebears, he maintains that the affair pales into insignificance beside the enormities of the Nazi ‘euthanasia’ programme. In addition, he describes the accusation that Singer is a Nazi as ‘erroneous’.⁵⁹⁶

This raises one of the questions which this chapter will address. Burleigh’s comments suggest that, as a historian, he wishes to draw a clear line between the Nazi genocide itself, and the ideas which may have contributed to it. Burleigh’s conviction that ideas alone are not of paramount importance is demonstrated when he describes the denial of personhood and the relativization of contemporary morality as ‘rather academic

⁵⁹⁴ Peter Singer, *Writings on an Ethical Life*, (London: Fourth Estate, 2001), p.309.

⁵⁹⁵ Singer, *Writings on an Ethical Life*, p.202.

⁵⁹⁶ Burleigh, *Death and Deliverance*, pp.287-289.

issues' , which can, he seems to imply, have little impact on the wider society.⁵⁹⁷ As this chapter will show, bioethicists and other philosophers generally take a rather different attitude, in which the historical contexts of ideas and events are taken to be of rather less importance than that which they are afforded by historians. Nevertheless, it may be rather surprising that, as this chapter will demonstrate, the question of the Nazi analogy aroused little interest amongst Anglo-American historians during the period of the 'Singer Affair'. During this time, and with the exception of Singer himself, most philosophers expressed far less interest in the issue than that which it was afforded by the general public, and, in some respects, by the media. Singer was, unsurprisingly, stung by the accusation that he entertained Nazi-like ideas, and devoted several journal articles to a vigorous refutation of the claims that had been made against him. This chapter will show that, right up until the present time, philosophers and, most especially, bioethicists, have discussed the relevance (or otherwise), of the Nazi 'euthanasia' programme extensively, but not during the period of the 'Singer Affair', when the problem was of so much interest to other commentators.

Singer himself was evidently angered by the reception which he received in Germany, and published articles in which he claimed that his experience proved that the principle of academic freedom was becoming seriously threatened in the German-speaking countries.⁵⁹⁸ He even asserted that, at one point, he felt like a victim of the Nazis himself:

⁵⁹⁷ Ibid, p.289.

⁵⁹⁸ Variations of this article have been published in a number of places, including *The Journal of Applied Philosophy* vol.9, no.1, (1992), pp.85-91; *The New York Review of Books*, pp.36-42, 15 August, 1992; and in the journal *Bioethics* vol.4, no.1,(1990), pp.33-44, which, at the time was edited, and had been co-founded, by Singer himself. It has also been published in a collection of Singer's writings entitled *Writings on an Ethical Life* (London: Fourth Estate, 2001), as well as in editions of *Practical Ethics* (check).

‘At the end of this protest, when I rose to speak, a section of the audience – perhaps a quarter or a third – began to chant: ‘Singer *raus!* Singer *raus!*’ As I heard this chanted, in German...I had an overwhelming feeling that this was what it must have been like to attempt to reason against the rising tide of Nazism in the declining days of the Weimar Republic. The difference was that the chant would have been, not ‘Singer *raus*’, but ‘*Juden raus*’.⁵⁹⁹

This was a evidently a point which Singer considered to be important: in an article published in his own journal *Bioethics*, he wrote,

‘Perhaps what really was instrumental in preparing the Nazi path to genocide, and has not yet been eradicated in the modern Germany, is not the euthanasia movement at all, but the kind of fanatical certainty in one’s own rectitude that refuses to listen to, or engage in rational debate with, anyone who harbours contrary views’.⁶⁰⁰

Similarly, in an article in the *Journal of Applied Philosophy*, he claimed that:

‘There is ... a peculiar tone of fanaticism about some sections of the German debate about euthanasia that goes beyond normal opposition to Nazism, and instead begins to seem like the very mentality that made Nazism possible ... Because the Nazis practised eugenics, anything to do with genetic engineering in Germany is now smeared with Nazi associations. This attack embraces the rejection of prenatal diagnosis, when followed by selective abortion of fetuses with Down’s syndrome, spina bifida or other defects, and even

⁵⁹⁹ Singer, ‘On Being Silenced in Germany’, *Writings on an Ethical Life*, p.317.

⁶⁰⁰ Peter Singer, ‘Bioethics and Academic Freedom’, *Bioethics*, p.42.

leads to criticism of genetic counselling, and even leads to criticism of genetic counselling designed to avoid the birth of children with genetic defects'.⁶⁰¹

When he was not accusing those Germans who disagreed with him of engaging in Nazi-like suppression of freedom of speech, Singer found time to mount spirited written defences of his position, as well as to produce philosophically-based explanations of why exactly the threat posed to bioethics and applied ethics is such a grave one. We shall consider these issues in turn, beginning with Singer's explanation of why it is wrong to refer to him as a Nazi.

Singer had already considered this problem some years prior to his experiences in Germany, in a book entitled *Should the Baby Live? The Problem of Handicapped Infants*.⁶⁰² Here, Singer discusses the use of the Nazi analogy not simply in terms of his own views, but in relation to the debate between John Lorber, a spina bifida surgeon, and John Harris, a medical ethicist and moral philosopher, in 1975. This debate will be discussed later in the chapter, but for now it is sufficient to say that Singer rejects Lorber's contention that active killing of a disabled infant who is considered to have a poor prognosis will lead to an inevitable slide down 'the slippery slope' towards Nazism. As we saw in the chapter dealing with legal debates in the United States, many commentators have been influenced by Leo Alexander's article 'Medical Science under Dictatorship', and by Alexander's claim that the entire Nazi genocide was made possible by the belief that there is such a thing as a 'life not worthy to be lived'. Singer rejects

⁶⁰¹ Peter Singer, 'A German Attack on Applied Ethics', p.87.

⁶⁰² Oxford (Oxford University Press, 1985).

this, based on his reading of comments made by the historian Lucy Dawidowicz to the effect that

‘These terms and the programs they stood for were integral parts of Nazi racism... derived from a theory about the ultimate value of the purity of the *Volk*... This health had no bearing on individual health, on family health, even on public health, or the health of society’.⁶⁰³

On this basis, Singer concludes that

‘[W]hen the Nazis talked of ‘a life not worthy to be lived’, they meant that...it did not contribute to the health of that mysterious racial entity, the *Volk*. Since our society does not believe in any such entity, there is no real prospect that allowing active euthanasia of severely handicapped newborn infants would lead to Nazi-style atrocities’.⁶⁰⁴

In the same book, Singer also used the prevalence throughout history of the desire to avoid the existence of people whose lives are ‘not worth living’ as a justification for why such ideas could not be equated with Nazism:

‘unless we are prepared to prolong such lives’ [babies born without intestines or without a brain] ‘we must admit that we judge some lives to be not worth living... So if the judgement that some lives are not worth living were enough to put us on a slippery slope towards Nazism, we would already be well down that slope; on the other hand, the fact that

⁶⁰³ Quoted in *ibid*, p.94.

⁶⁰⁴ *Ibid*, p.95.

such judgements are so inescapable, and must have been made in every society, should be sufficient grounds for doubting Alexander's claim that they have anything to do with the uniquely abhorrent Nazi policies'.⁶⁰⁵

The ethicist Ruth Macklin has pointed out that Dawidowicz' remarks that Nazi terms such as 'euthanasia' 'do not have our meaning' tells only half the story, indicating as it does that, in 'our' society, the word 'euthanasia' has only one meaning; a meaning, moreover, which Dawidowicz apparently regards as so obvious that she feels no obligation to state what it actually is⁶⁰⁶ In the second edition of *Practical Ethics*, which was published in 1993, Singer reiterated this view, and made some additional comments which indicate the extent to which his views on infanticide are underpinned by his utilitarian philosophy. In his opinion, the selective infanticide which he envisages presents no dangers to the rest of society:

'There has been no suggestion that doctors who begin by allowing severely disabled infants to die from pneumonia will move on to withhold antibiotics from racial minorities or political extremists. In fact legalising euthanasia might well act as a check on the power of doctors, since it would bring in to the open and under the scrutiny of another doctor what some doctors now do on their own initiative and in secret'.⁶⁰⁷

This is reminiscent of the claim made by Jeremy Bentham, the founder of modern utilitarianism, that infanticide is less wrong than the killing of an adult, because infants

⁶⁰⁵ Ibid, p.94.

⁶⁰⁶ Ruth Macklin, 'Which Way Down the Slippery Slope? Nazi Medical Killing and Euthanasia Today', in John Harris, (ed.), *Bioethics*, (Oxford: Oxford University Press), 2001, p.114.

