THE NUREMBERG DOCTORS' TRIAL: FRAMING COLLECTIVE MEMORY THROUGH ARGUMENT

by

DOYLE W. SRADER

(Under the Direction of Edward M. Panetta)

ABSTRACT

In 1946, a military tribunal constituted by the United States government put twenty-three physicians and medical support staffers from the recently defeated German Nazi regime on trial for war crimes and crimes against humanity consisting of participation in medical experiments conducted on concentration camp inmates. The trial produced sixteen convictions, seven acquittals, and the Nuremberg Code, which remains to this day a founding document in biomedical ethics. The Code does not mark a consensus, but rather an enduring controversy, in the medical field. This study examines the role of constitutive elements of argument in the framing of collective memory about the Nazi medical experiments within the specialized community of medical professionals. Findings included the core elements of the prosecution's proposed frame, points of stasis between prosecution and defense, and the tribunal's incorporation of the broad sweep of the prosecution's case with some of the defense's pleas of extreme necessity in the verdicts. From the state of human subject research ethics pre-Nuremberg to the present date, a definite break and alignment into enduring positions is discernible, which first appears at Nuremberg. The trial thus reconfigured discursive space and both opened up and channeled the possibility of deliberation on ethical matters in the global medical community.

INDEX WORDS: Collective memory, Nuremberg Code, Karl Brandt, Nazi doctors, Informed consent, Argument, Constitutive Rhetoric

THE NUREMBERG DOCTORS' TRIAL: FRAMING COLLECTIVE MEMORY THROUGH ARGUMENT

by

DOYLE W. SRADER

B.A., Baylor University, 1992

M.A., Baylor University, 1993

A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2003

THE NUREMBERG DOCTORS' TRIAL: FRAMING COLLECTIVE MEMORY THROUGH ARGUMENT

by

DOYLE W. SRADER

Major Professor: Edward M. Panetta

Committee: Celeste M. Condit
Thurmon Garner
Thomas M. Lessl
Dean G. Rojek

Electronic Version Approved:

Maureen Grasso
Dean of the Graduate School
The University of Georgia
August 2003

DEDICATION

To Douglas, Katie, Cole and Kaleigh. May their generation become aware of the lessons of Nuremberg, and teach their children to teach *their* children, so those lessons will never be forgotten.

ACKNOWLEDGMENTS

I would like to thank Jean Eldred for comments on the method, Marouf Hasian for invaluable research guidance, Edward Panetta and Katherine Srader for patience and support, Drs. Condit, Garner, Lessl, Logue, Rojek and Rubin for agreeing to serve on my committee, and Kelly Saros, Marcia Tiersky, David and Karen Runnels, Melane McCuller, and Rick, Dianna, Nicholas, Courtney and Gabrielle Reese, for helping me cling to sanity.

TABLE OF CONTENTS

CHAPTER ONE

THE RIDDLE OF THE NUREMBERG MEDICAL TRIAL

On December 9, 1946, General Telford Taylor, an attorney representing the United States War Department, stepped to the podium and began to speak. His audience was a trio of military officers empanelled as judges, in Nuremberg, Germany. His text was the opening argument for the prosecution in the case of *United States v. Karl Brandt, et al.* After speaking in broad terms of the charges brought against the defendants, he said,

> It is our deep obligation to all peoples of the world to show why and how these things happened. It is incumbent upon us to set forth with conspicuous clarity the ideas and motives which moved these defendants to treat their fellow men as less than beasts. The perverse thoughts and distorted concepts which brought about these savageries are not dead. They cannot be killed by force of arms. They must not become a spreading cancer in the breast of humanity. . . . That murder should be punished goes without the saying, but the full performance of our task requires more than the just sentencing of these defendants. Their crimes were the inevitable result of the sinister doctrines which they espoused, and these same doctrines sealed the fate of Germany, shattered Europe, and left the world in ferment. Wherever those doctrines may emerge and prevail, the same terrible consequences will follow. That is why a bold and lucid consummation of these proceedings is of vital importance to all nations. That is why the United States has constituted this

Tribunal. I pass now to the facts of the case at hand. (Nuernberg Military Tribunals, 1949, pp. 27-29)

In delivering an overview of the prosecution's mission to the court, Taylor deliberately emphasized its communicative and argumentative mission. Its purpose was not to incapacitate the defendants, for they were citizens of a defeated nation and the institutions that enabled their work had already been disbanded. Its purpose was not to exact restitution, for no restitution could approximate justice, due to the scale upon which the alleged crimes had been committed. The purpose was to communicate, both to the global audience of that moment, and to future audiences for generations to come, the unacceptability of the charged crimes. The prosecution team's mission was to refute the defenses for the defendants' conduct, and in so doing speak about the boundaries of ethics and the reach of law beyond national boundaries.

Given these facts, most Americans would recognize this story at once: the Nuremberg trial of major Nazi war criminals, at which Hermann Goering, Karl Doenitz, and other heads of the Third Reich were tried, found guilty, and sentenced to death. Yet that trial had finished several months earlier. At the time the plans for the trial of major war criminals had been laid out, the planners also prepared for a set of specialized trials, which would focus upon lawyers and judges, industrialists, police officers, local Nazi party leaders, and so forth. For the first trial in this set, the defendants in the dock all had a profession in common: they were all doctors. All had worked in the death camps, performing medical experiments upon inmates, mostly without their consent.

The experiments were gruesome. Some subjects were placed in chambers designed to simulate high altitude conditions. As the air was removed from the chamber,

they experienced excruciating pain, and many died. Some subjects were forced outside in freezing temperatures and doused with water. Researchers then tried different methods to warm them: hot water baths, warm water baths, or, in one experiment, being placed in between nude females. In other experiments, researchers deliberately infected subjects with malaria or typhus, sprayed them with mustard gas, fired guns at them at point-blank range and then rubbed dirt into the wounds, surgically severed muscles and/or nerves, attempted to transplant bones between subjects, forced them to drink only salt water until they died of thirst, exploded incendiary bombs near the subjects to inflict massive burns, and administered experimental poisons to measure how quickly they would kill the subject (Nuernberg Military Tribunals, 1949).

To many, it appeared that the prosecution had an open-and-shut case. Yet, there were complications. First, the defendants had obeyed the laws of the Nazi regime. In fact, their experiments were the result of legally valid orders given by government authorities. Thus, the prosecution had to make a case for crimes against humanity, drawing upon the still-controversial precedent from the major war criminals trial that had just concluded. To do this, the prosecution had to make a compelling case for violations of natural law: that the defendants' deeds had been so outrageous and so brutal that any sane member of any civilized society would have known that they were impermissible.

Accomplishing this task was complicated still further by the defendants' second line of defense. The defendants claimed that they were not guilty of any crime, and certainly not of a crime against humanity, because they were licensed physicians, engaged in research. Just as a surgeon who cuts open a patient in the course of conducting surgery, and then loses the patient because s/he is unable to cure the patient's

disease, is not guilty of murder, these defendants argued that the invasive and destructive procedures they carried out on the death camp inmates belonged to a special, protected category of conduct that could not be treated the same as if they were conducted by people who were not doctors. The challenge laid before the prosecution, then, was to assemble evidence to prove that extant standards of medical research ethics clearly and convincingly forbade the defendants' experiments. This was to prove far more difficult than anyone associated with the trial could ever have dreamed.

The chapters that follow will examine how argument practices at Nuremberg gathered and vetted evidence to be highlighted in a communicative ceremony designed to fix an authorized interpretation of the Nazi era in the prevailing public understanding, to make an account of those events into the most popular account. The remaining sections of this chapter will make a case that examining communicative activity at the Nuremberg Medical Trial fills a critical gap in understanding what was accomplished at the trial, will describe preparations made for the trial by its planners, will document the deflation of the larger Nuremberg project and subsequent energence of the doctors' trial as one of the few historically significant legacies of that project, will provide a brief history of human subjects research ethics before and after the trial, and, finally, will assess the response within the medical community to the trial's message.

The Nuremberg Medical Trial as a communication phenomenon

Some Nuremberg historians have begun the job of putting the Nuremberg Medical Trial and Nuremberg Code in perspective, insisting on their importance even as they acknowledge that they are deeply flawed documents: "To appreciate the true influence of the Code, one must abandon the expectation that, to be influential, it would

have to be accepted immediately and openly and integrated into the actual practices of the research community" (Moreno, 1997a, p. 359). One dimension in which Nuremberg produced a substantial and enduring impact was the communication of ideas about ethical conduct in scientific research. Whether it was effective, whether it was well-conceived, whether the event itself is something of which any of its architects should be proud, it did open space for discussions which had never before been convened on such a scale, and it did codify ideas in a setting that guaranteed worldwide attention and permanent historical significance. To date, though there have been studies of Nuremberg as a historical event (Grodin, 1992; Katz, 1996; Marrus, 1999), and assessing its influence on medical ethics today (Annas, 1992; Annas & Grodin, 1999; Barondess, 1996; Brandt & Freidenfelds, 1996; Caplan, 1992; Glantz, 1992; Katz, 1992; Lippmann, 1995; Macklin, 1992; Mariner, 1992; Moreno, 1997a; Perley et al., 1992; Sidel, 1996) no study has examined the communicative patterns, in particular the argument strategies, used at Nuremberg, nor their influence upon subsequent discourse about human participant research ethics in particular, or the broader questions of medical ethics and international law. Many authors quote the opening statement and the judges' verdict, but say nothing about the choices of argument and communication practice adopted by all parties at the trial. Arthur Caplan (1992) has criticized people's very liberal use of an analogy between the Nazi medical crimes and other practices such as doctor-assisted suicide, but in doing so he focuses on the differences in scale and type between the various medical procedures, not on the communication artifacts deployed then or now.

The absence of a sustained examination of communication at Nuremberg is especially puzzling given the researchers' free admission that such issues are central to

understanding the importance and contemporary applicability of the Nuremberg Trial and Code. Lippmann observes that "The tribunals pierced the verbal veil and rejected the effort to convert arbitrary abuse and murder into medically acceptable protocols" (1995, p. 60). Annas (1996) warns that "The project of at least some leading medical researchers since Nuremberg seems to have been to use language to obscure . . ." (p. 314), and ". . . it is morally imperative to use language to clarify differences because ignoring these differences undermines . . . the rights and welfare of patients and subjects" (p. 322). Tiefenbrun concurs:

> . . . each of us as professionals and members of influential groups must be diligent to decipher immoral or amoral sentiments and ideas that are couched in labels like "ethnic cleansing." These euphemisms for sanctioned killings have the potential of becoming the guiding principle for authorized mass destruction (Tiefenbrun, 1999, p. 200).

These innovations in coded language were synthesized by the defendants into an elaborate medical necessity defense, whose mechanics are worthy of study for the insight they offer into the roots of the problem. Caplan argues:

> The moral arguments of those in biomedicine who supported and carried out the policies of the Nazi regime must be taken seriously, if for no other reason than to understand how it was that doctors and public health officials came to play such a central role in the Holocaust. (1992, p. 260)

The tribunal's most aggressive move to counteract the Nazis' language games in defense of their experiments was, in itself, a major change in communicative practice. The requirement of informed consent was, first and foremost, a decree ordering a specific

pattern of communication for the purpose of heading off abuse. As far back as the first Prussian code, in 1900, the officials drafting the code acknowledged that the problem with abuse of research participants was one of "coercion, persuasion, and unequal authority" (Vollman & Winau, 1996). As informed consent was adopted as a requirement and enforced, some frustrated researchers reported that many patients, especially mentally ill patients, showed every sign of wanting to participate in research, but were simply unable to express that wish explicitly enough to meet the requirement (Weiss, 1998). The tribunal thus made a choice to require a particular illocutive utterance as a safeguard against abuses that had thrived under the changed language of the Nazi regime. That choice, and the reasoning accompanying it, was a direct and final refutation of the case the defendants had made for the legitimacy of their actions under the separate, specialized standards of medical practice: "The judges understood that the ethical arguments of those they had tried had to be addressed, and the Code was their attempt to articulate standards for the conduct of medical experimentation in the future" (Caplan, 1992, p. 268).

The trial, therefore, was the opening salvo in an ongoing effort to force progress in shared moral standards governing doctors' decisions to conduct unproven medical procedures upon human beings. At the time, experiments on mentally retarded children and on prisoners did not seem very ethically troubling, chiefly, one commentator suggests, because moral vision had not evolved very far (Annas, 1992). Over the years, the Code's application to these and other groups would proceed slowly, incrementally, as such understanding grew: "In fact, it was not logic that was operative in this evolution, but a growth in moral perception" (Moreno, 1997a, p. 359). At Nuremberg, the issue was

put on the global table; it "opened a worldwide discussion about . . . experimentation using living humans" (Jonsen, 1998, p. 134). The very extremity of the doctors' offenses, even as they created legal complications that would hamstring its effectiveness, nevertheless precipitated a crisis that demanded immediate attention and a drastic solution (Annas & Grodin, 1992). And even though the specific directives of the tribunal soon were cast aside, "The power of its appeal to respect for persons was too strong and survived, however diluted, in subsequent codifications and regulations" (Katz, 1992, p. 228). Today, the ethicists charged with continuing to examine and develop standards for appropriate conduct in human participant research acknowledge that writing rules and policing abuses is not the primary front on which their struggle is fought: Alexander Capron, head of the current NIH Commission on biomedical ethics admits, "We have no power other than the power of persuasion" (Weiss, 1998). To understand how and why the Nuremberg Medical Trial retains its power to shape opinion after its rocky history, and to understand fully the nature and contours of that persuasive force, it is important to study its source, the original messages deployed in rejection of Nazi science and in defense of punishment for crimes not codified in law when they were committed. The last word, from Annas and Grodin:

> International human rights law is similar to medical ethics in that both are universal and aspirational, and both have so far been unenforceable. A critical challenge is to make both meaningful, and this may be the most important legacy of the Nuremberg trials. (1999, p. 111)

Before commencing an examination of the argument practices at Nuremberg, in an attempt to accept Annas and Grodin's "critical challenge" by excavating their

contribution to making human rights law and medical ethics meaningful, it is necessary first to trace the path leading up to General Taylor's opening statement, the evolution of medical research ethics, the subject matter of the trial, from antiquity to the rise of the Third Reich.

Pre-scientific and private codes

The earliest codes of medical ethics said nothing about human experimentation, because as of the Hippocratic Era, the fourth and third centuries B.C.E., the idea of medicine as a science had not yet arrived. Healers relied on tradition, lore, and rough trial and error, and most patients probably understood that their chances of recovering from illness or injury were relatively low, unless they had the gods' favor. Rather, the first ethical codes were more codes of professional conduct, and served as guidelines for healers to communicate with their patients in a fashion that would comfort them, and reassure them of the healer's capability (Jonsen, 1998). The Hippocratic oath, it is now supposed, was not written by Hippocrates, but was the product of a Pythagorean cult which taught that all moral questions have objectively correct answers that may be determined by the proper formula. (Jonsen, 1998)

By the seventeen hundreds, though, some semblance of large-scale organization had struck the medical community, and doctors began launching systematic experimental trials, including experiments on human subjects. In 1721, in England, doctors tested new theories about inoculation against illness by trying different inoculations on prisoners. Those who agreed to participate in the study were granted pardons (Grodin, 1992). One fairly famous advance in medical research, Edward Jenner's discovery of the cowpox vaccine against smallpox, was tested in an early stage on an eight-year-old boy (Grodin,

1992). Still, at this stage, medicine was so hit-and-miss that physicians spoke little of the results of medical research providing wider benefits for humankind (Katz, 1992). In the late eighteen hundreds, as more and more medical researchers took a more scientific approach to their work, experimentation on humans exploded, particularly in the fields of bacteriology, immunology, and physiology (Vollmann & Winau, 1996).

The earliest writings on the ethics of research on human subjects were the private writings of individuals, often trying to clarify their own thinking by setting principles to paper. In 1803, an English physician named Thomas Percival published a code of ethics which called on researchers to be sure, to the best of their knowledge, that experimental treatments had a reasonable chance of being effective. Later, the AMA would use his work as the model for its first code of ethics, published in 1847 (Grodin, 1992). In the meantime, in 1833, a physician in New Orleans named William Beaumont set down the earliest recorded formulation of the principle of informed consent. Beaumont was treating a gentleman named Alexis St. Martin, who had suffered a gunshot wound which, because of the way it healed, gave Beaumont the opportunity to study his digestive tract. In defense against claims that he was exploiting his patient, Beaumont wrote a set of rules for his research which included a requirement of informed consent, and a requirement to stop the research if his patient objected (Grodin, 1992). In 1865, French physician Claude Bernard published a medical textbook which was used in medical schools worldwide, in which he asserted that medical ethics forbade researchers to conduct experiments that could harm the participants (Grodin 1992). What these writings have in common, and share with the Pythagorean Cult, is a conclusionary, warrantless approach to moral reasoning: "Much of the literature is in the voice of exhortation (and occasionally

sanction) rather than explanation. Detailed analyses of problems are rare, and the elaborate reasoning of moral philosophy almost nonexistent" (Jonsen, 1998).

In one of the towering ironies of recorded history, the earliest steps to codify medical research ethics in law came to pass within the boundaries of modern-day Germany, in Prussia. A series of developments marked the evolution of government regulations upon medical research that were in some ways more restrictive, and in other ways more flawed, than the Nuremberg Code. In 1891, the Prussian minister of the interior issued notice that researchers were not to inject tuberculin into prisoners unless they consented to the procedure (Vollmann & Winau, 1996).

Seven years later, in 1898, a small-scale precursor to the Nuremberg proceedings was uncovered: authorities discovered that a researcher was conducting repulsive experiments without the knowledge of his participants, and were forced by public outcry to punish him and concoct rules to prevent subsequent recurrences. Albert Neisser, a professor of venereology at the University of Breslau, had been injecting a serum processed from patients with syphilis, mostly prostitutes, into non-syphilitic patients, also mostly prostitutes, to see if they developed syphilis. Some did, and he concluded that his “vaccination” trial had been a failure. Neissler did not tell the recipients of the injections what they were, or what his purpose was. (Meyers, 2000)

Word of Neissler’s experiments reached the newspapers, and press coverage of his research sparked public outcry. Although most physicians took Neissler’s side, the Prussian royal prosecutor pursued the case, and the Royal Disciplinary Court ruled that regardless of Neissler’s expert opinion on the merit of the research, he should have obtained the research participants’ consent before proceeding (Vollmann & Winau,

1996). Two years later, the Prussian government adopted rules limiting hospitals and clinics to diagnosis, therapy, and immunization, forbidding experimental procedures conducted on patients who "had not given his or her unambiguous consent" after "proper explanation of the possible negative consequences" (Meyers, 2000, p. B03). Unfortunately, the directives had no enforcement mechanism, and thus, no binding force (Meyers, 2000).

In 1916, in America, Harvard physician Walter Cannon took inspiration from the Prussian case and subsequent rules, and petitioned the AMA House of Delegates to adopt an informed consent requirement for its code of medical ethics. The general sense of American physicians and researchers was that such matters should be left to the discretion, and conscience, of individual researchers, and the proposal was never brought to the floor for debate (Katz, 1996).

Back in Germany, the press continued to muckrake the medical profession, and a series of scandals involving medical research generated more and more pressure to tighten the restrictions (Grodin, 1992). In 1931, on the eve of the Nazi party's ascent to power, the code was updated, requiring researchers to keep records that they had followed informed consent procedures for each research participant, and holding directors of clinics accountable for lapses (Vollmann & Winau, 1996). However, as with the 1900 code, the 1931 code still had no enforcement mechanism, and made little difference in actual medical research practice in Germany (Grodin, 1992). In 1933, the new Nazi regime passed a comprehensive anti-cruelty law protecting animals. Besides the rather twisted reasoning of protecting animals while torture and murder of humans was fully sanctioned, the 1933 law also increased the pressure to experiment on humans,

by placing an onerous set of fully enforced regulations on any biomedical experiment on an animal, which had the effect of eliminating most animal experiments (Grodin, 1992).

By the time war broke out, any talk of protecting human subjects had been silenced, not just in Germany, but all over the world (Moreno & Lederer, 1996). With most nations raising armies by conscription, and also conserving vital war materials by requiring citizens to participate in food and consumer goods rationing programs, there existed a widespread attitude that everyone had to contribute to the war effort, and patients and prisoners who subjected themselves to experiments were simply doing their part. (Jonsen, 1998)

The road to the Nuremberg medical trial

Two weeks into 1942, the Allies released the St. James Declaration, which called for punishment of Nazi officers for wartime atrocities (Smith, 1977). By autumn, the United Nations War Crimes Commission had been formed, with the Soviet Union declining to participate, and had begun collecting evidence (Smith, 1977). For a time, some officials in the American and British government urged downplaying the possibility of punishment for war crimes, warning that such threats might result in reprisals against Allied prisoners of war (Smith, 1977). However, by 1944, with the German war effort collapsing, that resistance similarly collapsed, as the greater threat now seemed to be that Nazi officers might resort to scorched earth tactics to take revenge on the forces that were about to defeat them, tactics which might include massacres of Allied POWs. (Smith, 1977)

The decision to punish war criminals only after successful prosecution before a tribunal was not free from controversy. At first, Churchill and Stalin both favored

summary execution. At one meeting, Churchill suggested making a list of the twenty-five or one hundred most notorious Nazi officials and simply shooting them. Stalin joked that it was a good start, but that the number should be fifty thousand (Meltzer, 1999). Within the American camp, that approach also found favor with some parties. Henry Morgenthau, Roosevelt's Secretary of the Treasury, received documents from the working group that was planning for reconstruction activities following the end of the war, and took a firm stance that their approach was too lenient and failed to punish the Germans for the devastation they had unleashed on Europe and the rest of the world. He proposed that as far as punishment went, a good start would be to compile a list of known war criminals, so that as American forces advanced and took such officials into custody, they could shoot them on the spot. At first, Roosevelt agreed with Morgenthau about the excessive leniency of the reconstruction proposals, and seemed to be in danger of accepting the combined advocacy of one of his cabinet members and two of his allies. However, his Secretary of War, Henry Stimson, strongly opposed Morgenthau's position, and offered the idea of a war crimes trial as a compromise (Smith, 1977). The proposal met resistance initially, because it would keep a large American presence in Europe much longer than Morgenthau's plan, but Stimson assigned one of his staff attorneys, Murray Bernays, to draw up a blueprint of how the trial would work, and the document Bernays produced persuaded Roosevelt that it was the best course of action (Smith, 1977). Churchill and Stalin disagreed, and Stalin proposed a further compromise that the trial proceeding could be just a sentencing proceeding, stipulating guilt but deliberating on a proper punishment (Rosenbaum, 1993), but eventually they agreed to support the trial.

The Nuremberg proceedings did not operate like a well-oiled machine. There were logistical problems, unexpected legal difficulties, and even the problem of clashing egos and excessive ambition. On the eve of the first trial, Bernays wrote:

> As usual in this bloody mission it's snafu, because there's no organization, no control. At bottom of the whole thing is the fact the mission has been from the beginning infested with self-seeking competition for publicity; for cushy assignments with the least possible to do and the most to be got out of it; and having started at the very top a situation like that spreads and becomes a general infection (Conot, 1983, p. 25).

While plans to conduct specialized trials subsequent to the trial of major war criminals were laid early on, the original framework did not include a trial for doctors. However, once the camps were liberated, and evidence of the experiments came to light, the doctors' trial was added to the docket in the lead position following the major trial (Moreno, 1997b). Originally it was believed that the doctors' trial would be an uncomplicated, open-and-shut case that could be completed quickly (Moreno, 1997b), but ultimately, the proceedings lasted 139 days, from December 1946 to July 1947. The court considered 1500 documents, and the testimony filled a transcript that ran more than eleven thousand pages (Marrus, 1999).

There is ample evidence that this unexpected complexity overwhelmed the preparations that had been made for the trial. It was carried out by the Army (Grodin, 1992) featuring a staff of attorneys that had no particular expertise in medicine (Marrus, 1999). The number of defendants charged was determined not by the severity of crimes, but by the amount of space in the trial chamber (Marrus, 1999). Telford Taylor, the chief

prosecutor, had been a key player in the first Nuremberg trial, and was desperate to return home to his family, so as an enticement to stay, he was promoted to General. This strained relations between Taylor and the Army personnel conducting the trial, as they saw the rank of General as the culmination of a career in the military, not a political reward for taking on one difficult task (Persico, 1994). The cumulative effect of these problems left the impression with many observers that "the Doctors' Trial, as the first of these, in particular – had a haphazard, improvised character" (Marrus, 1999, p. 110). The inefficiency also is evident in the outcome: more than twice as many defendants were acquitted (seven) as the average for the other trials (three) (Marrus, 1999).

Ultimately, the Tribunal was unable to find adequate direction from the codes of medical research ethics then in existence. Therefore, they wrote their own. In the verdict, before announcing their findings on the charges, the judges announced ten principles, the Nuremberg Code, which they described as "basic principles [that] must be observed in order to satisfy moral, ethical and legal concepts" (Beals, 1947, p. 181). The first principle began, "The voluntary consent of the human subject is absolutely essential" (Beals, 1947, p. 182), and went on to detail all the conditions that must be met for a medical researcher to ensure that the participant's consent is voluntary and informed. Other principles forbade researchers to conduct any experiment that probably would harm the participant, required researchers to allow the participant to withdraw at any time, and described other rules and procedures to safeguard the core principle of informed consent. While the text for this study is the entire proceeding at the Nuremberg Medical Trial, it is this portion of the verdict, known as the Nuremberg Code, which is the most well known residue of the event.

The road from Nuremberg

The end of *United States vs. Karl Brandt, et al.,* did not signal the end of the Nuernberg Military Tribunal's work, but it perhaps signaled the beginning of the deflation of expectations for the entire project. Robert Jackson, the Associate Justice of the United States Supreme Court who prosecuted the heads of state trial, wrote to President Truman that a sustained commitment to untangle the Nazi infrastructure by trying all of its pivotal players,

> …must be factually authentic and constitute a well-documented history of what we are convinced was a grand, concerted pattern to incite and commit the aggressions and barbarities which have shocked the world. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. (Marrus, 1999, p. 107)

The doctors' trial was the first to apply the precedents set at the heads of state trial, and the first to follow in its procedural footsteps. Thus, its planners hoped that it would turn Nuremberg from an event into an institution, would demonstrate that the project had outlived the headline-grabbing proceeding presided over by a panel of judges from all Allied nations (Annas & Grodin, 1992). However, an intervening factor stemmed whatever limited potential the case against Karl Brandt and his co-defendants had: the backlash against the first Nuremberg trial emerged, and began its slow spread.

It began as street-level talk among legal commentators and philosophers. Reinhold Niebuhr led the charge with a procedural line of argument questioning the propriety of the trials. In a January 1946 essay, Niebuhr wrote, "One of the saddest

aspects of human victory is the inevitable taint with which victorious nations tarnish the justice of their cause by the manner in which they exploit their victory" (Bosch, 1970, p. 122). He went on to discuss the Allied forces' own dirty hands in the crimes being prosecuted, and the impossibility of providing the appearance of justice to the defeated so long as the victors were the prosecutors and judges. Hannah Arendt, writing to Karl Jaspers, drew a more pragmatic objection, summarizing the reaction of many in the Nuremberg spectators' gallery by dismissing the trial as dwarfed by its defendants: "…this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug" (Kohler & Saner, 1992, p. 54).

Among the legal functionaries who expressed disdain for Nuremberg were two of Jackson's fellow justices on the United States Supreme Court. William O. Douglas wrote that "No matter how many books are written or briefs filed, no matter how finely the lawyers analyzed it," the trial was still an *ex post facto* definition and punishment of a crime. Thus, "Goering et al deserved severe punishment. But their guilt did not justify us in substituting power for principle" (Kennedy, 1955, p. 216). Near the end of his career, Douglas would drop his detached, juristic tone and speak more freely: "I thought at the time and still think that the Nuremberg trials were unprincipled. Law was created *ex post facto* to suit the passion and clamor of the time" (Reisman & Antoniou, 1994, p. 334) By contrast, from the moment the Nuremberg project took shape, Chief Justice Harlan Fiske Stone showed far less restraint in his remarks: "So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, . . . I dislike extremely to see it dressed up with a false

façade of legality," and, perhaps mingling his legal opinion with his personal dislike for his fellow Justice:

> Jackson is away conducting his high-grade lynching party in Nuremberg. . . .I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas. (Mason, 1968, pp. 715-716)

Asked to serve in a ceremonial role, to swear in the United States' courtroom officers for the trial, Stone flatly refused (Mason, 1968).

The public profile of the issue was raised, however, when one of the leading voices of the loyal opposition throughout the war, Senator Robert Taft, made all of the preceding arguments on the record, for publication, and added in a taste of Cold War paranoia that had not yet blossomed into full McCarthyist splendor. In a 1946 speech published in its entirety in the New York Times the next day, Taft made a passionate case against the tribunal:

> The trial of the vanquished by the victors cannot be impartial no matter how it is hedged about with the forms of justice. I question whether the hanging of those, who, however despicable, were the leaders of the German people, will ever discourage the making of aggressive war, for no one makes aggressive war unless he expects to win. About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice. The hanging of the eleven men convicted will be a blot on the American record which we shall long regret. In these trials we have accepted the Russian idea of the purpose of trials – government policy and not

> justice – with little relation to Anglo-Saxon heritage. By clothing policy in the forms of legal procedure, we may discredit the whole idea of justice in Europe for years to come. In the last analysis, even at the end of a frightful war, we should view the future with more hope if our enemies believed that we had treated them justly in our English-speaking concept of law, in the provision of relief and in the final disposal of territory. (Kennedy, 1955, p. 218)

The speech broke controversy over Nuremberg into the public eye, if only briefly. Taft expressed publicly a view held by a minority of Americans, but a sizable one. While few expressed concern over legal improprieties such as prosecuting the Nazis for *ex post facto* crimes, all but a very few agreed that a trial didn't seem the appropriate response (Bosch, 1970), perhaps adopting Arendt's view that the crimes simply outsized the proceedings. Only a decade later, when John F. Kennedy singled out Taft as one of his courageous exemplars in his Pulitzer-prize winning *Profiles in Courage,* had the concerns of a formidable minority spread sufficiently to take root in the historical context of Nuremberg. Kennedy followed his account of Taft's speech and the ensuing controversy with the claim that "These conclusions are shared, I believe, by a substantial number of American citizens today" (1955, p. 217).

Indeed, today, Nuremberg has failed to take its place as a noble, impeccable innovation in international law, as its backers had hoped it would. Critics of Nuremberg nearly equal, in number and respect, those who endorse it (Bass, 1999). Recent commentary from legal scholars has painted Nuremberg as "a patchwork of political convenience, the arrogance of military victory over defeat, and the ascendancy of American, Anglo-Saxon hegemony over the globe" and "the model of the triumph of

convenience over principle, the subordination of justice to politics, and the arrogance of might over morality" (Mutua, 1997, pp. 170, 172), while contemporary commentators from outside the legal community insist that

> …the winners were producing a false image of justice, a theater of the absurd, as if the peoples of the world had created a government and passed laws against war and wartime acts of cruelty. . . . There has been no end of war and barbarism; Nuremberg deterred nothing (Frankel, 1995, p. 48).

What Stimson, Roosevelt, Truman and Jackson had hoped would become a thorough cleansing of German public discourse from the taint of Nazi ideas, instead sagged and collapsed under the weight of both criticism and Cold War necessity (Bush, 2002). The Soviet Union would never consent to another international tribunal, and the risk of alienating Germany, most of whose citizens were appalled by the Nuremberg proceedings (Friedrich, 1999), brought the project to a halt, and resulted in the early release of most of the Nuremberg defendants who had not been executed immediately after the trial (Bush, 2002). Thus, the early hope that the Nuremberg Medical Trial would be one of many milestones in a legal crusade to expose the roots of the Nazis' rise to power died on the vine. Instead, the doctors' trial itself stood out among all the Control Council trials as the only one to produce a lasting legacy, the only one to yield legal principles that would continue to play a powerful role in channeling controversy more than half a century later.

Medical research ethics after Nuremberg

As the postwar reconstruction period drew to a close, and people became adjusted to life without a world war, the newly crafted Nuremberg Code was put to the test. In the

first two decades, two trends were discernible. Military-sponsored research was accompanied by a deliberate attempt to adhere strictly to the Nuremberg Code in all research, activities, while civilian research drifted further and further away from its dictates. The civilian doctors used the vast array of new treatments discovered during wartime in novel ways, trying many different approaches on patients with difficult-to-treat conditions, often when such procedures were not accepted medical practice, which resulted in a blurring of the roles of 'patient' and 'research participant' (Moreno & Lederer, 1996) In both military and civilian research, the explosion of new discoveries escalated the benchmarks of expertise in the biomedical field: it became more difficult and more labor-intensive to become credentialed as an expert, and an attitude that this enhanced expertise was the proper safeguard on scientific research lay beneath discussion of research ethics (Brandt & Freidenfelds, 1996). Eventually, public pressure would result in the imposition of greater accountability on all phases of biomedical research.

In the early nineteen-fifties, one of the fastest growing areas of research generally was the study of atomic power, and the study of the effects of radioactivity on human bodies led the biomedical field. This research was overseen by the Atomic Energy Commission (AEC), which promulgated informed consent standards within months of the end of the Nuremberg Medical Trial, first requiring doctors to obtain informed consent, and then extending that regulation to require them to document the patient's consent (Moreno & Lederer, 1996). In 1951, advisory groups made up of physicians, led by the Committee on Medical Sciences, began objecting to these procedures, arguing that the best guarantee of ethical conduct was the judgment and conscience of the researcher, not some legalistic, mechanical set of rules imposed by a tribunal of military officers. The

AEC overrode these complaints and kept the rules in place (Moreno & Lederer, 1996). Unfortunately, the actual memoranda setting out the full requirements of ethical research were considered part of the nation's atomic energy secrets, and thus were classified top secret, which meant that while researchers were given forms to fill out and instructions for completing them properly, researchers in other, nonmilitary research were deprived of the documents setting forth the AEC's standards for ethical use of human participants (Jonsen, 1998).

On the civilian front, as previously discussed, researchers had steadily been eroding some of the boundaries set out in the Nuremberg Code. In 1959, these efforts became systematic and organized. The National Society for Medical Research empanelled a "Committee on the Evaluation of the Nuremberg Experimental Principles," which issued a call for consent to be presumed, and for third party consent to be sufficient for patients who were incapacitated (Moreno, 1997a). In 1961, the Army, in renewing a set of research contracts with Harvard, inserted a clause which had not appeared previously. The clause said that the requirements of the Nuremberg Code governed any research carried out under the contract. Harvard president Joseph Gardella objected, saying that the Nuremberg Code had been formulated solely to define crimes committed by Nazis, and also arguing that the code was impractical, because it required explaining complex medical phenomena to people whose capacity was, in many cases, already diminished by illness. (Moreno, 1997a) In 1964, the World Medical Association adopted the Helsinki Declaration, which effectively superseded the Nuremberg Code and rendered it a dead letter. The Helsinki Declaration placed informed consent in the middle of its text, rather than at the beginning, and surrounded it with phrasing that made it the

responsibility of the researcher, rather than a requirement to be enforced through external oversight (Jonsen, 1998). The Declaration also divided research into categories of "nontherapeutic" and "therapeutic," and established that, with research conducted on sick patients, informed consent was optional, and left up to the best judgment of the researcher (Annas & Grodin, 1999). This set the trend, and many specific applications of informed consent were, until the nineteen seventies, only recognized as customs, enforced informally by the whim of the researcher, rather than by rules: obtaining consent from parents before experimenting on their children, limiting research on prisoners, etc. (Moreno, 1997b).