⁶⁰⁷ Peter Singer, *Practical Ethics* (2nd edition), (Cambridge: Cambridge University Press, 1993), p.216-7.

cannot understand concepts such as life and death, and thus will not be able to experience anticipatory dread that the same fate may befall them.⁶⁰⁸ Bentham's effective toleration of infanticide also demonstrates utilitarian philosophers' concern for the welfare of the wider society, something which this chapter will address further in due course. In addition, Singer's remarks above about members of racial minorities and political extremists make it clear that, presumably in part because of his utilitarian philosophy, it has not occurred to Singer that there might be anything morally questionable about a blanket – or at least widely tolerated – policy of 'allowing severely disabled infants to die from pneumonia'.

As was demonstrated above, Singer's justifications for the inapplicability of the Nazi analogy to his philosophical views are based very much on his reading of the views expressed by various historians; they do not have an overtly philosophical basis. This supports Michael Burleigh's observation that

'Rather surprisingly for a professional teacher of philosophy, he omits the entire philosophical background to the Nazis' policies, notably the writings of Binding and Hoche and their various imitators. There one can easily discover an attempt to relativize prevailing morality through reference to ancient or primitive alternatives; the radical redefinition of what constitutes a 'person' as opposed to 'beings' or 'creatures, i.e. the denial of human attributes, and the purposive use of analogies with animals'.⁶⁰⁹

⁶⁰⁸ Bentham manuscripts, quoted in John Dinwiddy, *Bentham*, (Oxford: Oxford University Press, 1989), p.112. It is noteworthy that, in the passage quoted, Bentham mentions the infanticide of their newborn children by unmarried mothers, anxious to avoid the stigma of illegitimacy. Bentham describes this as being understandable, and deserving of far more sympathy than it actually received. In other words, Bentham mounts no challenge to what is essentially a social convention, and as such is more than prepared to countenance the resulting continuation of cases of infanticide. Echoes of this may be seen in Peter Singer's own attitude to selective infanticide, in which he takes for granted that, if parents do not want a disabled child, their reaction is natural, eminently understandable, and not something which should result in such measures as greater integration measures and improved social care.

⁶⁰⁹ Burleigh, *Death and Deliverance*, p.289.

As mentioned above, Burleigh appeared to regard these philosophical ideas as somewhat troubling, though of less concern than the practical consequences which might ensue. Singer claims that ‘If acts of euthanasia could only be carried out by a member of the medical profession, with the concurrence of a second doctor, it is not likely that the propensity to kill would spread unchecked throughout the community’, to which Burleigh comments that ‘many people might not find this scenario very reassuring’.⁶¹⁰

Nevertheless, denial of personhood by Singer is clearly of greater interest and concern to other philosophers than to a historian like Burleigh. The philosopher Jenny Teichman is one of the relatively few philosophers to have considered this problem, and she has concluded that ‘Singer is not a Nazi, he is a *personist*’. This is because he extends rights, such as the right not to be killed, only to those who meet his definition of personhood, which he derives from the philosopher John Locke: ‘a being with reason and reflection that can consider itself as itself, the same thinking being, in different times and places’.⁶¹¹

Singer believes that, as small children cannot have this type of awareness, thus: ‘No infant, defective or not, has as strong a claim to life as a person...the only difference between killing a normal infant and a defective one is the attitude of the parents’.⁶¹²

Teichman asserts that the doctrine of personism in some ways resembles Nazism because the two share a common principle: ‘that (non-criminal) human beings are of two types, those whom it is wrong to kill, and those whom it is all right, or even good, to kill. Nazi doctors invented the slogan ‘life not worthy of life’, attaching these words to the mentally and physically disabled people subjected by the regime to involuntary ‘euthanasia’. The same label was given to the Jews in the death camps. Now if it weren’t for the second of

⁶¹⁰ Ibid.

⁶¹¹ Quoted in Singer, *Writings on an Ethical Life*, p.217.

⁶¹² Jenny Teichman, ‘Freedom of Speech and the Public Platform’, *Journal of Applied Philosophy*, Vol.11, No.1, 1994, pp.99-105.

these gruesome associations the slogan ‘life not worthy of life’ would be a reasonably apt sub-title for Chapter 2 of Singer’s book *Practical Ethics*.⁶¹³ According to Teichman, however, there are a number of significant differences between Nazism and personism which should not be overlooked. Two interconnected points concern the definition of the word ‘person’, which is, according to Teichman, a rather arbitrary definition, which, under the right circumstances, could be changed to, or taken to mean, ‘Aryan’ – which is, in itself, almost as arbitrary, the only difference being that ‘personism only targets people who absolutely cannot answer back, mainly small children and infants, but also the elderly and the comatose’.⁶¹⁴ A further difference, to some degree connected specifically to utilitarianism, concerns the intentions of the Nazis, and of Singer’s philosophical ideas. Clearly, the Nazis’ intentions were malevolent, and Singer says that his are benevolent, with the ultimate goal of avoiding suffering, which is the cornerstone of utilitarian thought. However, as Teichman explains, purity of intention can make no difference to a utilitarian, for ‘intentions divorced from their probable effects are neither good nor bad. Intentions are good if and only if they tend to lead to actions which in turn lead to desirable results, and bad if and only if they tend to lead to actions which have undesirable results’.⁶¹⁵ This is called *consequentialism*.⁶¹⁶

An alternative, and much more positive, view of Singer, places less emphasis on his utilitarianism, and more on his position as a revisionary practical ethicist. In the view of the philosopher Dale Jamieson, an ethicist of this persuasion who confined himself to reproducing commonplace moral beliefs, or who clarified the range of views on a

⁶¹³ Ibid, p.101.

⁶¹⁴ Ibid.

⁶¹⁵ Ibid.

⁶¹⁶ See for example Robin Barrow, *Utilitarianism: A Contemporary Statement* (Aldershot/Vermont: Edward Elgar Publishing Company, 1991, p.15). This distinguishes between utilitarianism, which is teleological, and theories such as Kantian ethics, which are deontological, or based on a central concept of duty.

particular subject without expressing a definite preference for any of them, would certainly not court controversy, but would probably not make a useful contribution to philosophy either. Jamieson, however, provides no discussion of the problem of Singer and the Nazi analogy, except to remark that ‘physical assault is no way to treat a guest, especially when much of the guest’s extended family was murdered in your country by your parents and their compatriots’.⁶¹⁷ We can see here that Jamieson, a Singer supporter, is making no attempt to consider the Nazi analogy as such, but rather remarking that, due to the persecution to which a number of Singer’s family members were subjected at the hands of Germans, both he and his views ought to have been treated with significantly more courtesy by his German auditors – apparently regardless of the nature of the ideas which Singer might actually espouse. This chapter has shown that, as far as many other philosophers are concerned, the question of the possible applicability of the Nazi analogy to Peter Singer’s ethical theory would appear to be simply rather uninteresting, and worthy of little discussion. This view is mirrored in books other than that edited by Dale Jamieson and quoted above, which specifically discuss Singer and his philosophy. For example, Hyun Hochsmann’s *On Peter Singer* makes no mention of the problem.⁶¹⁸ Susan Lufkin Krantz does mention Nazi ideas in relation to Singer and his philosophy, but in a far more general sense. For her, the danger that Singer’s philosophy poses is that he seeks to subordinate human beings to an allegedly ‘higher’ principle, ‘in which the human is displaced by the sentient as the criterion of being a bearer of moral value’. If this were to occur, ‘whatever principle we pick, if we go beyond the ethical regard for human beings as such, we will end by subordinating human concerns to the principle. For

⁶¹⁷ Dale Jamieson, (ed.), *Singer and his Critics* (Oxford/Malden, Mass.: Blackwell, 1999), p.17.

⁶¹⁸ Hyun Hochsmann (ed.), *On Peter Singer* (Belmont, CA: Wadsworth Thomson Learning, 2002).

instance, the Nazis notoriously subordinated individual human welfare to the grand project of promoting the Aryan race'.⁶¹⁹ Krantz is, of course, speaking generally about Peter Singer's ethical theory and not about his ideas on 'euthanasia' and infanticide. Nevertheless, her remarks are particularly pertinent because, as a large part of this chapter will show, many pro-euthanasia writers claim that, in supporting 'euthanasia', they are supporting 'individual human welfare', and not subordinating it to an idea (as the Nazis did). Thus, in their own eyes, they are polar opposites of the Nazis.

This section has shown that, although some philosophers have considered the justification (or lack thereof), of accusing Singer of holding Nazi-like views, they have generally been far more concerned with other, arguably less interesting questions, such as whether or not Peter Singer was justified in expecting totally unfettered access to public platforms. This section also demonstrated that, hovering around the edges of the Singer debate was the question of how far Singer's views on selective infanticide from his utilitarian philosophy. This question will be addressed in more detail presently. Firstly, however, we are going to embark upon a short discussion of the widespread support for selective infanticide amongst Anglo-American physicians. This is important, as it will show that the questions about infanticide which have been considered by philosophers have been of great practical relevance. Interestingly, we will also see that there is a strong measure of agreement on the issue between physicians on the one hand and utilitarian philosophers on the other, with both of these groups being willing to state that, under certain circumstances, selective infanticide can be the 'least worst' option to consider, and can even be desirable. It will be shown, however, that whilst physicians who support

⁶¹⁹ Susan Lufkin Krantz, *Refuting Peter Singer's Ethical Theory: The Importance of Human Dignity* (Westport, Connecticut/ London: Praeger, 2002), p.16.

selective infanticide do so based upon their professional experience, philosophers' support has a much more overtly ideological foundation.

Selective Infanticide

One may find numerous sources referring to the prevalence of both active and passive infanticide in classical antiquity, but modern infanticide seems to have attracted little in the way of either public or scholarly attention until the early 1970s.⁶²⁰ In 1973 in the United States, Raymond Duff and A.G.M Campbell of Yale published an article concerning selective treatment of neonates,⁶²¹ a practice which, though hardly new, had previously been conducted 'behind closed doors'. In Britain in 1975, John Lorber, a pioneering spina bifida surgeon, described the practice of selective non-treatment of infants with spina bifida, which he had spearheaded, beginning in Sheffield in 1971.⁶²² This policy was motivated by the improved survival rates (but still with severe disabilities and health problems and significant risk of premature mortality) which new surgical techniques had caused. Lorber pioneered a policy which aimed to create a situation where 'no infant should be denied good treatment if he had a chance of surviving with only moderate handicaps'.⁶²³ Nevertheless, Lorber openly admitted that 'the main aim of selection is to...avoid treating those who would survive with severe

⁶²⁰ Pernick, *The Black Stork*, p.167.

⁶²¹ Ibid.

⁶²² John Lorber, 'Ethical Problems in the Management of Myelomeningocele and Hydrocephalus' in *Journal of the Royal College of Physicians*, vol.10, No.1, October, 1975, pp. 47-60, p.54.

⁶²³ Ibid, p.53.

handicaps'.⁶²⁴ So Lorber drew up a list of criteria which would enable an expert to determine, on the first day of life, whether an infant should be operated upon to close the lesion on its back, or whether it should merely be cared for until death, with such basic measures as feeding on demand, and the administration of analgesics, sedatives and anti-convulsants if needed, but with no antibiotics given to fight infection, and no tube-feeding or resuscitation.⁶²⁵ This led to an exchange of views between Lorber and the bioethicist John Harris, in which the Nazi 'euthanasia' programme was discussed. Harris formulated a reply to Lorber's 1975 article, while Lorber subsequently offered a rejoinder to Harris's remarks. Lorber's original concerns, with regard to the Nazi analogy, were that active euthanasia should not be allowed to replace non-treatment, and that 'euthanasia' should in particular never be legalized, as it would be impossible to prevent its abuse by the unscrupulous. Lorber claims that 'there have been plenty of horrific examples of this in the past, especially in Hitler's Germany'.⁶²⁶ Lorber does not elaborate on this remark, so it is difficult to know what sort of possible abuses he has in mind. In his reply to Lorber's article, Harris is quite clear that there is no analogy at all between the measures described by Lorber, and the actions of the Nazis, simply because Lorber's policy is designed to ensure that no child should survive with extremely severe problems meaning that life would be composed of suffering and little else. By contrast, 'under the Nazis euthanasia was simply one way of exterminating those morally or politically beyond moral consideration'.⁶²⁷ In Harris's view, 'If we do not cry 'Nazism' it is simply because there is no analogy and we know that all concerned are concerned only about the

⁶²⁴ Ibid.

⁶²⁵ Ibid, p.54.

⁶²⁶ Ibid, pp.57-8.

⁶²⁷ John Harris, 'Ethical problems in the management of some severely handicapped children', in *Journal of Medical Ethics*, vol.7, (1981), pp.117-124, p.118.

welfare of their patients'. This statement is echoed in a 1979 article by the aforementioned Campbell (of the University of Aberdeen) and Duff (of Yale University School of Medicine). Here, Campbell and Duff offer guidelines for the course of action to be taken in the case of infants with 'gross malformations or distressing terminal illnesses'.⁶²⁸ Like Lorber, Duff and Campbell take the view that the level of treatment which the child receives should be based upon its perceived prognosis – *i.e.* not necessarily upon the probability of the child's death. In their view, these options are: (a) maximum treatment, which should be pursued when the child's prognosis is good; (b) limited treatment, concentrating on alleviating the child's suffering rather than prolonging its life; and (c) withdrawal of life-sustaining treatment in order that the child's life should not be artificially extended.⁶²⁹ In this article, Duff and Campbell make no specific mention of the Nazi analogy in relation to 'euthanasia'. Nevertheless, they end their article with a warning that only doctors and parents of 'defective' or dying neonates should be allowed to decide that discontinuation of an infant's treatment is the most appropriate course of action to take. Like Lorber, Duff and Campbell believe that it is the parents and physicians alone who can make such a decision, because they 'care most for the patient and must bear the consequences'.⁶³⁰ They warn that decisions of this nature must never be placed in the hands of the state, for fear that a patient's death would be sought for 'minor difficulties or for the good of society or for the convenience of the family'.⁶³¹ Though the grounds for these concerns are not expressed in the article, the accompanying reference is to Leo Alexander's article 'Medical Science Under

⁶²⁸ A.G.M. Campbell and R.S. Duff, 'Deciding the care of severely malformed or dying infants', in *Journal of Medical Ethics*, vol.5, (1979), pp. 65-67, p.65.

⁶²⁹ *Ibid.*, p.67.

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

Dictatorship'. From this, one may infer that, in the opinion of Duff and Campbell, dire (but unspecified) consequences are likely to ensue if 'discontinuation of treatment' decisions are taken by anyone who is not immediately connected with the families who are going to be affected by them.

We have seen already that John Lorber's 'selective treatment' policy towards neonates with spina bifida was motivated largely by perceived problems that had arisen in the years since medical technologies had become sufficiently sophisticated to save the lives of such infants who would, in former times, have had little or no chance of survival. Duff and Campbell recognised that this was the case not just where spina bifida was concerned, but with regard to a whole range of illnesses and impairments which paediatricians were likely to encounter in their professional lives.⁶³² The improved survival rates for children with illnesses or impairments led many physicians and ethicists to put forward the view that a child's own prospects might sometimes justifiably be sacrificed for the good of its family. In other words, if a child was likely to be left with severe problems if treated, medical professionals should consider the supposed good of the child's family above that of the child itself. This would entail giving the child a level of care designed to make it relatively comfortable, but which aimed for its death, rather than to enable it to leave hospital and continue living. Campbell and Duff regard this situation as an outcome which some parents and physicians may choose:

'They [parents] may seek the death of the child to obtain relief from *their* suffering; the tensions of caring for a handicapped child, and their anxieties about the future... Having major commitments to understandably competing interests, [they] cannot accept the

⁶³² Ibid, p.65.

situation and conflict and disruption will result if it is forced upon them. What may be unifying, constructive and fulfilling for one family may be extremely destructive to another. Parents have varying capacities for giving unstinting, unselfish continuous care even to normal infants. They may be unable to cope with the increased physical and emotional demands of caring for the abnormal.’⁶³³

That a child’s life can be ended for the good of its family is a situation which, under certain circumstances, Duff and Campbell clearly countenance. This view is also echoed by Lorber, whose ‘selective treatment’ policy was designed to take into account not only an infant’s probable degree of residual disability, and need for future treatment, but also its family situation:

‘The problems created by a severely affected child often have disastrous effects on family life. A large proportion of the mothers are on tranquilising drugs and more need them. Young parents age prematurely through constant anxiety and recurrent crises. The upbringing of brothers and sisters suffers. Some families break up. Perhaps worst of all, because severely affected infants were ‘saved’, many more potentially normal lives never started because their parents did not dare to have other children’.⁶³⁴

One might point out that a ‘severely affected child’ would not actually ‘create’ *any* of the problems to which Lorber alludes. They would arise very largely from lack of support for the child and its family. It is striking that neither Duff and Campbell, nor Lorber, appear

⁶³³ Ibid, p.66.