However, as the nineteen sixties reached its midpoint, some countervailing social trends collided with the medical community's push for self-regulation. As with Prussia in the nineteen twenties, the American media discovered that scandals in medical research make for good, prurient horror stories. Examples included an attempt to transplant a chimpanzee's kidney into a human being (Moreno, 1997b), and the birth defects resulting from doctors' prescription of the anti-nausea medication Thalidomide for pregnant women (Yemma, 1996). Simultaneously, the climax of waves of rights-based social movements provided a public who were primed to translate their horror at medical research gone awry into demands for change (Brandt & Freidenfelds, 1996). Also, government proposals to help ease the price of medical care met stiff resistance from doctors, who warned of the dangers of "socialized medicine," but in the process generated for themselves a public image of being uninterested in the financial woes of their patients, which fed the growing distrust of the medical community (Jonsen, 1998). In 1966, Surgeon General William H. Stewart adopted a requirement of Institutional

Review Board (IRB) approval for any human participants research sponsored by the National Institutes of Health (NIH) (Moreno, 1997b).

Possibly the biggest scandal in human participant research in American history came to light just a few short years later in 1972. In Macon County, Alabama, physicians conducting research under the auspices of the United States Public Health Service had been withholding treatment from African-American sharecroppers suffering from syphilis for forty years, since the study's inception in 1932 (Jones, 1981). This gross violation of research ethics had begun before the Nazis came to power, had continued through the Nuremberg Medical Trial, and had only been halted when exposed to widespread scrutiny in the nineteen seventies, almost a quarter century after Nazi physicians were put to death for their participation in unethical medical experiments. In the aftermath, a federal commission to evaluate the Tuskegee scandal was empanelled, and released its findings in 1978, which were codified as federal regulations by the Department of Health and Human Services in 1981, and finally applied to all human-participant research receiving any federal funding in 1991 (Moreno, 1997b). Just shy of the fiftieth anniversary of the Nuremberg Medical Trial, the requirements of the Nuremberg Code had finally been applied as externally enforced rules, as the Nuremberg Tribunal originally envisioned.

The mixed legacy of the Nuremberg Medical Trial

Despite its rocky proceedings and checkered past, the Nuremberg Medical Trial, and its product, the Nuremberg Code, are invoked with reverence by writers in the field of medical ethics. In 1952, five years after the trial, Pope Pius addressed the International Conference on the Histopathology of the Nervous System, and chose as his subject praise

of the Nuremberg Medical Trial (Jonsen, 1998). In a seminal study of the sociology of medical institutions, Fox (1959) found that when the staff was asked about ethical dilemmas, they would paraphrase back the provisions of the Nuremberg Code faithfully. Today, scholars of medical ethics speak of the trial and the code in terms communication scholars would reserve for the Gettysburg Address: "The Nuremberg Code and the memory of the Nazi doctors' trial animate and permeate modern thinking about regulation of human experimentation" (Garnett, 1996, p. 469). The Nuremberg Code "remains the most authoritative legal and ethical document governing international research standards," and is "one of the premier human rights documents in history" (Annas, 1996, p. 301). It is "a bulwark of human decency in the pursuit of scientific knowledge" (Moreno, 1997b, p. 31), and "one of the leading influences on subsequent development of international and national codes governing the ethical aspects of research" (Perley et al., 1992, p. 149). The National Institutes of Health refers to the Nuremberg Code as the "Ten Commandments of Nuremberg" (Glantz, 1992). When committees are convened to draw up new documents regarding human participant research ethics, it is standard practice to provide them with a copy of the Nuremberg Code (Perley et al., 1992). And recently, when the ombuds officer of an AIDS medication research programme in a Florida prison was answering charges of unethical conduct, he began his defense by observing, "We always attempt to exceed the guidelines of the Nuremberg Code" (Freedberg, 2000, p. 1). References to the Nazi doctors and the Nuremberg medical trial are ubiquitous in medical literature.[1]

[1] In the Lexis-Nexis Academic Universe database, in the "Medical & Health Journals" library, a search conducted on March 30, 2003, for the terms "nazi or nuremberg or concentration camp!" produced three hundred ten hits for the previous ten years. By comparison, a search for the term "hippocratic" for the same period produced only two hundred twenty-three hits. Sorted for relevance, the top fifty hits included articles

Yet, the warrant for this praise is less than clear. To begin with, the apologists for the Nuremberg Medical Trial can't seem to agree on where its significance chiefly lies. It is something of a Rorschach test, drawing different responses from many different interested parties. For some, its chief significance is historical: it is claimed to be the first international codification of the rights of human participants in biomedical research (Perley et al., 1992; Katz, 1992). For others, the elevation of informed consent is its primary contribution: "its most memorable command was that, in medical research, the voluntary consent of the human subject is absolutely essential" (Garnett, 1996, pp. 469-70; also, Moreno, 1997b). Still others assert that its primary message is a renewed emphasis on the Hippocratic requirement of beneficence:

> . . . the ultimate enduring value of the code is not in its detailed provisions but in its approach to human dignity. . . . Scientific progress is important, but the human subject comes first. (Glantz, 1992, p. 199; also, Yemma, 1996)

And some take a broader view, calling attention to overarching philosophical principles:

> The Nuremberg Tribunal attempted to pave the way for a reconstituted moral vision. The source of that vision need not lie solely in a legal framework derived from the criminal law. The Nuremberg Code is prefaced by the judges' statement: *"All agree,* however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts." It is this vision that makes the

---

about medical treatments used on soldiers in wartime, fetal tissue research, human subjects research codes and institutional review boards, separation of conjoined twins, emergency room treatment, research on mentally ill patients, research with children/juveniles, AIDS clinical trials, research on prisoners, the history of medical ethics, research on the terminally ill, the economics of health care, UNESCO biotechnology policies, assisted suicide, potential liability in research, cloning, and cadaver research.

> Nuremberg Code the cornerstone of modern human experimentation ethics. (Grodin, 1992, p. 140, emphasis in original)

Mariner offers a different moral: "The legacy of the Doctors' Trial at Nuremberg is that knowledge is not the supreme value" (1992, p. 296). Perhaps the best evidence of the malleability of the Nuremberg experience is its use by opposing speakers: when one physician invoked Nuremberg to criticize Dr. Jack Kevorkian's advocacy of assisted suicide, calling his claims unacceptably similar to Nazi arguments debunked at Nuremberg (Szalewski, 1996), Kevorkian also cited Nuremberg in his retort that his experiments follow the principle of informed consent to the letter, and are more ethical than research sanctioned by the FDA (Kevorkian, 1997).

And, of course, some voices are raised in dismissal, or even denunciation, of the Nuremberg Medical Trial. Since its inception, a strong current of opinion in the medical field has rejected the Code as perhaps necessary to justify punishing Nazis, but inapplicable to American researchers, whose scruples (it is argued) are clearly more refined that those of the Nuremberg defendants (Moreno, 1997a; Katz, 1992). Some physicians also argue that the Nuremberg crimes were a product of wartime extremity, and just as many other rules and laws are modified for wartime conditions, the Nuremberg Code itself is a specialized wartime code, and is unnecessary in peacetime (Moreno, 1997b). What's more, many medical researchers report that the Code's requirements are cumbersome and retard important work that saves lives, especially the requirement that informed consent always be *attained,* not merely attempted (Perley at al., 1992). In particular, if the Code were followed to the letter, some argue that all psychiatric and pediatric research would necessarily cease (Moreno, 1997b). It was this

motive that drove the World Medical Association to adopt the less restrictive Helsinki Declaration in 1964, rendering the Nuremberg Code obsolete before it had seen two full decades (Katz, 1992). One commentator concludes,

> The Code stands tall in memory, but its influence has never lived up to its aims . . . . The code reflected neither the practice nor the ideals of scientists, but only those of a victorious and self-congratulatory moment, and therefore, never really had a chance. (Garnett, 1996, pp. 470, 472)

These objections have translated into a dismal compliance record in recent years. One recent survey of researchers in the United States and overseas found that most expressed the belief that informed consent is not a way to protect patients, but is just a way to fend off lawsuits (LaFraniere, 2000). In a break from the previous commitment to the Nuremberg Code among military officers, the threat of biological attack in the 1991 Persian Gulf War prompted a program to experiment with counter-biological warfare drugs on soldiers without their consent (Annas & Grodin, 1991). A study of schizophrenia conducted by researchers at UCLA produced charges that they were taking participants off their medication and deliberately producing relapses in order to study them (Garnett, 1996). In 1997, the Food and Drug Administration (FDA) issued regulations permitting emergency room personnel to use experimental treatments on unconscious patients without obtaining consent (Kevorkian, 1997). And in September 1999, research into gene therapy sponsored by the University of Pennsylvania resulted in the death of one eighteen year old participant (Meyers, 2000), and a subsequent study by the NIH concluded that the researchers had been delinquent in reporting the risks of the study as noted with previous participants (Freedberg, 2000).

In addition to its questionable effectiveness, the Code has come under criticism for its ethnocentrism. It shows an obvious bias for individual autonomy and individual rights, which is not a primary value in many cultures to the same degree as in the West (Perley et al., 1992). It contradicts some teachings of Islam, including an instruction in the Koran for doctors to hide patients' condition from them in certain circumstances (Macklin, 1992). And many doctors overseas report their perception that Americans in particular are too obsessed with their rights, and have an exaggerated fear of doctors (LaFraniere, 2000).

Finally, some question whether the Nuremberg Trial itself had any particular significance. It is argued that the atomic bombs at Hiroshima and Nagasaki, rather than the Nuremberg Medical Trial, were the catalyst that triggered the growth in biomedical ethics scholarship in the ensuing decades (Stevens, 2000), that because the trial was conducted solely by the United States, it has no worth as an international precedent (Drinan, 1992), and finally, to borrow Kevorkian's diagnosis, its message is inapplicable to a world suffering from "ethical anomie, philosophical befuddlement, and the hypocrisy that today permeates every aspect of our so-called civilized world" (Kevorkian, 1997, p. B9).

And some refuse even to admit that the proceeding was well intended. United States Chief Justice Harlan Stone called all the Nuremberg trials a "high class lynching party" (Meltzer, 1999). Another commentator concludes, "From the courtroom contest as well, probably nothing was gained . . . . The Doctors' Trial, therefore, offered little international perspective on its subject" (Marrus, 1999, p. 14). Its detractors are vocal, its failings are many, and even its supporters are divided on what role the Nuremberg

Medical Text plays in the evolution of bioethics. So, what can one make of this grand historical anomaly?

The mismatch between the reverence afforded to the historical memory of Nuremberg and the striking and widespread noncompliance with its principles, are the markers pointing toward the value of analyzing communication at the Nuremberg Medical Trial. When General Taylor stepped to the podium on December 9, 1946, the simple, straightforward trial he promised the tribunal was what he and his team believed they could deliver. Apparently unaware of the chaotic and incoherent state of medical research ethics literature to that date, they felt sure the extremity of the doctors' actions would guarantee an open and shut case, never imagining that doctors might have devoted so little attention to codifying ethics in prior ages that few if any of the defendants' deeds could be matched up with an ethical stricture forbidding them. Even after the trial, the medical community continued to press for more freedom of action than the Nuremberg Code had left them, and resisted its requirements in their governing documents and in their scholarship. Almost sixty years later, even though virtually all medical professionals instantly recognize references to Nuremberg, and a sizable segment of that population profess to revere the trial and the Code as high moral reasoning, the binding force of the Code has been reduced to tatters. If it still exerts force, it does so by keeping a controversy alive, by refusing to permit doctors to succeed in making the argument that human subject research ethics is a relatively unimportant concern, that doctors can be trusted to do what's best for their patients, a set of arguments that largely held sway before Nuremberg.

In this chapter, I have argued that the doctors' trial at Nuremberg merits study as a communicative phenomenon, because the issues facing the officers of the court were more intertwined with effective and appropriate communication than other types of human activity. I have situated the Nuremberg medical trial in its medico-historical context by explaining how it came to occur, how unexpected shifts of public and professional opinion actually heightened its significance, and how it was received and incorporated into the conventional wisdom of the medical field. The chapters that follow will address the following questions: What is the legacy of the Nuremberg Medical Trial for the study of communication? How, through argument, did all parties to the trial shape the contemporary understanding of Nuremberg outlined in this chapter? What might have motivated choices in content and choices in presentation at the trial, and what did the interplay between those choices reveal? If Nuremberg embedded the human subjects research ethics controversy in the fabric of medical knowledge for the foreseeable future, how did it do so, and what argumentative exchanges and sorties between both sides, played into that longevity? And, finally, what role did the tribunal play?

The next chapter will justify further the application of a communication studies perspective to this text. It will identify and explore the performative element in argument, and more specifically in legal communication, it will introduce the concept of collective memory, and it will justify analyzing the Nuremberg Medical trial through the filter of those concepts.

CHAPTER TWO

LAW, CONSTITUTIVE ARGUMENT, AND COLLECTIVE MEMORY

When General Taylor stepped to the podium and began to speak, he executed a misdirection trick that would have made Harry Blackstone jealous. While all of the world waited to see the evidence and find out what had happened, Taylor and his team of prosecutors had already worked out a strategy for its selective release, and even more deliberate exclusion. While attorneys around the world waited for the tribunal's verdict, forces were already at work that would lead to the verdict being a legal dead letter within a few years of its pronouncement. The most significant legacy left by General Taylor, Dr. Karl Servatius, Judge Walter Beals, and all the other communicators at the Nuremberg Medical Trial, was not evident at the time, and would not become evident for over fifty years.

This chapter outlines this study's approach to the Nuremberg Medical Trial text. It begins from the premise that legal communication, far from being "all talk and no action," acts in a number of ways. Legal argument *performs,* putting communicators in all camps into roles, forcing them to tread a balance between following a script and improvising in response to another's unexpected move. These performances both reveal and obscure, both reshape and impede changes to, the physical world and the existing social order. In so doing, legal argument postulates a framework of relationships as a byproduct, a penumbra, of its direct message: it therefore performs a *constitutive* function, building elements into its rhetorical audience for subsequent use. Particularly, these constitutive moves gather and filter accounts of experience, selecting some to

include in a dominant frame of collective memory, and working to exclude others. The frame, a work always in progress, both shores up the constitutive power of law, and maintains relationships between actors under the law's dictates. These concepts fit well with the Nuremberg Medical Trial and Nuremberg Code, because the medical community has adopted those texts as artifacts of collective memory, as frames of interpretation that direct attention to, and filter evidence of, the importance of the experiments in concentration camps for the medical community.

Law as performative communication

Among the seemingly endless array of complaints that people outside the legal profession have about courtroom proceedings, one of the dominant impressions lay participants in a trial are left with is, "It's all talk and no action" (Fletcher, 1996). During the 1999 impeachment trial of President Bill Clinton, a spectator named Richard Llamas expressed the frustration many Americans felt about the interminable proceedings when he shouted, from the observers' gallery in the Senate chambers, "Good God almighty, take the vote and get it over with!" (Johnson, 1999, p. 2B) And yet, law talk *is* action. People shape the physical world, and order its social configurations, in very real ways, by employing the vocabulary and commonplaces of law.

Law talk's influence through its *constative* dimension is substantially more indirect, more attenuated, and less interesting, than its influence when viewed as a *performance* (Austin, 1962). By virtue of its structure, the legal system does not lend credence to the notion that legal claims can be understood constatively, as reliably true or false: ladders of appellate judges may knock legal premises in and out of bounds as swiftly as the filings can roll off the laser printer. But the *illocutionary* and

perlocutionary force of legal communication, the potential of legal pronouncements to set events in motion, or impact the relationship between speaker and hearer, provide a gold mine for scholars of communication to understand how messages impose order on the world. If one takes a static view of law, this statement is neither controversial nor particularly enlightening: viewed simply as a series of propositions, law clearly fits within Austin's framework, and many of Austin's illustrations of illocutive force are legal proclamations. According to Kurzon (1986), "the legal performative is considered the most straightforward, trouble-free example of the performative utterance" (p. 1). But if the *process* by which those proclamations are engineered is the object of study, then the performative element is less obvious and less well understood. Verdicts, judgments, court orders, writs, warrants, all work changes in the world by announcing a difference in legal status; but the arguments leading up to those moments of closure also yield not just constative meaning, but illocutive and perlocutive meaning as well.

Communicators in any situation at times reinvent the medium in which they communicate, typically with an unexpectedly effective message that violates every convention then practiced by other communicators, but such reinventions are exceptional. In argument, any conventions are temporary constructs which come under constant questioning, whether by attorneys, scientists, deliberators, debaters, partners in a relationship, or academics at a convention. What argument is being made? What requirements of proof, soundness and falsifiability must it meet? The fluid nature of the argumentative framework permits it to accommodate times of epochal change, because its participants *perform* communication, referring to their script, but improvising in response to their fellow arguers, rather than simply constructing and delivering messages.

Schuetz and Snedaker (1988) argue that when scholars approach legal discourse as a performance, they focus more attention upon relationships between participants, and view the text as one whole message forged in controversy by opposing sides, constructed dynamically by multiple authors through the crucible of disagreement, *not* collaboration, rather than separating the message into a pairing of discrete strategies. As a play is understood as both the sum total and intermix of all the actors' performances, and as a group dance consists not only of each performer's performance, but their spacing, arrangement, and syncopation, so legal performances are fully understood only when the various messages are arranged into a total message, one that is not essentialized or reduced, but includes contradictions, paradoxes, and irrational claims. When communication is understood as *performance,* then, it is understood as a phenomenon that is engineered and carried out according to a strategy or plan, a work whose task is achieved in its process, perhaps more than, or even instead of, its product.

The performative elements of law can be grouped into two categories, which correspond to those of the actor and the surgeon: law *reveals,* and it also *reshapes*. In *revealing,* it provides its audience with access to information, insight, understanding, a myriad of clues that might help to explain any number of puzzles of human interaction. It also *reshapes,* by putting into place tangible changes that can be detected with the senses. However, since law is a tool in the hands of communicators, and since most legal proceedings are adversarial and involve a clash between opponents, it must also be said that the mirror images of the two performative elements are also products of law: it *obscures,* as well as revealing, and it also *impedes,* in addition to reshaping.

To begin with, law *reveals* much about the events surrounding the crime or cause of action. Legal proceedings assemble artifacts and testimony to aid triers of "fact" in compiling an official pronouncement of "what *really* happened." One might be tempted to label such claims as constative, but because they are shaped in controversy, because different eyewitnesses dispute one another's accounts, because different experts interpret different exhibits in varying ways, any truth value can only be a compromised and contingent one. In fact, both Hasian (2000) and Belliotti (1992) agree that the element of argument in legal proceedings provides a third way between capital-T truth and nihilism. The gathering of information into compilations that are available to any researcher interested in the facts of the case, even separate from its interpretation by the attorneys and judge, is both construction of a message and construction of an event. It detaches certain people, places, and items, from those that surround them, and *frames* them as an occurrence that must be judged, while containing the residue of uncertainty emanating from the losing side's evidence and arguments beneath the imposed closure of the legitimate verdict.

In addition to revealing much, legal communication also *obscures* much about the events which are grist for its operation. To begin with, "truth" in legal forums takes on some characteristics that would be unrecognizable to those not trained in its methods. First, when introduced as evidence, *all communication is taken literally*. Prince (1990) observes that when people communicate outside a courtroom, they have many different purposes for doing so, but on the witness stand, remembered conversations and relayed comments are often, if not always, treated as literally true and shorn of irony, humor, exaggeration, or other inputs of personality. An attorney attempting to defuse damaging

testimony may ask a witness if s/he could tell that the conversation included any of the above elements, but the attorney who can repeat to a jury loaded words spoken by a defendant, words shorn of all paralinguistic cues, obtains a powerful weapon. Second, *truth is treated as necessary and sufficient for decisionmaking*. Gaskins (1992) argues that rules of evidence are written from the beginning assumption that triers of fact need only to hear the "truth," stripped of all fripperies, in order to decide rightly. He notes that this notion does not account for the situatedness of hearers. Specifically, Pillsbury (1989) criticizes the legal system's energetic pursuit of *emotion,* for the purpose of purging it from decisions. Attorneys may fan a jury's emotion in specific, limited circumstances, but may be disciplined for doing so at any unauthorized moment or in any unauthorized fashion. And even if they perform their role perfectly, judges will follow with instructions to the jury advising them to put aside those emotions while deciding, and focus only on the evidence, the "truth." Third, *truth-value is bracketed pending judgment.* Tiersma (1999) observes that while people exchanging stories in nonlegal communication tend to proceed as though they were true, stories offered up in legal settings are held in abeyance as mere allegations while the trial proceeds, much as the claims of characters on a stage are adjusted and trimmed as a plot unfolds. Jurors may be instructed to disregard a witness's words entirely if a later ruling strips the testimony of admissibility. All of these manipulations and strainings at messages to square them into neat, acceptable evidence may be greeted with some skepticism and resistance by jurors, but the standards are laid before them as the parameters of their assigned task, and the claim that they do not exert substantial influence on deliberation would be an implausible one.

Beyond its manipulation of truth, legal communication also downplays the situatedness of auditors in several other ways. Tiersma points out that when a witness is being questioned on the stand, the underlying assumption is that the witness will answer with reference to an abstract, perfect body of "facts" which meet the test of "the truth, the whole truth, and nothing but the truth." He contrasts normal expectations of witnesses with the behavior of Australian aborigines on the witness stand, who openly confess that they are answering with what they believe the audience wants to hear. Scarry (1996) observes that virtually every message in a criminal trial re-labels the defendant: accusations create an accused, convictions create convicts, and those who receive sentences are the sentenced. Willard (1989) notes that such a labeling strategy permits prosecutors to "avoid the burden of rejoinder, as the Shiite, for example, eschews dialogue with ‘infidels,’ Sunni or Christian. By naming their opponents in a particular way, they deny the obligation to argue" (p. 117) Finally, White (1999) identifies the standard form of reasoning in law as analogical reasoning, regarding precedent, interpretation of evidence, explanation of key elements of a trial to a jury, and so forth. He argues that attorneys strain to draw comparisons, and downplay differences, between parties to a case and parties to other cases that advance the chances of a favorable outcome. Each of these three phenomena – the witness's presumed universal testimony, the labeling of defendants, and the constant deployment of argument by analogy – chip away at the irreducible uniqueness of persons and situations.

As was the case with the Nuremberg Code, in the previous chapter, a cursory look at the operation of legal proceedings may leave the impression that they are futile, unpromising sites of study. But again, a deeper look reveals that far more is at work in

the courtroom. Courts may stumble over their own procedures when trying to re-create the reality from before, but along the way they also create a reality *within* the courtroom that merits study. For Rourke (1997), judges and lawyers misconceive the power of their work when they think only of their speeches and documents as communicative. She argues that the *entire process* communicates, that the treatment of participants in legal disputes is a grand reflexive message about the persons and institutions involved. Fletcher (1996) adds that legal performances include costumes, such as police uniforms and judges' robes, and ritualistic paperwork that may contain utterly unnecessary information, but must be complete for legal proceedings to continue. Famed attorney Melvin Belli, defender of Jack Ruby and Jim and Tammy Faye Bakker, complained, "Time and time again I have told apprentices in my office that the moment they enter a courtroom they are on stage. What these youthful swains find difficult to realize is that they are on stage whether they are reciting lines or not!" (Bennett & Feldman, 1981, p. 116)

Legal communication also performs in the same sense that a surgeon *performs* an operation: it carries out modifications that are tangible and empirical. To begin with, legislation, court orders, police orders, all are pronouncements or writs that activate the efforts of affiliated people to secure compliance with their requirements. All may control the flow of wealth, the deployment of deadly force, or the pooled efforts of people not employed by the governing agency issuing the order. Soper (1984) observes that the struggle between legal communicators really is for control of the institutional power and legitimacy that acts directly upon the public, both with its claim to their allegiance, and even more tangibly with the sanctioned power it marshals.

Law, then, communicates, but it is hardly guilty of being "just talk, no action." Beyond the words on the page, beyond the dull echo of voices in a courtroom, there is much at work when legal messages are exchanged. Law displays both the local reality of a case and the broader reality of its systemic antecedents. It builds buildings, identities, and institutions, and yet holds them apart.

Constitutive functions of legal performance

As discussed above, legal argument frames what is known, what can be accepted as evidence; it channels the content of messages that exert influence on the material conditions of life. But beyond that, legal argument performs a powerful, extra-rhetorical function by cultivating expectations in the minds of potential audience members, by constructing different identities into which they can be combined as members of a community, for the purpose of persuading them to act. Austin and Searle both speak of the perlocutive element of a performative utterance, the influence exercised on hearers and the configuration of space for subsequent communicative encounters, but Maurice Charland (1987) explores the phenomenon in far greater detail. Building upon the work of Burke and Althusser, Charland describes the problem of understanding constitutive rhetoric as, "…attempts to elucidate ideological or identity-forming discourses as persuasive are trapped in a contradiction: persuasive discourse requires a subject-as-audience who is already constituted with an identity and within an ideology" (p. 134). Thinking out beyond traditional frameworks of rhetorical encounters as message encoded by sender and delivered to an audience already possessed of powerful beliefs, attitudes and values, Charland argues that "… we cannot accept the 'givenness' of 'audience,' 'person,' or 'subject,' but must consider their very textuality, their very constitution in

rhetoric as a structured articulation of signs" (p. 137). Just as an educator works at all times to prepare students for lessons, and prepare lessons for students, so Charland argues that *all* producers of rhetorical discourse work both ends of the model of communication to match message to receiver.

The linkages between constitutive *rhetoric* and constitutive functions of *public argument* are everywhere in Charland's work, and in the work of argumentation scholars. First, the process of identity construction more resembles an unfolding controversy, an oppositional dialogue played out over time, than a monologic message from speaker to audience. Charland observes that "… rhetoric of identification is ongoing, not restricted to one hailing, but usually part of a rhetoric of socialization." Speaker and audience build a relationship with one another through repeated encounters, much as arguers do. Furthermore, the most fertile seedbed for constitutive messages is the individual or group that experiences role tension, that is embroiled in conflict concerning the proper understand of one's role. Charland cautions critics not to leap to the conclusion that audiences are constituted into *stable* and *enduring* formations of identity, but rather that "… this world is not seamless and a subject position's world view can be laced with contradictions" (p. 142). The potential opened up by such tension is formidable: "These contradictions place a strain upon identification with a given subject position and render possible a subject's rearticulation. Successful new constitutive rhetorics offer new subject positions that resolve, or at least contain, experienced contradictions" (p. 142). Finally, constitutive message most often condense around a live and ongoing controversy:

> … the contradictions between discourses as well as the dialectic between discourse and a changing concrete world open a space for new subject positions.

> Tensions in the realm of the symbolic render possible the rhetorical repositioning or rearticulation of subjects (p. 147).

Other communication scholars have elaborated further on the nature of this controversy. Drzewiecka (2002) argues that constitutive rhetoric creates an identity that can incorporate individual difference and create conditions for coexistence and shared purpose among widely divergent people who share few character traits: "… constitutive discourse creates a particular collective identity to legitimate particular ways of collective life by transcending individual differences" (p. 3). Lake locates the phenomenon within *argumentative* construction of identity, explaining that individuals may shop from a marketplace of identity elements, but in each case give a measure of affiliation and loyalty to the constructed identity:

> …such inauthenticity is to be affirmed and embraced, not shunned, because this stance is liberating: attempts to preserve a natural culture are nonsensical and oppressive, interfering with "syncretism and parodic invention," holding persons hostage to a constraining "tradition" rather than freeing them to construct individual and collective identities out of multicultural resources (of which the young Russians who wear American jeans made in Korea are emblematic) (1997, p. 67).

Hazen and Williams concur that an overlooked, neglected function of argument is its utility in "…the creation, maintenance and change of collective identity (but also, necessarily, by implication, the creation, maintenance and change of individual identity through participation in – and identification with – various collectives)" (1997, p. v).

Charland identifies, in the construction of an identity target toward which subsequent messages can be aimed, the centrality of value cultivation: "Furthermore, and hardly surprisingly, the ultimate justification for these claims is the subject's character, nature, or essence. This is so because this identity defines inherent motives and interests that a rhetoric can appeal to" (p. 137). This parallels Perelman and Olbrechts-Tyteca's description of "epidictic [sic] argumentation" as preparatory to subsequent controversy, an undertaking to pave the audience's expectations with heightened "intensity of adherence to certain values," without making precise formal claims about particular issues (1969, p. 51). Others identify the meat of particular controversies as also performing constitutive functions as they are processed through argument. McKerrow and Bruner observe that "The arguments that one hears and that one expresses are a furtherance of that social act of constructing meaning, and hence identity" (1997, p. 56). Hazen and Williams focus upon the direct appeal for affiliation:

> "Better" "arguments of identity" (that is, arguments which function to constitute identity formation/transformations) are not per se those which are deemed more "rational" by traditional analytic standards (validity) but those which stimulate the individual's (or collective's) desire and willingness to associate, to "merge," to find consubstantiality, to identify. (Hazen & Williams, 1997, p. v)

Here argument's purging filter of mutual correction (Ehninger, 1970) loses much of its potency, as the strength of evidence and coherence of claim take second place to the attractiveness of the identity and community created in argument.

Although the attention to constitutive functions of communication, pursued by Charland and others who followed, is an important corrective to the preexisting model of

speaker and audience, it is not the exclusive discovery of communication scholars. Prior to Charland's seminal article, two legal scholars spoke of how law should be rethought as a language, or else a communicative behavior, so that jurists could account for *its* constitutive function in the community it governed, and the smaller community that manipulated it as a professional discipline. James Boyd White (1985) begins his discussion by describing the descent, in history, of law from authority to rhetorical toolbox. In antiquity, Boyd argues, laws were commands, that they were issued authoritatively and not made the subject of endless discussion. Today, according to Boyd, we have reached the point that the legal field has become an exercise in applied sociology, with the biggest mass of energy expended in guessing which legal tool, which precedent, which innovative court procedure, might herd an unruly community of potential lawbreakers into compliance, order and peace. The byproduct of this transformed legal machine is a "we": it is uncommon that courts speak expansively of the collective identity of the community, but they at all times invoke it, cast its shadow, in doing their work:

> It is the true nature of law to constitute a "we" and to establish a conversation by which that "we" can determine what our "wants" are and should be. Our motives and values are not, in this view, to be taken as exogenous to the system (as they are taken to be exogenous to an economic system) but are in fact its subject. (p. 698)

Like Charland, White maintains that the construction of the factors that motivate an audience is part of the content of a message; that audiences are *textual,* not an external factor shaping a text. White identifies three criteria for distilling the rhetorical impact

from legal proceedings, including the preexisting legal language, the speaker's success in remaking that language, and, most importantly for this discussion,

> 3. The rhetorical community. What kind of person is speaking here, and to what kind of person does he [sic] speak? What is the voice here and what kind of response does it invite, or allow? What place is there for me, and for others, in the universe defined by this discourse, in the community created by this text? What world does it assume? What world does it create? (1985, p. 702)

White explicitly acknowledges the role of argumentative discourse in this process, and concurs with Lake that arguments in the legal sphere don't merely promote a particular imposed closure on the controversy, but also perform a certain idealized community: "The lawyer's speech is thus always implicitly argumentative not only about the result -- how should the case be decided? -- and about the language -- in what terms should it be defined and talked about? -- but also about the rhetorical community of which one is at that moment a part." (p. 690) He concludes: "The lawyer is always establishing in performance a response to the questions, 'What kind of community should we, who are talking the language of the law, establish with each other, with our clients, and with the rest of the world? What kind of conversation should the law constitute, should constitute the law?'" (p. 690)

Peter Gabel, writing a year before White's own introductory piece, pulls together many of the same ideas but reaches a more pessimistic conclusion. Gabel argues that law is a response to alienation, that people follow the conventionalized performances of legal messages because doing so protects their authentic selves from devastating rejection. He compares the virtual community accomplished through legal machinery to the virtual

love of country generated through *planned exercises* in patriotism, as distinguished from the spontaneous patriotism of authentic experience. This explanation dovetails with Lake's observation that identity is "…the locus of tension or contradiction in a person; and second, that engaging in argument necessarily places this self at risk" (1997, p. 69), and Charland himself observes that effective constitutive rhetorics "…capture alienated subjects by rearticulating existing subject positions so as to contain or resolve experienced dialectical contradictions between the world and its discourses" (p. 142). Jody Freeman, an attorney writing in the wake of both White's and Gabel's discussion of law as constitutive rhetoric, draws the threads together in a model of argument familiar to communication scholars but few others:

> The relevant methodology is the enthymeme, a process through which the audience participates in its own persuasion. I think the enthymeme captures the difference between constitutive rhetoric and both scientific deduction and dialogue. For example, unlike a syllogism, an enthymeme makes assumptions based on the common experience of the speaker and the audience. It establishes, at the start, an unspoken bond between speaker and audience. Because it has internal coherence and links the participants in this way, the enthymeme has rational, emotional and ethical appeal. (1991, p. 316)

Perhaps the best summation of the interplay between law, communication, and the constitution of a community, comes from Joseph Gusfield: “Legal affirmation or rejection is thus important in what it symbolizes as well or instead of what it controls. Even if the law was broken, it was clear whose law it was” (1975, p. 88).

The work of communication scholars in legal rhetoric affirms many of these observations. White's assertion that law's primary exercise is to determine what voices may be heard, and to order the relationships between them parallels Hasian, Condit & Lucaites' conclusions from analyzing the Critical Legal Studies movement (1996). Scarry's previous observation about labeling includes the point that the ultimate phase, the sentence, is subsequently inscribed on the defendant's very body. Even prior to that, with the pronouncement of successive labels, any previous relationships the defendant had with others in the community are overridden in the most brutal fashion. Furthermore, the legal messages modify and balance relationships between individuals. Butler (1997), attempting to theorize the law's expansion of "hate speech" into action by treating it as a potentially injurious assault, joins Austin's discussion of illocutionary speech acts to Althusser's (1977) concept of interpellation, and concludes that the act of applying a label to another person is both illocutive and perlocutive, setting down the identity of both the labeled and the labeler. Morgan (1988) makes the performative element both explicit and unmistakable in his study, calling trials "retributory theaters" that correct imbalances in value between criminal and victim through performances of the victim's equal entitlement to respect and safety. This parallels the claims made by Ehninger (1970), Habermas (1990) and others about argument, namely that it creates a relationship, drawing a mutual acknowledgment of humanity from all participants. Finally, as Hariman (1990) notes, legal performances allot roles not only to courtroom officers and participants, but also to people outside the community, from children to military officers to multimillionaires. Hasian, encouraging critics of legal rhetoric to adopt a performative perspective, emphasizes this community-building function: "Instead of searching for the correct

propositions or 'rules of law' that should be applied in a particular situation, the critic would look to see how legal 'performances' ask communities to accept or reject particular dialogic and iconographic configurations." (2000, p. 194) Lewis (1994) also concludes that this is the most powerful communicative impact of legal communication, and ought to be the focus of scholarly attention: "This is how law is most thoroughly political: not in how it influences partisan issues of the day, but in how it shapes the forms and directions of communal life." (p. 7) Just as a speaker, giving a speech on a certain occasion, may do more to alter the communicative landscape by configuring possibilities for speakers who follow than by influencing the particular audience on that day, frequently legal speakers and arguers do more to configure their world by altering the possibilities of future legal argument than by settling a case in favor of one party or another. Had Justice Stone foreseen the impact of the doctrine of "discrete and insular minorities," it seems unlikely he would've relegated his coining of one of the most pivotal legal concepts in contemporary antidiscrimination law to a footnote in the Carolene Products case (1938).