⁶³⁴ Lorber, ‘Ethical Problems in the Management of Myelomeningocele’, p. 52.

to consider this, or to regard these problems as being even moderately remediable by efforts which do not entail lethal consequences for the person who is supposedly ‘causing’ them. This problem has been identified by many disability studies scholars:

‘For the past three decades, scholars and activists in disability have argued that the problem of disability was ... one of denial of civil, social and economic rights and not one of biology and health. Yet the attitudes towards disability and the assumptions about the impact disabled people have on families and society that abound in medicine and bioethics all compel those scholars and activists to assert that the first right of people with disabilities is a claim to life itself, along with the social recognition of the value and validity of the life of someone with a disability’.⁶³⁵

The attitude that a disabled infant is seen as a problem to be solved rather than as a human being, is even more marked in the writings of philosophers (specifically utilitarian philosophers) of the 1970s and 1980s. The role of the Nazi analogy in discussions of infanticide from the 1970s onwards has been rather mixed, with many ethicists scornfully rejecting the ‘Nazi’ accusation out of hand. By contrast, John Lorber expressed concern that both the legalisation of ‘euthanasia’ and any practice of the active killing of newborns might perhaps have the alarming effect of brutalising those who carried out any killings, or alternatively of giving them a ‘taste’ for killing. John Harris rejected this concern, arguing that it was quite clear to everybody involved in these life-or-death decisions that they were being taken for the good of a patient and his or her family, and that the Nazis never thought of

⁶³⁵ Adrienne Asch, ‘Disability, Bioethics and Human Rights’, in Albrecht, Seelman and Bury (eds.), *Handbook of Disability Studies*, p.301.

‘euthanasia’ as a benefit to the persons to whom it was applied. Jonathan Glover strongly favoured selective infanticide but, as we shall see presently, his only discussion of the Nazi analogy comes when he is considering the problem of withdrawal of artificial nutrition and hydration. As the second section of this chapter showed, Peter Singer also rejects any analogy with the Nazis in relation to his views on ‘euthanasia’. We will now, however, encounter James Rachels, a U.S. philosopher whose ideas in many respects resemble those of Peter Singer.⁶³⁶ Rachels goes further than Singer, however. As we have seen, the idea that some lives are not worth living is uncontroversial in the field of medical and bio-ethics. In his book *The End of Life: Euthanasia and Morality*, published in 1986, Rachels acknowledged this, and stated that, contrary to what some might believe, this did not constitute ‘some insidious new thought which, once admitted, will lead us into unimaginable wickedness’.⁶³⁷ As we saw at the beginning of the chapter, Rachels subsequently remarked: ‘our distinction between Baby Jane Doe’s ‘life’ (or lack of it) and other, fuller human lives expresses a rational moral principle, whereas Dr Himmler’s prejudices do not’.⁶³⁸

So, Rachels is, in effect, stating that, in life, it is entirely logical to make a distinction between the relative ‘worth’ of different lives. To do so is, in fact, often necessary. This is not, in Rachels’ opinion, a new idea which should cause widespread alarm. It is dangerous only if, as under the Nazis, it begins to encompass prejudices regarding the supposedly disparate ‘value’ of the lives of persons of different races. This

⁶³⁶ For example, Singer also claims that nobody really thinks that there is no such thing as a life which is not worth living. See *Should the Baby Live?*, p.8.

⁶³⁷ James Rachels, *The End of Life: Euthanasia and Morality*, (New York/Oxford University Press, 1986), p.63.

⁶³⁸ *Ibid*, pp.66-67.

is an idea which, it will be remembered, was expressed in by the Tribunal in the judgement of the Nuremberg Medical Trial.

There are, however, significant grounds for suspecting that both Singer and Rachels have chosen to draw attention to particular real-life cases to justify a pre-existing enthusiasm for selective infanticide, rather than using opposing cases equally in order to make their respective discussions of the merits and demerits of selective infanticide as comprehensive as possible. With regard to Peter Singer, this suspicion is intensified when one notices that he pays greater attention to the case of ‘Baby Andrew’ than he does to, for example, that of ‘Baby Doe’. This is probably partly due to the greater availability of sources concerning the former case. For example, after the death of ‘Baby Andrew’, his mother published a diary which she had kept during the months in which the doctors attempted to save his life.⁶³⁹ There is no indication that ‘Baby Doe’s’ parents took a similar course of action. Nevertheless, it does seem that Singer exerts himself to advocate only one side of this particular argument. With regard to James Rachels, this behaviour is even more marked. ‘Baby Jane Doe’ was another U.S. infant, born in 1983 with spina bifida and associated hydrocephalus, as well as microcephaly – an abnormally small head indicative of mental retardation. Rachels uses the rather grim medical prognosis given to ‘Baby Jane Doe’ to conclude that she was ‘lacking a life, or even the possibility of one’, and that

‘[I]f her existence were prolonged by surgery, she would remain alive for perhaps twenty years. But this is not, by itself, important... Merely being alive does one no good unless it enables one to have a life... We are told that she would lack the mental and physical

⁶³⁹ Robert and Peggy Stinson, *The Long Dying of Baby Andrew* (Boston: Little, Brown, 1983).

abilities to engage in even simple human activities; she would not be capable of normal associations with other people, of being curious about the world and having that curiosity satisfied, of enjoying the things that people enjoy. It would not, in short, be a human life, in any sense other than that she would be a member of the biological species who is alive'.⁶⁴⁰

The problem with this is that 'Baby Jane Doe's situation subsequently changed dramatically. Six months after refusing to allow surgery to close her spina bifida, 'Baby Jane Doe's parents reversed their decision. Her lesion had healed, and tough skin protected it from infection. After their daughter had been fitted with a shunt to relieve the pressure on her brain caused by hydrocephalus, her parents were allowed to take her home. Four years later a reporter interviewed her parents, and found that the little girl (now named Kerri-Lynn) could not walk, but was attending a special school and interacting with other children.'⁶⁴¹

Rachels' *The End of Life* was published in 1986. Thus, its publication preceded that of the interview with 'Baby Jane Doe's parents. Nevertheless, Rachels could have investigated the story to see whether it really suited his own views as ideally as he imagined. That he did not do so, would tend to suggest that he was not interested in 'Baby Jane Doe' herself, but only in using what turned out to be a very small part of her story to support views which he already entertained, but which, in this case at least, did not reflect reality very accurately. In addition, Rachels' discussion of the 'Baby Jane Doe' case leads him on to a more general exploration of the so-called 'slippery slope' argument, and the applicability or otherwise of the Nazi analogy to questions of modern

⁶⁴⁰ James Rachels, *The End of Life: Euthanasia and Morality*, pp.65-66.

⁶⁴¹ Peter G. Filene, *In the Arms of Others: A Cultural History of the Right-to-Die Movement in America*, (Chicago: Ivan R. Dee, 1998), p.122.

‘euthanasia’. As Peter Singer was to do some years later in his book *Practical Ethics*, Rachels states that ‘the meaning of Nazi ‘euthanasia’ can be understood only in the context of their especially virulent kind of racism’. To support his claim, Rachels quoted from comments made by the historian Lucy Dawidowicz at a conference on the Proper Use of the Nazi Analogy in Bioethics, which had been held at the U.S. Hastings Center in 1976.⁶⁴² By utilising Dawidowicz’ description of the malevolent racism which she claims as the impetus for the ‘euthanasia’ programme, Rachels is able to make the following claim:

‘Contemporary proponents of euthanasia advocate mercy-killing in response to the patient’s request. Among the Nazis, there was never any thought of killing as a compassionate act for the benefit of suffering ... patients ... the killings were completely involuntary. Where, then, is the analogy with the real euthanasia movement?’

One might at this point question Rachels’ own avowed enthusiasm for some types of what he calls ‘non-voluntary euthanasia’. We have already seen him confidently declare that ‘Baby Jane Doe’ would not suffer any real harm from being ‘allowed to die’, because, in Rachels’ opinion, she lacked any possibility of developing a real human life. To support his ideas, Rachels also uses the case of Repouille, which was discussed in the U.S. legal chapter, and the case of Hans Florian, who shot dead his Alzheimer’s-stricken wife through fear of what might befall her were he to predecease her. It is at this point that Rachels makes the claim central to his whole argument:

⁶⁴² Rachels, *The End of Life*, pp.176-180. .

‘Although this unfortunate woman was still alive, that fact has little significance. The critical fact is that, when her husband shot her, her life was already over. He was not destroying her life; it had already been destroyed by Alzheimer’s disease. Thus he was not behaving immorally ... If we should not kill, it is because in killing we are *harming someone*. That is the reason killing is wrong. The rule against killing has as its point the protection of the victims ... This conception leads directly to the conclusion that her husband did no wrong. She was not harmed by her husband’s killing her – indeed, if anything, it seems more likely that she was helped’.

Another, equally important distinction raised by Rachels’ views is one which has, thus far, only been touched upon; namely, the distinction (if there is one) between killing someone and ‘allowing’ him or her to die, whether that be through withdrawal of hydration and nutrition, or through failure to administer life-saving treatment.

Killing, Letting Die, and Benevolence

The distinction between killing and ‘allowing to die’ has, thus far, only really been mentioned in passing. Lorber supported the latter, but shied away from the former. During the period with which we are concerned (that is to say, mainly the 1970s and 1980s), ‘allowing to die’ was relatively common medical practice, and seemed really to cause consternation only when news of its occurrence entered the public sphere (as we saw at the beginning of this chapter, with regard to Patrick J. Buchanan’s concerns over the ‘Baby Jane Doe’ case, which will be discussed shortly. Philosophers of the period were, however, dissatisfied with this situation, feeling that the active killing of the child

was a more humane course of action. In the opinion of such thinkers, the benefits of this approach would be twofold: the child would be speedily ‘released from its suffering’, and its parents could return quickly to their former lives and perhaps have more children, instead of spending weeks or months devoting all their energies to the needs of one sick or disabled child, whose requirements would banish all thoughts of further procreation from its parents’ minds’. The two main examples of this school of thought (apart from Jonathan Glover, whose discussion of this problem does not focus on specific real-life cases), are Peter Singer and James Rachels. The main cases which they focus on to support their point of view are U.S. cases; namely, those of ‘Baby Andrew’, ‘Baby Doe’, and ‘Baby Jane Doe’.

Peter Singer uses the case of ‘Baby Andrew’ Stinson to demonstrate what can happen when an infant with a poor prognosis is the subject of extensive and, often, prolonged medical treatment in an attempt to save its life. ‘Baby Andrew’ had been born at only twenty-four weeks, in December, 1976, and lived for almost six months. However, he spent all that time in hospital, receiving intensive treatment, against the wishes of his parents.⁶⁴³

Singer’s main criticisms of this course of action are twofold. Firstly, that Andrew’s survival prevented his parents having any more children – this is a point made by Andrew’s mother in a diary she kept which was later published. Singer also raised the possibility that, even if Andrew lived, he would have significant residual ‘disabilities’.⁶⁴⁴ The claim with regard to ‘residual disability’, and also the reference to the possibility that the existence of a sick or disabled child would interfere with its parents’ plans to have

⁶⁴³ Peter Singer, *Writings on an Ethical Life*, (London: Fourth Estate, 2000), p.126.

⁶⁴⁴ Peter Singer and Helga Kuhse, *Should the Baby Live? The Problem of Handicapped Infants* (Oxford: Oxford University Press, 1985).

more children, lead Singer on to a discussion of the ‘Baby Doe’ case. This took place in Bloomington, Indiana, in 1982, and concerned a baby born with Down’s syndrome and an associated blockage of the oesophagus. Though this defect was easily operable, the baby subsequently died of starvation and dehydration because his parents did not want a child with Down’s syndrome.⁶⁴⁵ We saw previously that the idea that a child could be sacrificed for the supposed good of its parents and its current, or even hypothetical, future siblings was, in medical ethics of this period, widely accepted. Singer also is prepared to countenance it, saying:

‘A couple considering whether to terminate a pregnancy when the fetus has been diagnosed with Down (sic) syndrome is in a similar situation to the Stinsons...It is implausible that the choice between one life and another does not enter the minds of many parents with disabled newborn infants ... We know that once our children’s lives are properly underway, we will become committed to them; for that very reason, many couples do not want to bring up a child if they fear that both the child’s life and their own experience of child-rearing will be clouded by a major disability’.⁶⁴⁶

As we have just seen, the philosopher James Rachels’ views on life and death, and on the point at which life ceases to be meaningful, are nothing if not robust. This being so, it is unsurprising that Rachels sees no real distinction between killing someone and ‘allowing’ that person to die. As shown above, Rachels uses three cases to explain his support for what he terms ‘non-voluntary’ ‘euthanasia’. Of these, two (Repouille’s son and Hans

⁶⁴⁵ Ian Dowbiggin, *A Merciful End: The Euthanasia Movement in Modern America*, (New York: Oxford University Press, 2003), p.158.

⁶⁴⁶ Singer, *Rethinking Life and Death: The Collapse of Our Traditional Ethics* (Oxford: Oxford University Press, 1995).

Florian's wife) involve the direct killing of the victim, whilst one (that of Baby Jane Doe) involved non-treatment of the baby's medical problems (such as the open spina bifida on her back) in the expectation that she would quickly succumb to infection and die. The fact that Rachels has used these three rather different cases to illustrate the same point would indicate that he makes no distinction between active and passive killing, preferring to rely upon his own judgement that the victim of the killing was not *really* a victim, having already lost, or being permanently unable to acquire, what Rachels terms 'a biographical life':

'I have argued or implied that killing (or deliberately allowing to die, *which, in my view, is morally the same thing* (my italics) would not be wrong in a variety of cases: the case of Hans Florian's wife, the case of Repouille's son, the case of Baby Jane Doe, and the cases of persons in irreversible coma. None of these are examples of patients who request death, (but) I would favour removing legal penalties for killing in these cases... Where a person's biographical life is over, or where there is no prospect of a biographical life, there is no point in insisting that biological life be preserved'.⁶⁴⁷

Apart from anything else, this statement makes it clear that, to Rachels, the deciding factor in whether or not life is worth preserving is that of cognitive ability, whether actual or potential. In the case of Mrs Florian, for example, as well as that of Baby Jane Doe and of Repouille's son, what mattered was not the length of time which their lives were likely to last, but the level of awareness they were likely to have and, thus, the question of whether or not they could have lives which Rachels considered meaningful. As they

⁶⁴⁷ Rachels, *The End of Life*, p.179.

could not, it did not matter to Rachels how or when they died – the question of the Nazi analogy having been discarded long ago as being applicable only in cases of killing motivated by a virulent racist ideology. Other philosophers have emphasised the importance of their own benign intent when rejecting any suggestion that the Nazi analogy might be applied to their own ideas. As a believer in a ‘virulent racist ideology’ would evidently not be motivated by compassion or benevolence, it is easy to see the link between these two ideas. For example, in his 1993 work *Life’s Dominion*, Ronald Dworkin considered the question of the Nazi analogy and its potential applicability to the approval of selective abortion of disabled foetuses. It is intriguing that, unlike, say, Peter Singer, he chose to discuss a practice which (at least on the face of it) would appear to be considerably more common and accepted than the somewhat more controversial issue of selective infanticide. Peter Singer has written in many of *his* books that were he to apply his justifications for selective infanticide to mounting arguments in favour of selective abortion, the majority of the population would agree with him, and his views would attract little controversy, if any.⁶⁴⁸ By contrast, Dworkin does not explain why he chose to concentrate on selective abortion in preference to selective infanticide. Nevertheless he, like many other philosophers, is certain that benignity of intent is the single most important reason why it is unjust to invoke the spectre of Nazism in relation to contemporary debates about the abortion of disabled foetuses. H.J. Glock, a philosopher from the University of Reading, also considered the problem of intentionality (Singer’s *vis-à-vis* those of the Nazis). His remarks came in response to those of Jenny Teichman, which we encountered earlier in the chapter, and were published in a later issue of the *Journal of Applied Philosophy*. However, just as Teichman herself regarded the ‘Nazi’

⁶⁴⁸ Peter Singer, *Practical Ethics*,

accusations made against Singer as something of a side-issue, so Glock only responds to her assertions in a footnote of his article. The only point which relates specifically to Singer and the Nazi analogy is Glock's contention that Teichman's claim that intentions cannot matter to a utilitarian is redundant, given that Teichman herself is not a utilitarian. Consequently, argues Glock, she must consider Singer's motives, and 'acknowledge that they are morally superior to those of the Nazis'.⁶⁴⁹ Glock fails to explain the precise basis upon which Singer's motives *are* superior to those of the Nazis. However, it is unsurprising that all the philosophers in this chapter who support a departure from traditional ethics (in terms of, say, selective infanticide have insisted strenuously on the purity of their motives. This insistence means that the debates themselves invariably get stuck in something of an impasse. Interdisciplinary, bioethical debates about infanticide have often been precipitated by medical advances which make it *possible*, but, in the view of some professionals, *undesirable* to safeguard the lives of persons who would previously have died. Such arguments often hinge upon concerns for the patient's welfare, and questions about whether he or she would want to live on in, for example, a persistent vegetative state. In the case of disabled neonates, the question of whether killing (or 'allowing to die') an infant who is thought to have little prospect of a fulfilling life, has been one in which the applicability (or otherwise) of the Nazi analogy has been discussed. We saw earlier in the chapter that, in the Lorber-Harris debate of the mid-1970s, John Lorber expressed concern that the active killing of neonates would lead to the brutalization of those called upon to do the deed. This idea was roundly rejected by John Harris, who insisted that all those involved in these kinds of life-or-death decisions