Once the major premise is established, the implications for critical work must be laid out. For Gewirtz (1996), the duties of a critic of legal rhetoric include examining how decisions are made, analyzing the rhetor's audience, and understanding "laws as artifacts that reveal a culture, not just policies that shape the culture." Hasian (2001) criticizes past studies of legal rhetoric for focusing excessively on the main holdings in landmark cases, and ignoring the bounty of evidence in briefs and other neglected documents that point to widely shared assumptions of the time which served as rhetorical materials and constraints. Messages thus yield clues to identity and persona, and attention

to those facets of legal messages has the potential to spur insights that an excessive focus on the outcome or effect of legal rhetoric may eclipse. Gaskins (1992) adds that sudden changes in those role allotments serves as the canary in the coal mine for social solidarity: when parties who have traditionally suffered defeat in court begin winning in unexpected numbers, then norms and expectations are undergoing seismic shifts. The question posed by Gusfield, "whose law is it?" at such times reallocates shares of ownership among groups, as Oliver Brown of Topeka, Kansas might confirm. Stormer (2002) suggests that effective criticism under a performative model of rhetorical effectivity "stresses 'the process of world disclosure' within cultural practices, rather than the relation of 'speaker and audience as a form of persuasion or goal oriented activity'" (p. 265). Thus, if legal argument is a performance that shapes the community into which it is deployed, what is its interface? Through what mediating idea do the noninitiates of legal procedure encounter the law's constitutive messages?

Legal communication as framing of collective memory

If a Fourth of July speaker calls a community into being with an epideictic oration, or a preacher pronounces spouses a married couple through an illocutionary declaration of state sanction, then how are we to characterize the mechanism through which courts in general, and the Nuremberg tribunal in particular, allotted and configured roles? If the judgment and the Nuremberg Code are not observed as binding law, but nevertheless are invoked as powerful, compelling ideas, then how does such a phenomenon work?

Here, I propose to examine the Nuremberg texts, both proceedings and decision, as *collective memory*. Wolvin (1989) defines collective memory rather simply:

"Collective memory has to do with the formation, interpretation, and retention of a public past." (p. 33) The definition makes the term seem synonymous with that of history, but there are important differences. Osiel (1997) explains collective memory as

> . . . the stories a society tells about momentous events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods . . . . These events are also distinguished by the tendency for recollection of them to 'hover over' subsequent events, providing compelling analogies with later controversies of the most diverse variety. (p. 19)

While historiographers compile their accounts to fulfill such values as completeness, authenticity, and so forth, collective memory consists purely of those historical moments, events, and images that still exert a powerful and contemporary pull on the public imagination. Such a definition makes clear the congruence with rhetorical effect and argumentative force that the concept of collective memory carries. Schwartzman (2001) describes "artifacts of collective memory" as "arguments for how to represent and commemorate the past" (p. 545) Hariman (1990a) demonstrates the parallel in distinguishing a trial's legal significance from its historical significance: "A case has rhetorical significance if it becomes a standard reference in public argument." (p. 4)

LaCapra (1999) argues that collective memory has a symbiotic relationship with history, such that collective memory sets the agenda and gives history a valence, while history fact-checks collective memory. If collective memory is too far uncoupled from historical research, it becomes historical dishonesty, such as Holocaust denial, while if history takes no account of collective memory, it becomes a sterile process of cataloging curiosities and dead issues. Schwartzman distinguishes history from collective memory

by noting the latter's inclusion of particular voices: ". . . memory--unlike history--always belongs to someone. Memories never detach from the person who remembers. Memory, therefore, seems to take a back seat to history because historians reconcile individual memories into an overarching narrative" (p. 548). Zelizer (1995) breaks collective memory down into two acts: *recollection,* and *commemoration:* recollection establishes the relationship to the past, while commemoration appropriates the past for present use. Hasian (2001b) concurs that when people carry out practices that engage history, such as visiting memorials or listening to messages about historical events, they are "being invited to participate in symbolic acts of selective remembering and forgetting" (p. 351). Thus, the work of collective memory is to serve as a people's history, processed into a form that enables use, expression, invocation in varied settings, as set apart from, or perhaps carved out within, the exhaustive cataloging of minutiae with which the field of history as a whole concerns itself. Irwin-Zarecka concludes,

> To understand how collective memory works, we cannot restrict our inquiries to tracing the vicissitudes of historical knowledge or narratives. We must also, and I believe foremost, attend to the construction of our emotional and moral engagement with the past. (1994, p. 7)

Importantly, collective memory is not composed, authored, crafted, or otherwise originated in a creative act. By definition, its collectivity means that it is not the product of a single mind. But as it emerges as the common product of many minds, it eludes control by multiple minds in collusion. It has a certain characteristic authenticity through the simple check that if enough people don't share the memory, it loses its critical mass of source minds. Rather, collective memory is *framed,* sometimes in many different ways,

and the important question then becomes which frame is *dominant* (Irwin-Zarecka, 1994). Winter & Sivan (1999), employing a metaphor reminiscient of Condit's (1987) workshop of morality, describe collective memory as "a sort of choir singing, or better still, a sing-along" (p. 28). Individuals may understand an event differently, but their understanding is bound within a parameter set by the more common understanding. For many years after Pearl Harbor, an interpretation that did not include patriotic fervor and denunciation of the attackers would be a terribly sour, dissonant note in the chorus, and might have drawn a hostile response from most Americans. After the conclusion of Operation Desert Storm, President Bush said to assembled members of Congress, "It's a proud day for Americans and by God, we've kicked the Vietnam syndrome once and for all" (Devroy & Gugliotta, 1991, p. A1), exuberant over the reappropriation and redirection of the dominant frame of the Vietnam War. For some collective memories, the dominant frame is obvious, such as monuments commemorating battles, or memorials to victims of the Shoah[1]. But for others, the dominant frame for collective memory may be pieced together only through careful detective work in contemporary cultural artifacts, such as popular publications, public opinion surveys, ethnography, and the like (Irwin-Zarecka, 1994). Zelizer notes that Watergate is commemorated almost daily in conversation, speeches, and published commentary, although no holiday or monument draws attention to it. Irwin-Zarecka similarly observes that those who live through the Depression relive it daily in countless ways: through their storytelling, their use of money, their understanding of possessions, their drive for security, and more. This

[1] For this work, I choose the term "Shoah" over "Holocaust." *Holocaust* refers to destruction by fire. *Shoah* is Hebrew for "desolation." The choice of "Shoah" refers to the reality that the victims of the Nazis were destroyed in a variety of ways, ranging from fire to gas to bullets to starvation to stripping of civil rights. Only the term "Holocaust denial" remains unchanged, because that term is still in virtually unanimous use in the literature.

potential for widely varying interpretations distinguishes frames of collective memory from ideographs (McGee, 1980). Hasian & Carlson (2000), also speaking of landmark court decisions, conclude that "These selective slivers of memory are constantly recirculating in our legal and public sphere, inviting us to engage in ritualized practices that bring either celebration or condemnation of particular historical decisions." (p. 42) The struggle, whether conscious or not, to create a dominant frame for any powerful collective memory is, perhaps, the decisive factor in the strength of that invitation.

Many of the set pieces of legal communication are plainly framing moves. Gaskins (1992) argues that the initial struggle over burdens of proof is one of the turning points of a trial, because the victor establishes a default framework of logic that governs all evidence presented afterward. Sarat & Kearns (1989) call law a “narrative of continuity” that “faces backwards,” explaining that the choice of governing precedent is a framing move that piggybacks on a special species of collective memory peculiar to the legal profession. Osiel observes that defense attorneys often will attempt to widen the time horizon on a case, arguing that the roots of a crime stretch back before the defendant's involvement, while the prosecution struggles to prove a robust link between the time of the defendant's direct involvement and the core elements of the crime. Attorneys also will argue over the admissibility of evidence, its probative value, and the credentials of experts called to testify. If questions are leading or testimony is identified as hearsay, a jury may be instructed to disregard it, an act lawyers jokingly refer to as "unringing a bell" (Tanford, 1986, p. 119). Tiersma (1999) describes the outcome of this process: a record of facts is compiled which is necessarily incomplete, being

circumscribed by the partisan strategic choices of the adversaries in the case, but is treated as complete by subsequent levels of appellate review.

But just as collective memory is symbiotically tied to history, it also serves the purposes of law even as it draws sustenance from law. International law's grounding in custom and tradition, which D'Amato argues "is binding because it is the corporate expression of the soul of the people," (1971, p. 172) points to the importance of collective memory in its legitimation. Perhaps most importantly, collective memory serves to maintain and manage social cohesion in the wake of traumatic events: it thus shores up the constitutive work done in previous messages by addressing breaches to the communal identity occasioned by mass internal attacks such as the Nazi genocide. Shoshanna Felman (1999) argues that, "Law is, in this way, an organizing force of the significance of history. But law relates to history through trauma." (p. 66) Fletcher offers the Exxon *Valdez* trial and the trial of Bernard Goetz as examples of therapeutic legal response to traumatic events. In those cases, the earliest public understandings of the events were either so vast in scale, in the case of the Valdez's unimaginably large spill of crude oil into the ocean, or so viscerally threatening, as in the case of the common man on the subway opening fire, that an accounting and an official interpretation were important comforting moves. Wolvin asserts that communities manage trauma by bowdlerizing the official memory, officially forgetting the most traumatic elements, and requiring forgetfulness as a condition of inclusion in the community. However, Osiel counters that a more common strategy is to tinker with the community's founding myth, and create a re-founding myth that demonstrates a clean break with the past. Ron Christenson (1986) concurs that placing a regime on trial serves to "engage those paradigmatic myths that are

prior to the rules governing normal trials." Having tandem legal and political agendas "raise[s] questions which bear upon the primary stories which the rules of law clarify and modify. . . . The myths that are at the core of our understanding are given new meaning …" (pp. 257-58) A certain degree of trauma accompanies nearly any event that becomes the grist for legal action, but the severity of the trauma may vary widely, and where it is sharpest, it compels the most powerful soul-searching and the most urgent imperative to understand and commit to memory in hopes of avoiding a repeat occurrence. Osiel concludes:

> A traumatized society that is deeply divided about its recent past can greatly benefit from the collective representations of that past, created and cultivated by a process of prosecution and judgment, accompanied by public discussion about the trial and its result. Thus, the internal dynamics of this process, especially the implications of the choices it entails for all parties, are very significant. (p. 39)

Above, I argue that law both draws people into a communicative order, and also maintains a chasm between them by alienating them. Osiel proposes a framework that accounts for both dynamics, anchored to a third phase beyond Emile Durkheim's (1933) concepts of *mechanical solidarity* and *organic solidarity,* both explanations of how a community incorporates members with different perspectives. *Mechanical* solidarity characterizes a social order which demands complete or nearly complete consensus among community members on important issues. The Roman Catholic church, for example, does not tolerate substantial dissent among its clergy, and takes a dim view of it from the laity as well. *Organic* solidarity is found in groupings, such as a marketplace, in which the members are interdependent, but have different occupations and pursuits.

Differences typically are downplayed or ignored. Osiel's third way, *discursive* solidarity, describes a grouping in which participants agree only on the requirement of remaining engaged in dialogue. Difference is accommodated, and disrespect and open hostility are not necessarily fatal. Osiel argues that once such solidarity is joined, it has the potential to continue past the end of a legal proceeding and beyond the walls of a courtroom, into the larger community for weeks or years following. The point of joining, then, is what Ehninger and others earlier observed about any argumentative encounter, "By accepting the risks implicit in an attitude of restrained partisanship the arguer both bestows 'personhood' on his opponent and gains 'personhood' for himself" (1970, p. 109), and what White (1990) also observed about legal proceedings: ". . . the premises of the legal hearing commit it to a momentary equality among its speakers and to the recognition that all ways of talking, including its own, may be subject to criticism and change" (p. 24). Osiel's concept of discursive solidarity may be to the form of communication what Charland's theory of constitutive rhetoric is to its content: two aspects of the same process of framing and maintaining order through communication.

The final function collective memory provides for legal communication is its effectiveness in fixing the allocation of roles among members of a social order. Irwin-Zarecka identifies this constitutive function as one of the chief draws for scholars in this area. Zelizer concurs: "Rather than be taken at face value as a simple act of recall, collective memory is evaluated for the ways in which it helps us to make connections – to each other over time and space, and to ourselves." (p. 226) Hom & Yamamoto attach this role to groups as well as individuals, arguing that "Collective memory not only vivifies a group's past, it also reconstructs it and thereby situates a group in relation to others in a

power hierarchy." (2000, p. 1758) Any cursory study of rhetoric and argumentation's emphasis on audience analysis immediately confirms that determining what elements of a message, what triggers of understanding work for any particular auditor requires a thorough exploration of that auditor's "[d]irect experiences, cultural norms, institutional practices, and political ideology." (Hom & Yamamoto, p. 1762) The study of framing techniques, and the resultant up and down lifespan of a dominant frame, is a window, if small and not entirely transparent, into what the bearers of those collective memories were prepared and willing to embrace. Zelizer concludes:

> In this view, remembering helps communities stick together in certain ways and break apart in others . . . . The trick here is to effect belonging for certain individuals or groups and exclusivity for others, making a certain level of differential address a necessary accoutrement of memory. (p. 227)

The Nuremberg Medical Trial: Studying the proceedings as constitutive argument framing collective memory

The following chapters analyze the proceedings of the Nuremberg Medical Trial for performative messages that frame collective memory, particularly those that speak to the allocation of roles among trial participants. In justifying this method, there are four claims to develop. First, the medical community has its own collective memories; second, analyzing the Trial will provide valuable insight into the processes by which collective memory is framed; third, this perspective will also aid in the understanding of the Trial itself; and fourth, it is worthwhile to close gaps in memory study surrounding the Shoah, because accounting for the formation and effectiveness of memory afterward is the best defense against its recurrence.

Given the emphasis of past memory studies on ethnic groups, national founding myths, and other familiar elements of identity politics, one might ask whether the concept of collective memory could be applied to the discourse of a sub-national group such as the medical community whose representatives were on trial at Nuremberg. I argue that doctors, both as local communities and as a global, professional community, do indeed have their own unique collective memories that influence their choices and drive their discourse. To begin with, as Perry (1999) observes, doctors share with judges the reality that their social role is one "perpetually regenerated and sustained through discursive productions of meaning." (p. 173) Such an ongoing process must draw upon past events, but in a form that is vivid and expressive, to prepare its practitioners to accommodate the discursive constraints imposed upon them by their patients. Duffin (1999) puts it rather simply: "Doctors can be doctors only when someone else agrees. A contract has always existed between physician and patient, although usually it was not recorded in writing." (p. 115) Willard argues that within a discipline, arguments about norms are not completed in a single space before a judge and an audience, although many commit the "debate fallacy" of proceeding as though they were. Such a temporally unbounded unfolding of argument in different minds is quite congruent with the description of collective memory offered previously.

Furthermore, medical practitioners, having constituted themselves as a profession, thus have developed the elements of a culture in order to maintain their discursively created identity (Henderson et al., 1997). Thus, new medical students entering the field undergo an extensive process of socialization that is designed to homogenize what starts out as a rather heterogenous group (Lum, 1978). An important milestone in the

socialization process is the administering of the Hippocratic Oath. While not all new doctors take the Oath in a ceremony, Hasday (2002) notes that virtually all doctors speak of themselves as being bound by it. Her discussion of the importance of the Oath establishes a role for collective memory in the medical community as a powerful socializing and norm-establishing force:

> … the Oath very much evokes the larger medical community into which the physician is about to enter, creating what Heinrich von Staden calls a 'sense of belonging to a transgenerational professional collectivity.' Indeed, generations upon generations of medical practitioners have sworn to follow the oath's words. (p. 302)

And, from the discussion and evidence in Chapter One, it should be apparent that many doctors consider themselves equally bound, and in some sense constituted, by the Nuremberg Code. Even if any particular doctor could no more tick off the Nuremberg code, especially the last nine principles, than recite the Hippocratic Oath word for word, the fact that reference to the Code is instantly recognizable both as an event and as shorthand for various ethical precepts says much about its power and endurance as collective memory. As Gusfield concludes, "Unlike human limbs, norms do not necessarily atrophy through disuse. Standards of charity, mercy, and justice may be dishonored every day yet remain important statements of what is publicly approved as virtue." (p. 88)

Second, the opportunity to analyze the framing of collective memory in a sharply drawn confrontation is one that ought not be foregone. Irwin-Zarecka calls for more study of collective memory formation in controversy and struggle, arguing that when multiple

frames of a pivotal event are offered in competition, the machinery of framing and the patterns of acceptance among auditors reveal far more about the functions and functioning of collective memory than studies that lack controversy. Sicher (2001) argues that "countermemory by individuals or marginalized groups may reshape national or communal identity and put changing political and ideological agendas in tension with the public commemorative narrative" (p. 265). For Sicher, as well as Nozick (1999), the memories that retain potency are the ones over which the framing struggle is hotly joined, and the issues addressed continue to be sites of dissent long after the event itself has passed from anyone's direct, personal memory. Cox (1990) calls for the reincorporation of memory study into argumentation, emphasizing that memory is a necessary element of a critical theory of argument, "a 're-membering' of what had been split asunder -- reason, imagination, and the capacity for action" (p. 2). He urges critics to break down "the apparently unitary meaning of dominant warrants" (p. 11) as a move toward unleashing the emancipatory potential of argument. Butler cautions against conceptualizing a society's constitutive ideas as a consensus, or from the perspective of a single author. Critiquing Bourdieu's (1991) conception of performative utterances as socially permitted and ritualized statements that reinforce the status quo, she argues that controversy over performative utterances such as hate speech are

> but one of the powerful and insidious ways in which subjects are called into social being from diffuse social quarters, inaugurated into sociality by a variety of diffuse and powerful interpellations. In this sense, the social performative is a crucial part not only of subject *formation,* but of the ongoing political contestation and reformulation of the subject as well. The performative is not only a ritual

> practice: it is one of the influential rituals by which subjects are formed and reformulated. (p. 160)

Finally, Hasian, Condit & Lucaites (1996) assert that the negotiated compromises that emerge from legal battles have a "certain cultural authenticity" because they are "forged in the fires of controversy." (p. 327) This is true of the legal rulings, but also true of the informal understandings that such trials produce. And from the discussion in the previous chapter, it seems beyond dispute that this is true of the Nuremberg Medical Trial and its entourage of issues.

Third, an examination of the evidence and arguments introduced at trial from the collective memory perspective may bring to light important turning points that were not germane to the purely legal question of the guilt or innocence of the defendants. Osiel thunders against the limitations imposed at Nuremberg by the requirements of legal procedure:

> … it borders on the obscene to resolve so historiographically momentous and weighty a question as 'the cause of the Holocaust' – for purpose of collective memory – on the basis of so narrow and peculiarly professional a preoccupation as the terms of a treaty's jurisdictional provision. (p. 97)

Similarly, courts concern themselves not with ideal conduct, but merely with forbidding anyone to fall below a certain floor of minimally acceptable conduct. The exclusive focus upon violations of the law, the benchmark of the minimum, crowds out consideration of aspirational expectations of conduct (Sinha, 1989). Scott (2000) argues that this is the fatal flaw in legal supervision of medical ethics.

Finally, I argue that the Shoah is inextricably tied up with the operation of memory. It was the weak, stunted memories of previous atrocities that left the way open for Hitler to carry out his project. On the eve of his invasion of Poland, Hitler calmed his worried colleagues with the chilling reassurance, "Who after all is today speaking of the destruction of the Armenians?" (Dadrian, 1995, p. 403). More than sixty years later, Schwartzman holds out more hope, suggesting that "… if memory can aid in culling the lessons from this tragedy, then the Holocaust could prove the decisive example for reconsidering the role of memory in fostering peaceful human interaction," and concluding:

> On Yom HaShoah, the annual Jewish commemoration of the Holocaust, communities throughout the world issue the command: "Remember!" ("Zakhor!"). In response, one could answer, "Yes, but how?" The answer must lie beyond the dry recital of facts and dates, in making the past resonate in the present and future. (p. 557)

In the previous chapter, I justified studying the Nuremberg Medical Trial as a communicative phenomenon, and contextualized it within both world history and the history of the medical profession. In this chapter, I have situated it at the intersection of several converging streams of communication scholarship. I have argued that legal proceedings are *performative* communication, following Austin and Searle, that the adversarial exchanges in legal fora extend Maurice Charland's theory of constitutive rhetoric by demonstrating the role of argument in cultivating within auditors a collective identity, that the framing of collective memory is the mechanism by which this cultivation takes place, and that the pursuit of discursive solidarity packages these

elements of identity within a practice of mutual confrontation and acknowledgment, thus positioning potential enemies as fellow members of a community, even though elements of their identities are utterly incompatible. This study examines the operation of legal discourse at the Nuremberg Medical Trial as a single communicative performance in which at least three parties – the prosecution, defense, and tribunal – worked to impose their own understanding of the Nazi medical experiments on one another, by making moves to include and exclude evidence, issues, and other messages from the trial record. Examining their framing moves, and their discursive construction of roles will produce insight into the workings of the Trial itself, and to the process by which collective memory is framed.

Chapter three examines the prosecution's opening bid, the case they made for their dominant frame. Chapter four examines points of stasis between the prosecution and defense cases. Chapter five attends to the tribunal's role as a party to the communicative encounter. Finally, chapter six summarizes the study's findings and suggests directions for future research.

CHAPTER THREE

CONSTRUCTING AND CONTESTING A DOMINANT FRAME

Collective memory is not a phenomenon constructed entirely through the designs of individual speakers, nor that of teams of communicators operating in tandem. Communities embrace collective interpretations of past events in an organic process, with different frames achieving dominance through the passing of critical masses of acceptance, as the weight of popular opinion gets behind, then abandons, one premise after another in the universe of value claims. Yet the same may be said for the manifestation of audience response in almost any persuasive communicative encounter, and throughout history rhetors have risen to the challenge of shaping an audience's opinion, and many have been successful. Thus, an opening move in the understanding of how collective memory was framed at the Nuremberg Medical Trial is an analysis of the prosecution's attempt to construct an appealing, resonant frame, and offer it up both to the immediate, and global, audiences, as well as the defense's initial response to the proffered frame.

Stipulating the framing function

Comments made by both sides leave little doubt that the officers of the court all were aware that the eyes of interested parties around the world were upon them, and that they spoke to an audience not only of their contemporaries, but also of generations yet unborn. General Telford Taylor, delivering the prosecution's opening statement, developed three lines of argument to justify the framing function of the trial. First, he asserted that a proper understanding of the Nazi medical atrocities by all observers,

worldwide, was an urgently needed protection against their recurrence in other places and times:

> The defendants in the dock are charged with murder, but this is no mere murder trial. We cannot rest content when we have shown that crimes were committed and that certain persons committed them. . . . It is our deep obligation to all peoples of the world to show why and how these things happened. It is incumbent upon us to set forth with conspicuous clarity the ideas and motives which moved these defendants to treat their fellow men as less than beasts.

The first element of the prosecution's constructed role was reluctance. The American prosecutors did not choose to press this case before the tribunal: they had a *deep obligation,* and it was *incumbent upon them* to set forth the facts. In a trial which many had already discounted as nothing more than victors' vengeance upon the defeated, this was one of the most critical preemptions of all, striking to the heart of the court's right to exist, even before the merits of the case had been reached. Taylor continued:

> The perverse thoughts and distorted concepts which brought about these savageries are not dead. They cannot be killed by force of arms. They must not become a spreading cancer in the breast of humanity. They must be cut out and exposed, for the reason so well stated by Mr. Justice Jackson in this courtroom a year ago- "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated." (Nuernberg Military Tribunals, 1949, pp. 27-28)

Although, as noted in the first chapter, the officers of the court were military officials operating under the aegis of a military governor, Taylor denied that what they had come to combat was a military threat. Instead, he used the language of medicine to justify prosecuting the case. Although the defendants were charged with war crimes, and although many had been commissioned in the German military, Taylor rejected "force of arms" and argued instead that the "spreading cancer" must be "cut out." Thus, even as Taylor's primary subject matter was the importance of the trial for onlookers beyond the courtroom walls, his choice of metaphor began the process of defining his, and his associates', role: they were reluctant physicians who had been summoned by a grave responsibility to purge humanity of toxic, contagious ideas.

Second, General Taylor localized the argument and insisted that the German people in particular must be persuaded to put the Nazi project into the proper perspective, so that they would not allow resentment to breed martyrdom, and thus sow the seeds of a renewal of Nazi ideology on their own soil:

> To the German people we owe a special responsibility in these proceedings. . . . Most German children will never, as long as they live, see an undamaged German city. To what cause will these children ascribe the defeat of the German nation and the devastation that surrounds them? Will they attribute it to the overwhelming weight of numbers and resources that was eventually leagued against them? Will they point to the ingenuity of enemy scientists? Will they perhaps blame their plight on strategic and military blunders by their generals? If the Germans embrace those reasons as the true cause of their disaster, it will be a sad and fatal thing for Germany and for the world. . . . To reestablish the greatness

> of Germany they are likely to pin their faith on improved military techniques. Such views will lead the Germans straight into the arms of the Prussian militarists to whom defeat is only a glorious opportunity to start a new war game. "Next time it will be different." We know all too well what that will mean. This case, and others which will be tried in this building, offer a signal opportunity to lay before the German people the true cause of their present misery. . . . I do not think the German people have as yet any conception of how deeply the criminal folly that was nazism bit into every phase of German life, or of how utterly ravaging the consequences were. It will be our task to make these things clear. (Nuernberg Military Tribunals, 1949, pp. 28-29)

Here, it is notable that Taylor digressed into the possibility that German children would view the events of the previous decade in one perspective or another. Having described himself and his colleagues as physicians, Taylor now added another hat: they were also educators, who would "make … things clear" so that German children would not commit the same errors that their parents and grandparents had committed, both for their own sake and the sake of the world. In his earlier remarks, Taylor had turned aside from the ordinary tasks of an attorney trying a case, to explain to the tribunal that other dynamics were at work. Now, having outlined those purposes, Taylor had moved his identity from a professional adversary and spokesperson to that of two different types of caregivers, promising to treat sickness, and to teach the uneducated, in the course of presenting evidence throughout the coming proceedings.

An objection to the asserted framing function of the trial was raised only in passing. Dr. Servatius, defense counsel for defendant Karl Brandt, complained that using

his client as a proxy to put an entire regime on trial made a mockery of justice: "In obeying the orders of his state, the defendant Karl Brandt did no wrong. If sentence is passed against him, it would be a political sentence against the state and the ideology it represents" (Nuernberg Military Tribunals, 1949b, p. 126). In his final statement to the tribunal, defendant Gerhard Rose concurred:

> Mr. President, may it please the Tribunal, the scientists who are among the defendants in this trial are confronted with a principal difficulty, the fact that purely scientific questions have been made political, ideological questions by the prosecution. In the opening speech by the Chief of Counsel, General Taylor, the political and ideological nature of the indictment has been expressed as clearly as possible. A subject of the personal charges against myself is my attitude toward experiments on human beings ordered by the state and carried out by other German scientists in the field of typhus and malaria. Works of that nature have nothing to do with politics or with ideology, but they serve the good of humanity, and the same problems and necessities can be seen independently of any political ideology everywhere, where the same dangers of epidemics have to be combated. (Nuernberg Military Tribunals, 1949b, p. 160)

Rose's passion was evident, but his sense of strategy was less than shrewd. His colleagues had claimed that circumstances alter rules, that they could not all be judged by a universal yardstick, that the prosecution was guilty of faulty reasoning and plain injustice in charging them with shared responsibility for one grand crime, instead of trying each defendant's case on its merits. Rose's contribution to that controversy was to claim that

medicine is a value-sterile pursuit that is recognizably the same in all circumstances and all places. In more ways than one, this clearly was a dissenting view.

In stark contrast to these pleas for treatment of medicine as value neutral, other defense spokespeople argued fervently for the precedential value of the trial, making expansive claims about the tribunal's responsibility, and the likely opinion of onlookers both overseas and in the future. Representative of this line of argument was the summation by Dr. Josef Weisgerber, counsel for defendant Wolfram Sievers, in his final plea to the tribunal:

> It need hardly be said that first and foremost I am supporting my own client. But in your verdict, you, your honors, are not judging only this defendant. Beyond this particular case your verdict has a far more extensive, general, nay, world-wide importance. For it is the first time that a tribunal of such importance is to decide upon the actions of a member of a resistance movement. Consequently, your judgment is a fundamental one and a signpost for our time for many, many other defendants and accused men in this connection who have stood before this Tribunal or will be brought before other courts. Your decision for all time extends to cover thousands and thousands of men who, at some time, may be put in the position of opposing some criminal system of government by similar means as Sievers did. . . . And therefore, your Honors, with your verdict in the Sievers case you take upon you a responsibility before the whole world and for all time to come, a responsibility as is seldom placed upon a tribunal. But on the other hand you can also say with pride that with this judgment you render an immeasurable service to the world in its struggle for peace and justice. Therefore the reasons for

> your verdict in the Sievers case are so immensely important, far more important than the trifling Sievers case can be in the universal history of all times. (Nuernberg Military Tribunals, 1949b, pp. 13-14)

Although all the defendants would make the claim that their own individual cases should be judged on their own bodies of evidence, and not treated as symptoms of a larger evil, it was nevertheless rather futile to attempt to ignore the historic significance of the trial, the global attention being paid to Nuremberg, and the likelihood that lawmakers and medical ethicists would refer to the outcome of the proceedings in addressing future problems. Thus, even the defense attorneys accepted the prosecution's claim that the Nuremberg tribunal's judgment would imprint the common understandings of World War Two, particularly the Nazi party's use of medical professionals in pursuing its goals.

Constructing the dominant frame

As in any trial, the prosecutors participated in a number of argumentative threads, including those they initiated and those in which they responded to defense challenges. However, in this particular trial, they deployed additional, rather unique arguments which served primarily to advance its framing function, and to manage its use of technical sphere arguments and calibration of expertise. These arguments were of greatest relevance to the global community of doctors, scientific researchers, and ethicists who had previously failed to nail down black-letter law that might have made the prosecution's case more open and shut. In addition to the usual claims about culpability and the heinousness of the experiments, which largely are discussed in the following chapter, two arguments constituted the core of the prosecution's proposed frame: Nazi

wartime medical atrocities were the result of a system-wide corruption of the German medical community, and the experiments had no scientific value.

The first element was the key to the prosecution's stated goal of putting Nazi ideology on trial. If future generations could argue that any atrocious experiments had been the result of renegade doctors who did not represent the Nazi regime, then the entire effort of convening a special tribunal and charging crimes against humanity would be out of proportion to the results. Only if the prosecution could succeed in laying the atrocities at the feet of the Nazi system would the trial be worthwhile. The second element served to neutralize the defense of particularity that surrounds scientists, the same defense that shields a doctor from murder charges if s/he loses a patient on the operating table. If the prosecution could prove that defendants were culpable for the acts charged in the indictment, and those acts were sufficiently heinous to warrant punishment, and the veneer of science provided no defense, *and* the doctors were key elements of Nazism's praxis, then the outcome of the trial would be both a legal precedent permitting prosecution of criminal medical experiments under international law, and, more importantly, a plausible claim to a micro-cultural shift within the specialized communities involved, that might serve as a more powerful norm to bind researchers and medical personnel in situations that law enforcement was unlikely to reach with any power.

These are not the only arguments aimed at the technical, specialized issues in the trial. As will be discussed in the following chapter, other framing matters arose from the give and take between prosecution and defense. But these two premises were *preemptive;* they were raised by the prosecution from the start, as part of the opening bid to move the

tribunal to find the defendants guilty. They are part of the starting position of the dialogue, and thus merit separate consideration.

The system-wide corruption of German medicine

To keep the trial on course as a condemnation of Nazi ideology, the prosecution had first to demonstrate that German medical norms and practices had not existed in the current degraded state prior to the ascent of the Nazi leaders. Telford Taylor addressed this issue in his opening address, claiming that

> German medical science was in past years honored throughout the world, and many of the most illustrious names in medical research are German. How did these things come to pass? I will outline briefly the historical evidence which we will offer and which, I believe, will show that these crimes were the logical and inevitable outcome of the prostitution of German medicine under the Nazis. (Nuernberg Military Tribunals, 1949, p. 56)

Elaborating, Taylor explained that the Nazi government had disbanded the German Medical Association *(Deutscher Aerztevereinsbund),* replacing it with a National Physicians' Chamber modeled after the Gestapo, whose top members wore SS uniforms and brought "pressure on physicians to join and take part in various party organizations, such as the SA and the SS" (Nuernberg Military Tribunals, 1949, p. 59). Most physicians succumbed to the pressure, unwilling to give up their careers to protest a political movement. However, far from satisfying the Nazi leaders, the physicians' assent was merely an overture to subsequent intrusions, such as requiring all doctors to spend a large portion of each year at elaborately staged political rallies and Nazi party functions, in an

attempt to lend a gloss of science to the racial theories that were the cornerstone of Nazi ideology:

> A command performance, especially for younger physicians, was attendance at the so-called Fuehrer-School of German Physicians at Altrehse in Mecklenburg, which had been organized by the defendant Blome. There physicians were indoctrinated in the National Socialist point of view and way of life. The so-called comradely association and sports activity were merely window dressing for political spying. These courses finally became compulsory and had to be attended for several months annually. (Nuernberg Military Tribunals, 1949, p. 59)

Not satisfied with pressuring and molding currently practicing physicians, the Nazis also aimed their challenge at medicine's root, rewriting medical school curricula to transform it into a watered-down mix of some instruction and more political and racial indoctrination:

> Medical students had to be "Aryan," and were required to belong to the National Socialist Students' League. The students' entire course of studies was constantly interrupted by the demands of the various party organizations to which they were forced to belong. A student whose knowledge of the racial theories and Nuernberg laws was not sufficient would fail his medical examinations. Chairs in the universities were filled in many cases by Nazi so-called "professors" who might or might not have a scientific background. (Nuernberg Military Tribunals, 1949, p. 60)

This discussion of the historical antecedents of the trial, the altered backdrop against which the defendants' behavior must be judged, followed the technique, described by

Osiel, of broadening the time horizon. Although later in the trial, the alleged crimes would be described in very stark, dry language with no discussion of context, at this early stage the prosecution lavished attention on matters not directly relevant to the charged acts. The first element of the frame had to establish that women and men who bore the title of "doctor" were *not* doctors as the tribunal understood the term, that their training, socialization, and store of professional knowledge had been corrupted and no longer deserved the respect and deference commanded by doctors in other countries and other eras.

Having outlined, in broad strokes, the organizational trappings of the Nazi assault on medical knowledge and practice, the prosecution drilled down to two specific changes propagated among doctors working under Nazi oversight: the dissemination and widespread acceptance of Nazi racial theory, and the rise of "Thanatology."

General Taylor cited as a primary cause of the medical atrocities the published works of Dr. Arthur Guett, appointed to be the director of Public Health in the Ministry of the Interior in 1933. Guett's seminal 1935 work, *The Structure of Public Health in the Third Reich,* condensed the changed direction of Nazi medicine into a few sentences:

> [T]he ill-conceived "love of thy neighbor" has to disappear, especially in relation to inferior or asocial creatures. It is the supreme duty of a national state to grant life and livelihood only to the healthy and hereditarily sound portion of the people in order to secure the maintenance of a hereditarily sound and racially pure folk for all eternity. (Nuernberg Military Tribunals, 1949, p. 58)

This reconception of the sanctity of life, and appropriation of its value to the subcategory of racially pure Aryans, led, according to Taylor, directly to the breakdown of ethical

conduct in Nazi medical research: "From the preaching of Guett . . . life and livelihood became the birthright of no one. The weak and the physically handicapped are in the way and must be pushed aside. Inferior peoples are born to be exterminated by the Herrenvolk." (Nuernberg Military Tribunals, 1949, p.61) This argumentative move not only bound up the atrocities to be described later with the Nazi regime, but also provided a motive for the crimes, and lent plausibility to the most extreme accounts that would counteract defense evidence and testimony that the descriptions were overblown. The very political "bible" of the regime had given explicit and unmistakable sanction to callous disposal of human beings, in the process spurning the scruples that restrained most people from doing so; therefore, subsequent accounts of experiments that fit that description became more plausible than the voices of moderation claiming that all was simply a misunderstanding.