⁶⁴⁹ H.J. Glock, 'The Euthanasia Debate in Germany – What's the Fuss?' in *Journal of Applied Philosophy*, Vol.11, No.2, (1994), pp. 213-224, p.224.

were focused solely on the welfare of the infant and its family. This benevolent intent made comparisons with the Nazis ludicrous. The philosopher Philippa Foot considered these problems too, in an article published in the same year as Glover's *Causing Death and Saving Lives*. As a non-utilitarian philosopher, it is perhaps not especially surprising that Foot's views differ markedly from those of Singer and Glover. She believes that, in the case of the infanticide of a disabled infant, it may be quite proper to invoke the Nazi analogy, because it may be that the infant is being killed for reasons which have little or nothing to do with its perceived prognosis.⁶⁵⁰ In Foot's view, this is particularly true with regard to infants born with Down's syndrome and easily correctible additional problems such as blockages of the oesophagus. She argues that such infants are perfectly capable of living contented lives, and that their medical prognosis can *never* be described as 'wretchedly bad'.⁶⁵¹ Indeed, she also cites the work of Professor R.B. Zachary to show that, contrary to the views expressed by Lorber, Glover, and Singer, it would be wrong simply to assume that a person with even very severe spina bifida can have no quality of life at all.⁶⁵² Foot concludes that, in most cases of the active or passive infanticide of disabled infants, pessimistic medical predictions concerning an infant's future 'quality of life', doctors are actually thinking not of the infant, but of the ease with which any difficulties can be avoided by leaving it to die. This, to Foot, is 'not a matter of euthanasia except in Hitler's sense'.⁶⁵³ She supports this by means of a quotation from Hannah Arendt's *Eichmann in Jerusalem*. Arendt relates a memorandum which Eichmann received from an S.S. man stating that, as Jews in the coming winter could no

⁶⁵⁰ Philippa Foot, 'Euthanasia', *Philosophy and Public Affairs*, vol.6, no.2, (Winter, 1977), pp.85-112, p.109-110.

⁶⁵¹ *Ibid.*

⁶⁵² R.B. Zachary, 'Ethical and Social Aspects of Treatment of Spina Bifida', *The Lancet*, (August 3, 1968), pp.274-276.

⁶⁵³ *Ibid.*

longer be fed, it might be more humane actively to kill those incapable of work before the winter arrived.⁶⁵⁴ We saw at the beginning of this chapter that the philosopher James Rachels rejected any suggestion that the Nazi analogy could be relevant to subsequent debates, because the Nazis' prejudices were not based on reason – unlike, apparently, Rachels' own ideas about the 'quality' of Baby Jane Doe's future life. Foot rejects such ideas, and clearly regards the readiness to assume that a disabled infant's life is valueless as another form of prejudice. In addition, it is noteworthy that, unlike many other philosophers, Foot makes no mention of the Nazis' malevolent intentions towards the victims of the 'euthanasia' programme – her comment that the infanticide of the vast majority of disabled infants 'is not euthanasia except in Hitler's sense' makes it clear that, though contemporary killing of individual disabled infants might entail a different *degree* of malevolence, the Nazi analogy is still applicable.

Controversies concerning the 'euthanasia' of comatose patients and of those in a persistent vegetative state (PVS) are similarly closely connected to developments in medical technology. PVS was first described as a sequel of brain damage only in 1972, and said to be caused by extensive damage to the cerebral neo-cortex, but with the brain stem remaining intact. The effect of this was to render the patient unable to respond to stimuli, unable to speak or (presumably) to understand, unable to express emotion and incapable of cognitive function, but apparently awake.⁶⁵⁵ This is rather different from being in a comatose state, which is described as 'a state of unnatural, heavy, deep and prolonged sleep, with complete unconsciousness and slow, stertorous, often irregular, breathing, due to pressure on the brain, to the effect of certain poisons, or to other causes,

⁶⁵⁴ Ibid.

⁶⁵⁵ 'Euthanasia: Death, Dying and the Medical Duty: A Series of Expert Reviews', *British Medical Bulletin*, vol.52 (2), (April, 1996), p.266.

and frequently ending in death'.⁶⁵⁶ Sometimes, however, the terms seem to be used interchangeably, at least by non-specialists.⁶⁵⁷ The philosopher Philippa Foot wrote in 1977 that the dictionary definition of 'euthanasia' as 'a good death' had perhaps failed to keep pace with developments in medical technology, which include deaths such as that of Karen Quinlan under the heading of 'euthanasia'. This is despite the fact that, in such a case, death is presumably not an evil, but neither can it be seen as a positive good.⁶⁵⁸ This question is of great concern to Foot, who writes that in ensuring that death is for the good of the one who dies, or at least that it is 'no evil', we are 'refusing to talk Hitler's language'.⁶⁵⁹ Foot bases her ideas on Leo Alexander's famous article 'Medical Science under Dictatorship', and particularly on Alexander's famous claim that 'In truth, all those unable to work and considered non-rehabilitable were killed'.⁶⁶⁰ This leads Foot to advocate the drawing-up of 'Living Wills', and to state that, though 'charity does not demand that strenuous measures are taken to keep people alive' when they are in a similar situation to Karen Quinlan, to kill such people cannot be described as 'euthanasia', as there is no suffering.

Jonathan Glover's aforementioned book *Causing Death and Saving Lives* considers the use of the Nazi analogy in relation to the 'euthanasia' of comatose and PVS patients. As we have seen, Glover strongly supports the idea that, under certain circumstances, life will not be worth living, and that, furthermore, 'in these rare cases [where] the undiluted act of killing may not be a wrong act, but the act of a decent and

⁶⁵⁶ Compact edition of the *Oxford English Dictionary*, vol.1, (Oxford: Oxford University Press, 1971), p.471.

⁶⁵⁷ For example, Ian Dowbiggin describes Karen Quinlan, who was in an irreversible coma, as 'persisting in her vegetative state for months'. (Ian Dowbiggin, *A Merciful End: The Euthanasia Movement in Modern America* (Oxford: Oxford University Press, 2003), p.145).

⁶⁵⁸ Philippa Foot, 'Euthanasia', *Philosophy and Public Affairs*, vol.6, no.2, (winter, 1977), pp.85-112, p. 86.

⁶⁵⁹ Ibid.

⁶⁶⁰ Quoted in *ibid.*

generous person...we should respect rather than condemn someone who manages to do it'.⁶⁶¹ Glover approaches the 'use of the Nazi analogy' question through a discussion of Gitta Sereny's 1974 book *Into that Darkness: From Mercy Killing to Mass Murder*. In this book, Sereny reported that Franz Stangl, who became the commandant of Treblinka, had honed his homicidal talents during the Nazi 'euthanasia' programme, before being considered sufficiently proficient to take charge of the killings at a much larger death camp.⁶⁶² Glover's reading of Sereny's book convinces him that

'Franz Stangl was not the kind of person you might easily find working for the National Health Service'. Furthermore, 'any profession contains some people who are callous, unscrupulous or too willing to obey orders of the established authorities. The lesson of the German experience is a political one: not to allow power to pass to a government under which that kind of doctor will be at home. We need not draw the over-simple moral that, because of what the Nazis did, doctors should be encouraged to leave the respirator on beyond the point where life is worthwhile'.⁶⁶³

Here, Glover is advancing an argument which is diametrically opposed to that given by Foot. In Glover's opinion, any potential danger from a resurgence of Nazi-like practices comes from individual doctors who might be callous in their attitude towards their patients, or who might have to great an enthusiasm for following dubious orders given to them by 'the authorities'. By contrast, Foot believed that the idea that it was acceptable to kill disabled infants or to leave them to die was part of a more general underestimation of

⁶⁶¹ Jonathan Glover, *Causing Death and Saving Lives*, (London: Penguin Books, 1977), p.200.

⁶⁶² See Glover, p.201.

⁶⁶³ Glover, pp.201-202.

their worth and potential – and was, as a result, more insidious, as it was not noticed or challenged in the same way as the attitude of one individual might be. One can say, however, that in Foot’s opinion, the Nazi analogy is less pertinent in the case of PVS and comatose patients than it is in that of disabled infants. The reason for this seems to be that Foot feels that infants who are killed or left to die are robbed of their potentiality. Comatose and PVS patients, on the other hand, are seen as *having* no potentiality: ‘Perhaps charity does not demand that strenuous measures are taken to keep people in this state alive, but euthanasia does not come into the matter...when someone is, like Karen Quinlan, in a state of permanent coma’.⁶⁶⁴

In his book *Life’s Dominion: An Argument about Abortion and Euthanasia*, the philosopher Ronald Dworkin considers the problem of the ‘euthanasia’ of PVS patients, but in relation to another famous U.S. case. Nancy Cruzan had been left in a persistent vegetative state following a car crash in 1989, and her parents took the hospital where she was being cared for to court in an attempt to order them to withdraw Cruzan’s feeding tubes.⁶⁶⁵ As we saw in the ‘infanticide’ section of this chapter, Dworkin’s discussion of the Nazi analogy is considerably less exhaustive than Philippa Foot’s. Nevertheless, it is noteworthy that, unlike Foot, Dworkin seeks to draw a clear line between ‘loathsome Nazi eugenics’ on the one hand, and any and all actions of persons living in a modern liberal democracy on the other. The reasoning behind this appears to be similar to the claims by Peter Singer and some of his supporters to the effect that his desire that his recommendations should lead to a reduction in suffering – in other words, that his professed benevolence was sufficient to render him the polar opposite of the Nazis, who

⁶⁶⁴ Philippa Foot, ‘Euthanasia’, p.111.

⁶⁶⁵ Ronald Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia*, (New York: Alfred A. Knopf, 1993), pp.11-12.

were, clearly, malevolent. Dworkin follows a similar line of thought. In his view, the potential damage in ‘forcing people to live’ is much greater than any that might be brought about by legalizing ‘euthanasia’:

‘The ... familiar ‘slippery slope’ argument: that legalizing euthanasia in even in carefully limited cases makes it more likely that that it will later be legalized in other, more doubtful cases as well, and that the process may end in Nazi eugenics. That argument also loses its bite once we understand that legalizing *no* euthanasia is in itself harmful to many people – then we realise that doing our best to draw and maintain a defensible line, acknowledging and trying to guard against the risk that others will draw the line differently in the future, is better than abandoning these people altogether. There are dangers both in legalizing and refusing to legalize; the rival dangers must be balanced, and neither should be ignored’.⁶⁶⁶

Dworkin regards a complete rejection of ‘euthanasia’ to be a far greater threat than the potential danger that once legalized, ‘euthanasia’ might be used in questionable cases. Unlike Foot, Dworkin clearly believes that, for some seriously ill or comatose people, death is *evidently* preferable to continued existence, and that no further investigation of the matter is required. With specific reference to the use of the Nazi analogy, Dworkin, like Singer, Glover and others, emphasize the benevolence of their own views in contrast to the malevolence of those of the Nazis. To Foot, the question of benign versus malign intent does not seem to be of any importance, as we saw in the ‘infanticide’ section of this chapter.

⁶⁶⁶ Ibid, pp.197-198.

Conclusion

As this chapter has shown, it is no simple matter to disentangle all the various uses to which the Nazi analogy has been put in Anglo-American philosophical debates about ‘euthanasia’. One thing is clear, however; namely, the dividing line between utilitarian and non-utilitarian philosophers. This chapter has demonstrated that it is utilitarian philosophers who are most willing to state that traditional views concerning the sanctity of life are outdated, and drastically in need of revision. When confronted with the argument that such revisions run the risk of bringing modern society to the point of endorsing practices which the Nazis might recognize and regard with approbation, utilitarian philosophers rely on two main arguments. These are, firstly, the argument made by Lucy Dawidowicz to the effect that accusations of Nazism would only ever be applicable in the case of a virulently racist society in which everything was done for the benefit of an entity similar to that of the *Volk*. Secondly, utilitarian philosophers also argue that their own intentions are entirely benevolent, and that, as such, to equate their ideas about ‘euthanasia’ with those of the Nazis is simply insulting.

Arguments about the ‘euthanasia’ of entirely *compos mentis* persons with terminal illnesses were, as stated in the introduction, conspicuous by their absence from this chapter. This is due to the emphasis placed by so many of our philosophers upon the importance of having a ‘mental life’, or at least the possibility of one. There was probably also an unspoken assumption amongst philosophers that people, who were ill, but still able to make end-of-life decisions for themselves, came under the heading of ‘voluntary euthanasia’. As such, philosophers tend to discuss them less, particularly with regard to discussions about the use of the Nazi analogy.

There was little agreement on the question of whether or not forms of active and passive ‘euthanasia’ were radically different, or on the question of which of them might, in view of the Nazi ‘euthanasia’ programme, have more in the way of deleterious effects upon society as a whole. Here again, utilitarian philosophers (most notably Singer, Glover and Rachels) led the way in advocating active killing, as being quicker, more definite and decisive, and, allegedly, more humane. On this issue, the utilitarians’ views were diametrically opposed to those of Philippa Foot. Whilst not being greatly alarmed by the possibility of withdrawing nutrition and hydration from comatose patients, such as Karen Quinlan, Foot stated that the active killing of, or the refusal to treat, neonates with such conditions as Down’s syndrome, was not ‘euthanasia’ ‘except in Hitler’s sense’ – in other words, killing not for the benefit of the person being killed, but as a subtle form of social engineering in which the potentiality of disabled newborns was systematically underestimated..

Conclusion

This thesis has demonstrated the clash between ‘traditional’ ideas about disability and impairment, and those based upon the social model of disability I have established, in other words, that debates about ‘euthanasia’ in Britain and the United States have long been characterized by the enforced absence of the people who are most affected by them, and who are most likely to have valid and informed opinions. This approach necessitated a marked focus upon the views of people who expressed precisely the views which I myself do not advocate. In doing this, I have shown the widespread nature of the views which need to be challenged and, particularly in my historians’, legal and philosophy chapters, I have shown how this is beginning to happen. The message of the thesis as a whole is very much that there are so many residual problems regarding the questions of ‘euthanasia’ and ‘assisted suicide’ that it is unwise to be too eager to pursue the idea that these are simply matters of personal freedom and individual choice. It is noteworthy that, for example, two of the most prominent members of the British ‘right to die’ debate – Debbie Purdy and Sir Terry Pratchett - have both become ill relatively recently. This does not mean that their views are not important, or that they would not adhere to them even if the tenor of the debate was significantly different. However, as I have shown in this

thesis, I do not believe that the attitudes to the ‘euthanasia’ programme and its victims which were on display at the Nuremberg Medical Trial have previously been analysed as closely as they are in this study. The first chapter showed that the prosecution and the Tribunal mounted no real challenge to the defendants’ claims regarding the purity and altruism upon which their participation in the programme was based. As Chapter One also demonstrates, however, this dismissive attitude was not simply caused by an oversight, or a failure to research the exact nature of the Nazi ‘euthanasia’ programme. Instead, what is revealed by the Nuremberg Medical Trial transcript is the prosecution team and judges’ ingrained inability to treat the programme as a case of systematic murder. The judgement in particular sends a clear message that – presumably because the victims were inmates of institutions – the German state was perfectly entitled to exercise the power of life and death over them.