Once the Nazi teachings had devalued life, the logical next premise was the mass production of dead bodies. In one of the most striking passages of the opening statement, General Taylor coined and explained the concept of "Thanatology": "But our proof will show that a quite different and even more sinister objective runs like a red thread through these hideous researches. We will show that in some instances the true object of these experiments was not how to rescue or to cure, but how to destroy and kill." Briefly, introducing this topic, Taylor cast aside the secondary roles of healer and teacher he claimed earlier in his opening statement, and spoke instead in the unmistakable language of an attorney. But a few sentences later, he reclaimed his educator hat, teaching his audience a new word to capture the essence of the charged crimes:

> The prisoners at Buchenwald who were shot with poisoned bullets were not guinea pigs to test an antidote for the poison; their murderers really wanted to know how quickly the poison would kill. . . . Mankind has not heretofore felt the need of a word to denominate the science of how to kill prisoners most rapidly and subjugated people in large numbers. This case and these defendants have created this gruesome question for the lexicographer. For the moment we will christen this macabre science "thanatology," the science of producing death. The thanatological knowledge, derived in part from these experiments, supplied the techniques for genocide, a policy of the Third Reich, exemplified in the "euthanasia" program and in the widespread slaughter of Jews, gypsies, Poles, and Russians. This policy of mass extermination could not have been so effectively carried out without the active participation of German medical scientists. (Nuernberg Military Tribunals, 1949, pp. 37-38)

Although he conceded that the enterprise was bound up with the military and with the waging of war, Taylor categorically asserted that "Thanatology" was not a weapon, or a philosophy of war, but was *medical* in its essence: a perversion of medicine, perhaps, but characteristically medical. It was practiced by medical personnel, cloaked in medical procedure, actuated by medical knowledge, and even rationalized with euphemisms that drew from medical discourse. His conclusion made the point explicit:

> The Nazis were searching for methods of extermination, both by murder and sterilization, of large population groups, by the most scientific and least conspicuous means. They were developing a new branch of medical science

> which would give them the scientific tools for the planning and practice of genocide. (Nuernberg Military Tribunals, 1949, p.48)

The first element of the prosecution's preferred frame, then, was the systemwide corruption of German medicine, from newly admitted medical students to venerable career physicians in positions of high leadership. Taylor argued that the Nazis devalued life in two ways: they particularized its value by stripping the sanctity of life from impure races, and they harnessed the set of practices historically dedicated to its preservation and turned their lessons into raw material for new and more efficient ways to exterminate it. Even if the defendants sported many of the trappings shared by doctors worldwide, in the form of degrees, knowledge of anatomy, ability to conduct medical procedures, Taylor warned the tribunal not to be fooled by appearances. With the attention to race and to "medical" means of ending life, the defendants had turned the purpose of medicine on its head, and had therefore severed the root that held medical professionals in the social order, that maintained their special status and their permission to interfere in the functioning of human bodies.

The unscientific nature of the experiments

Having laid the groundwork to claim that the German doctors were not doctors, Taylor moved on to claim that their medical work was not medical at all. He was aggressive in his assault on the deference afforded to scientists in execution of experiments. No such deference belonged to the defendants, he argued, and no bolstering could be found in data or discoveries from their work, because the work itself was so poorly done and ultimately so untrustworthy:

> The Nazis have, to a certain extent, succeeded in convincing the peoples of the world that the Nazi system, although ruthless, was absolutely efficient; that although savage, it was completely scientific; that although entirely devoid of humanity, it was highly systematic — that "it got things done." The evidence which this Tribunal will hear will explode this myth. The Nazi methods of investigation were inefficient and unscientific, and their techniques of research were unsystematic. These experiments revealed nothing which civilized medicine can use. It was, indeed, ascertained that phenol or gasoline injected intravenously will kill a man inexpensively and within 60 seconds. This and a few other "advances" are all in the field of thanatology. There is no doubt that a number of these new methods may be useful to criminals everywhere and there is no doubt that they may be useful to a criminal state. Certain advance [sic] in destructive methodology we cannot deny, and indeed from Himmler's standpoint this may well have been the principal objective. Apart from these deadly fruits, the experiments were not only criminal but a scientific failure. It is indeed as if a just deity had shrouded the solutions which they attempted to reach with murderous means. The moral shortcomings of the defendants and the precipitous ease with which they decided to commit murder in quest of "scientific results", dulled also that scientific hesitancy, that thorough thinking-through, that responsible weighing of every single step which alone can insure scientifically valid results. (Nuernberg Military Tribunals, 1949, p.73)

In this passage, Taylor asserted a fourth extralegal role, that of a scientist qualified to judge the merit of scientific work, and to assign or withhold the label of "scientific" to

research. He argued that the experiments failed three tests: the test of legality ("useful to criminals everywhere"), the test of the scientific method ("inefficient and unscientific, and their techniques of research were unsystematic") and the test of utility ("nothing which civilized medicine can use"). Thus, while keeping the discussion grounded in law by including a reference to legal propriety, Taylor appealed both to the audience of scientists, and to the audience of lay folk who might fail to grasp the intricacies of international law and medical ethics, but could not fail to understand that the experiments were both gruesome (as was to be demonstrated later) *and* a failure.

That charge would be applied repeatedly throughout the proceedings, to specific experiments. Taylor himself applied it to the sulfanilamide and regeneration experiments charged against thirteen of the defendants: "We will show that the defendants did not even have any substantial scientific objective. These [sulfanilamide & regeneration] experiments were senseless, sadistic, and utterly savage" (Nuernberg Military Tribunals, 1949, p. 45). His staff called to the stand witness Sofia Maczka, an X-Ray technician at the Ravensbrueck camp, who described experimental surgeries in the bone, muscle and nerve regeneration project:

> The operations were to be carried out for scientific purposes, but they had nothing to do with science. They were carried out under horrible conditions. The doctors and the assisting personnel were not trained properly medically. Conditions were neither aseptic nor hygienic. After operations, the patients were left in shocking rooms without medical help, without nursing or supervision. The dressings were made according to the whim of the doctors with unsterilized instruments and compresses. Dr. Rosenthal, who did most of the dressings, excelled himself in

> sadism. In the summer of 1943 the last operations were carried out in the "bunker." Bunker is the name of the horrible prison in the camp. The victims were taken there because they resisted, and there in the cell their dirty legs were operated on. This was the "scientific atmosphere" in which the "scientific" operations were carried out. (Nuernberg Military Tribunals, 1949, pp. 402-403)

Maczka identified credentials, conditions, and procedures as the signs that ostensibly scientific work was undeserving of the legitimacy of that label. She made allusions to the participants' cruelty, and to her "shock" at what she witnessed, but the kernel of evidence that emerged from her testimony was the impropriety of the experiments as measured by the accepted best practices of the medical field at that time.

If Maczka's critique was aimed at the conditions before (credentials) and during (sepsis and procedures) the experiments, the prosecution team renewed the charge with reference to the value of the information gained *after* the experiments had been concluded. In the closing argument to the tribunal, the prosecution argued:

> At least five human lives were sacrificed in the sulfanilamide experiments, while an additional six were shot after having survived the operations. All the surviving victims suffered terrible pains and were crippled for life. Nevertheless, the experiments were not even scientifically successful. The results, as reported by Gebhardt and Fischer at the Third Conference of the Consulting Physicians of the Wehrmacht at the Military Medical Academy in Berlin in May 1943 were not adopted . . . The sulfanilamide experiments were entirely unnecessary, since similar results could have been achieved by the treatment of wound infections of

German soldiers normally contracted during the course of the war. (Nuernberg Military Tribunals, 1949, p. 360)

The prosecution's opening bid, apart from the overview of the specific charges, was a struggle over identity. It was a struggle to speak to a larger audience, to set an extralegal precedent, by calling upon doctors worldwide to constitute themselves as *distinct* from the defendants in the dock, to cultivate their alienation from their German colleagues, so that the defendants' apologetic claims would fall upon deaf ears, and future medical professionals would be socialized toward rejecting such rationalizations.

Telford Taylor adopted several unorthodox roles for himself and his associates, while simultaneously preempting an argument from sign, that the defendants were carrying out their duties as doctors, with a more subtle argument, also from sign, that the defendants had disqualified themselves from the status of doctor by their ideas, their association, and their failure to adhere to the scientific norms of medical research and medical care. Taylor's assumed secondary roles were metaphorical and fleeting, but the role he assigned to the defendants was a mask, a role depleted of meaning. The first wave of framing moves, therefore, broadened the time horizon to include evidence of systemic corruption of German medical knowledge by Nazi ideology, but excluded potential discussion by the defendants of their objectives and designs as physicians and medical researchers.

However, this is not simply a study of message construction: it is a study of how roles were allocated in controversy, in the clash between opponents in argument. The defense had plenty to say about the prosecution's framing moves, and their arguments also revealed much about both their identity and their preferred frame.

Contesting the dominant frame

While the defense attorneys primarily addressed the specific indictments against their own clients, devoting less time to the broad, sweeping framework of the trial than did the prosecution, they did at times attempt direct refutation of the elements of the prosecution's framing arguments described above. To begin with, they argued against the claim that German medicine had succumbed to systemic corruption. In pursuit of this claim, they developed three lines of argument: the prosecution had committed the fallacies of composition and division, and had overlooked evidence that the German people still had faith in their doctors. Leading this charge was Dr. Fritz Sauter, who represented defendants Kurt Blome and Siegfried Ruff. While the case against Ruff was well documented, and ultimately persuasive to the tribunal, the charges against Blome began to disintegrate almost as soon as the prosecution introduced the first exhibits. This, perhaps, left Sauter room to address other issues, as it was in his addresses to the court on behalf of Blome that he made most of his challenges to the prosecution's framework arguments. Other defense attorneys responded to elements of the prosecution's frame in passing, or only in the context of specific charges. Sauter addressed them in detail.

First, the defense argued that reasoning from individual doctors to the entirety of German medicine, however much documentary evidence could be introduced to the court, however sweeping the scale of the experiments, was a poor inductive move: the fallacy of *composition* (Engel, 1980). Even a doctor who oversaw the entire nation's medical apparatus, such as Karl Brandt, did not serve as the tip of a larger iceberg of medical breakdown. Dr. Sauter, in his final plea for Blome, offered this impassioned appeal to the tribunal:

> . . . as defense counsel of the former Deputy Reich Physicians' Leader, I beg you to make it clear by your verdict that in judging the defendant, if you must condemn him, you do not condemn and defame the entire German medical profession, but that the abuses which were committed were individual acts such as, perhaps, happened in all professions during Hitler's time without necessitating a condemnation of the entire profession. . . . If beside the 23 defendants there is a 24th sitting in the dock, invisible to our eye, he is not of the German medical profession but the SS spirit of Himmler and of a dozen other murderers of millions of people. This spirit might have led a fanatic to forget his professional ethics and to commit crimes. But the entire medical profession remained sound and conscious of its duty. May your verdict not completely rob the German people of their confidence in their physicians but restore it to them, and I have no doubt that after the present crisis has been overcome and in more normal circumstances, the German medical profession will prove to its people that as a body it never forgot nor will ever forget the professional ethical commandments of the Hippocratic oath. (Nuernberg Military Tribunals, 1949b, pp. 88-89)

The content of Sauter's argument was plain: doctors were individuals, and the misdeeds of one did not prove misconduct by others. However, Sauter's execution of the argument began a subtext that would continue through many of his other statements, and one that seemed at tension with its content, the claim that each individual had to be judged distinctly. The chief framing move discernible in Sauter's plea was the constitutive one: a hardening of the difference between Germans and non-Germans. In his argument, the group boundary did not surround physicians and cut across national lines, but rather

encompassed Germans and cut across professional lines. Sauter repeatedly invoked the "German medical profession," undercutting Weisgerber's earlier claim that physicians are all the same and know nothing of political difference. Sauter furthermore begged the tribunal not to "rob the German people of their confidence in *their* physicians," and promised that German doctors would "prove to *its* people" that the prosecution's charge of systemic corruption was wrong. All physicians might be individuals, but here Sauter subtly began a theme that all German physicians were bound together, and to their patients, by the bond of German-ness. Sauter might not win the tribunal's endorsement, since they themselves were non-German, but he might complicate the tribunal's ambition to judge the German medical infrastructure *and have their judgment accepted by the German people,* as Taylor had boldly promised in his opening statement that they would do. Ironically, Sauter seemed to affirm Taylor's earlier assertion that the tribunal's job included educating the German people as to the proper understanding of the previous fourteen years' events. However, he urged the tribunal to send a more contingent, less coherent narrative to its audience, one that judged individuals without endorsing Taylor's claims of systemic breakdown. This coherence/contingency divide would extend throughout the clash of claims, and is discussed in more detail in the next chapter. Interestingly, Taylor may have attempted to inoculate the tribunal against this response that his charge was overbroad. He softened his systemic charges a bit, conceding that "Individual Germans did indeed give warning of what was in store, and German doctors and scientists were numbered among the courageous few" (Nuernberg Military Tribunals, 1949, p. 72), but he insistently characterized the conscientious doctors as the aberrations and the dissenters, whereas Sauter insisted that the prosecution could not claim even that

the critical mass of medical effort had been turned aside into Nazi atrocities on the evidence presented.

Sauter was not content to challenge the strength of Taylor's inductive claim: he offered counter-evidence of his own, again in his final plea for Blome, arguing that the German people's continuing confidence in their doctors gave lie to the claim that Nazi administration had stripped it of quality as well as conscience:

> We Germans have our own opinion about our physicians, we know their conscientiousness and willingness to render help; especially during the war we have been able to observe and appreciate their readiness to sacrifice themselves; we know that the good qualities that made the German physicians and researchers a model in former decades were not lost during Hitler's time, and it would be a pity if the abuses, which have been revealed and proved by this trial, should serve to undermine the confidence of the German people in their physicians and expose them to the contempt of all civilized nations. Individual researchers, who out of ambition or a passion for research did not value a human being's life more than that of a rabbit, should not be considered representative of the German physicians' profession, nor should those physicians of the concentration camps, who for lack of a conscience or for some other wicked reason gave fatal injections to prisoners or tortured them to death, be regarded as representative of the German medical profession. No. (Nuernberg Military Tribunals, 1949b, pp. 87-88)

Here, Sauter's constitutive turn was even more pronounced, starting with *"We* Germans," and continuing through assertions that he personally could attest to the quality of German medical care. Interestingly, Sauter made two references that involved the opinion of non-

Germans, and each came at the *end* of a list, almost as an afterthought: German doctors were conscientious, helpful, self-sacrificing, *and* a model to the world; furthermore, revealing German doctors' past abuses threatened to make Germans distrust their physicians *and* draw worldwide contempt. Perhaps countering Taylor's assertion that the trial was an American responsibility, and that the entire world had an interest in an accounting for the doctors' crimes, Sauter placed his emphasis, and sometimes his exclusive focus, upon the interests of the German people. The argument that the tribunal had no jurisdiction over German crimes had already been forwarded and rejected, but Sauter continued to deploy it in an exercise in guerrilla argumentation.

Kurt Blome himself, addressing the tribunal in his final statement, underscored the same argument his attorney had made:

> As former Deputy Reich Physicians' Leader I know conditions in the German medical profession during the Hitler period, and I must say even today that in its *totality* the German medical profession was efficient, decent, industrious, and humane. Their willingness to work under the most difficult conditions that one can imagine, their unselfishness to the utmost, their courage and their helpfulness were exemplary. Beyond all praise were in particular the numerous old doctors who were already living in retirement and who, in spite of their great age, returned to the service of the sick, and those innumerable women doctors who, married, and often the mothers of many children, deserted their household duties for the difficult work of medical practice during wartime. The whole German people knew this, in whose midst and under whose eyes the German medical professions spent the years of distress and fright, and who, therefore, will

> continue to place unlimited confidence in German doctors. (Nuernberg Military Tribunals, 1949b, pp. 149-150, emphasis in original)

Blome did not undercut Sauter's move to make German opinion and German experience the anchor of the trial, but he did refrain from homogenizing Germans as thoroughly as his attorney had done. Targeted by the prosecution for treating humanity as an undistinguished mass, Blome spoke of German medical professionals outside the mainstream and belonging to groups targeted, at times, by the SS for special torment: "… the numerous old doctors … [of] great age," and "… the innumerable women doctors …" Neither Sauter's nor Blome's remarks could constitute any more than anecdotal evidence that the German medical profession had not succumbed to corruption, but their subtle suggestion that only German opinions were relevant evidence in an assessment of German medicine struck squarely at the prosecution's argument that German medicine had fallen below a standard that could only be applied by comparison to the practice of medicine in other nations.

Third, Sauter disputed the premise that guilt was interchangeable, that the prosecution could lower its burden of proof by indicting the system of Nazi medicine and then simply showing that each defendant was an effective operative of that system: the fallacy of *division* (Engel, 1980). He reminded the court that each defendant had a right to have their case judged on its merits:

> If the medical training was no good, if medical officers were released with insufficient scientific knowledge or with bad or wrong professional ethics, then the professor may be considered responsible for this if their teaching did not reach the required goal. On the other hand perhaps the heads of the clinics were

> responsible. Perhaps they did not imbue their practitioners and assistants with the proper professional ethics. Whatever the case may have been, one should not merely look around for a scapegoat to shoulder the moral responsibility. (Nuernberg Military Tribunals, 1949, p. 956)

Here, he was backed up by Dr. Servatius, counsel for defendant Karl Brandt: "If there are offenders there are many co-offenders, and one understands Pastor Niemoeller saying: 'We are all guilty.' This is a moral or a political guilt, but cannot be shifted to a single person as criminal guilt" (Nuernberg Military Tribunals, 1949b, p. 137).

Finally, the defense answered the claims that the experiments were unscientific. In nearly every case, the defense attorneys led their respective clients through recitations of what precautions they had taken, what procedures they had followed, and what credentials gave them the authority to exercise professional judgment in directing their own research. A defense expert witness, Dr. Franz Vollhardt, testified about the impeccable scientific credentials of several defendants. And the defense attorneys occasionally addressed the charge of unscientific work head-on. Dr. Hans Fritz, representing defendant Gerhard Rose, defended his judgment in overseeing an underling's methods in vaccine experiments:

> It would be unfair to blame the defendant Rose for having taken no steps at all on learning that another research scientist, namely Haagen (who was not subordinated to him) was using a method which he knew was widely practiced. . . . This field, with which he was not so familiar, was described in detail by the defendant Rose in his direct testimony. When interrogated, Professor Haagen, as the actual originator of the plans, substantially enlarged and in some instances

> corrected this description. It does not seem feasible to me to classify as criminal, experiments which tend to make more bearable and less dangerous a recognized method already applied on millions of people. (Nuernberg Military Tribunals, 1949, p. 536)

Dr. Fritz, in contrast to General Taylor, did not add descriptors which revealed his own opinion of the scientific quality of the experimental work. Instead, he made simple, easily-checked claims of fact about the procedures being in widespread use by other physicians. Later, the defendants would claim again and again that their actions could not be understood by people not trained in medicine, that expertise was an essential factor in interpreting their work properly. Where General Taylor assumed for himself the role of critic of science, Dr. Fritz's words were free from anything that suggested his own judgment, limiting his capacity to that of spokesperson for an expert, who offered a standard of judgment that involved the behavior of other experts.

Perhaps the most aggressive case for the defense on this charge was made by Dr. Gustav Steinbauer, counsel for defendant Wilhelm Beiglboeck:

> Even medical science on both sides had to assist warfare. I have before me the index of the best known scientific English periodicals from the war period, "The Lancet" and "Nature". Now, after the war, General T. J. Betts of the United States War Department and Professor W. T. Sinsteat of the British Supply Office declared that the captured German scientific results accomplished during the war were of the greatest use for the economic progress of British and American industry. Even the terrible freezing experiments of Dr. Rascher proved to be of

> greatest use for America in the war against Japan. (Nuernberg Military Tribunals, 1949b, p. 64)

If Taylor and his staff wanted a simple, open-and-shut case that any product of the Nazi medical corps was so tainted by poisonous thinking that no medical researcher in any other part of the world could tolerate it, then Steinbauer's evidence dealt a stout blow to that asserted global consensus. It fell far short of exonerating Beiglboeck, as the gleaning and application of data from experiments performed by another was clearly different from performing those experiments[1], so its effectiveness in influencing the verdict was minimal: but as an attack on Taylor's framing move, it was extremely troubling. The tribunal's later reluctance to adopt the prosecution's rather lax standards of complete guilt for minimal participation may be traceable to the prosecution's poor job of distinguishing the defendants' acts from similar practices carried out worldwide.

In the opening exchange, both prosecution and defense wove constitutive messages into their starting positions. The prosecutors constructed the identity of "doctor" as one who not only bears the professional credentials and aptitude to practice medicine, but also as one who observes ethico-medical propriety, refraining from breaching the asserted best practices of experimental ethics. They argued not just that the Nuremberg defendants were *bad* doctors, but furthermore that they *weren't* doctors, that both the German medical community as a whole, and the particular physicians on trial, had excluded themselves from that identification via their crimes. Thus, doctors worldwide were encouraged to refrain from committing the same offenses, lest they

[1] Although much later, controversy would erupt over the use of the data in any way, shape or form, and the U.S. Environmental Protection Agency would restrict its use (Sun, 1988), no serious commentator ever claimed that using the data was *morally equivalent* to actually conducting the experiments.

betray their community and endanger their acceptance within it. The defense, in return, challenged these arguments on their face, and forwarded its own constitutive strategy: Germans had properly protected the interests of Germans, an undertaking that could only be judged by German judges. Perhaps this strategy was directed at generating a bit of discomfort in the tribunal, none of whom were German, but more likely it served to cast doubt on the legitimacy of the trial's findings in the larger, global audience.

More than anything else, what made the Nuremberg Medical Trial significant as an occasion for framing collective memory was its nature as a case of first impression, its importance in laying down principles to govern a situation that had not been foreseen by the opinion leaders within the communities of specialists called to account at the trial. While certain questions addressed in the proceedings would be commonplace in any criminal trial, certain other questions, characteristics of argument, and recurring patterns and themes grew out of the unique elements of this trial, and give clues to its input to the frames of collective memory that emerged. The prosecution devoted substantial energy from the beginning, and throughout the proceedings, to establishing two overarching premises, one abstract, and one mundane: the Nazi medical experiments had a single root cause which the tribunal had to address, and the tribunal need not concern itself with the legitimating factor of scientific breakthroughs, or even useful scientific knowledge, from the defendants' deeds. In executing this argumentative strategy, the prosecutors positioned themselves as reluctant participants, as therapists, as teachers, as critics of science, and called into question the defendants' very status as doctors. The defendants, for the most part, paid more attention to their own specific legal challenges than to the framework, but did on some occasions contest the prosecution's umbrella claims. Those

challenges contained palpable reframing moves regarding the Americans' unwelcomeness as interlopers, the importance of expertise, and the untenability of the prosecution's claim that German medicine suffered a unique, systemic breakdown unheard of in other quarters.

The next chapter will discuss the trial's midgame, the clash and points of stasis between prosecution and defense on details of the charges.

CHAPTER FOUR

POINTS OF STASIS

For many, the contrasting approaches to knowledge taken by Plato and Aristotle are the two pillars of all that has followed: Plato's theories postulated a perfect, complete, coherent world toward which the scholar could work, gaining more and more knowledge and approaching perfection. Aristotle, on the other hand, dealt with the contingent, the uncertain, and the probable, and bypassed many of Plato's absolutist premises. Perhaps emerging from the very structure of reasoning, this divide has reproduced itself in many particular fields of inquiry, from the Kant vs. Mill duality in moral philosophy, to the formalist/realist debate in legal theory, to the idealist/realist schools in international relations. Some question are best answered deductively, through the application of principles and universal claims, and others are most instructively addressed inductively, by observing and gathering information and interpreting as effectively as possible.

When those with fundamentally different beginning assumptions attempt to engage in argument, the going is hazardous. One technique dating back to antiquity to bear down to the pivots of a controversy is the development of *points of stasis,* or statements of the clash between opposing sides. Dieter (1950) defines a point of stasis as "the rest, pause, halt, or standing still, which inevitably occurs between opposite as well as between contrary 'moves', or motions" (p. 369). While this captures the phenomenon as a relationship between statements in an exchange over controversial subjects, Pullman extends the definition by describing it as a *process* to be followed,

> …a series of hierarchically arranged questions that can be used to locate specific differences of opinion within a broader disagreement. If the heuristic is appropriately applied, the questions asked will locate resolvable differences of opinion and so facilitate agreement (1995, p. 224).

Carter calls it "the place where rhetoric begins" (1988, p. 99), while Dill asserts that "if there is no stasis, there is no argument" (1988, p. 20). Thus, attention to points of stasis at the Nuremberg medical trial reveals the critical couplings of opposing claims, clearing away the premises that are at skew with one another, the claims that are apples and oranges, and the elements which both sides stipulate. This chapter describes four points of stasis between prosecution and defense.

Content and relational dimensions of argument

A second divide, between content and form, also runs through much of the field of communication studies. The need for communication arises from the separation and confinement of individuals within their own skulls, and the challenge to transmit experience from one person's mind to another. Thus, there is content, and there is the method of transporting it. The concept of "collective memory" incorporates this duality, consisting of an *understanding* of a past event, and, independently, the manner in which it becomes *collective,* or optimally meaningful for a critical mass of people.

And yet, the two elements are not neatly distinct from one another, but are dimensions of a single phenomenon. Throughout the history of the field of communication studies, rhetorical scholarship has confronted head on the asserted difference between substance and style, and demonstrated that style communicates substance, and substance is changed materially by style. Specifically, scholars in

argumentation also examine the mutual influence of ideas upon relationships and relationships upon ideas. Stephen Toulmin's (1958) primary interest in argument is with the structure of its premises, its claims and proof, while for Douglas Ehninger (1970), the important feature is the relationship between arguers, and the way that relationship not only purifies knowledge, but also "paves the way toward 'personhood'" (p. 110). Jurgen Habermas (1984) explains this duality as argument as *process*, or an event that creates and maintains a relationship between arguers, and argument as *product,* or the configuration of premises that makes a "redeemable truth claim" likely to gain assent.

As mentioned briefly in chapter two, Charland's work in constitutive rhetoric and Osiel's work in discursive solidarity demonstrate that community is constructed both through the content of communication and the conditions of its practice: both through its substance and its form. Of the four points of stasis described in this chapter, two are chiefly concerned with content, and two are chiefly relational, although each contains elements of the other. The two points of stasis concerned with content are *what/why* and *Principle/expediency.* The two points of stasis that are primarily relational in nature are *individual/state* and *culpability/constraint.*

Points of stasis in the Nuremberg Medical Trial

The purposes undertaken by the prosecution and defense were worlds apart. As discussed before, the prosecution sought to put a regime, and a body of ideas, on trial. The forum they had selected, because of its veneer of legitimacy, required the identification of particular individuals as defendants. Tradition and theory dictated that the defendants would be presumed innocent, and that the prosecution must assemble a substantial body of proof that would convince the tribunal beyond a reasonable doubt to

return a guilty verdict, in order to secure their goal. Thus, from the beginning, the prosecutors were no different from any other prosecutors in their need to concoct a coherent, straightforward, unproblematic account of what had happened and who was responsible. However, because of the collective memory functions that General Telford Taylor explicitly announced, in his opening argument, that the Allies sought to carry out, in this case the need for certainty and ease of acceptance was heightened still further. The case had to be sufficiently solid not only to compel a verdict from the tribunal, but also to satisfy history's verdict. The efforts to compose a grand narrative with high fidelity began, and were best overviewed, in Taylor's first description of the entire case in his opening statement:

> But we must not overlook that the medical experiments were not an assortment of unrelated crimes. On the contrary, they constituted a well-integrated criminal program in which the defendants planned and collaborated among themselves and with others. We have here, in other words, a conspiracy and a common design, as is charged in count one of the indictment, to commit the criminal experiments set forth in paragraphs 6 and 11 thereof. There was a common design to discover, or improve, various medical techniques. There was a common design to utilize for this purpose the unusual resources which the defendants had at their disposal, consisting of numberless unfortunate victims of Nazi conquest and Nazi ideology. (Nuernberg Military Tribunals, 1949, p. 67-68)

Although the conspiracy and common design charge would later be abandoned as unprovable, the pursuit of an elegant explanation, the effort to turn aside complexity and uncertainty would prove a relentless thread of the prosecution's efforts throughout the

trial. It is striking that in the above excerpt, Taylor made no reference to any *particular* idea that united the charged offenses. The "conspiracy and common design" was "to commit the criminal experiments," but not, according to Taylor, to achieve any greater purpose than that: no mention of racial purity, or Nazi aggression, or any other goal that could add coherence to the prosecution's narrative. Similarly, the "common design" was "to discover, or improve, various medical techniques," and "to utilize … the unusual resources," but nothing more. As discussed in previous chapters, Taylor had already made the claim that Nazi thought had contaminated German medicine and thereby made the experiments possible, but actual proof that the defendants had conspired to further Nazi goals was much more difficult to come by, and its lack would ultimately be one of the fatal blows to the prosecution's conspiracy charge.

The defendants, like all defendants, were confronted with the task of opening up doubt in the minds of the triers of fact. But their larger task was to disentangle themselves from the trial of the Nazi state, to show that it was not the smooth, dissent-free machine described by the prosecution, and to suggest to the judges that they, too, had they been in the defendants' position, might have found themselves with no other choice but to do exactly what now made up the indictment against the defendants. Karl Gebhardt, a doctor who participated in wound experiments, captured the thrust of the defense's message, that of a world gone mad and the impossibility of reason, in his final plea to the tribunal:

> The historical situation at that time placed me in a totalitarian state which, in turn, placed itself between the individual and the universe. Virtues in the service of the state were paramount virtues. Beyond that I do not know anywhere where the intellect was not debased as a tool for war. Everywhere, in some way values and

> solutions were put into the service of the war. (Nuernberg Military Tribunals, 1949b, p. 144)

Gebhardt here gave agency to institutions, and put all individuals in the objective case. The state positioned both itself and its subjects, the state debased the intellect, the war effort overrode values and appropriated solutions. While the prosecution worked to prove that the defendants had acted, Gebhardt's statement summarized a defense effort to prove that they had been acted *upon,* and had, mostly, been powerless to make any difference.

In the sections that follow, I will develop this divide between prosecution and defense themes through the four points of stasis.

What versus why

The first divide lay between detail and context. The prosecution argued from the start that the case wasn't complex, that if the tribunal simply learned of the time, place, and details of the alleged offenses, they would find the defendants guilty without need for extensive deliberation. In his opening statement, General Taylor asserted that "This case is one of the simplest and clearest of those that will be tried in this building" (Nuernberg Military Tribunals, 1949, p. 71). He provided a quick overview of the obscure and nuanced nature of ethical theory in the medical field, but reassured the judges, "I intend to pass very briefly over matters of medical ethics . . . . This case does not present such problems. No refined questions confront us here." (Nuernberg Military Tribunals, 1949, p. 70). Similarly, the prosecution's strategy for the actual proceedings included a conscious decision to rely primarily upon confronting the defendants with their own words, through introduction of documents into evidence, rather than wrangling over eyewitness testimony (Meltzer, 1999). Thus, the prosecution moved the frame into

extreme close-up, limning the details of particular events exhaustively, but devoting scant attention to the abstract matters such as motive and convention.

Of the prosecution's various descriptions of experiments, most began with an almost journalistic tone. Explaining defendant Karl Gebhardt's bone experiments on Vladislava Karolewska, the prosecution reported that,

> The first operation was conducted on 14 August 1942 by Fischer. *(Tr. p. 819.)* Gebhardt inspected her early in September. *(Tr. p. 821.)* She was sent back to her block on 8 September 1942, but was unable to walk and remained in bed for a week. On 16 September 1942 she was again taken to the hospital and operated on for the second time by Fischer. *(Tr. pp. 821-2.)* She left the hospital on 6 October 1942 and remained in bed for several weeks. Her leg did not heal until June 1943 *(Tr. pp. 822-3)*. She filed a written protest with the camp commander, together with other experimental subjects in February 1943. In August 1943 she was operated on literally by force in the bunker at Ravensbrueck. Both her legs were cut open. These operations were carried out on five other Polish girls under indescribably filthy conditions. On 15 September 1943, a further operation was performed on her right leg by a doctor from Hohenlychen. Two weeks later her left leg was operated on and pieces of the shinbone were removed. She stayed in the hospital for 6 months – until the end of February 1944. *(Tr. pp. 828-9.)* Karolewska identified the defendants Gebhardt, Fischer, and Oberheuser as having participated in the experiments on her. (Nuernberg Military Tribunals, 1949, pp. 395-396)

But for the asides about the use of force and the filthy conditions, which are quick afterthoughts taking up no more than six words in a lengthy paragraph, the account could be indistinguishable from a technical description of a series of normal surgeries on a normal patient.

The journalistic tone was even more evident in a brief description of poison experiments conducted by one of defendant Joachim Mrugowsky's assistants. The account reads, in its entirety, "Four Russian prisoners of war were experimented upon by Ding. The poison was administered to the experimental subjects in their food without their knowledge. All four survived, but were strangled in a crematorium of the concentration camp in order that autopsies could be performed" (Nuernberg Military Tribunals, 1949, p. 632). There is no discussion of motive, no elaboration upon context. It would transplant neatly to the opening paragraph of a newspaper story. The prosecution, based on their opening remarks, apparently preferred to cling to simplicity, perhaps unwilling to offer the defendants ground by opening up broader, more abstract matters to discussion. They reserved for themselves the argumentative move of claiming that such matters had no bearing on the instant case, an option they would surrender if they presented the case with those issues already addressed.

Even while narrating instances in which the defendants behaved cruelly or abused the subjects, the tone was oddly dry. Describing defendant Wilhelm Beiglboeck's crackdown on rebellious experimental subjects that were given only seawater to drink for a period of several weeks, the prosecuting attorney reported, "On one occasion Vorlicek spilled some fresh water on the floor and forgot the rag which he used to mop it up. The experimental subjects seized the dirty rag and sucked the water out of it. Beiglboeck

threatened to put him in the experiments if it ever happened again." (Nuernberg Military Tribunals, 1949, p. 432) He continued,

> One of the subjects tried to persuade the others to refuse to drink the sea water. Beiglboeck threatened to have him hanged for sabotage. The subject later vomited after drinking sea water whereupon Beiglboeck had the water administered through a stomach tube. *(Tr. p. 10207.)* Another subject was tied to his bed and adhesive tape was plastered over his mouth, because he had obtained some fresh water and bread (Nuernberg Military Tribunals, 1949, p. 432).

The prosecution proceeded, apparently, from the strategy that to interpret is to dilute, to explain or theorize what is permissible and what is not is to rob the raw description of events of its persuasive power. The enthymeme's suppressed premise plainly was expected to emerge not from the tribunal's commonplaces, but from the visceral reaction of their conscience.

An even more laconic argument tactic was the prosecution's frequent presentation of the defendants' own words and writings to the court. The experiments were, for the most part, meticulously documented, and in many cases the defendants' own mixture of detached phrasing, appropriate for a lab report, and description of intense suffering on the part of the subjects, made wrenching evidence when read into the record, with a minimum of interference by the prosecution's own claims. Defendant Joachim Mrugowsky's observations of the firing of poisoned bullets into prisoners, displayed this combination:

> The entrance of the projectile did not show any peculiarities. Evidently the arteria femoralis of one of the subjects were injured. A slight stream of blood issued

from the wound. But the bleeding stopped after a short time. The loss of blood was estimated as having been at the most _ of a liter, and consequently was on no account fatal. The symptoms of the condemned three showed a surprising similarity. At first no peculiarities appeared. After 20 to 25 minutes a motor agitation and a slight ptyalism set in, but stopped again. After 40 to 45 minutes a stronger salivation set in. The poisoned persons swallowed repeatedly, but later the flow of saliva became so strong that it could not even be overcome by swallowing. Foamy saliva flowed from their mouths. Then choking and vomiting set in. After 58 minutes the pulse of two of them could no longer be felt. The third had a pulse rate of 76. After 65 minutes his blood pressure was 90/60. The sounds were extremely low. A reduction of blood pressure was evident. During the first hour of the experiment the pupils did not show any changes. After 78 minutes the pupils of all three showed a medium dilation together with a retarded light reaction. Simultaneously, maximum respiration with heavy breathing inhalations set in . . . . After approximately 90 minutes, one of the subjects again started breathing heavily. This was accompanied by an increasing motor unrest. Then the heavy breathing changed into a flat, accelerated respiration, accompanied by extreme nausea. One of the poisoned persons tried in vain to vomit. To do so he introduced four fingers of his hand up to the knuckles into his throat, but nevertheless could not vomit. His face was flushed. The other two experimental subjects had already early shown a pale face. The other symptoms were the same. The motor unrest increased so much that the persons flung themselves up, and down, rolled their eyes, and made meaningless motions with their hands and

> arms. Finally the agitation subsided, the pupils dilated to the maximum, and the condemned lay motionless. Masseter spasms and urination were observed in one case. Death occurred 121, 123, and 129 minutes after entry of the projectile. (Nuernberg Military Tribunals, 1949, pp. 635-636).

At times, the principle of elegance underlying these tactics led the prosecution to highlight portions of the defendants' documents, even down to individual words and phrases stripped even of the context of the sentences in which they had appeared. Explaining the high altitude experiments carried out by defendants Siegfried Ruff and Hans Romberg, the prosecution winnowed the defendants' report down to the most inflammatory descriptive terms: "The report describes the victim's reactions- 'spasmodic convulsions,' 'agonal convulsive breathing,' 'clonic convulsions, groaning,' 'yells aloud,' 'convulses arms and legs,' 'grimaces, bites his tongue**,**' 'does not respond to speech,' 'gives the impression of someone who is completely out of his mind'" (Nuernberg Military Tribunals, 1949, p. 41).

On more than one occasion, the defendants' words were used to discredit them on the stand. Regarding experiments in which camp inmates were executed by being injected with phenol, prosecutor Alexander G. Hardy had the following exchange with defendant Mrugowsky:

> Q. Then at no time did you even propose that experiments be conducted to determine the tolerance of sera containing phenol; is that what you say?
>
> A. No. I never suggested that.
>
> Q. Are you sure, Doctor?
>
> A. Yes.

MR. HARDY: At this time, your Honor, I offer Document NO-1198 as Prosecution Exhibit 466, for identification. This is a letter dated Berlin, 24 August 1944. Subject: Service of experiments. It has reference-file indexes, addressed to the chief hygienist on the staff of the Reich Physician SS and Police, Berlin-Zehlendorf:

"Dear Mrugowsky,

"I am able to inform you that the Reich Leader SS has approved today the series of experiments proposed by you.

"1. Specific therapy with typhus.

"2. Tolerance of sera containing phenol." (Nuernberg Military Tribunals, 1949, p. 693).

But the documentary evidence secured from the defendants' own laboratories offered the prosecution more than just the defendants' words. Introducing the charge against defendant Wolfram Sievers for collective the skeletons of prison inmates for a medical collection, the prosecution promised that the pictures of stacked corpses would "tell the grim story of this mass murder more vividly than witnesses and documents ever could" (Nuernberg Military Tribunals, 1949, p. 741). Similarly, when defendants Ruff, Romberg and Georg Weltz argued that the fatalities in their high altitude experiments were painless, the prosecution replied, "This is on the theory that the subjects lost consciousness before any sensation of pain. This anomalous defense is completely disproved by the photographic exhibits showing the expressions of pain of the subjects." (Nuernberg Military Tribunals, 1949, p. 105) Here again, the elegance of the prosecution's strategy, and the narrowing of the frame, worked to deprive the defense of

opportunities to identify flaws in the case. The less the prosecution had to guide the court in interpreting this evidence, the less ground they opened up for the defense to seize, and the more they availed themselves of the opportunity to narrow the frame to exclude issues raised by the defense to explain or extenuate the alleged offenses.

This pattern, running through prosecution arguments on almost every charge, was not merely a strategy, but was itself evidence for the argument made by General Taylor in his opening statement. Taylor had promised the tribunal a simple, stark, unmistakable judgment against the defendants, unclouded by intruding secondary issues:

> Were it necessary, one could make a long list of the respects in which the experiments which these defendants performed departed from every known standard of medical ethics. But the gulf between these atrocities and serious research in the healing art is so patent that such a tabulation would be cynical (Nuernberg Military Tribunals, 1949, p. 71).

His team of attorneys carried out the promise by constructing a body of evidence consisting almost entirely of foundation, with the most residual veneer of theory or elements of a crime delivered only in quick asides, or in the closing statement.

The defense's side of the what/why point of stasis was the attention to context. Having been accused of a simple, brutal, easily explained programme of tortures, the defense attorneys set about putting each experiment into a broader context, explaining what was really intended in each case, pointing out motives that didn't square with the prosecution's allegations. At times, the defendants reported that if the experiments were truly as cruel as they had been described, they wouldn't produce the data the defendants sought. Explaining experiments on prisoners with *Lost,* the liquid form of mustard gas,

defendant Karl Brandt's attorney, Robert Servatius, explained, "The usual forms of the 'Lost' experiments, applying a drop to the skin, as described by Holl *(Tr. p. 1052)* do not entail any danger to life, because the aim is to ascertain the most detailed reactions of the skin toward tiny drops of 'Lost.' Experiments with deadly quantities would prevent this being ascertained" (Nuernberg Military Tribunals, 1949, p. 327).

Other defendants explained the exigencies of war that had made the experiments necessary. Joachim Mrugowsky, giving his own account of the poison bullet experiments, began by explaining that the experiments were preceded by an attack on German officers by Russian agents firing poisoned ammunition. He reported that the purpose of the experiments was to set some baseline research to prepare the way for antidotes, and also to establish the severity and rapidity of the threat of poisoning. Wrapping up his remarks, he managed to introduce his own feelings, the scientific purpose, and the futility of resistance, all in a few sentences:

> The sight of this execution was one of the most horrible experiences of my life. On the other hand, I could not shorten the symptoms for in the first place there was no antidote against aconitine available. If it is in the circulation, then there is no possibility of removing it. In the second place, it was the express purpose to find out how long the symptoms of poisoning last in order in later cases to be able to use an antidote, which it was hoped would soon be discovered (Nuernberg Military Tribunals, 1949b, p 59).

Some defendants simply attempted to redescribe the medical procedures, disputing the prosecution's stark claims of painful, violent and debilitating manipulations with their own, more medically appropriate, accounts. Defendant Karl Gebhardt,

testifying from the stand about his own experiments in which wounds were artificially inflicted upon camp inmates, reported, "So we did not insert dirt, glass or earth, cruelly; the dirt in the wound was represented by sterile glass silicate; soil and textiles which would enter a wound were replaced by us through sterile cellulose, finely ground." Having replaced the prosecution's language, he worked to broaden the frame still further by explaining his motive:

> The only effect it has is to produce a catalysis for the germs and a local obstruction to the flow of blood, and possibly to damage a few cells slightly. In other words, we produced inflammation in the safest way possible for such an experiment. That is an unquestionable scientific train of thought in this sphere (Nuernberg Military Tribunals, 1949, p. 388).

In the first divide, the prosecution attempted to lay ground for the possibility of closure, while the defense persisted in contaminating the prosecution's neat accounts of open-and-shut crimes with the kind of uncertainty and half-justification characteristic of tragedy.

Principle versus expediency

The second divide ran between the prosecution's stubborn defense of absolute adherence to rules, and the defense's aggressive pursuit of arguments based on maximizing benefit and minimizing harm. Here, the prosecution put even less development into its arguments than in the descriptive case presentations described in the last section. Having made its case in the opening argument, the prosecution offered a few scornful replies to the defense's claims, and otherwise left the issue to the tribunal's judgment.

The chief prosecution spokesperson on the issue of expediency was Dr. Andrew C. Ivy, who had directed medical research at Bethesda Naval Hospital and Northwestern University Medical School, and was the American Medical Association's chosen expert on medical ethics for the Nuremberg Medical Trial (Faden et al., 1995). In a running battle with Dr. Servatius, defendant Karl Brandt's attorney, Ivy insisted repeatedly that the norms binding doctors in their practice could not justifiably be breached, or even bent, to accommodate extreme need. He couched his argument in the timelessness of principle, arguing that extreme need is short-lived, but the consequences of abandoning principle for expediency outweighed the need by out-enduring it. Asked by Brandt whether he thought people dying of plague would forgive him if he doomed them to die by refusing to experiment on a prisoner, Ivy replied,

> They have understanding for the importance of the maintenance of the principles of medical ethics which apply over a long period of years, rather than a short period of years. Physicians and medical scientists should do nothing with the idea of temporarily doing good which, when carried out repeatedly over a period of time, would debase and jeopardize a method for doing good. (Nuernberg Military Tribunals, 1949b, p. 42)

Brandt pursued him relentlessly, eliciting from Ivy not only a willingness to allow teeming masses of people to die, but also a willingness to die himself before surrendering his principles:

> Q. Then you are of the opinion that the life of the one prisoner must be preserved even if the whole city perishes?
>
> A. In order to maintain intact the method of doing good, yes.

> Q. From the point of view of the politician, do you consider it good if he allows the city to perish in the interests of preserving this principle and preserving the life of the one prisoner?
>
> A. The politician, unless he knows medicine and medical ethics, has no reason to make a decision on that point.
>
> Q. But as a politician he must make a decision about what is to happen. Shall he coerce the doctor to carry out the experiment, or shall he protect the doctor from the rage of the multitude?
>
> A. You can't answer that question. I should say this, that there is no state or no politician under the sun that could force me to perform a medical experiment which I thought was morally unjustified.
>
> Q. You, then, despite the order, would not carry out the order, and would prefer to be executed as a martyr?
>
> A. That is correct, and I know there are thousands of people in the United States who would have to do likewise. (Nuernberg Military Tribunals, 1949b, p. 43)

After the initial two exchanges, which were confined to abstract statements of the value proposition at issue, Servatius grounded the discussion with a concrete example. At first, Ivy resisted even admitting that the question could properly be considered ("You can't answer that question"), possibly believing the dilemma set up in Servatius' question between coercion and mob violence to be a false one, but when Servatius reformulated the question to weigh unethical medical work against death as a martyr, Ivy finally responded. The first formulation of the question was a weighing of two evils, the kind of dilemma that the prosecution had stubbornly refused to admit in its description of the

alleged crimes, but the second permitted Ivy to characterize himself as heroic, so committed to principle that he would choose death before dishonor.

Brandt made one more attempt to move Ivy to admit room for reasonable disagreement on the issue, but Ivy stood firm:

> Q. If a soldier deserts from the front where typhus is raging for fear that he too will contract typhus and prefers to be imprisoned in order thus to save himself, do you think it is right for him to be persuaded while he is serving his sentence to subject himself to a typhus experiment?
>
> A. As a volunteer? Yes.
>
> Q. I see. And would you not take a step further, if this prisoner says, "No, I refuse, because if I do this there wouldn't have been any point in my deserting; I deserted in order to save myself. My buddies may die but I would just prefer not to."
>
> A. The answer to that question is no.
>
> Q. Don't you admit that one can hold a different view in this matter?
>
> A. Yes, but I don't believe it could be justified. (Nuernberg Military Tribunals, 1949b, p. 61)

Ivy's final response to Servatius may have seemed flippant, but actually was a careful negotiation between his role at the trial and the principle he worked so hard to defend. While the prosecution drew its case in lines of absolute claims, binding obligations and situations where discretion could not be exercised, Ivy was hard at work defending the idea that free will was a primary value, and the overriding of an individual's decision was a grave ethical breach. The two situations weren't facially contradictory, as Ivy was defending a person's right to decide about their own bodily integrity, whereas the

prosecution argued that discretion did not reach a doctor's decision concerning whether to treat a *patient* according to ethical dictates, but there existed tension. So while Ivy might have felt tempted to answer Servatius that no other viewpoint was ethically permissible, instead he underscored the two realities that people may be mistaken, but they still decide for themselves.

Apart from Ivy's spirited insistence on adherence to principle, the prosecution argued that responding to emergency left the proper action up to each individual conscience, and curtailed judgment of any atrocity, however severe, so long as the perpetrator could articulate a reason for it, however flimsy. If this were the case, then the entire trial would become an empty exercise. Answering Ruff, Romberg and Weltz's invocation of the Necessity of State doctrine, the prosecution argued:

> "Necessity of the State" has been much used by the defendants as if it were a defense. This is clearly unfounded even though necessity, military or otherwise, be assumed. It is to be supposed that each defendant *thought* there was some necessity to what he was doing. This is no defense. . . . It was deemed necessary to incarcerate hundreds of thousands of persons in concentration camps. It was deemed necessary to murder millions of Jews. The slave labor policy was bottomed on necessity. If that is a defense, then these trials lose all meaning. (Nuernberg Military Tribunals, 1949, p. 113)

Here again, in stark contrast to the defendants' claims that their situation was chaotic, unpredictable and resistant to neat ordering into ethical categories, the prosecution argued in favor of limits and boundaries of acceptable action. The objection to the necessity defense was that it could not be restrained, and thus any action could be justified. The

defendants might well have responded, "That is an accurate description of the reality we faced," but for the prosecution, that served as refutation. If the principle could not be limited, if behavior could not be excluded, then the principle failed.

Ostensibly, the defendants had been pursuing their own absolute, unyielding principle as well. Nazi ideology demanded that the propagation of the Aryan race be valued above all other concerns. However, even though General Taylor introduced the evidence in his opening statement that most of the defendants were active members of the Nazi party, with some attaining truly exalted ranks, not one of the defendants resorted to claiming that the duly enacted laws protecting "racial health" created a competing value consideration. Instead, they argued that the prosecution's absolutism had to give way to the extremity of wartime emergency.

As Dr. Ivy was the most vocal defender of principle, Dr. Servatius, his nemesis, was the most aggressive proponent of modifying principles in time of emergency. Giving his final argument in defense of Dr. Karl Brandt, Servatius announced that "It is the hard necessity of the state on which the defense for Karl Brandt is based against the charge of having performed criminal experiments on human beings" (Nuernberg Military Tribunals, 1949b, p. 127) He centered his defense on a reduction of the case for absolutism to a paradox. In his final plea to the court, he pursued the hypothetical example he had posted to Ivy, suggesting that if experiments on prisoners held out the only hope of treating a wartime plague, then the state would be justified in adding the experiments on to their punishment. He concluded, "The prosecution says 'No.' According to this, human rights demand the downfall of human beings" (Nuernberg Military Tribunals, 1949b, p. 128).

In tandem, Dr. Alfred Seidl, defense counsel for defendant Karl Gebhardt, argued that legal doctrine worldwide supported the emergency departure from otherwise binding principles:

> The problem of emergency and the specific case of self-defense has been regulated in almost all criminal codes in a way applicable only to individual cases. The individual is granted impunity under certain conditions when "acting in an individual emergency arising for himself or others". The administration of justice and legal literature, however, recognize that even the commonwealth, the "state," can find itself in an emergency, and the acts which are meant to and actually do contribute to overcome this emergency may be exempt from punishment (Nuernberg Military Tribunals, 1949b, pp. 6-7).

He continued: "The necessary consequences of conceding such actions on the part of the individual must be that not only is he absolved from guilt, but moreover his acts are 'justified'" (Nuernberg Military Tribunals, 1949b, pp. 7). By this claim, Seidl asserted not only that the obligations had been overridden by circumstances, but that clinging to typical obligations in the face of questions of survival was itself indefensible. Seidl blurred the lines between individual and institution, more so than the defense attorneys cited previously, by drawing attention to the fact that individual defendants *chose* to respond to the necessity of the state, rather than being *forced* to do so, but applied the doctrine of emergency both to individual and institution, suggesting that individuals were not free to act independently of the institutions that commanded them.

Testifying on the witness stand, defendant Gerhard Rose argued that the experiments had produced disproportionate benefits in lives saved:

> There was only one choice, the sacrifice of human lives, of persons determined for that purpose, or to let things [the typhus plague] run their course, to endanger the lives of innumerable human beings who would be selected not by the Reich Criminal Police Office but by blind fate. How many people were sacrificed we cannot figure out today; how many people were saved by these experiments we, of course, cannot prove. The individual who owes his life to these experiments does not know it, and he perhaps is one of the accusers of the doctors who assumed this difficult task. (Nuernberg Military Tribunals, 1949b, p. 70)

Rose attempted to appropriate the prosecution's claims of injustice against the prisoners by noting that the deaths by disease of people guilty of no crime would be even more unjust. He also augmented Servatius' survival argument, noting that the immediate members of his audience, the officers of the court, might have been saved from disease by those of his actions under indictment. Where earlier Ivy had argued that expediency was short-lived and did long-term damage to the principle that was violated, Rose responded that the benefits of the experiment were temporally indeterminate, that checking a plague produced ripple benefits that could not easily be calculated.

Fritz Flemming, counsel for defendant Joachim Mrugowsky, responded to Rose's implicit challenge, advancing the exchange by putting an explicit, and extremely disproportionate, figure on Rose's argument:

> But the typhus experiments were dangerous experiments. Out of 724 experimental persons, 154 died. But these 154 deaths from the typhus experiments have to be compared with the 15,000 who died of typhus *every day* in the camps for Soviet prisoners of war, and the innumerable deaths from typhus among the civilian

> population of the occupied eastern territories and the German troops. (Nuernberg Military Tribunals, 1949, pp. 542-543)

Clearly these were struggles to include data in the dominant frame, data that the prosecution had preferred to exclude. Earlier, they had attempted to prove the doctors' work so scientifically bankrupt that any benefits came about by accident. In this phase of the trial, they argued that the end didn't justify the means, so if the experiments resulted in successful treatment of subsequent patients, those lives could not be factored into the decision to condone or condemn the experiments.

In one of the most energetic framing moves on the part of a defense attorney in the entire trial, Josef Weisgerber, defense counsel for Wolfram Sievers, announced that the case for abandonment of ordinary norms of conduct under extremity was so pivotal to judging the case properly, the tribunal must explicitly set a precedent enshrining it in law for future postwar trials:

> You, your Honors, are called upon to bring the principles of "self-defense" and of "necessity", "this great law of defense" to their common denominator, to apply them to the Sievers case and thus to insert them into the unwritten rules of the international relations of public and political law. The Anglo-Saxon legal way of thinking and the principles of natural law will give you a valuable support in forming the verdict. (Nuernberg Military Tribunals, 1949b, p. 16)

As the first point of stasis had addressed the question of "how shall the tribunal *comprehend,"* the second one was directed to the issue of "how shall they *judge."* Once again, the prosecution opted for the simple, elegant account, resistant to the exigencies of

different situations. The defense responded that circumstances had the ability to reduce those principles to absurdity.

Individual versus state

Although virtually none of the Nazi racial theory survived the fall of the regime, much of the political residue was evident. The strong communitarian spirit that nourished fascist regimes in Spain, Italy, and Germany, was not dissipated by the Allied victory, and one of the lines of argument pursued most energetically by the defendants was the permissibility of the state taking liberties with its citizens for the greater good. One of the prosecution's most stubborn, most fundamental claims was that the obligation on the part of doctors to respect other humans' bodily integrity, and invade it with experiments only if they consented, did not give way because of the low status of the experimental subject: Jews, gypsies, homosexuals, political prisoners, convicted thieves and murderers, and even Russian prisoners of war all were beyond the permissible reach of medical curiosity. This point of stasis entailed the forcible joining of two irreconcilable sets of claims.

Living up to Morgan's (1988) description of war crimes trials as a retributive colloquy that affirms the value of the victims by reminding the world that they lived, died, and were worthwhile, General Taylor presaged his team's focus on the identities of the experimental subjects in the fifth and sixth sentences of his opening argument: "For the most part they are the nameless dead. To their murderers, these wretched people were not individuals at all" (Nuernberg Military Tribunals, 1949, p. 27). A few sentences later, General Taylor explicitly promised that the gathering of evidence and the punishment of the defendants would in some way restore the value stripped away from the lives of the victims:

> The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable; and that this Court, as the agent of the United States and as the voice of humanity, stamp these acts, and the ideas which engendered them, as barbarous and criminal. (Nuernberg Military Tribunals, 1949, p. 27).

This overt commitment to retributive justice dovetailed well with the two prosecution positions laid out in the previous two points of stasis: according to Morgan, retributive justice understood this way calls for a *remembrance* of the victims, who were neglected, and in a sense forgotten, both by their attackers and by anyone else who had the power to intervene; it is also a view of justice based on principle, not expediency, and not at all on maximizing benefits to any party involved.

Paying out on this promise throughout the trial, the prosecution rarely missed an opportunity to highlight the victims' identities, saying of bone transplant experiments that "The experiments conducted principally on the female inmates of Ravensbrueck concentration camp were perhaps the most barbaric of all" (Nuernberg Military Tribunals, 1949, p. 45), pointing out that in research into live malaria vaccines, "Over l,200 inmates of practically every nationality were experimented upon" (Nuernberg Military Tribunals, 1949, p. 43), and in research into sterilization techniques, "At least 100 involuntary experimental subjects – Poles, Russians, French, and prisoners of war – were used for these experiments. Only young, well-built inmates, in the best of health, were selected for them" (Nuernberg Military Tribunals, 1949, p. 702) and finally, noting

that in experiments with blood coagulants and wound disinfectants, "Polish Catholic priests were used for these tests. Many died and others became invalids" (Nuernberg Military Tribunals, 1949, p. 46). Many times, the same prosecutors who dealt briskly with the defendants' actions and said little about their motives would stop to describe the victims in almost loving words:

> Alfreda Prus was infected with oedema malignum the same day as the witnesses Kusmierczuk, Kiecol, and Lefanowicz. She was a beautiful, young 21-year-old girl, and a university student. She proved to be stronger than Kiecol and Lefanowicz and for that reason she lived a few days longer. She suffered terrible pain and finally died of hemorrhage. (Nuernberg Military Tribunals, 1949, p. 359)

Evidence of the defendants' devaluing of their subjects was often vivid. Prosecution witness Zdenka Nevedova-Nejedla reported that experimental subjects "were placed in one block and they were generally known as 'rabbits'" (Nuernberg Military Tribunals, 1949, p. 401), while camp survivor Vladislava Karolewska offered a variation on the same theme: "At the end of February 1943, Dr. Oberheuser called us and said, 'Those girls are new guinea pigs'; and we were very well known under this name in the camp" (Nuernberg Military Tribunals, 1949, p. 414). One of the prosecution's most inflammatory charges against defendant Waldemar Hoven was, as discussed before, delivered to the court in Hoven's own words:

> On 20 August 1942, Hoven suggested to the camp commander of Buchenwald that the reporting of deaths of Russian political prisoners be discontinued in order to save paper. He said – "It is requested that the question should be examined whether it is necessary to issue reports of the death of political Russians.

> According to a direction issued last week, an issue of only one form was required. This may effect a saving of paper, but as political Russians are for the greatest number among the dead prisoners at the present time, more time and paper could be saved if these death reports were dropped. Notifications of death could be made as before, as for the Russian prisoners of war" (Nuernberg Military Tribunals, 1949b, pp. 3-4).

Not only, then, did the defendants value their victims as less than human, but Hoven evidently valued them less than the paper it took to write reports of their deaths.

As with the earlier prosecution bulwark of testimony about medical ethics from Andrew Ivy, the vanguard of the prosecution's case for individual worth was their expert witness, in this case Dr. Werner Leibbrandt. And, again, Dr. Servatius led the defense's efforts to wrench open holes in Leibbrandt's testimony, trying to ply his arguments about emergency and the risk of deaths by the thousands from disease and military defeat. Leibbrandt would have none of it:

> DR. SERVATIUS: Witness, you stated that the performance of experiments on human beings, as is the subject of the indictment here, can be ascribed to biological thought. What do you mean by biological thought?
>
> WITNESS LEIBBRANDT: By biological thought I mean the attitude of a physician who does not take the subject into consideration at all, but for whom the patient has become a mere object, so that the human relationship no longer exists, and a man becomes a mere object like a mail package.
>
> Q. You spoke of thinking as a biologist. Do I understand that you see therein an action belonging to biological thought?

A. An exaggeration of the purely mechanical or biological point of view, because the physician is not merely a biologist, he is also a biologist. Primarily, however, a physician is a man who assists the human being and not a scientific judge of biological events.

Q. Could there not be other causes for the experiments, such as a collective state thinking?

A. Yes.

Q. Witness, you used the expression "demoniac order". What do you mean by that?

A. By demoniac order I mean the following: If I define as a basis for medical activity merely the maintenance and safeguarding of the substance of the nation according to blood, the result is that everything which falls outside this pretense has to be cleared away. That is a mild expression of what actually happened, namely, extermination.

Q. Then your demoniac order only refers to the blood aspect. Could it not be applied to the purely state collective aspect as well?

A. Could you give an example so that I can understand it better?

Q. I mean that experiments were undertaken and that the voluntary act of the individual is replaced by the act of the state namely, by the voluntary approval given by the state.

A. Between the collective idea and the state order on the one hand and the medical individual on the other, there stands something rather important — the human conscience (Nuernberg Military Tribunals, 1949b, pp. 80-81).

Leibbrandt's argument was a powerful extension of Taylor's discussion of "Thanatology," examined in the previous chapter. Leibbrandt went to the mechanics of how medical practice broke down into a tool of the military, and located it in *medical* vocabulary, rather than Nazi ideology. Servatius floated the possibility that the interests of the community were a factor in such medical decisionmaking, but Leibbrandt returned to the prosecution's commitment to principle and argued that the needs of the state could not compel what the physician's conscience could not permit.

The prosecution argument that most forcefully brought home the imbalance between the doctors' esteem for their subjects and for themselves was the observation, made several times, that the doctors required concentration camp inmates for their experiments because no one else would volunteer, and because the doctors themselves were unwilling to participate. Summing up defendant Hans Romberg's actions in the high altitude experiments, the prosecution asserted,

> It should be noted that Romberg and Rascher who tested themselves in the altitude chamber at Dachau with an air pressure equivalent to 12,500 and 13,500 meters altitude respectively, for 30 to 40 minutes, discontinued these experiments on themselves because of intense pain. *(NO-402, Pros. Ex. 66)* Yet, these men proceeded, as proved by their own joint report, to conduct experiments on prisoners which they would not perform on themselves. (Nuernberg Military Tribunals, 1949, p. 102)

The prosecution acted to correct this unbalancing by bringing the survivors of experiments into the court to relate their experiences from the witness stand, to announce, demonstrate, and celebrate their survival despite the best efforts of the defendants to

eliminate them. Witness Karl Hoellenrainer, describing Beiglboeck's sea water experiments, told the court that "After a few days, the people became raving mad; they foamed at the mouth," and "The people were crazy from thirst and hunger, we were so hungry – but the doctor had no pity on us. He was cold as ice. He didn't take any interest in us." (Nuernberg Military Tribunals, 1949, p. 460) Witness Piasecka, who was too ill to enter the court, had her affidavit read into the record, describing surgery to remove bones from her legs: "I fought and resisted until I lost consciousness. I was completely dressed and my legs were filthy dirty from walking in the camp. As far as I know my legs were not washed. I saw my sister during this time unconscious on a stretcher, vomiting mucous" (Nuernberg Military Tribunals, 1949, p. 396). But the testimony of witness Jadwiga Dzido perhaps best captured the doctors' contempt for their subjects:

> The Germans were at the zenith of their power. You could see haughtiness and pride on the face of every SS woman. We were told every day that we were nothing but numbers, that we had to forget that we were human beings, that we had nobody to think of us, that we would never return to our country, that we were slaves, and that we had only to work. We were not allowed to smile, to cry, or to pray. We were not allowed to defend ourselves when we were beaten. (Nuernberg Military Tribunals, 1949, p. 382)

As mentioned earlier, the prosecution had decided to minimize its use of eyewitness testimony because it believed documents were less subject to challenge than the memory or knowledge of a human witness. However, with these witnesses, the prosecution apparently gambled that they would make few factual claims that would leave openings for the defense, testifying rather to their visceral experience of the defendants'

experiments. The gamble appears to have paid off. Following Dzido's testimony, presiding judge Beals asked, " Is there any defense counsel who desires to cross-examine this witness?" Only Dr. Seidl, counsel for defendants Gerhardt, Oberheuser and Fischer, bothered to reply: "I do not want to cross-examine the witness; however, I do not wish the conclusion to be drawn that my clients admit all the statements made by the witness" (Nuernberg Military Tribunals, 1949, p. 386). The other defense attorneys were silent. This pattern was repeated following the testimony of several other camp survivor witnesses.

These overtures built to the most fundamental principle of the prosecution's case, and the principle for which the Nuremberg doctors' trial is best remembered: the principle of consent. The gravamen of the indictment was that the subjects in the experiment had not been permitted to opt out, that their bodies had been invaded, modified, mutilated, all without their cooperation. General Taylor, in his opening statement, called obtaining a patient's consent "a fundamental and inescapable obligation of every physician under any known system of law," and aggressively preempted the defense's response: "I fervently hope that none of us here in the courtroom will have to suffer in silence while it is said on the part of these defendants that the wretched and helpless people whom they froze and drowned and burned and poisoned were volunteers." (Nuernberg Military Tribunals, 1949, pp. 70-71) From there, the prosecution made the subjects' objection to the experiments the centerpiece of their growing body of evidence. Female Polish prisoners conscripted into defendant Karl Gebhardt's wounding experiments "protested against the experiments both orally and in writing. *(Tr. pp. 789, 794, 823-5.)* They stated that they would have preferred death to continued experiments" (Nuernberg Military Tribunals,

1949, p. 358), and of the high altitude experiments conducted by defendants Siegfried Ruff, Hans Romberg and Georg Weltz, the prosecution pointed out, "The heights involved were 12,000 meters to over 20,000 meters, hence it goes without saying that such experiments were very dangerous and, as indicated by the evidence, volunteers were not to be had" (Nuernberg Military Tribunals, 1949, p. 92).

Some halfhearted efforts at manufacturing a sort of ersatz consent were discussed, in which coercion, or powerful incentives, were used to elicit the prisoner's agreement that s/he was "volunteering." Witness Dorn, who had survived Buchenwald, spoke on one such point of leverage:

> Imagine the position of a prisoner, who perhaps for years had not had enough to eat to satisfy him, and who perhaps learns from a camp conversation that if he were to offer himself for this or that experiment he would receive a double or triple amount of food. You can imagine that hundreds or more presented themselves merely from the purely human urge to eat their fill once again (Nuernberg Military Tribunals, 1949, p. 135).

Other prisoners were suddenly informed that they had been sentenced to death, with a reprieve possible only if they "volunteered" for experiments. The prosecution pointed out the absurdity of offering reprieves after experiments that were likely to be lethal, citing one example from Ruff, Romberg and Weltz's project:

> The assertion on the part of the defendants that Himmler had ordered that the criminals used be volunteers is ridiculous and incredible when one considers that Himmler instructed Rascher to pardon these unfortunate inmates only if they could be recalled to life after having been subjected to the type of experiments

> outlined in Rascher's first interim report, wherein it is shown that the experimental subjects had stopped breathing altogether and their chests had been cut open, i.e., autopsy had been actually performed on them. (Nuernberg Military Tribunals, 1949, p. 100)

By the closing statement, the prosecution explicitly highlighted this issue as the pivotal question in the trial: " This is a clear dividing line between the criminal and what may be noncriminal. If the experimental subjects cannot be said to have volunteered, then the inquiry need proceed no further. Such is the simplicity of this case" (Nuernberg Military Tribunals, 1949, p. 980). Once again, they attempted to deny ground to the defense by casting suspicion on any explanation or infusion of context that made the case complex, that narrated a tragedy with no right choice. If the defendants performed experiments on subjects who were not volunteers, then questions of coercion from above, or extreme need based on a public health emergency, were no defense. Simple questions of adherence to principles protecting the individual were the sum-total of the decisionmaking formula proposed by the prosecution.

However vigorous and determined their presentation in this case might have been, the defense was far from ready to surrender this ground. To begin with, the defendants offered a few token challenges to the charge that they had devalued human life. Defendant Gerhard Rose denied the prosecution's charge that the doctors were unwilling to participate in the experiments themselves:

> . . . not only did I repeatedly offer myself as an experimental subject to test vaccines but that frequently in my official capacity and in my research work I gave myself injections with cholera, typhus, malaria and hepatitis epidemica and

> that I am still suffering from the consequences. (Nuernberg Military Tribunals, 1949b, p. 163)

But far more attention was directed to the issue of consent. An early line of defense was the claim that the researchers were within the spirit of the law, if not its letter. Many defendants testified that they had not coerced their subjects, that coercion actually would have made their experiments impossible to carry out. Fritz Sauter, defense counsel for defendant Ruff, pointed out that in Ruff's experiment, the subject "reaches up with his arm and pulls down the handle of the parachute, which in practice reduces the speed of the fall, insuring the flier of a smooth landing on the ground," noting that "this was only possible when the experimental subjects themselves cooperated when they took part in the experiments voluntarily and took an interest in them." (Nuernberg Military Tribunals, 1949, p. 123) Sauter went on to cite the "incentives" discussed by the prosecution as proof that the subjects retained some autonomy and some leverage in their relationship with the defendants:

> . . . nobody in a concentration camp would have thought of troubling himself about these people, if they had been forced against their will to take part in the experiments. In a concentration camp, according to the opinion of Himmler and his men, 1,000 people were of no consequence. Therefore, if efforts were made to obtain these inmates for the experiments, and to get them willingly, if even a Himmler found kind words to say to them and promised them rewards, then as we know today, this can only be explained by the assumption that even in concentration camps, for some reason, it was desirable to obtain voluntary

> subjects for the experiments and to induce them to go through the experiments voluntarily. (Nuernberg Military Tribunals, 1949, p. 120)

Sauter's apparent definition of "volunteer" was loose, amounting to any cooperation, whether coerced or willing. The fact that the subjects did not openly defy the researchers and their guards and resist, physically, participating in the experiments, proved for Sauter that they volunteered. Ironically, nearly all of the *defendants* claimed they had resisted the pressure put on them by colleagues and supervisors, and all insisted that resistance short of open defiance freed them from culpability for their crimes. As the prosecution had asserted, two different standards applied to subjects and researchers not only in the operation of the camps, but in the trial proceedings as well.