This chapter, then, lays the groundwork for the rest of the thesis. The other chapters follow the first one in showing how pervasive this ‘deadly paternalism’ has been, and how it is not confined solely to one particular time period or academic discipline. Chapter Two looked at outsiders’ views of the Nuremberg Medical Trial, and this was done by seeing how the Trial was reported in prominent newspapers, as well as in medical and legal journals, in both the United States and Britain. By doing this, I showed that, during the period it was taking place, the Trial was reported almost exclusively as being solely concerned with the prosecution of Nazis who had carried out medical experiments upon concentration camp inmates. One could argue that this virtual silence leaves us none the wiser about how contemporaries regarded the Nazi ‘euthanasia’ programme, but I maintain that the silence speaks volumes. Had the

journalists reporting from the Trial felt that the ‘euthanasia’ programme was unequivocally wrong and shocking, presumably they would have highlighted it in their reports? Most interestingly, the medical journals consulted for this chapter identified various ethical problems brought into focus by the Nuremberg Medical Trial, but these were all to do with human vivisection – whether it is right to use data obtained in the experiments, for example. One assumes that prominent medical journals may well have sent their own representatives to the Nuremberg Medical Trial rather than relying solely upon reports gleaned second-hand from newspapers. However they obtained their information, it is striking – and somewhat depressing – that their assumptions and preoccupations are so similar to those of the journalists reporting from the Trial. The legal journals consulted for this chapter show that, whilst legal scholars understood the Nuremberg Medical Trial to be solely concerned with human vivisection, they were not particularly interested in it, perhaps because they regarded it as being of more relevance to the field of medicine. It certainly did not impinge upon their discussions of ‘mercy-killing’ cases of the time, such as the *Long* case in England and the *Repouille* case in the United States. I argued in Chapter Two that this inconsistency, like those of the journalists and physicians, is extremely telling. It is not that the murder of one disabled person by, say, a parent is *like* systematic murder by a state. It is that both, here, are characterized by official indifference to the fate of the victim(s), as well as an unspoken assumption that the victim has not been deprived of anything by being murdered, and that the perpetrator was almost entitled to act in the way that he did. This also lays the foundations for Chapters Four and Five, in which the persistence of this paternalistic attitude – right up to the present day – was demonstrated.

Chapter Three took a slightly different approach, whilst drawing similar conclusions regarding the widespread existence of a paternalistic and dismissive attitude towards people subjected to ‘euthanasia’. Here, I looked at how historians in Britain and the United States have written about the Nazi ‘euthanasia’ programme. My investigation went right from the decade or so following the Nuremberg Medical Trial up until books published very recently and attempting to integrate study of the Nazi ‘euthanasia’ programme into the new discipline of disability history. I demonstrated that by far the most tenacious view of the ‘euthanasia’ programme amongst historians is that which ignores every aspect of the programme itself, whilst highlighting the protests against it which supposedly brought it to an end, but in fact did not. Chapter Three is also thematically linked with Chapters One, Two, Four and Five in that the attitudes of the historians who emphasize the protests to the programme rather than the programme itself are, in a way, demonstrating a similar kind of ‘deadly paternalism’ to that which was so evident at the Nuremberg Medical Trial, and which is so evident in legal and philosophical debates about ‘euthanasia’. In other words, in using the programme solely as an example of the possibilities of German resistance to the Nazis, many of the historians in Chapter Three seem to be relegating the victims of Nazi ‘euthanasia’ to the role of ‘optional extras’ in German society. Just as the Nuremberg Medical Trial tribunal stated that a state may *subject* certain classes of its citizens to ‘euthanasia’, many historians appear to follow suit, in their seeming assumption that the ‘euthanasia’ programme was a dry ethical issue, not a programme of systematic murder of tens of thousands of innocent people. Happily, though, Chapter Three ended with a discussion of the ways in which disability historians in particular are trying to remedy the situation.

They are, of course, benefiting from the work carried out by pioneers such as Michael Burleigh and Henry Friedlander, but they are also trying to consider the ‘euthanasia’ programme from a new perspective. For example, Suzanne E. Evans 2007 book *Hitler’s Forgotten Victims: The Holocaust and the Disabled* offered little new research (although perhaps a new way of looking at things) but used the Nazi ‘euthanasia’ programme for clearly-expressed socio-political ends:

‘Disability Rights Advocates ... established the Disability Holocaust Project with several objectives: (1) to shatter the silence that has surrounded the fate of people with disabilities during the Holocaust; (2) to heighten public awareness about the current desperate plight of people with disabilities; (3) to utilize the shared history of the Holocaust as a vehicle for building greater cooperation between organizations of people with disabilities; and (4) to relate pre-Holocaust Nazi concepts to pernicious contemporary attitudes and enhance awareness of the existing stigmatization of people with disabilities’.⁶⁶⁷

Four years earlier, in an article published in the *American Historical Review*, Catherine J. Kudlick of the University of California pointed out that there were few books written about the Nazi ‘euthanasia’ programme, and that those which were invariably took a ‘medicalized’ stance, regarding the victims as ‘poor unfortunates’ who should have been cared for and not murdered, but who were nevertheless not really part of mainstream society.⁶⁶⁸ Kudlick further suggests that ‘a number of factors may explain this lacuna, among them perhaps a tacit acceptance that the Nazis may have been right to

⁶⁶⁷ Suzanne E. Evans, *Hitler’s Forgotten Victims: The Holocaust and the Disabled* (Stroud, Gloucestershire: Tempus Publishing in co-operation with Ivan R. Dee, 2007), p.7.

⁶⁶⁸ Catherine J. Kudlick, ‘Disability History: Why We Need Another ‘Other’’, *The American Historical Review*, Vol. 108, No.3, (June, 2003), p.787.

want to eliminate this particular group of ‘undesirables’’.⁶⁶⁹ Though this is a shocking statement, and perhaps might have benefited from some additional elucidation, it does raise a number of questions which modern society often appears to try to circumvent.

Chapters Four and Five of my thesis highlighted and addressed these questions, from the points of view of law (Chapter Four) and bioethics (Chapter Five). Chapter Four considered the legal situation with regard to ‘euthanasia’ in both the United States and in England and Wales (the Scottish legal system being somewhat different). Instead of providing an explanation of exactly what the legal situation is in each country, the chapter continued the theme which ran through the previous three chapters. I showed that in both countries, but in somewhat different ways, the ‘law on the books’ differs markedly from ‘the law in action’. As Chapter Four demonstrates this is particularly the case in England and Wales. Whilst ‘mercy-killing’ is supposed to be murder, it has, in fact, never been treated as such by English law, particularly when the perpetrator is a layperson. In some ways the situation in England and Wales continues to be rather the way that that in the United States was described by the legal scholar Yale Kamisar in 1958: ‘[A] high incidence of failures to indict, acquittals, suspended sentences and reprieves’.⁶⁷⁰

Chapter Five considered the place of ‘disability’ in bioethical debates, and it in this final chapter that I embarked upon a discussion of how the Nazi analogy has been used, both by bioethicists themselves, and by those who disagree with them – although the question of the Nazi analogy had also been raised in the legal chapter, owing to the interest taken in it by US lawyers and legal scholars. In this chapter we discovered that

⁶⁶⁹ Ibid.

⁶⁷⁰ Yale Kamisar, ‘Some Non-Religious Views Against Proposed ‘Mercy-Killing’ Legislation’, *Minnesota Law Review*, Vol.42, No.6, (May, 1958), p.971.

many of the most prominent bioethical philosophers are also utilitarians, but that there is a clear ideological divide between utilitarians (such as Peter Singer and Jonathan Glover), and non-consequentialists (such as Philippa Foot). Utilitarian beliefs have led those philosophers who hold them to the idea that traditional adherence to the ‘sanctity’ of life is outdated, and should be replaced by more reasonable and rational values. In particular, bioethicists claim that no-one really believes that all human lives are of equal value, and that there must be an overt acceptance of this, rather than the current situation in which the law says one thing and does another. In a sense, the utilitarian philosophers’ focus on legal standards not having kept pace with contemporary morality tallies with the findings in my legal chapter. However, whilst the utilitarian philosophers conclude that this dichotomy means that the ‘old ethic’ needs replacing, I argued that the philosophers have reached this conclusion only because, like so many others, they are embarking upon a discussion of ‘euthanasia’ (including the infanticide of disabled newborns) without paying any attention to the views of people who would have been affected by such a measure, had it existed when they themselves were born. In short, then, this thesis addresses ‘a question which *should* enter into the issues’, but has really been prevented from doing so until very recently.

This thesis demonstrates, above all, that the tenor of the debate, the important questions which it asks, and the scope of participation in the debate as a whole are all in dire need of significant change. Every chapter demonstrated the existence of paternalistic and stereotypical attitudes regarding disability and disabled people. I did also show – most notably in the ‘historians’ chapter – that these attitudes are beginning to change, thanks in no small part to the contributions made by disabled people themselves. For example, it

strikes me that one problem that many historians may have had when writing about the Nazi 'euthanasia' programme is that they have assumed that the victims thereof were suffering primarily from their impairments. As discussed in my introductory chapter, as well as at relevant points in my other chapters, the reason for this is most likely to be due to deeply ingrained ideas that external factors make no difference to an impaired person. This is one reason why the 'euthanasia' programme has not been considered to be 'the same' as any other systematic killing programme. I hope that, by challenging this attitude, I and others will be able to help move the debate on into new territory. After all, the knowledge that a disabled person is a full human being, not just a physical manifestation of various medical problems, is clearly essential to all aspects of the 'euthanasia' debate, and also to so many debates in so many other areas of society – indeed, so many different areas of life itself.

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