Alfred Seidl, defense counsel for defendant Karl Gebhardt, offered an analogy to the "action for the benefit of an injured person" doctrine to claim a legal equivalent of consent. Because the subjects had no other way to escape death through starvation, immediate execution, or the other lethal hazards of the camps, Seidl asserted that a reasonable third party observer would agree to the experiments on behalf of the subjects if they were rendered incommunicado:

> The illegality of an action is excluded not only if the injured person agreed either actually or tacitly, but if there could have been a possible consent. These are the cases where the consent of the injured person could be expected normally, but where for some reason or another such a consent was actually not given. (Nuernberg Military Tribunals, 1949b, p. 53)

Here, Seidl tried to reappropriate the role of caregiver, using a hybrid argument that combined the necessity defense and a rather surprising acknowledgment of the primacy

of the individual's interests. If camp inmates truly had no other way to escape starvation or execution, and if participation in experiments meant the torment and mutilation would be accompanied by food and safety from a guard's bullet, then a case could be made that the researchers had acted pragmatically and defensibly, even without the subject's consent. The prosecution's work building a foundation of evidence that the defendants had treated the subjects like raw material cast fatal doubts on this claim, but as an attempt to refute the prosecution's claim that individuals had been sacrificed, it was surprisingly well adapted.

A second defense offered by Fritz Sauter for defendant Ruff's experiments dealt with the subjects' attenuated ties to the community. Since many of the inmates had been convicted of crimes, Sauter argued that they had forfeited the complete protection of the state offered to law-abiding citizens, and thus had to accept substitution of the state's commands for their own consent in many matters relating to their bodily integrity: ". . . the opinion prevails everywhere that in the case of prisoners, in particular those who have been sentenced to death, the consent of the prisoner to the experiment can be replaced by the permission of the authorities" (Nuernberg Military Tribunals, 1949, p. 992). This turned Seidl's argument on its head. Rather than acting as the experimental subjects' agent and claiming to protect their interests, Sauter argued that the defendants were entitled to treat the subjects as without interests, or with an attenuated expectation of having their interests protected. Sauter stipulated that his client might have treated certain of his subjects as less valuable beings than himself, but claimed their legal status gave him the right to do so.

But the most aggressive opponent of the requirement of consent from the experimental subjects was Drs. Ivy and Leibbrandt's nemesis, Dr. Servatius, defendant Karl Brandt's defense counsel. Brandt raised the issue with Dr. Ivy:

> Q. I say, Professor, don't you know that in general the volunteer aspect of the person's consent has been under suspicion?
>
> A. I don't understand that question. Will you repeat it?
>
> Q. Is it not so that in medical circles and also in public circles these declarations of voluntary consent are regarded with a certain amount of suspicion; that it is doubted whether the person actually did volunteer? (Nuernberg Military Tribunals, 1949, p. 995)

And in his final plea to the tribunal, he did not mince words: "Voluntariness is a fiction; the emergency of the state hard reality." (Nuernberg Military Tribunals, 1949b, p. 129) Defendant Gerhard Rose, speaking from a privileged position within the medical field, expanded upon Servatius' argument:

> Aside from the self-experiments of doctors, which represent a very small minority of such experiments, the extent to which subjects are volunteers is often deceptive. At the very best they amount to self-deceit on the part of the physician who conducts the experiment, but very frequently to a deliberate misleading of the public. . . . These facts will be confirmed by any sincere and decent scientist in a personal conversation, through he would not like to make such a statement in public. (Nuernberg Military Tribunals, 1949b, p. 161)

Here Gebhardt made an appeal based on his role that the prosecution could not appropriate: that of an insider. Even if his medical practice had drifted far from what was

allegedly acceptable in that field, even if the prosecution worked to justify its own criticism of the defendants' scientific work, Gebhardt still could claim inside knowledge that most medical researchers merely went through the motions of ensuring consent, a claim which to some degree still accurately describes the situation today, according to the evidence laid out in chapter one. The prosecutors, having had some difficulty finding black-letter ethical rules that the defendants had violated, had proceeded with a case that was very stripped down, heavy-handed and absolute, organized around inflexible moral declarations. But when Servatius and Gebhardt argued that even the researchers who honored those declarations did so only by manufacturing an appearance, rather than by enforcing their substance, they introduced a very hard reality which Taylor's aspirational case was hard-put to overcome, and, ultimately, did not entirely overcome.

Culpability versus constraint

The fourth and final divide between prosecution and defense was the emphasis upon what the doctors' profession *required* them to do, versus what their placement in the Nazi medical community *permitted* them to do. In this point of stasis, the prosecution drew its linkage between their indictment of the Nazi regime and their call for punishment of the defendants, and the defense deployed one of the most enduring arguments from the Nuremberg series of trials: the defendants were simply following orders, and would have been unable to stop the atrocities even if they had tried their hardest.

The prosecution addressed the issue locally, making explicit claims in individual cases of what element of affiliation would warrant a judgment that the defendant was responsible, and ought to bear the consequences, for the entire programme of experiments

described in the indictment. To begin with, having supervisory authority for experiments was a prime linkage, in many cases bringing more severe punishment on the supervisor than the people who actually carried out the experiments. In the closing statement, the prosecution said, "It would be an unforgivable miscarriage of justice to punish the doctors who worked on the victims in the concentration camps while their superiors, the leaders, organizers, and instigators go free. It has been established beyond controversy that those things could not have happened without cover from the top." (Nuernberg Military Tribunals, 1949, p. 926) Speaking about defendant Georg Weltz's complicity in the high altitude experiments, the prosecution pointed out, "Not only did he participate in plans and enterprises involving the commission of these experiments, but he was also the direct superior of Rascher who, together with Ruff and Romberg, actually executed the experiments" (Nuernberg Military Tribunals, 1949, pp. 99-100). Karl Brandt, in particular, was held responsible for actions with which, in some instances, he had very little direct contact. In concluding remarks on the Lost (mustard) gas experiments, the prosecution said,

> . . . the fact remains that the experiments were performed by Bickenbach and his collaborators, whose work was directly controlled by Brandt. *(Supra.)* Were there no other evidence on this point, the circumstances of the report having been addressed to Karl Brandt are sufficient proof of his responsibility. (Nuernberg Military Tribunals, 1949, p. 317)

While it is not uncommon for prosecutors to hold defendants responsible for giving explicit orders, and to seek a similar punishment for the decisionmaker as for the person who pulls the trigger, in this case mere placement in the chain of command and authority

to halt the experiments were treated as dispositive. The key facts moving the experiments from permissible to criminal were all matters of execution, so the defendants' knowledge of the broad sweep of the experiments could not reasonably constitute an order to conduct them in a criminal manner. Yet the prosecution's standard of guilt was plain: if the defendants were remiss in their duty to supervise the line doctors, and to stop the experiments when they violated unwritten norms, then they were culpable. This standard revived the prosecution's argument that Nazi medicine was a systemic form of corruption, that the defendants had a common design, and that an entire mass project was on trial rather than the particular misdeeds of particular medical researchers. Within that framework, equal responsibility for anyone in a position of authority became understandable.

Furthermore, the prosecution argued that if a reasonable observer would conclude that the doctors *should* have been aware of the experiments, they were culpable for their failure to stop them. The claim was made explicitly in the case against defendant Gerhard Rose for experiments with malaria vaccines: "The defendant Rose participated in the criminal experiments of Schilling by furnishing him with material with which to carry out the experiments. This material was furnished by Rose with knowledge of facts which would have led any reasonable man to the conclusion that Schilling was carrying out criminal experiments" (Nuernberg Military Tribunals, 1949, p. 281). Again, the prosecution revived a framework argument from the beginning of the trial, and insisted that the judging of medical matters was so accessible that people far removed from the time, place and sphere of expertise – a generic "reasonable man [sic]" – could, with confidence, conclude that Rose had been remiss in his duty.

Finally, the prosecution argued that if the defendants at any point became aware of the nature of the experiments, and at that moment *failed to withdraw,* then they could be held accountable for the entirety of the crimes charged. Defendants Siegfried Ruff and Hans Romberg were held to this standard for their participation in the high altitude experiments: "Ruff's and Romberg's guilt is beyond doubt when we consider that they did not take the opportunity to withdraw after the first death of an experimental subject in April 1942." The prosecutors were out to prove that virtually any discernible degree of participation brought with it the weight of full guilt, and any claimed resistance short of nonparticipation was insufficient to quell guilt.

Having built up a list of individual tests of culpability, the prosecution dealt with the matter at some length in the closing statement:

> The use of involuntary subjects in a medical experiment is a crime, and if it results in death it is the crime of murder. . . .The person planning, ordering, supporting, or executing the experiment is under a duty, both moral and legal, to see to it that the experiment is properly performed. This duty cannot be delegated. It is surely incumbent on the doctor performing the experiment to satisfy himself that the subjects volunteered after having been informed of the nature and hazards of the experiment. . . . These defendants have competed with each other in feigning complete ignorance about the consent of the experimental victims. They knew, as the evidence proves, that the miserable inmates did not volunteer to be tortured and killed. But even assuming the impossible, that they did not know, it is their damnation not their exoneration. Knowledge could have been obtained by the simple expedient of asking the subjects. The duty of inquiry could not be

clearer and cannot be avoided by such lame excuses as "I understood they were volunteers," or, "Himmler assured me they were volunteers." In this connection, it should never be lost sight of that these experiments were performed in concentration camps on concentration camp inmates. However little some of these defendants say they knew of the lawless jungles which were concentration camps, where violent death, torture, and starvation made up the daily life of the inmates, they at least knew that they were places of terror where all persons opposed to the Nazi government were imprisoned without trial, where Jews and Poles and other so-called "racial inferiors" were incarcerated for no crime whatever, unless their race or religion be a crime. These simple facts were known during the war to people all over the world. How much greater then was the duty of these defendants to determine very carefully the voluntary character of these experimental subjects who were so conveniently available. True it is that these defendants are not charged with responsibility for the manifold complex of crimes which made up the concentration camp system. But it cannot be held that they could enter the gates of the Inferno and say in effect: 'Bring forward the subjects. I see no evil; I hear no evil; I speak no evil.'. . . They embraced the Nazi doctrines and the Nazi way of life. The things these defendants did were the result of the noxious merger of German militarism and Nazi racial objectives. . . . These defendants with their eyes open used the oppressed and persecuted victims of the Nazi regime to wring from their wretched and unwilling bodies a drop of scientific information at a cost of death, torture, mutilation, and permanent

> disability. For these palpable crimes justice demands stern retribution. (Nuernberg Military Tribunals, 1949, pp. 981-983)

In this excerpt, the prosecution laid out its entire case in logical sequence in a few sentences. First, the experiments themselves could not be contextualized, could not be evaluated by any standard other than the strictest propriety of medical ethics: if they failed the test of consent, they were criminal. Second, any participant who played a substantial role, even an indirect one, shared as much guilt as if s/he were solely responsible for the entire enterprise. Third, the defense of ignorance was disingenuous because of the prosecution's claim that people outside Germany had knowledge of atrocities in German prison camps; and fourth, a revival of the only claim of motive in the trial: the doctors had succumbed to Nazi thinking and had become Nazi doctors, and in so doing had lost every shred of humanity and become savage. This statement of the case linked simplicity, unyielding principle, the primacy of consent, and the requirement of medical ethics, in one succinct statement of the argument.

Once again, the defendants developed several lines of defense. One primary response was that the defendants simply were not aware of the experiments, or were not aware of their nature. Dr. Fritz Sauter, counsel for defendant Siegfried Ruff, insisted that "it cannot be denied that Ruff and Romberg were firmly convinced that all their experimental subjects actually were volunteers" (Nuernberg Military Tribunals, 1949, p. 123). Defendant Wilhelm Beiglboeck, testifying about his belief that his subjects were volunteers, concluded that "I had at that time absolutely no reason to doubt that this information was correct. Superiors, officers of the SS, and the human experimental subjects themselves admitted this to me. And I do not know what more I could have done

in order to assure myself still further" (Nuernberg Military Tribunals, 1949, p. 135). Several defendants bolstered their claims with the explanation that their bureaucratic duties were so overwhelming, they didn't have time to scrutinize every document and report that crossed their desks. Hanns Marx, defense counsel for defendant Oskar Schroeder, noted,

> Because of the extremely heavy official duties caused for Professor Schroeder in his capacity as chief medical officer by the imminent collapse of German military resistance, this affair was only a small segment of his official duties and it must be admitted that he could not concern himself further with this affair (Nuernberg Military Tribunals, 1949, p. 438).

Alfred Seidl, defense counsel for defendant Karl Gebhardt, hammered the ignorance defense home with a claim that it was a universal legal standard of innocence:

> In criminal law it is a generally recognized principle that there can be no question of intentional action if there existed an erroneous assumption of justificatory facts. This principle can also be found in Article 59 of the German Penal Code. But beyond that, this legal principle may be considered one of the principles which is generally valid and which is derived from the general principles of the criminal law of all civilized nations, thus representing an inherent part of our modern conception of criminal law. In application of this principle – and even if the Court does not consider the consent of the experimental subjects as proved and, therefore, does not provide the prerequisites for a legal excuse for objective reasons – we still cannot assume an intentional act on the part of the defendant

> Gebhardt if he acted under the "erroneous assumption of consent by the experimental subjects." (Nuernberg Military Tribunals, 1949b, p. 55)

Since the prosecution's larger case, the case that amounted to a regime trial, involved the widespread acceptance and application of the Nazi school of thought, the claim of ignorance cast substantial question on it. If the prosecution's best effort to locate the key people in the Nazi machine had instead turned up people who could not be proven aware of the deeds, then even if one might call them criminally negligent, even if one might charge them with having failed in their responsibilities, one could not call them, as a popular author did a few years ago, "Hitler's *willing* executioners" (Goldhagen, 1997).

Finally, Josef Weisgerber, counsel for defendant Wolfram Sievers, accused the prosecution of hindsight bias, noting that the evidence which, the prosecution argued, should have made clear to the defendants the nature of what they were doing, all rested against a backdrop of 1947 knowledge, although the actions being judged had taken place many years earlier, prior to many revelations about the activity, purpose, and goals of the leadership of the Third Reich:

> Upon the request of Hirt for assistance in his anthropological experiments, Himmler immediately made a corresponding offer; as the competent chief of the German police, he was in a position to do so. And Sievers, at that time, need not have assumed, by any stretch of the imagination, that the experimental subjects were to be killed for this purpose. On the basis of the general practice, he could perhaps more easily assume that only the corpses of those legally condemned to death and legally executed would be considered for the experiments of Hirt. Today we know that it was compatible with his criminal mentality insofar as

> human experiments and the like were concerned. At that time, the latter part of 1941, no one who, like Sievers, had not up to this time come in contact with experiments on human beings could have suspected in advance that in this case it would be a question of criminal acts. (Nuernberg Military Tribunals, 1949, p. 745)

Taking a step beyond simply manipulating the time horizon, Weisgerber urged the tribunal and any other audience members to remember that these claims were *situated* in time, that they were contextualized by subsequent events and subsequent discoveries, and a defendant confronted with an evidenced narrative of his actions might be just as surprised and shocked as the tribunal to discover what he had done, and especially what he allegedly had *deliberately* done as part of a "common design."

Even assuming *arguendo* that any participation brought a degree of culpability, the defense disputed the prosecution's efforts to lay all consequences at their feet, because they claimed they were incapable of ending medical experiments. Disobeying orders under the Nazi regime would have meant endangering their own lives. Defendant Hans Romberg, answering the prosecution's charges on the high altitude experiments, testified from the witness stand:

> After this death I went to Berlin and told Ruff about it. Ruff agreed with me that death should not be allowed to occur in high-altitude experiments and it had never occurred before. Since Rascher, however, performed these experiments for Himmler on men who were condemned to death, we saw no way of preventing Rascher after we had made an official report. In general, when objections were made Rascher simply referred to the orders from Himmler and to the fact that he

> was covered by them. It was quite impossible to remove the chamber from Dachau against Himmler's and Rascher's will. And to give this death as a reason for removing the chamber was even more impossible. In the first place, Himmler would not have reacted. He would certainly not have given up the chamber. He might have started proceedings for treason or for sabotage of an essential war experiment (Nuernberg Military Tribunals, 1949, p. 193).

The point of stasis is made even clearer by contrast with Dr. Ivy's earlier claim about necessity of the state: here, Romberg claimed that overt resistance was impossible because it would have guaranteed his death, while Ivy claimed that he would willingly choose death over following such an order. The turning of the case on the question of duty versus constraint becomes apparent between these two statements. The defense's argument about powerlessness applied an effectiveness standard to the question of culpability: since action would not have stopped the experiments, the defendants ought not be held accountable for their completion. The prosecution, however, explicitly argued that if the defendants had any option open to them that constituted resistance, whether it was effective or not, whether it would result in their death or not, they were obligated to choose it over participation in the experiments. Answering Romberg's defense, the prosecution argued,

> Romberg saw these men die and did absolutely nothing. It was within his power to save them at the time. He said he was operating the electrocardiograph. He knew precisely by their heart action when the subjects were in danger of dying. He also knew this from his knowledge of reaction to high altitudes. He could see and read the pressure gauges. He could have turned the pressure down and saved

> their lives by simply moving the gauge which was within arm's reach. He was a bigger man than Rascher. Force could have been used if necessary. Not only did he do nothing while the helpless victims died before his very eyes, but he assisted in the autopsies. After all these murders had occurred, and were known to them, Ruff and Romberg still went on. They issued a joint report on the experiments in the name of Ruff, Romberg and Rascher in July 1942 *(NO-402, Pros. Ex. 66.)* They were still collaborating with this admitted murderer and gave him the cover of their scientific reputation. (Nuernberg Military Tribunals, 1949, p. 103)

The point of stasis between full culpability and the complex nature of obligation can perhaps best be illustrated by the most succinct summaries of both positions. In this instance, as in most others, the prosecution clearly outdoes the defense in brevity. Dr. Otto Nelte, counsel for defendant Siegfried Handloser, delivered the challenge to a simple view of culpability:

> An offense against the duties of service supervision constitutes in itself an offense. It does *not* automatically demand that the supervising official should be punished for the criminal offense committed by the subordinate, for according to the criminal laws of all civilized countries, a person can only be made responsible before criminal law for an offense committed by *himself,* i.e., if the supervising official can be considered an accomplice or participant in the crime of a subordinate. (Nuernberg Military Tribunals, 1949, p. 946)

The prosecution's response is short and to the point: "There is no such thing as half a murderer. These defendants are responsible for those murders or they are not responsible. (Nuernberg Military Tribunals, 1949, p. 103)

The antecedents of the tribunal's decision can be traced from the earliest framing of the prosecution's case, and the defense's targeted objection to those argumentative elements, as discussed in the previous chapter. But it is in the clash, in the particular issues over which the two sides directly refuted one another's premises, that the "authenticity" derived from the "fires of controversy" can be obtained. This chapter has argued that the prosecution streamlined its arguments, arguing for simplicity, principle, duty, and the individual, while the defense scrambled to introduce a more complex picture assembled from the memories and observations of people who had been caught under the rule of the Third Reich: context, emergency, the community, and the constraints of possible behavior.

Both sides adopted frameworks for the judgment of content, and also followed recognizable themes in their discussion of the relationships between parties to the case. They offered the tribunal filters for approaching the body of evidence, as well as theories for assessing proper conduct and fair obligation to both the defendants and to all other participants in the proceedings.

CHAPTER FIVE

IMPOSING APPARENT CLOSURE: THE TRIBUNAL SPEAKS

Throughout the proceedings, the group of participants with the least to say sat at the front of the courtroom, attending to matters brought before the court but rarely raising their own voices to add to the discussion. Although in some cases the judges questioned the witnesses themselves, in few cases did those examinations depart from issues raised by prosecution or defense. As the trial drew to a close, the judges had revealed very little of their disposal toward either set of arguments: they had ruled on a bare handful of objections, asked a few questions, but otherwise sat silent and sphinx-like in their magisterial seats.

After one hundred thirty nine days of testimony, resulting in a transcript more than eleven thousand pages in length, and including introduction of over fifteen hundred documents into evidence, the prosecution and defense rested, and the tribunal withdrew to deliberate and prepare its verdict, its first unrestrained, free-ranging statement of its position on the controversies raised by prosecution and defense. When the court reconvened, the tribunal's fully written message, not delivered extemporaneously as the two sides' arguments had been, was delivered to the audiences in and outside of the courtroom. Going far beyond brief declarations of the guilt or innocence of each defendant, the verdict included discussions of evidentiary standards, critiques of both sides' argumentative tactics, and the document for which the Nuremberg medical trial is most remembered: the Nuremberg Code.

Although the tribunal held plenary power during the trial proceedings, and had all necessary authority to curtail any unwanted argumentative practice by either side, it cannot be said that the verdict was the definitive interpretation of the events recorded in the proceedings. The entire trial, as argued previously, was a message to audiences beyond the courtroom, and while the tribunal's decision brought closure to the event, it did not bring closure to the controversy, and from remarks made by participants throughout the proceedings, it seems apparent that none of them ever believed it would. As Osiel predicted, the trial began a dialogue between speakers that otherwise had little incentive to acknowledge one another's existence, and the joining of controversy set in motion a dialogue that extended far beyond the imposed closure of the verdict. The tribunal's part in the trial, including official pronouncements before and during the proceedings, the verdict, and the disposition of appeals, constituted a third voice, fully aligned with neither the defense nor the prosecution. On some issues, the tribunal announced that the prosecution had overreached, or had not provided sufficient proof. In settling some objections, the tribunal clearly favored the defense attorneys. In the end, the broad sweep of the prosecution's case was accepted, but the elements that were rejected cannot be called trivial. The tribunal integrated selected defense objections into the message, giving them suasory force by endorsing them over countervailing prosecution rebuttals.

In this chapter, I argue that the tribunal put noticeable effort into erring on the side of the defense in procedural matters, that they set the line of culpability between the defense and prosecution's respective proposals, and that they ultimately accepted the fourposts of the prosecution's case, rejecting most of the defense's broad theories of the

case. In the Nuremberg Code, the most often quoted excerpt of the trial proceedings, I argue that the tribunal addressed four issues: the prosecution's two framing arguments, the value of the individual, and the clash of principal and expediency. The prosecution's arguments were enshrined in the first three issues, but the arguments of the defense made a substantial mark on the fourth.

Protecting fairness

On the day of the arraignment, presiding judge Walter Beals' first remarks did not follow the tone of General Telford Taylor's. There was no reference to the gravity of the situation, no call to the audience to draw their somber attitude from their historical situation in the aftermath of battles of unprecedented scale. Instead, Beals began with a brisk, and rather detailed, announcement that the requirements of fair and impartial justice were to be taken seriously in all matters related to the trial:

> This Tribunal will conduct the trial in accordance with controlling laws, rules, and regulations, and with due regard to appropriate precedents in a sincere endeavor to insure both to the prosecution and to each and every defendant an opportunity to present all evidence of an appropriate value bearing upon the issues before the Tribunal; to this end, that under law and pending regulations impartial justice may be accomplished. (Nuernberg Military Tribunals, 1949, p. 26)

Beals' implicit definition of "justice" was curious: he did not promise a just *verdict* or just *punishment* of the guilty, but apparently regarded giving both sides their day in court as the limit of justice's requirements. Perhaps picking up on Taylor's claim that the more urgent function of the trial was to compile a complete record of what had happened for all to review, Beals committed himself and his colleagues to policing the presentation of

evidence: "… the prosecution and … each and every defendant" would be granted "… an opportunity to present all evidence of an appropriate value," and justice would be done.

Twelve months later, the first words of the verdict were likewise a proclamation of the overriding importance of fairness, but this time the announcement came in the form of a more complete catalogue of the safeguards that had been maintained throughout the trial to enforce the defendants' rights:

> Copies of all exhibits tendered by the prosecution in their case in chief were furnished in the German language to the defendants prior to the time of the reception of the exhibits in evidence. Each defendant was represented at the arraignment and trial by counsel of his own selection. Whenever possible, all applications by defense counsel for the procuring of the personal attendance of persons who made affidavits in behalf of the prosecution were granted and the persons brought to Nuernberg for interrogation or cross-examination by defense counsel. Throughout the trial great latitude in presenting evidence was allowed defense counsel, even to the point at times of receiving in evidence certain matters of but scant probative value. All of these steps were taken by the Tribunal in order to allow each defendant to present his defense completely, in accordance with the spirit and intent of Military Government Ordinance No. 7 which provides that a defendant shall have the right to be represented by counsel, to cross-examine prosecution witnesses, and to offer in the case all evidence deemed to have probative value. (Nuernberg Military Tribunals, 1949b, pp. 171-172)

What had begun as a commitment to impartiality, to equal protection for both sides in the dispute, had evolved into a plain preference for the wishes of the defense, in, perhaps, an

effort to overcorrect for claims that the trial was nothing but victor's vengeance. If the defense was indulged to the point of near-absurdity, allowed to introduce evidence of "scant probative value," and the tribunal still could claim in open court that the prosecution had proven its case, then the damage to the proceedings' legitimacy could be reduced. Notably, the tribunal did *not* use the same language as in the opening statement: there were no references to "controlling laws," but rather to the *"spirit and intent"* of the laws. Specifically the tribunal clearly did not regard the procedural protections listed as *rights* of the defendants, as necessary protections to which the defendants were entitled, but rather as privileges graciously granted to the defendants by a court that would have been justified in rendering summary judgment. Exhibits were "furnished," applications to interrogate witnesses were "granted," and "great latitude … was allowed defense counsel" in the introduction of evidence. This self-congratulatory language addressed questions about the court's legitimacy, asserting that the court had been not only evenhanded, but actually magnanimous and indulgent, in its treatment of the defendants.

This trend was evident in the tribunal's disposition of objections, nearly every one of which was decided in favor of the defense. When Josef Weisgerber, conducting direct examination of his client, defendant Wolfram Sievers, offered to summarize the testimony thus far, prosecuting attorney Alexander Hardy objected, "If it please your Honor, the defense counsel has put questions to the witness and the witness has testified to these questions. I really think summations after each experiment are unnecessary here. That can take place in his closing statement." Judge Beals demurred, noting "A short summation on the part of the defense counsel might be in order, as long as it does not contain too much repetition." (Nuernberg Military Tribunals, 1949, p. 278) Here, the

tribunal hamstrung the prosecution's preference for elegance discussed in earlier chapters: the prosecution urged the court to let the testimony speak for itself, uninterpreted and uncontextualized, whereas Beals decided to indulge Weisgerber in his desire to package the testimony for the tribunal.

Subsequent exchanges also resulted in momentary victories for the defense in matters of procedure. While Dr. Hanns Marx, counsel for defendants Herman Becker-Freyseng and Oskar Schroeder, cross-examined an expert witness, Dr. Franz Vollhardt, about the seawater experiments, he had the following exchange with Vollhardt:

> Q. Professor, according to the documents at your disposal were these experiments sufficiently well prepared?
>
> A. It was my impression that they were extremely well prepared, and I was particularly impressed by the fact that Beiglboeck had sufficiently examined the participants carefully and had considered the use of three of them to be unsuitable since he found a defect of the lungs.

Scenting hearsay, Alexander Hardy objected, arguing:

> I do not think by any stretch of the imagination this witness can testify from the records that Beiglboeck conducted an examination or rejected three experimental subjects. In my opinion it does not appear from the records, and he can only testify what Beiglboeck told him. Unless he can say it does appear in the records, I think it should be stricken.

The tribunal's ruling on the objection was laconic and bland: "Counsel has an opportunity of cross-examining the witness at the close of his testimony." (Nuernberg Military Tribunals, 1949, p. 482) Here again, where Hardy preferred to have evidence excluded by

judicial fiat, perhaps to preserve the minimalist strategy of giving the defense as little ground as possible, the judges chose to require the prosecution to engage Dr. Vollhardt's claims, requiring them to cross-examining the witness to draw out their interpretation of events.

Perhaps most glaring of all was the tribunal's indulgence of a defendant in his denunciation of the prosecution's character from the stand. The defendant was Kurt Blome, and, as previously discussed, the prosecution's case against him had, by now, all but fallen apart. He complained,

> Please excuse me for saying this, but I must say it, when such a charge is made against me. I will try to speak as dispassionately as possible. Dr. Sauter had just said that the prosecution considers my letter a "masterpiece of murderous intention." I now state the following: Apart from this questionable affidavit of Rudolf Brandt, the prosecution has not produced a single document to prove the murder of tubercular Poles by me. On the contrary, the prosecution has submitted Himmler's reply dated the end of November 1942, according to which Himmler, in answer to my letter, prohibited the liquidation of the tubercular Poles, and this letter expressly says that my suggestion was to be carried out and that this matter was to be used as propaganda. In spite of that, the prosecution makes such charges as these against me. I am accused of being a murderer 10,000 times for a crime which I did not commit but which I prevented, as I can prove. I should like to say something else. The press, of course, has taken up this charge. I cannot hold that against the press. The consequence of this news, however, was that my family, my wife and my little children, are subjected to unpleasantness and even threats.

> Through this assertion of the prosecution, the name of Blome has been defamed in a way which it does not deserve, especially if it can be proved that I prevented the crime with which I am charged.

Alexander Hardy interjected, "If it please your Honor, I object to any further comment of this type from the witness." Judge Beals' reply was precisely five words long: "Objection overruled. Witness may continue." (Nuernberg Military Tribunals, 1949, p. 786) This may be the paradigm case of what the tribunal meant in its reference to "… receiving in evidence certain matters of but scant probative value … " No prosecutor welcomes the disintegration and severance of a charge, but, in this case, the prosecutors were required by the tribunal to endure a dressing-down by a defendant from the witness stand. The tribunal's choice to include severe, overt criticism not just of the prosecution's case, but to the prosecution's conduct and integrity, highlighted the sharp split between the prosecution's obligations and those of the tribunal: an elegant, uncomplicated case versus a complete, balanced record of the proceedings.

In contrast to the judges' tolerance of a pungent verbal assault on the prosecutors, a violent physical assault on a defendant drew impressively sharp correction from the tribunal, who snuffed out a vivid performance of the prosecution's retributive claims by responding harshly to an instance of acting out in the courtroom. Alexander Hardy, conducting direct examination of prosecution witness Karl Hoellenrainer, a survivor of the seawater experiments, asked him to leave the dock and identify the doctor who had dealt with him directly. Hoellenrainer approached defendant Wilhelm Beiglboeck. Hardy urged Hoellenrainer to step right up to the doctor he intended to identify. Hoellenrainer

vaulted over the railing of the dock and assaulted Beiglboeck. Once order had been restored in the courtroom, the tribunal had the following exchange with the witness:

> Presiding Judge Beals: . . . Witness, you were summoned before this Tribunal as a witness to give evidence.
>
> Witness Hoellenrainer: Yes.
>
> Q. This is a court of justice.
>
> A. Yes.
>
> Q. And by your conduct in attempting to assault the defendant Beiglboeck in the dock, you have committed a contempt of this Court.
>
> A. Your Honors, please excuse my conduct. I am very excited.
>
> Q. Ask the witness if he has anything else to say in extenuation of his conduct.
>
> A. Your Honors, please excuse me. I am so worked up. That man is a murderer. He has ruined my whole life.
>
> Q. Your statements afford no extenuation of your conduct. You have committed a contempt in the presence of the Court, and it is the judgment of this Tribunal that you be confined in the Nuernberg prison for the period of 90 days as punishment for the contempt which you have exhibitd before this Tribunal.
>
> A. Would the Tribunal please forgive me. I am married and I have a small son. This man is a murderer. He gave me salt water and he performed a liver puncture on me. I am still under medical treatment. Please do not send me to prison.
>
> Q. That is no extenuation. The contempt before this Court must be punished. People must understand that a court is not to be treated in that manner. Will the marshal call a guard and remove the prisoner to serve the sentence which this

> Court has inflicted for contempt? (Nuernberg Military Tribunals, 1949, pp. 457-458)

Previously, the tribunal had permitted, and perhaps even tacitly encouraged, the sort of tirade against a courtroom officer that ordinarily would draw at minimum a warning from the bench. Now, a violent outburst in the courtroom had earned the contemnor ninety days in detention. Given the average *maximum* sentence for criminal contempt in the United States is between sixty and a hundred and eighty days (Zlotnick, 1995), the tribunal had meted out punishment near the top of the scale. Perhaps this owed to the fact that the court was convened in the aftermath of a war, and thus reacted disproportionately to breaches of peace that involved violence; perhaps it foreshadowed the tribunal's conclusion, discussed later in this chapter, that *knowing* and *speaking* of criminal activity was not punishable, but being *actively involved* in the criminal enterprise was categorically different.

The judges' exquisite caution extended, in one instance, beyond the trial proceedings to the verdict. In judging the case against defendant Gerhard Rose, the tribunal abstained, finding the defendant neither guilty nor innocent, instead dismissing the charges of participation in malaria experiments on what some might regard as a technicality:

> However, no adjudication either of guilt or innocence will be entered against Rose for criminal participation in these experiments for the following reason: In preparing counts two and three of its indictment the prosecution elected to frame its pleading in such a manner as to charge all defendants with the commission of war crimes and crimes against humanity, generally, and at the same time to name

> in each sub-paragraph dealing with medical experiments only those defendants particularly charged with responsibility for each particular item. In our view this constituted in effect, a bill of particulars and was, in essence, a declaration to the defendants upon which they were entitled to rely in preparing their defenses, that only such persons as were actually named in the designated experiments would be called upon to defend against the specific items. Included in the list of names of those defendants specifically charged with responsibility for the malaria experiments the name of Rose does not appear. We think it would be manifestly unfair to the defendant to find him guilty of an offense with which the indictment affirmatively indicated he was not charged.

The tribunal followed this dismissal with a careful disclaimer against entertaining doubt of the evidence introduced at trial, especially as it bore on the other charges against Rose: "This does not mean that the evidence adduced by the prosecution was inadmissible against the charges actually preferred against Rose. We think it had probative value as proof of the fact of Rose's knowledge of human experimentation upon concentration camp inmates" (Nuernberg Military Tribunals, 1949b, pp. 266-267). Osiel might identify this as a sop to legal propriety that was "obscene" in the wake of administrative massacre. However, the evidence of Rose's actions had been made part of the public record, even if the sentence that served as the tribunal's final, and most performatively potent, message to the audience excluded Rose's share of guilt for the malaria experiments.

Only in two episodes did the tribunal decide a procedural issue in favor of the prosecution. Interestingly, the two events were linked by subject matter, and the defense was forbidden to discuss that which the prosecution was permitted to discuss over the

defense's objections. As Dr. Josef Weisgerber conducted direct examination of his witness, Dr. Friedrich Hielscher, over defendant Sievers' activity in the underground resistance movement, Judge Beals interrupted a lengthy story by Hielscher to ask, "In what connection are these narrations, Witness?" Hielscher replied, "In connection with the question as to whether it was morally justifiable to enable Sievers to remain at his post." Beals ruled the testimony out of order, asserting that "Such matters as that would not be material in this inquiry." (Nuernberg Military Tribunals, 1949b, pp. 38-39) In so doing, Beals continued the line of argument begun by General Taylor in his opening argument, that no abstract matters of morality were at issue in the inquiry, but purely a matter of determining the legal status of the acts charged in the indictment. In the verdict, immediately following the Nuremberg Code, the tribunal would make this point again:

> Of the ten principles which have been enumerated our judicial concern, of course, is with those requirements which are purely legal in nature – or which at least are so clearly related to matters legal that they assist us in determining criminal culpability and punishment. To go beyond that point would lead us into a field that would be beyond our sphere of competence. (Nuernberg Military Tribunals, 1949b, pp. 182-183)

And yet, in another dispute, the tribunal openly encouraged discussion of what was morally proper over a defense objection. As the prosecution carried out its direct examination of Dr. Alexander Ivy, Ivy answered a question about physician responsibility with the comment, "I do not believe the state can assume the moral responsibility that a physician has for his patient or experimental subject" (Nuernberg Military Tribunals, 1949b, p. 85). The remark drew objections from multiple defense

attorneys. Dr. Seidl, first to his feet, presaged the tribunal's exact words, "purely legal," in their verdict: "I object to this question in that it is a purely legal question which the Court has to answer" (Nuernberg Military Tribunals, 1949b, p. 85). Dr. Sauter, speaking at length, fleshed out the victors' vengeance objection that had lurked largely beneath the surface of the trial:

> The question asked here is always what the opinion of the medical profession in America is. For us in this trial, in the evaluation of German defendants, that is not decisive. In my opinion the decisive question is for example, in 1942, when the altitude experiments were undertaken at Dachau, what the attitude of the medical profession in Germany was. From my point of view as a defense counsel I do not object if the prosecution asks Professor Ivy what the attitude or opinion of the medical profession in Germany was in 1942. If he can answer that question, all right, let him answer it, but we are not interested in finding out what the ethical attitude of the medical profession in the United States was. In my opinion a German physician who in Germany performed experiments on Germans cannot be judged exclusively according to an American medical opinion, which moreover dates from the year 1945 and was coded in the years 1945 and 1946 for future use; it can also have no retroactive force (Nuernberg Military Tribunals, 1949b, p. 85).

Here, Sauter made the most explicit reference to the argument he had begun earlier in his defense of defendants Blome and Ruff, that only the perspective of Germans mattered in determining the guilt of German doctors working in a German community constituted by

German history and culture. If any moral claims were made, they would have to incorporate German propriety.

In his longest speech during the trial proper, Judge Beals considered, then dismissed, both objections:

> The first objection imposed by Dr. Seidl might be pertinent if the question of legality was concerned, a legal responsibility, that would be a question for a court. The question of moral responsibility is a proper subject to inquire of the witness. As to Dr. Sauter's objection, the opinion of the witness as to medical sentiment in America may be received. The counsel's objection goes to its weight rather than to admissibility. The witness could be asked if he is aware of the sentiment in America in 1942 and whether it is different from this of the present day or whether it does not differ. The witness may also be asked whether he is aware of the opinion as to medical ethics in other countries or throughout the civilized world. But the objections are both overruled (Nuernberg Military Tribunals, 1949b, p. 85).

The contrasting, inconsistent rulings demonstrate that there were not two, but *three* agendas involved in the framing of collective memory at the trial. While on many evidentiary questions, Judge Beals and his colleagues were comfortable denying the prosecution's pleas and indulging the defense, on the question of moral argument, the defending attorneys' case was sharply circumscribed from the bench, while the prosecution's introduction of expert testimony on moral questions was permitted. The ensuing discussion therefore laid down the moral precepts for a judgment that would claim, in its own text, that it did not address matters of morality:

MR. HARDY: It is your opinion, then, that the state cannot assume the moral responsibility of a physician to his patient or experimental subject?

WITNESS DR. IVY: That is my opinion.

Q. On what do you base your opinion? What is the reason for that opinion?

A. I base that opinion on the principles of ethics and morals contained in the oath of Hippocrates. I think it should be obvious that a state cannot follow a physician around in his daily administration to see that the moral responsibility inherent therein is properly carried out. This moral responsibility that controls or should control the conduct of a physician should be inculcated into the minds of physicians just as moral responsibility of other sorts, and those principles are clearly depicted or enunciated in the oath of Hippocrates with which every physician should be acquainted.

Q. Is the oath of Hippocrates the Golden Rule in the United States and to your knowledge throughout the world?

A. According to my knowledge it represents the Golden Rule of the medical profession. It states how one doctor would like to be treated by another doctor in case he were ill. And in that way how a doctor should treat his patient or experimental subjects. He should treat them as though he were serving as a subject.

Q. Several of the defendants have pointed out in this case that the oath of Hippocrates is obsolete today. Do you follow that opinion?

> A. I do not. The moral imperative of the oath of Hippocrates I believe is necessary for the survival of the scientific and technical philosophy of medicine. (Nuernberg Military Tribunals, 1949b, pp. 85-87)

Substantive findings

Once the tribunal reached the merits of the case, they accepted the broad sweep of the prosecution's case. However, they did balk at accepting the prosecution's most ambitious claims about culpability, and did find several defendants innocent of some or all charges based on the prosecution's failure to prove active participation in the execution of the experiments.

An early paragraph of the verdict signaled the tribunal's acceptance of substantially all of the prosecution's account:

> Judged by any standard of proof the record clearly shows the commission of war crimes and crimes against humanity substantially as alleged in counts two and three of the indictment. Beginning with the outbreak of World War II criminal medical experiments on non-German nationals, both prisoners of war and civilians, including Jews and "asocial" persons, were carried out on a large scale in Germany and the occupied countries. These experiments were not the isolated and casual acts of individual doctors and scientists working solely on their own responsibility, but were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort. They were ordered, sanctioned, permitted, or approved by persons in positions of authority who under all principles of law were under the

> duty to know about these things and to take steps to terminate or prevent them. (Nuernberg Military Tribunals, 1949b, p. 181)

However, what may have seemed from the opening paragraphs like a complete victory for the prosecution was quickly attenuated by the tribunal's ruling in several cases that the standard of proof of actual participation in the experiments had not been met. On a long list of charges against Karl Brandt, including the freezing, malaria, bone, muscle and nerve regeneration and bone transplantation, seawater, sterilization, and typhus experiments, for which the prosecution claimed he had supervisory responsibility, but no direct participation, the tribunal responded that "The evidence does not show beyond a reasonable doubt that Karl Brandt is criminally responsible on account of the experiments with which he is charged under these specifications" (Nuernberg Military Tribunals, 1949b, p. 195). In dismissing all charges but those connected with the sulfanilamide experiments against defendant Karl Gebhardt, the tribunal discounted the evidence of high-level association cited against most of the defendants:

> In these enterprises the defendant seems not to have taken any active part, as he did in the sulfanilamide experiments and in other programs. It may be argued that his close connection with Heinrich Himmler creates a presumption that these experiments were conducted with Gebhardt's knowledge and approval. Be that as it may, no sufficient evidence to that effect has been presented, and a mere presumption is not enough in this case to convict the defendant. (Nuernberg Military Tribunals, 1949b, pp. 226-227)

Here, the tribunal seems to have allowed for the possibility that "knowledge and approval" of experiments *could* be sufficient to warrant a guilty verdict, but only if the

evidence was truly compelling. As has been said of the strict judicial scrutiny standard in antidiscrimination law, it appears that the tribunal's standard of sufficient evidence was "strict in theory, but fatal in fact" (Marshall, 1980, p. 519).

In particular, the tribunal separated knowledge of the experiments from active participation in the planning, execution, or recording of results, a distinction which had the potential to drive a sizable wedge into the prosecution's attempt to craft a narrative of systemic corruption and national conspiracy. The divide first appeared in the tribunal's final prefatory remark before proceeding to the particular verdicts for each defendant:

> If any of the defendants are to be found guilty under counts two or three of the indictment it must be because the evidence has shown beyond a reasonable doubt that such defendant, without regard to nationality or the capacity in which he acted, participated as a principal in, accessory to, ordered, abetted, took a consenting part in, or was connected with plans or enterprises involving the commission of at least some of the medical experiments and other atrocities which are the subject matter of these counts. Under no other circumstances may he be convicted. (Nuernberg Military Tribunals, 1949b, p. 184)

All the words in the tribunal's list of turnkeys that could trigger a guilty verdict connoted active, hands-on involvement: " … acted, participated as a principal in, accessory to, ordered, abetted, took a consenting part in, or was connected with plans or enterprises … " Knowledge, even such detailed knowledge that would compel most people to investigate further or even take action, was not represented in the list. The prosecution's attempt to prosecute and punish poisonous *thoughts* had suffered a severe blow in the judges' articulation of the benchmark of culpability.

This distinction between knowledge and active participation was applied in a number of different verdicts. In declining to find defendant Paul Rostock guilty, the tribunal summarized the crux of the prosecution's case against him:

> The prosecution does not contend that Rostock personally participated in criminal experiments. It vigorously argues, however, that – with full knowledge that concentration camp inmates were being experimented upon – he continued to function upon research assignments concerning scientific investigations, the result of which would probably further experiments upon human beings. The prosecution then argues that his knowledge concerning these matters, considered together with the position of authority which he occupied in connection with scientific research and the fact that he failed to exercise his authority in an attempt to stop or check criminal experiments, renders him guilty as charged. (Nuernberg Military Tribunals, 1949b, pp. 208-209)

This was not sufficient, as the tribunal concluded: " Military Tribunal I finds and adjudges that the defendant Paul Rostock is not guilty as charged under the indictment, and directs that he be released from custody under the indictment when this Tribunal presently adjourns" (Nuernberg Military Tribunals, 1949b, p. 210).

The divide was even more stark in the tribunal's disposition of the charges against defendant Helmut Poppendick regarding the freezing experiments:

> The evidence is that Poppendick gained knowledge of the freezing experiments conducted by Rascher at Dachau, as the result of a conference held between Rascher, Grawitz, and Poppendick on 13 January 1943 for the purpose of discussing certain phases of the research. The evidence does not prove beyond a

> reasonable doubt that Poppendick was criminally connected with these experiments. (Nuernberg Military Tribunals, 1949b, p. 249)

Here, the tribunal plainly stipulated that Poppendick "gained knowledge" of the experiments, but nevertheless acquitted him because the evidence did not prove he "was criminally connected" with them. The tribunal was applying a standard that neither side had proposed: the prosecution wanted awareness and failure to act criminalized and punished, while the defense wanted extreme wartime conditions applied in extenuation of the acts, to the point of acquittal. The tribunal provided neither, continuing to pursue its own third approach to constructing the trial's message.

The pattern repeated itself in the majority of cases in which the defendants were acquitted, although not, in many cases, without some public agonizing by the judges. In explaining the acquittal of defendant Helmut Poppendick on charges of participating in the hormone experiments, the tribunal explained,

> We have given careful consideration to the evidence concerning the charges made by the prosecution against the defendant Poppendick. Certainly the evidence raises a strong suspicion that he was involved in the experiments. He at least had notice of them and of their consequences. He knew also that they were being carried on by the SS, of which he was and remained a member. But this Tribunal, however, cannot convict upon mere suspicion; evidence beyond a reasonable doubt is necessary. The evidence is insufficient to sustain guilt under counts two and three of the indictment. (Nuernberg Military Tribunals, 1949b, p. 252)

Despite stipulating that he was fully aware of the experiments, and probably had influence that he could have exercised to prevent the researchers from continuing them,

the tribunal found that since they could not confirm that he had participated directly in them, they could not find him culpable.

In acquitting defendants Siegfried Ruff and Hans Romberg of participating in the malaria experiments, the tribunal spoke even more at length of their standards of evidence:

> The issue on the question of the guilt or innocence of these defendants is close; we would be less than fair were we not to concede this fact. It cannot be denied that there is much in the record to create at least a grave suspicion that the defendants Ruff and Romberg were implicated in criminal experiments at Dachau. However, virtually all of the evidence which points in this direction is circumstantial in its nature. On the other hand, it cannot be gainsaid that there is a certain consistency, a certain logic, in the story told by the defendants. And some of the story is corroborated in significant particulars by evidence offered by the prosecution. The value of circumstantial evidence depends upon the conclusive nature and tendency of the circumstances relied on to establish any controverted fact. The circumstances must not only be consistent with guilt, but they must be inconsistent with innocence. Such evidence is insufficient when, assuming all to be true which the evidence tends to prove, some other reasonable hypothesis of innocent may still be true; for it is the actual exclusion of every other reasonable hypothesis but that of guilt which invests mere circumstances with the force of proof. (Nuernberg Military Tribunals, 1949b, pp. 275-276)

In stark contrast, defendants whose motive was unclear, or whose effectiveness in directing the experiments was minimal, were nonetheless found guilty once the tribunal

could nail down proof of their immediate participation in the tasks of the experiments. The best example of this standard in action was the conviction on multiple counts of Rudolf Brandt, a man who was not a physician, but was administrative assistant to Heinrich Himmler and dealt with much of the paperwork and correspondence issuing from the medical experiment programs in the camps. Despite his insistence that he did not have the knowledge to judge the permissibility of the experiments, and dealt with so much paperwork that he wasn't quite sure what he had signed off on, the tribunal laid responsibility for several of the experiments at his feet:

> The smooth operation of these experiments is demonstrated to have been contingent upon the diligence with which Rudolf Brandt arranged for the supply of quotas of suitable human experimental material to the physicians at the scene of the experiment. In view of these proven facts, the defendant Rudolf Brandt must be held and considered as one of the defendants responsible for performance of illegal medical experiments where deaths resulted to the nonconsenting human subjects. (Nuernberg Military Tribunals, 1949b, p. 239)

While Brandt made comparative claims, noting that he had less to do with the nuts and bolts of the experiments than many doctors and medical assistants who did not even appear in the dock, the tribunal brushed those claims aside, noting that his efforts had rippled outward into the necessary conditions for virtually all of the charged experiments to take place:

> If it be thought for even a moment that the part played by Rudolf Brandt was relatively unimportant when compared with the enormity of the charges proved by the evidence, let it be said that every Himmler must have his Brandt else the

> plans of a master criminal would never be put into execution. The Tribunal, therefore, cannot accept the thesis. (Nuernberg Military Tribunals, 1949b, p. 241)

Much of the foregoing was reinforced in the dismissal of final appeals, conducted through the military governor's office, some months after the trial. Although in these rulings the tribunal was not the speaker, nevertheless the rulings were narrow applications of the tribunal's findings, deferring most questions, as in the case of Karl Brandt's appeal, with a comment that the complaint "relates principally to the finding of guilt against the defendant and as such is not properly a part of a petition to the Military Governor. If it can be considered at all, it can be only as a basis for the mitigation of the sentence." (Beals, 1947b, p. 217) However, in a few asides, the responses to the appeals fleshed out the tribunal's standard of action trumping knowledge or supervision. In rejecting defendant Karl Gebhardt's appeal, the military governor's legal staff entertained his argument that

> … he was responsible only for the medical part of the experiments and that he relied on the assurances of Himmler as Reischfuehrer-SS that the experiments were legal (Petition, p. 15). Such an argument is without merit. Every doctor who contemplates experiments on human beings must assume legal responsibility for such experiments (Beals, 1947b, p. 228).

In addressing the appeal from defendant Herta Oberheuser, the sole woman among the defendants, the military governor's legal staff addressed on-point the primacy of direct participation over degree of authority, concluding that "The argument that the defendant could not have prevented the experiments is not significant. The basis of her guilt is her voluntary and active participation in the atrocities" (Beals, 1947b, p. 255).

The Nuremberg Code

The Nuremberg Code was the tribunal's response to the biggest monkeywrench in the trial: the absence of black-letter law that would prove that the defendants' behavior was not just abhorrent, not just the stuff of nightmares, but actually *illegal.* If no one could produce a binding law that the defendants had transgressed, the trial would amount to no more than a meaningless twelve months on the hot seat for them, and a hopeful stab toward future consensus on better ways to conduct research on human subjects.

Judge Beals and his colleagues cut the Gordian knot by describing their own law as a summary of the evidence presented to them about medical ethics. The tribunal's phrasing obscured the divided and inconclusive nature of that evidence with some clever verbal misdirection:

> The great weight of the evidence before us is to the effect that certain types of medical experiments on human beings, when kept within reasonably well-defined bounds, conform to the ethics of the medical profession generally. (Nuernberg Military Tribunals, 1949b, p. 181)

The first words of the announcement, "the great weight of evidence," creates the impression that the pronouncements that follow are actually *supported* by that "great weight of evidence." But upon a closer reading, the tribunal makes no such claim. They dilute the claim with verbiage such as "reasonably well-defined" and "conform to the ethics of the medical profession *generally."* No amount of judicial hand-waving could dispel the reality that the medical propriety of some of the charged offenses rested squarely within a gray area, and that the gray area was actually much larger than the

black and white areas, owing to the very underdeveloped nature of principles of human subject experiment ethics at the time.

It is not, however, the case that the tribunal didn't at least try to make the problem go away with a fairly sweeping, and demonstrably inaccurate, assertion:

> The protagonists of the practice of human experimentation justify their views on the basis that such experiments yield results for the good of society that are unprocurable by other methods or means of study. All agree, however, that certain basic principles must be observed in order to satisfy moral, ethical and legal concepts. (Nuernberg Military Tribunals, 1949b, p. 181)

These two sentences, which led directly into the ten principles of the Nuremberg Code, may most politely be called a well-intended fiction. All did *not* agree on the principles listed below, and all *would not* agree on them, especially not as strongly worded as the tribunal had phrased them, even after the trial. All might *respect* the principles as a good guide, a valuable aspirational declaration of ethical research, but, as was discussed in chapter one, the consensus claimed by the tribunal simply did not exist.

Of the issues raised by prosecution and defense, and catalogued in the previous two chapters, four were unmistakably addressed in the Code: the two initial framing arguments of systemic breakdown and unscientific medical work, and the two points of stasis regarding the individual vs. the community and principle vs. expediency. In the first three issues, the tribunal's work strongly supported the prosecution's position, but on the fourth, the defense apparently made inroads.

The systemic breakdown issue received the least attention of the four in the Code's declarations. The first point of the Code, the one which unpacked the principle of

"informed consent" and is the most quoted part of the entire work, was organized in two parts. Following the discussion of informed consent, the tribunal had started a new paragraph and written, "The duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity" (Nuernberg Military Tribunals, 1949, p. 182). This declaration, which also seemed to signal a prosecution victory on the stasis point of culpability/constraint, represented a far-reaching move to recalibrate the relationships between medical professionals throughout the world. If each researcher was to be held responsible for ensuring that s/he had used only consenting subjects, by the Code's stringent definition, then the very nature of collaborative work would have to be reconceptualized. Lead researchers would have to plan their work, and proceed, with far more consensus building and participation by associate researchers, all of whom were *required* to take full responsibility for this ethical question. This move, perhaps intended to throw circuit-breakers into the propagation of toxic ideas described by Telford Taylor in his opening argument, acknowledged that it was the groupthink, the system-wide messages in the German medical community, that had permitted the experiments first to be imagined, far in advance of the actual crimes.

The second and third points of the Nuremberg Code were unmistakably addressed at the thread of the prosecution's case dealing with the defendants' unscientific practices:

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

> 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study that the anticipated results will justify the performance of the experiment (Nuernberg Military Tribunals, 1949b, p. 182).

The eighth point also codified the prosecution's claim that failure to prepare adequately to do science ought to be an offense against ethics and law: "8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment" (Nuernberg Military Tribunals, 1949b, p. 182). Here, Judge Beals et al. required that researchers arrange their background work, facilities, personnel, and projected outcomes, all based on sound scientific principles. It is puzzling that the tribunal included these admonitions in the code, since lack of consensus on the necessity of laying a scientific foundation before proceeding with experiments was not especially a problem for the prosecution. The defendants argued that their work *was* scientifically conducted and scientifically valuable, rather than denying that those were important criteria for judging the propriety of research. However, perhaps to emphasize the point, the tribunal did include them.

Regarding the individual/community point of stasis, the Nuremberg Code's most enduring contribution to medical ethics came in its first three sentences:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of

> constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment (Nuernberg Military Tribunals, 1949b, pp. 181-182)

The rhythm of this passage is striking. The first sentence is short, emphatic, and undiluted. Voluntary consent is essential. No excuses are acceptable, no special circumstances weaken the requirement. The two sentences that follow express a complete listing of elements that is both meticulous and exhaustive: consent must be free, and possible threats to freedom are listed; knowledge of the experiment must be complete, and elements that must be discussed are listed. The frustration that both prosecution and tribunal must have felt at the absence of preexisting law to apply to this case seems evident in this point. Responding to a vacuum in law, the tribunal seems determined to fill the vacuum with as much legal matter as possible; confronted with a situation that no one had taken seriously in writing previous laws, the tribunal covered many possible anomalous situations with its elaboration.

Yet, the historic first point of the Nuremberg Code was not the last word in that document on informed consent. The principle echoed throughout the rest of the proscriptions as well. Adopting an element of the prosecution's argument explicitly, the

tribunal also addressed the individual-community point of stasis in the Code with its prohibition on fatal or disabling experiments: "5. No experiment should be conducted where there is an priori reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects" (Nuernberg Military Tribunals, 1949b, p. 182). Several points later, Beals et al. enhanced the protection of making researchers responsible for the subjects' welfare by placing the power to defend one's individual dignity in the hands of the subject: "9. During the course of the experiment the human subject should be at liberty to bring the experiment to an end if he has reached the physical or mental state where continuation of the experiment seems to him to be impossible" (Nuernberg Military Tribunals, 1949b, p. 182). Up to this point, all of the tribunal's required elements of human subject experiment ethics seemed to have been carbon-copied from the prosecution's wish list. And yet, traces of the defense's case were too stubborn to be purged.

After the prosecution's dismissal of the defense's necessity of war arguments, after Dr. Ivy's passionate insistence from the witness stand that he would rather die than conduct unethical research, it is startling to discover how many of the elements of the Nuremberg code contain loopholes, balancing mechanisms, and allowances for extreme need. This was one of the tribunal's clearest points of departure from the prosecution's frame, along with the previously-discussed different standard of culpability.

The code's pain and suffering standard was loose, and many of the experiments could arguably have met its requirement: "4. The experiment should be so conducted as to avoid all *unnecessary* physical and mental suffering and injury" (Nuernberg Military Tribunals, 1949, p. 182, emphasis mine). The potential for experiments to injure or kill

subjects was explicitly put in a balance with the extremity of need: "The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment" (Nuernberg Military Tribunals, 1949, p. 182). Finally, in the last point of the code, even a provision assigning responsibility to the researcher was weakened by its hesitant language:

> During the course of the experiment the scientist in charge must be prepared to terminate the experiment at any stage, if he has probably cause [sic] to believe, in the exercise of the good faith, superior skill and careful judgment required of him that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject. (Nuernberg Military Tribunals, 1949, p. 182)

The scientist was not *compelled* to terminate the experiment if substantial risks become apparent; rather, s/he must demonstrate only that s/he was "prepared" to terminate the experiment. The scientist's judgment was the measuring tool, and how much risk was tolerable was left to each individual scientist. A researcher guilty of killing subjects through poorly designed experiments would simply have to prove that monitoring of risk had occurred, and then testify that s/he was *prepared* to terminate the experiments if necessary.

The softness in this set of declarations robs much strength from the rest of the document. While powerful language commanded physicians and researchers to assume personal responsibility, to follow best scientific practice, and to preserve the dignity and worth of individuals in their work, the more tentative language of extreme need and balancing of risks seemed a straightforward reproduction of the defense's arguments at trial. The prosecution's elegant, terse statement of facts and principle gave way to an

energetic condemnation of the defendants' actions, coupled with an allowance that under the right set of circumstances, the principle simply would have to give way.

Shielding and unsettling the grand narrative

This chapter argues that the tribunal carried out three functions. The first two apparently opposed the prosecution, but both actually served to shore up the strength of the prosecution's project to frame collective memory. First, the tribunal found in favor of the defense in most procedural matters during the trial proper. While each overruled objection might be a setback for the prosecution, the total effect of these moves helped to inoculate future audiences against the claim that Nuremberg was merely a show trial, that the defendants were hamstrung from presenting an effective defense. Second, the tribunal, while accepting the broad outlines of the prosecution's case, still carried out quality control on individual charges, ultimately convicting most of the defendants of something, but acquitting them of many of the original offenses in the indictment. In this effort, the tribunal again bolstered the apparent fairness of the trial, demonstrating that it was willing not just to rein in the prosecution, but to reject elements of its case in the moment of decision. The tribunal also chose the most concrete benchmark for establishing culpability, insisting on direct, tangible action in support of the experiments. While this worked against the prosecution's original stated goal that it would put the ideas of Nazi Germany, and the delinquent leadership of Germany's medical community, on trial, it did serve to match the frame to the legitimate purpose of criminal law, that of punishing behavior rather than politics or states of being. While the prosecution railed repeatedly against the doctors for using "political prisoners" as their subjects, the tribunal

declined to confine those same doctors as "political prisoners" according to the prosecution's design.

In the tribunal's third task, authoring the Nuremberg Code, again, a split occurred between prosecution and defense, but this time an apparent prosecution victory masked inclusion of several ideas that sapped the victory of its effectiveness. Given this, it is perhaps less surprising that the Helsinki Declaration would follow the trend of widening the operating freedom of doctors, and that, decades later, many would complain that the Nuremberg Code had never really achieved its potential.

In the final chapter I will explain how the framework constructed in the previous three chapters matches the contours of the controversy over human subjects research and informed consent to the present day. I will then summarize my findings and offer directions for future research.

CHAPTER SIX

CONCLUSION

On December 9, 1946, General Telford Taylor set in motion a trial that was enormous both in logistical and historical scale, and yet left a historical footprint that was strikingly ambivalent. Although most commentators who shared the defendants' profession praised the verdict as a milestone in their field's moral growth, its explicit code of conduct was watered down, and the principle it elevated was violated again and again by researchers who followed. It rivaled the first Nuremberg trial of heads of state, and outstripped any of the other specialized Nuremberg trials, as a reference in public discussion, but was the least successful of the entire series of trials in ratio of defendants convicted to defendants acquitted. Therefore, while it remained a potent presence in any discussion of the limits of medical research and patient protection, that potency was not straightforward and unmixed: the Nuremberg Medical Trial and Nuremberg Code framed the entire phenomenon of Nazi medical atrocity, and the frame incorporated tension and controversy from the moment of its emergence to the present day. This study has examined the argumentative patterns and practices between prosecution and defense, and has discovered several divides between them. This chapter gathers those divides into a pattern, discusses its significance for understanding the Nuremberg Medical Trial and the framing of collective memory, and suggests directions for future research

Legal performatives at Nuremberg

Contemporary communication scholars still find usefulness in Aristotle's three-part taxonomy of rhetoric: deliberative, forensic, epideictic. Returning to the framework laid out for communicative performance back in chapter two, J.L. Austin's tripartite identification of performatives display some striking parallels with Aristotle's, and the qualities of two of them may be useful in gathering and arranging the first cluster of findings from this study. The forensic aspect of the trial corresponds to the constative nature of the prosecution and defense's statements: both ask, what is known, what was observed, what judgments can rationally be rendered upon the body of evidence? And the set of questions spanning those parallel categories are the least pertinent to this work. Deliberative rhetoric follows the illocutionary performative: what is being done, what programme of action is proposed, what tasks are being executed toward a purpose? This facet of the Nuremberg discourse is represented by the moves toward framing collective memory: what knowledge claims about the events of Nuremberg and their proper interpretation receive the tribunal's seal of approval, and are ready for dissemination as acceptable history, acceptable lessons recovered from an unspeakable tragedy? Epideictic rhetoric corresponds to perlocutionary rhetoric: how shall we understand one another, what regimes do we proclaim, maintain, or attack? In its most immediate and straightforward form, it is represented by Osiel's discursive solidarity: how did the immediate, real-time clash between prosecution and defense modify the claims of both sides, and modify the *argumentative practices and strategies* of both sides, thus shaping the outcome? But last, and perhaps the most important performative category, is that of constitutive elements of argumentation at Nuremberg. This set of phenomena spans the

gap between illocution and perlocution, between deliberative and epideictic, because it is *both* substantive and relational, *both* about truth-claims and truth-frameworks. Collecting what the study has unearthed about all three performatives will explain in part what keeps the Nuremberg Medical Trial alive today, even in its almost complete disgrace.

Illocution: Collective memory

At Nuremberg, as throughout legal communication, the various speakers' words did things. First, prosecution and defense each followed a narrative framework that turned their presentation of evidence into a recognizable script. The prosecution sketched the alleged offenses as a collection of fables: straightforward stories with stark lines of responsibility, a plain villain, and easily accessible moral content. The unified, monolithic ideological mafia they invoked in the systemic breakdown arguments identified in chapter three served as an evil force every bit as one-dimensional as a Disney animated feature's obligatory heavy. Their choices throughout the points of stasis, including simplicity, principle, the sanctity of the individual, and the binding nature of obligation, all bolstered the elegant, streamlined framework the prosecution worked to offer both the tribunal and their larger audience. In addition to simplifying the act of distinguishing good from evil, the prosecutors erected categorical boundaries to keep the distinctions sharp and separate: the defendants, having forfeited the esteem surrounding doctors, instead were a unique, distinguishable species unto themselves: practitioners of an unscientific cult of racial purity, sociopathic murderers who attached no value to human life.

The defendants contested this framing, and retold the story as a series of tragedies: complex situations fraught with dilemmas, featuring fundamentally noble

players who may have suffered from a weakness or failing, but did not bear the monstrous, savage character traits imputed by the prosecution. Their defense against the systemic breakdown argument emphasized situatedness and unique circumstances, denying collective decisionmaking or concerted action, and insisting that culpability was distributed unevenly among their number. On their end of the points of stasis, they insisted their actions could only be understood as the *product* of the circumstances, rather than the engine driving them; that they had been driven to acts contrary to ordinary medical practice by extreme and atypical need; that they had assessed the worth of individual research subjects as embedded in a community from which they were allotted responsibility alongside protection; and that the defendants could not fulfill their obligations due to the power and threat of the Nazi officers who supervised their work. They furthermore blurred the boundaries of the prosecution's categories by identifying similar conduct on the part of researchers elsewhere, even in the United States.

Throughout the trial, both sides carried out the content of their arguments in their execution. The prosecution asserted that the case itself was simple and easily understood without necessary reference to detail, and then enacted that premise in its arrangement of evidence, stripping its claims down to the bone. The defendants pled that extreme circumstances had pushed them to unconventional acts, and then enacted the logic of that claim by approaching the trial, in which their lives were at stake if they failed, with unconventional argument and evidence such that the tribunal would later point out that much of the defense's evidence shed little light on the case. The prosecution, following a thread of the case claiming that ethical obligations in medicine were both obvious and unyielding, then proceeded to apply, throughout its arguments, a standard of absolute

culpability to any defendant associated, however remotely, with an alleged crime. The defense, responding to that claim, pointed to their constraints both in attempting to carry out their ethical obligations, and in attempting to marshal evidence and reasoning to refute the prosecution's charges within their own framework.

What the performance of both sides' arguments accomplished, not as its product but through its unfolding, was a reconfiguring of the discursive space of this particular controversy. As was discussed in chapter one, previous discussion of the ethics of experimenting on human subjects had relied heavily upon the discretion of the researcher, or upon informal guidelines that were merely advisory, rather than binding. In extreme cases, research had been halted, but little in the way of systematic, codified rules had been promulgated. The prosecution at Nuremberg was not perfectly successful in persuading anyone that such rules *did* exist, and were simply known so well by all researchers that no one needed to write them down or ratify them, but it was more successful in changing the terms of the debate, claiming that there *ought* to be universal principles, that individual consciences were not sufficient. The defense argued that they could not have abided by such rules even if they existed, but did not pursue the argument that their conscience was sufficient and no outside supervision was required.

The defense was also successful, though, in emphasizing that such research ethics were laden with dilemmas, paradoxes, and difficulties that made simple, universal rules unlikely to be useful. As mentioned in the first chapter, earlier research ethics were long on exhortation and short on sophistication, consisting more of slogans and unhelpful half-arguments that provided no guidance to medical practitioners caught in the act of balancing competing interests and discerning the lesser of many evils. The tribunal's

acceptance of some of the defense's claims, and its subsequent imposition on the prosecution of a higher burden of proof than they had sought, demonstrated that those terms of the debate had shifted as well.

Through these moves, the two sides carried out the performative function, discussed in chapter two, of using legal argument to *reveal.* Both sides worked changes on how their audiences would understand the evidence presented and the events described, as well as changing how the audience would continue the argument, in Osiel's continuing wave of discursive solidarity, once the trial ended. The accretion of interpreted facts into a dominant frame of collective memory did more than just stock a storehouse of rhetorical commonplaces: it changed what it was *possible* to say, how substantive and systematic warrants would have to be to draw adherence to claims in this controversy in all future iterations. In a hybrid splicing of premises from opposing positions, the prosecution and defense took an ethical landscape that had treated issues as simple and suited to informal decisionmaking, and invented, as a replacement, the idea that the issues were extremely complex, but nonetheless required explicit, systematic decisionmaking guides. The collective memory of Nazi medical atrocities and the Nuremberg medical trial would include channels and framing elements that marked a sharp break with the previous prevailing understanding of what separated medical atrocities from benign medical practice.

Thus, following LaCapra, the Nuremberg Medical Trial gave a *valence* to the history of the Nazi doctors: by forcing prosecution and defense to justify their irreconcilable claims, and processing those claims down to a fusion that eliminated much of what each side had brought to the interpretive project, the trial sealed the events

documented by the body of evidence as historically coherent and communicative. What had merely been events had now become *precedents*. And, following Zelizer, the trial followed the recollection of Nazi medical atrocities with *commemoration,* or appropriation of the events for public use. From the building blocks of both prosecution and defense arguments, the tribunal established forward-looking procedures aimed explicitly at providing a decisionmaking formula to guide any future medical researchers who might find themselves in the same dilemmas as the Nuremberg defendants.

Perlocution: Discursive solidarity

In each of the phases of this study, the characteristics have broken down into a pattern: what is known, and who is knowing it? In the framing elements of the prosecution's opening argument discussed in chapter three, the prosecution framed the defendants' data as unscientific, and characterized the defendants as only ersatz doctors who had put aside the legitimacy of their profession by giving up the procedures and constraints of scientific work. In the points of stasis discussed in chapter four, the prosecution and defense exchanged reciprocal role claims for doctor and patient, with the prosecution enmeshing doctors in the web of medical community responsibility while maintaining the research subjects as precious human individuals, not subject to attack or violation even in extreme need, while the defense claimed that they themselves were isolated and detached from their support structures while emphasizing their subjects' duty to the community. These dynamic, interwoven role disputes, as predicted by Scarry and Willard, governed the two sides' willingness to engage in direct clash with one another's arguments. The defense contested the prosecution's claims to sufficient expertise to judge their work, while the prosecution passed curtly over the medical necessity and medical

propriety arguments with an insistence that the defendants had ceased to be doctors. Within these exchanges and their accompanying argumentative moves, the potential for Osiel's discursive solidarity waxed and waned. From beginning to end, the struggle to control the allocation of roles was a key fulcrum in the dispute: the opening statement included as one of its longest sections a review of the Nazi organization, with each defendant in her/his place, while the defendants' final pleas to the tribunal consisted almost entirely of their descriptions of how they had understood their professional identities. Placement of persons in networks of relationships nearly outstripped documents and exhibits as the grist of the trial.

The two latter points of stasis were particularly significant perlocutive elements of the event. The struggle between the prosecution's rugged individualism and the defense's demanding communitarianism worked changes on the communicative landscape that set in motion much of the reasoning behind the Nuremberg Code: if each person was finally free to reject the demands raised by the community and hold her/his body safe from invasive medical procedure, even when neighbors were suffering the most extreme need, then, as NIH ethicist Alexander Capron noted in the first chapter, “We have no power other than the power of persuasion.” The specific provisions of the Code attempted to set down the terms by which communication between researcher and subject must take place, but a far greater, more groundbreaking development, was the changed reality that since coercion of subjects justified a criminal conviction pulled from the legal ether, the only viable alternative was a meeting of the minds with potential subjects.

Similarly, the elevation of duty above constraint, the prosecution's claim that obstacles such as threatening supervisors and ever-present Gestapo surveillance did not

excuse doctors from following the requirements of their profession, drastically reconfigured the discursive space between medical researchers. Before, dissent had been exceptional. Now, it had become a duty. Before, the discretion of researchers and research directors had been honored as the product of specialized knowledge and training, and thus not subject to close scrutiny. Now, the defendants' refusal to go to extremes, even putting their own lives in danger, to denounce their colleagues' unethical work, justified prison sentences and executions.

The arguers at Nuremberg excavated a rift in the controversy that persists to this day. While the *illocutive* element of their arguments, discussed in the previous section, *revealed* a changed argumentative terrain, their *perlocutive* moves carried out the function of *reshaping* the order that prevailed within their profession. The first chapter identified the complaint of medical ethicists that ethics had to be aspirational, while rules and laws were simply floors of behavior, a sharp contrast to the complaints of medical researchers who found ethical practice as defined by their field as cumbersome, bureaucratic and simply an inoculation against lawsuits. Subsequent chapters identified that rift as the continuation of the prosecution and defense's fundamental disagreement, namely whether medical researchers ought to pursue knowledge wherever it leads them, or whether they should purge their techniques of risk and error in a quest to bring them ever closer to the ideal of perfect propriety.

The tribunal's contribution further shaped discursive space surrounding the controversy, and further complicated both sides' efforts to impose their own strategy upon the encounter. Chapters three and four showed how prosecution and defense struggled for a year to move the tribunal to adopt their preferred interpretive filter, and chapter five

described how the tribunal responded to these efforts, both as a governor and referee of argument during the trial, and as the respondent and decisionmaker following the trial. The tribunal's first two acts, passing on objections and reporting a verdict, both added its voice to the illocutive element of the trial, and the Nuremberg Code was the tribunal's contribution to the trial's perlocutive content.

The tribunal's tilt toward the defendants in the trial's mechanics presaged its own change in how medical ethics would be discussed. Previous ethical policing, as described in chapter one, had been ad hoc, informal, and oriented toward conclusionary exhortions rather than fully developed reasoning, but now the tribunal insisted that both sides would be heard, and the side of those accused of misconduct would be aired fully, even to procedural protections that might strike some as technicalities. The subsequent institutionalization of informed consent procedures into paper trails and protocols was the descendant of this move, perhaps reifying a very dynamic problem of trust between researcher and subject, but also devoting sustained, thorough attention to the interests of all sides.

Similarly, the tribunal's incomplete acceptance of the prosecution's case struck a balance between the two competing accounts that favored the prosecution, but incorporated defense claims. The standard of conduct by which the judges judged the defendants was high, but not unreachable. Culpability was strict, but not infinite. Subsequently, the discussion of ethics in human subjects research would tilt heavily in favor of protecting the subjects, and preventing a recurrence of "those horrible atrocities that the Nazis committed," but would nevertheless account for difficult cases, and would acknowledge that assigning responsibility was not always an open and shut case. The

"therapeutic/nontherapeutic research" distinction developed in the Helsinki Declaration was recognizably an extension of the expediency side of the principle/expediency point of stasis: where there was a medical crisis of extreme urgency, doctors were held to a lower standard of conduct, and great deference was given to their expert discretion, the same decisionmaking habit that the prosecutors argued had permitted the Nazi atrocities in the first place.

Furthermore, the tribunal's reluctance to accept mere association with other guilty parties as sufficient to warrant punishment was vindicated in the pattern of compliance with the new ethical code following the trial. The prosecution had argued, in its first framing move, that German medicine's collapse and corruption by Nazi ideas had transformed it into an arm of the military, which turned the doctors' commonly understood mission on its head. And yet, as documented in chapter one, the segment of the medical research community that had the best record of compliance with the Nuremberg Code throughout the next two decades was the military. A factor accounting in part for the difference was the availability of new protocols and guidelines that were written to comply with the tribunal's verdict, but were withheld from civilian researchers as military secrets, but that also illustrates one of the trade-offs predicted both by the doctors themselves and by Gabel: as ethics moved from informality to institutionalization, informal lines of communication were blocked, and the systems that arose to monitor compliance with the new rules became gatekeepers for access to the very information they were assigned to promulgate. Ironically, formalized requirements had the potential to achieve more universal results, but also had a tendency to bring the

same institutional power to bear in cutting off pockets of the medical community from knowledge of the requirements.

Osiel's model of *discursive solidarity* predicts that before an actual argument is joined, the two sides struggle with powerful incentives to remain in a state of nonacknowledgment, disjoined from one another and primed for more violence, more atrocities. History is replete with spirals of violence to dialogue to breakdown of dialogue to violence and back again, beginning with the earliest recorded wars and extending all the way to present-day Middle East peace negotiations (Lampman, 2003). Furthermore, Osiel argues that unless the survivors of administrative massacre, including both perpetrators and victims, enter the symbiotic relationship of argument, both will simply cling to the strongest, most unadapted renditions of their version of the truth, yielding no ground to the other side. At Nuremberg, the prosecution arrived with a brief to pain the Nazi doctors with the broad brush of savagery, while the defense channeled enormous effort into describing life under Hitler's rule as the worst of all nightmares doubled and redoubled again, an end to rational decisionmaking or the possibility of moral action. Both sides suffered setbacks in their attempts to force these accounts upon one another and the tribunal, and both were forced to stipulate portions of the other's cases. In the end, the tribunal accepted key premises from *each* side, and did so in a verdict that was forward-looking, oriented toward continuation of the dialogue for months or years to come, as new problems arose within the same field.

Fusion: Constitutive rhetoric

One long-standing mystery in physics is the difficulty of describing light as a wave or as a particle, when it displays qualities of *both*. It is little known, but

nevertheless true, that Albert Einstein received his Nobel prize not for relativity experiments or his famous equation, but rather for his discoveries regarding these qualities of light (Last, 1998). Extending this knowledge, Werner Heisenberg proposed the uncertainty principle, which explained that one could identify a quantum particle's location, or its momentum, but not both, because pinning down one would alter the other (Gribbin, 1994). A similar difficulty in complete identification may apply to argument, especially in the kinds of norm-rupturing controversies that produce collective memory. An argument is both claim and relationship, both a statement and a nexus between speakers. One may unpack exhaustively the content of the statement, but that requires reference to the intersubjective exchange of the argument between arguers. One may fully explore that relationship, but that necessitates attention to the statements exchanged in the actual argument. Neither may be fully understood as an element independent from the other. Although this is, to some degree, true in any communicative situation, the constant exchange of messages between arguers breaks down the coherent outlines of a message even further than a speaker's attempt to adapt a text to an audience.

Maurice Charland argues that constitutive *rhetoric* is a unique species, because it is not, strictly speaking, a rhetorical enterprise, but must be approached as the textualizing of an audience, which is a most unconventional departure from the classic model of a rhetorical encounter. Here I argue that constitutive messages deployed as the particular subset of rhetorical claims identifiable as *argument* also must be understood differently, because they blur, rather than categorizing, the two phenomena previously described, and reveal that they are simply facets of one communicative process. The

framing of collective memory and the generation of discursive solidarity are the constituent elements of constitutive argumentation.

The situated nature of arguments made by arguers is no grand revelation, as anyone who intrudes in an argument between spouses could confirm, but in this case, where the controversy was extraordinarily entangled with the value of personhood, and where the premises were even less plainly defined at the start of the argument than in typical situations, there came a dynamic of channeling, of role-assignment, which left recognizable traces of the alignment of forces in the controversy nearly half a century later. The trial dealt with the questions of what it meant to be a subject in human research, what it meant to be a doctor, what it meant to have expertise, and what topics one might address as the officer of a court when a trial was underway. Subtexts included whether non-Germans could impose an outside, uninvited order upon Germans; whether affiliation with an identity ought to include an irreducible bottom layer of individual inviolability, or whether the group's survival could justify appropriating everything its members had to offer; and whether the obligations that bound group members together were simple formulae, or secondary goals that could be sought through indirect strategies. Both sides disputed not just what their counterparts had said, but who they had claimed to be. Both sides disputed not just what was lawful, but what was the substance, and what was the ultimate limit, of an obligation.

With the Nuremberg Code, the tribunal invoked the global community of medical practitioners to legitimize its superlegislative act. Drawing on the prosecution's claim that ethical principles in medicine existed already as a matter of community consensus, the tribunal made the move of laying down a summary of the prosecution's ideals and

claiming it was just making the rules explicit as a safeguard against future abuse. The code defined proper conduct, but spoke at length about the roles, responsibilities and protections of both researcher and subject. Once again, the content was bound up with the identities of the persons involved.

In all phases, the project of making Hazen and Williams' "arguments of identity," of laying down Perelman and Olbrechts-Tyteca's epidictic precursors of argument, drew both from collective memory and from discursive solidarity. Identities were limned both by collecting, sifting and interpreting events, as Charland had explained, *and* through participation, adjustment, and filtering of claims in response to the unfolding of the opponent's defenses, as Lake predicted. Thus, to understand how constitutive messages exist in controversy, particularly in events that entail a complete rupture of social order, it is useful to consider the process of identity construction as *argument,* as the workshopping or choral performance of a dominant frame of collective memory, and as the reconnection of identity groups that build in a hefty dose of implacable enmity with one another through the attractive and civilizing force of argument. Put plainly, the Nuremberg Medical Trial survived the mistakes, foolishness and controversy that buried its successors in the dusty back shelves of law libraries because it succeeded, through the progression from opening position to struggle over stasis to interspersion of premises in the verdict, in constituting an identity for *all* involved parties that reconciled their different and opposing identities with the absolute necessity of coexistence. The answer to the question asked at the beginning of this study is, the trial yielded a framework, if a flawed one, that allowed both sides to claim some portion of their interpretation had won acceptance, and eased the fear that a recurrence of such events could deal such

unbuffered trauma to the participants, the medical community, and the entire population of the world.

Directions for future research

The likelihood that future events like Nuremberg will generate similar communicative phenomena is skyrocketing. More than a decade after the fall of the Berlin wall and the end of the Cold War, borders continue to change and flow (Hoffman, 2002), reconfiguring geography as drastically as a magma flow from a volcano, while the explosive expansion of the internet continues to break down barriers to the flow of information (Brandon, 2003), in both cases bringing rapid and radical challenges to previously settled identities, opening up space for more and more constitutive work in nearly all realms of rhetoric. The simultaneous explosive growth in fragmenting identities and communication channels lends urgency to the task of understanding how constitutive messages are worked out in argument, how audiences internalize controversy processed through unfolding, oppositional encounters that resist closure. Future research into constitutive rhetoric should attend to argumentation's contribution to the subject, and should explore how arguers collect and distill their body of evidence collaboratively through assertion and refutation, as well as examining how the very process of joining in argument shapes the constitutive product, the collective identity that subsequent audiences are invited to adopt.

Furthermore, with the arrival of the International Criminal Court (Richburg, 2003), and the growing popularity of "truth commissions" (Boutsany, 2001), framing of collective memory on grand institutional stages that encourage controversy is becoming an everyday occurrence. From Rwanda to Bosnia to Cambodia to Chile, just to name a

few, people struggle with trauma on a scale that rises to Osiel's category of "administrative massacre," and in doing so they write a new chapter into their founding myth, to explain why events so horrible and seductively forgettable must not be forgotten. Those responsible for the bloodshed, and those with ties to them, contest the framing of those collective memories, complicating simple denunciations with dilemmas and paradoxes. As these tribunals and commissions collectively generate a history and a body of precedent, future research should address the evolution of framing moves in courts that are less inchoate and more settled than the ad hoc tribunal at Nuremberg with its ad hoc lawbook. Rules of evidence and rules of procedure are especially critical, since they are the fulcra from which many framing moves are made.

The continued revelation of human subject research scandals, such as the Iowa study of stuttering behavior that "taught" several orphans to stutter (Reynolds, 2003), signals that although human subjects research ethics has come a long way since the days of Hippocrates, or even Thomas Percival, there still remains enormous room for progress in that field. Future research should address the partisan divides that surrounded the framing of subsequent codes, such as the Helsinki declaration, and should compare the points of stasis in those deliberations within the medical field to the views articulated by researchers and regulators today, to assess how the contemporary understanding of research ethics continues to be informed by its argumentative heritage.

On a broader scale, research in legal communication would benefit from attention to the performance of argument, to messages that inhere in the argumentative moves themselves, rather than simply emerging as the argument's content. When attorneys, judges, and lay participants make arguments about affirmative action, or police power, or

tort liability, they necessarily reason their way through claims whose intelligibility depends upon assumption of a particular role, pretense that one is a jobseeker or student who belongs to a suspect class, or someone detained by police, or someone suffering damages as a result of negligence. The argumentative moves that assume, question, and criticize those roles communicate beyond the conclusion of the syllogism or thrust of the enthymeme: they arrange those roles in configurations that change the possibilities for argument between those that come later. Similarly, the points of stasis, the issues at which clash truly is joined and competitive positions can be discerned across one critical question, communicate beyond simply setting one up to decide between the opponents: where the points of stasis lie reveals the situatedness of the arguers. There, argument is not a confrontation between two hostile forces, with one bound to vanquish the other, but it is a collaborative encounter between communicators: locating the split between their positions is an important development in understanding the controversy. Finding the fault line is not finding the place where agreement failed, where consensus broke down, where communication ruptured, but it is mining one's way through secondary issues to the pivot, the issue which provides access to the differing perspectives. If argument is productive, as Osiel suggests, not when it converges toward closure, but when it continues, when arguers labor over the points of stasis, and in so doing become, over time, more and more resigned to coexisting with one another if only because their disagreement requires their continued engagement, then recognizing the particular issues that forge that chain of argumentative cohesion is a critical step in responding to such traumatic events.

In this chapter, I have summarized the findings of this study. I argue that all parties to the argument at the Nuremberg Medical Trial executed legal performatives that

were both illocutive and perlocutive, both deliberative and epideictic, and that the two streams of discourse actually were mere branches of a larger communicative phenomenon, the constitution of the discursive community through the assumptions from which the arguments had been assembled, and through the collective revision of those arguments through the collaborative performance of argumentation. Specifically, I have argued that prosecution, defense and tribunal all contributed to changing the discursive space of controversies over human research ethics, that they balanced a need for systematic and universal rules with accommodation for complexity and difficult decisions. Additionally, they changed how communication itself would be practiced between practitioners in the field, for the sake of preventing another ethical implosion and rash of atrocities: doctors would be accountable to one another, and would be required to communicate fully and honestly with their patients, as well as listening to the patients and understanding their feedback. If these two processes, changing the content of ethics and changing the conditions of its practice, are understood as intertwined surfaces of the same species of communication, constitutive *argument,* then the question I asked at the end of the first chapter can finally be answered: the Nuremberg Code, and the collective memory artifact of the Nuremberg trial itself, enjoy such disproportionate longevity because of their success as a balance between what had seemed irreconcilable positions on the parts of all those represented at the trial. The trial reconstituted *who the doctors were* by reconstructing what values they would be required to defend, and what modes of intracommunity interaction were acceptable defenses. If it failed to make its prison sentences stick, if it failed to legislate a binding document as enduring as the United States constitution, it succeeded as a founding document in the same manner as

the Ten Commandments or the Gettysburg Address, by reassembling the elements of the conflict in such a way that the possibility, even likelihood, of coexistence became evident.

On August 20, 1947, Judge Walter Beals called Tribunal Number One to order, and the tribunal issued its verdict. Seven defendants were sentenced to death, including three (Sievers, Brack and Hoven) who were not physicians. Nine were sentenced to prison terms, ranging from Poppendick's ten year term solely for being a member of the SS, to life sentences for five defendants. Seven were acquitted and set free. Interspersed with these sentences, Beals pronounced judgment on both sides' arguments, incorporating the prosecution's vehement denunciations, but tempering them with acceptance of the defense's insistence that the events had been complex and fraught with dilemmas. To arrange and clarify the basis for those rulings, Beals read aloud the tribunal's synthesis of what it could glean from the testimony about what constituted ethical research on human subjects, organizing it as a list of rules, the neat list of rules that the prosecution had so craved before and during the trial.

Those messages, understood in the context of the previous eight months of proceedings, taught the world a lesson about how to argue, on a public stage and in a comprehensive manner, about medical ethics. It brutally pushed back limits on discussion based in expertise, in the overriding urgency of saving those potentially threatened by illness, in the trustworthiness of a physician's conscience, and opened up the controversy to systematic deliberation. The exercise laid bare many of the interests involved, and arranged those interests into partisan sides, who then generated arguments that would become commonplaces in later deliberation. Today, when people speak of the Nuremberg

Medical Trial as a milestone in the history of human rights and medical ethics, they speak the truth. Even though the Nuremberg Code is a legal dead letter, even though almost a third of the defendants were acquitted, even though the trial is more of a legal oddity than a legal breakthrough, the Nuremberg Medical Trial and Nuremberg Code assembled the dominant frame for collective memory of the Nazi medical experiments, and in so doing, paved the way for future generations to understand how the limits of permitted medical research ought to be drawn.

REFERENCES

Althusser, L. (1977). Ideology and Ideological State Apparatuses (Notes Towards an Investigation). 'Lenin and Philosophy' and Other Essays, London: New Left Books, 253 pp.

Annas, G.J. (1992). The Nuremberg code in U.S. courts: Ethics versus expediency. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Annas, G.J. (1996). Questing for grails: Duplicity, betrayal and self-deception in postmodern medical research. Journal of Contemporary Health Law & Policy, 12 (2), 297-

Annas, G.J., & Grodin, M.A. (1991, January 8). Our guinea pigs in the Gulf. New York Times, A21.

Annas, G.J., & Grodin, M.A. (1992). Introduction. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Annas, G.J., & Grodin, M.A. (1999). Medical ethics and human rights: Legacies of Nuremberg. Hofstra Law & Police Symposium, 3 (1), 111-133.

Austin, J.L. (1962). How to do things with words. Oxford: Clarendon Press, 166 pp.

Barondess, J.A. (1996). Medicine against society: Lessons from the Third Reich. Journal of the American Medical Association, 276 (20), 1657-1661.

Bass, G.J. (1999). War crimes and the limits of legalism. Michigan law review, 97 (4), 2103-2116.

Beals, W.B. (1947a). Judgment. In Military Tribunal Number One (Ed.), United States of America vs. Karl Brandt et al., (Vol. 2, pp. 171-300). Washington, D.C.: U.S. General Printing Office.

Beals, W.B. (1947b). The first German war crimes trial: Chief Judge Walter B. Beals' desk notebook of the doctors' trial, held in Nuernberg, Germany, December, 1945 to August, 1947. Burman, W.P., ed. Chapel Hill: Documentary Publications, 274 pp.

Belliotti, F.A. (1992). Justifying law: The debate over foundations, goals, and methods. Philadelphia: Temple University Press, 301 pp.

Bourdieu, P. (1991). Language and symbolic power. Cambridge: Harvard University Press, 302 pp.

Boutsany, N. (2001, August 3). Promoting Truth as Antidote In a World of Brutality. Washington Post, A13.

Brandon, G. (2003, April 3). The Internet: Speeding Up Fast. Kiplinger Business Forecasts, 2003 (0404), np.

Brandt, A.M., & Freidenfelds, L., (1996). Research ethics after World War II: The insular culture of biomedicine. Kennedy Institute of Ethics Journal, 6 (3), 239-243.

Bush, J.A. (2002). "The Supreme … Crime" and its origins: The lost legislative history of the crime of aggressive war. Columbia law review, 102 (4), 2324-2424.

Butler, J. (1997). Excitable speech: A politics of the performative, New York: Routledge, 185 pp.

Caplan, A.L. (1992). The doctors' trial and analogies to the Holocaust in contemporary bioethical debates. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Carter, M. (1988). 'Stasis' and 'Kairos': Principles of social construction in classical rhetoric. Rhetoric review, 7 (2), 97-112.

Charland, M. (1987). Constitutive rhetoric: The case of the *peuple Québécois*. Quarterly journal of speech, 73 (2), 133-150.

Christenson, R. (1986). Political trials: Gordian knots in the law. New Brunswick: Transaction Books, 303 pp.

Condit, C.M. (1987). Crafting virtue: The rhetorical construction of public morality. Quarterly journal of speech, 73 (1), 79-97.

Conot, R. (1984) Justice at Nuremberg. New York: Carroll & Graf Publishers, Inc., 593 pp.

Cox, J.R. (1990). Memory, Critical Theory and the Argument from History. Argumentation and Advocacy, 27 (1), 1-13.

Dadrian, V.N. (1995). History of the Armenian Genocide: ethnic conflict from the Balkans to Anatolia to the Caucasus, Providence, RI : Berghahn Books, 452 pp.

D'Amato, A. (1971). The concept of custom in international law. Ithaca: Cornell University Press, 286 pp.

Devroy, A., & Gugliotta, G. (2001, March 2). Bush to 'Move Fast' on Mideast Peace; Cease-Fire Talks Delayed By 'Technical Details.' Washington Post, A1.

Dieter, O.A.L. (1950). Stasis. Speech monographs, 28 (4), 345-369.

Dill, R.P. (1988). An analysis of stasis in James H. Thornwell's sermon, "The rights and duties of masters." The journal of communication and religion, 11 (1), 19-24.

Drinan, R.F. (1992). The Nuremberg principles in international law. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Drzewiecka, J.A. (2002). Reinventing and contesting identities in constitutive discourses: between diaspora and its others. Communication Quarterly, 50 (1), 1-23.

Duffin, J. (1999). History of medicine: A scandalously short introduction. Toronto: University of Toronto Press, 432 pp.

Durkheim, E. (1933). On the division of labor in society. New York: Macmillan, 352 pp.

Ehninger, D. (1970). Argument as method: Its nature, its limitations, and its uses. Speech monographs, 37 (2), 101-110.

Engel, S.M. (1980). Analyzing informal fallacies. Englewood Cliffs, NJ: Prentice-Hall, 184 pp.

Faden, R.R., et al. (1995). Advisory Committee on Human Radiation Experiments: Final Report. Available: http://tis.eh.doe.gov/ohre/roadmap/achre/chap2_2.html

Felman, S. (1999). Forms of judicial blindness: Traumatic narratives and legal repetitions. In Sarat, A., & Kearns, T.R., eds., History, memory, and the law, Ann Arbor: University of Michigan Press, 25-93.

Fletcher, G.P. (1996). Basic concepts of legal thought. New York: Oxford University Press, 213 pp.

Fox, R.C. (1959). Experiment perilous; physicians and patients facing the unknown. Glencoe, IL: Free press. 262 pp.

Freedberg, S.P. (2000, March 19). Questions raised over AIDS research on inmates. St. Petersburg Times, 1A.

Friedrich, J. (1999). Nuremberg and the Germans. In War Crimes: the legacy of Nuremberg, B. Cooper, ed., New York: TV Books, 20-31.

Gabel, P. (1984). The phenomenology of rights-consciousness and the pact of the withdrawn selves. Texas law review, 62 (4), 1563-1598.

Garnett, R.W. (1996). Why informed consent? Human experimentation and the ethics of autonomy. Catholic Lawyer, 36 (2), 455-

Gaskins, R.H. (1992). Burdens of proof in modern discourse. New Haven: Yale University Press, 362 pp.

Gewirtz, P. (1996). Narrative and rhetoric in the law. In Law's stories: narrative and rhetoric in the law, Gewirtz, P. & Brooks, P., eds., New Haven: Yale University Press, 2-13.

Glantz, L.H. (1992). The influence of the Nuremberg code on U.S. statutes and regulations. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Goldhagen, D. J. (1996). Hitler's willing executioners: Ordinary Germans and the Holocaust, New York: Knopf, 622 pp.

Gribbin, J. (1994). Uncertainty rules in the quantum world. New Scientist, 1818.

Grodin, M.A., (1992). Historical origins of the Nuremberg code. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Gusfield, J.R. (1975). Moral passage: The symbolic process in public designation of deviance. In The collective definition of deviance, F. James Davis & Richard Stivers, eds., New York: The Free Press, 85-98.

Habermas, J. (1984). The theory of communicative action, volume one: Reason and the rationalization of society. Boston: Beacon Press, 465 pp.

Habermas, J. (1990). Moral consciousness and communicative action. Cambridge: MIT Press, 225 pp.

Hariman, R. (1990). Performing the laws: Popular trials and social knowledge. In Hariman, R., ed., Popular trials: Rhetoric, mass media, and the law, Tuscaloosa: University of Alabama Press, 17-30.

Hasday, L.R. (2002). The Hippocratic Oath as literary text: A dialogue between law and medicine. Yale journal of health policy, law and ethics. 2 (2), 299-

Hasian, M. (2000). Jurisprudence as performance: John Brown's enactment of natural law at Harper's Ferry. Quarterly Journal of Speech, 86 (2), 190-214.

Hasian, M.A. (2001a). Silences and articulations in modern rhetorical criticism. Western Journal of Communication, 65:3, 295-313.

Hasian, M.A. (2001b). Anne Frank, Bergen-Belsen, and the Polysemic Nature of Holocaust Memories. Rhetoric and public affairs, 4 (3), 349-374.

Hasian, M., & Carlson, A.C. (2000). Revisionism and collective memory: The struggle for meaning in the *Amistad* affair. Communication Monographs, 67 (1), 42-62.

Hasian, M., Condit, C.M., & Lucaites, J.L. (1996). The rhetorical boundaries of 'the law': A consideration of the rhetorical culture of legal practice and the case of the 'separate but equal' doctrine. Quarterly journal of speech, 82 (4), 323-342.

Hazen, M.D., & Williams, D.C. (1997). Introduction: Argument and identity, Argumentation and advocacy, 34 (3), v-viii.

Henderson, G.E., King, N.M.P., Strauss, R.P., Estroff, S.E., & Churchill, L.R., eds. (1997). The social medicine reader. Durham: Duke University Press, 516 pp.

Hoffman, S. (2002). Clash of globalizations. Foreign affairs, 81 (4) 104-109.

Hom, S.K., & Yamamoto, E.K. (2000). Collective memory, history, and social justice. UCLA law review, 47 (3), 1747-1802.

Irwin-Zarecka, I. (1994). Frames of remembrance: The dynamics of collective memory. New Brunswick: Transaction Publishers, 214 pp.

Johnson, R.G. (1999, February 8). Tolerance wanes as trial drags on. Atlanta journal and constitution, 2B.

Jones, J. H. (1981). Bad blood: the Tuskegee syphilis experiment. New York: Free Press, 272 pp.

Jonsen, A.R. (1998). The birth of bioethics. New York: Oxford University Press, 431 pp.

Katz, J. (1992). The consent principle of the Nuremberg code: Its significance then and now. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Katz, J. (1996). The Nuremberg Code and the Nuremberg trial: A reappraisal. Journal of the American Medical Association, 276 (20), 1662-1666.

Kennedy, J.F. (1955). Profiles in courage, New York: Harper & Brothers, 266 pp.

Kevorkian, J. (1997, February 12). At least my patients gave consent; FDA regulations that permit experimentation without consent are tantamount to what Nazi doctors did. Los Angeles Times, B9.

Kohler, L., & Saner, H. (Eds.). (1992). Hannah Arendt and Karl Jaspers: Correspondence 1926-1969, New York: Harcourt Brace Jovanovich, 821 pp.

Kurzon, D. (1986). It is hereby performed…:Explorations in legal speech acts. Amsterdam: John Benjamins Publishing Company, 81 pp.

LaCapra, D. (1999). Memory, law, and literature: The causes of Flaubert and Baudelaire. In Sarat, A., & Kearns, T.R., eds., History, memory, and the law, Ann Arbor: University of Michigan Press, 25-93.

LaFraniere, S., Flaherty, M.P., & Stephens, S. (2000, December 19). The dilemma: Submit or suffer; 'Uninformed consent' is rising ethic of the drug test boom. Washington Post, A1.

Lake, R.A. (1997). Argumentation and self: The enactment of identity in *Dances with Wolves*. Argumentation and advocacy, 34 (3), 66-89.

Lampman, J.L. (2003, June 19). Abrahamic faiths crack the door to deeper dialogue. Christian Science Monitor, 17.

Last, J.V. (1998). Light year; what Einstein did in 1905. The Weekly Standard, 35.

Lewis, W. (1994). Of Innocence, Exclusion, and the Burning of Flags: The Romantic Realism of the Law. Southern communication journal, 60 (1), 4-21.

Lippman, M. (1995). War crimes prosecutions of Nazi health professionals and the contemporary protection of human rights. Thurgood Marshall Law Review, 21 (1), 11-

Lum, J.L.J. (1978) Reference groups and professional socialization. Role theory: Perspectives for health professionals, New York: Appleton-Century-Crofts. 137-156.

Macklin, R. (1992) Universality of the Nuremberg code. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Mariner, W.K. (1992). AIDS research and the Nuremberg code. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Marrus, M.R. (1999). The Nuremberg doctors' trial in historical context. Bulletin of the History of Medicine, 73 (1), 106-123.

Marshall, T. (1980). Fullilove v. Klutznick, 448 U.S. 448, 519.

Mason, A.T. (1968). Harlan Fiske Stone: Pillar of the law, New York: Archon Books, 914 pp.

McGee, M.C. (1980). The "Ideograph": A Link Between Rhetoric and Ideology, Quarterly Journal of Speech, 66 (1), 1-16.

McKerrow, R., & Bruner, M. (1997). Argument and multiple identities: Contemporary European nationalism and environmentalism. Argumentation and advocacy, 34 (3), 51-65.

Meltzer, B. (1999). Remembering Nuremberg. In War Crimes: the legacy of Nuremberg, B. Cooper, ed., New York: TV Books, 20-31.

Meyers, A.S. (2000, January 30). Informed consent; A lot of rules, too many exceptions. Washington Post, p. B03.

Moreno, J.D. & Lederer, S.E. (1996). Revising the history of cold war research ethics. Kennedy Institute of Ethics Journal, 6 (3), 223-237.

Moreno, J.D. (1997a). Reassessing the influence of the Nuremberg code on American medical ethics. Journal of Contemporary Health Law & Policy, 13 (2), 347-361.

Moreno, J.D. (1997b). The dilemmas of experimenting on people. Technology Review, 100 (5), 31-39.

Morgan, E. (1988). Retributory theatre. American University Journal of International Law and Policy, 3 1, 1-64.

Nozick, P. (1999). The Holocaust in American life. Boston: Houghton-Mifflin, 373 pp.

Nuernberg Military Tribunals. (Ed.). (1949). United States of America vs. Karl Brandt, et al., Trials of war criminals before the Nuernberg Military Tribunals under Control Council law no. 10. (Vols. 1-2). Washington, D.C.: United States Government Printing Office.

Osiel, M. (1997). Mass atrocity, collective memory, and the law. New Brunswick: Transaction publishers, 317 pp.

Perelman, C., & Olbrechts-Tyteca, L. (1969). The new rhetoric: A treatise on argumentation, Notre Dame: University of Notre Dame Press, 566 pp.

Perley, S., Fluss, S.S., Bankowski, Z., & Simon, F. (1992). The Nuremberg code: An international overview. In The Nazi doctors and the Nuremberg code, George J. Annas & Michael A. Grodin, eds., New York: Oxford University Press, 371 pp.

Perry, M.M. (1999). Fragmented bodies, legal privilege, and commodification in science and medicine. Maine law review, 51 (1), 169-

Persico, J.E. (1994). Nuremberg: Infamy on trial. New York: Penguin Books, 520 pp.

Pillsbury, S.H. (1989). Emotional justice: Moralizing the passions of criminal punishment. Cornell law review, 74 (2), 655-710.

Prince, E.F. (1990). On the use of social conversation as evidence in a court of law. In Levi, J.N., & Walker, A.G., eds., Language in the judicial process, New York: Plenum Press, 279-290.

Pullman, G.L. (1995). Deliberative rhetoric and forensic stasis: Reconsidering the scope and function of an ancient rhetorical heuristic in the aftermath of the Thomas/Hill controversy. Rhetoric society quarterly, 25 (1), 223-30.

Reynolds, G. (2003, March 16). The Stuttering Doctor's 'Monster Study.' New York Times, 36.

Richburg, K.B. (2003, March 12). International War Crimes Court Is Inaugurated, but Without U.S. Washington Post, A18.

Rosenbaum, A.S. (1993). Prosecuting Nazi war criminals. Boulder: Westview Press, 144 pp.

Rourke, N.E. (1997). A difference of reason. Lanham: University Press of America, Inc., 323 pp.

Sarat, A., & Kearns, T.R., (1999). Writing history and registering memory in legal decisions and legal practices: An introduction. In Sarat, A., & Kearns, T.R., eds., History, memory, and the law, Ann Arbor: University of Michigan Press, 1-24.

Scarry, E. (1996). Speech Acts in Criminal Cases. In Brooks, P., & Gewirtz, P., eds., Law's Stories: Narrative and Rhetoric in the Law. New Haven: Yale University Press, 290 pp.

Schuetz, J., & Snedaker, K.H. (1988). Communication and litigation: Case studies of famous trials. Carbondale: Southern Illinois University Press, 277 pp.

Schwartzman, R.J. (2001). Recovering the Lost Canon: Public Memory and the Holocaust. Rhetoric and public affairs, 4 (3), 543-558.

Scott, C. (2000). Why law pervades medicine: An essay on ethics in health care. Notre Dame Journal of Law, Ethics & Public Policy, 14 (1), 245-

Sicher, E.S. (2001). The future of the past: Countermemory and postmemory in contemporary American post-Holocaust narratives. History and memory, 12 (2), 56-91.

Sidel, V.W. (1996). The social responsibilities of health professionals: Lessons from their role in Nazi Germany. Journal of the American medical Association, 276 (20), 1679-1681.

Sinha, S.P. (1989). What is law? The differing theories of jurisprudence. New York: Paragon House, 274 pp.

Smith, B.F. (1977). Reaching judgment at Nuremberg. New York: Basic Books, 349 pp.

Soper, P. (1984). A theory of law. Cambridge, MA: Harvard University Press, 190 pp.

Stevens, M.L.T. (2000). Bioethics in America: Origins and cultural politics. Baltimore: Johns Hopkins University Press, 204 pp.

Stone, H.F. (1938). United States vs. Carolene Products Co. 304 U.S. 144, 153.

Stormer, N. (2002). In living memory: Abortion as cultural amnesia. Quarterly Journal of Speech, 88 (3), 265-283.

Sun, M. (1988). EPA bars use of Nazi data. Science magazine, 240 (4848)

Szalewski, S. (1996, April 1). Doctor: Nazism echoes in ethics issues. Omaha World Herald, p. 11SF.

Tanford, J.A. (1986). Closing Argument Procedure. American journal of trial advocacy, 10 (1), 47-119.

Tiefenbrun, J. (1999). Doctors and war crimes: Understanding genocide. Hofstra Law & Policy Symposium, 3 (1), 125-

Tiersma, P.M. (1999). Legal language. Chicago: The University of Chicago press, 314 pp.

Toulmin, S. (1958). The uses of argument. Cambridge: Cambridge University Press, 264 pp.

Vollmann, J., & Winau, R. (1996). Informed consent in human experimentation before the Nuremberg code. British Medical Journal, 313 (7070), np.

Weiss, R. (1998, November 16). Bioethics group divided over research on mentally ill. Washington Post, A06.

White, G.E. (1999). Analogical reasoning and historical change in law: The regulation of film and radio speech. In Sarat, A., & Kearns, T.R., eds., History, memory, and the law, Ann Arbor: University of Michigan Press, 283-317.

White, J.B. (1985). Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life. University of Chicago Law Review, 52 (2), 684-702.

White, J.B. (1990). Justice as translation: an essay in cultural and legal criticism. Chicago: University of Chicago Press, 313 pp.

Willard, C.A. (1989). A theory of argumentation. Tuscaloosa: University of Alabama press, 324 pp.

Winter, J., & Sivan, E. (1999). Setting the framework. In War and remembrance in the twentieth century, Winter, J., & Sivan, E., eds. Cambridge: Cambridge University Press, pp. 6-39.

Wolvin, S. S. (1989). The presence of the past. Baltimore: Johns Hopkins University Press, 228 pp.

Yemma, J. (1996, December 10). Conference revisits the medical horrors of Nazi death camps. Boston Globe, A1.

Zelizer, B. (1995). Reading the past against the grain: The shape of memory studies. Critical studies in mass communication, 12 (3), 214-235.

Zlotnick, D. M. (1995). Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders. Ohio State Law Journal, 56 (4), 1153-1215.