

## **A Theory of International Bioethics: Multiculturalism, Postmodernism, and the Bankruptcy of Fundamentalism**

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*Abstract.* This first of two articles analyzing the justifiability of international bioethical codes and of cross-cultural moral judgments reviews "moral fundamentalism," the theory that cross-cultural moral judgments and international bioethical codes are justified by certain "basic" or "fundamental" moral principles that are universally accepted in all cultures and eras. Initially propounded by the judges at the 1947 Nuremberg Tribunal, moral fundamentalism has become the received justification of international bioethics, and of cross-temporal and cross-cultural moral judgments. Yet today we are said to live in a multicultural and postmodern world. This article assesses the challenges that multiculturalism and postmodernism pose to fundamentalism and concludes that these challenges render the position philosophically untenable, thereby undermining the received conception of the foundations of international bioethics. The second article, which follows, offers an alternative model--a model of negotiated moral order--as a viable justification for international bioethics and for transcultural and transtemporal moral judgments.

Man in the Twentieth Century can not be circumscribed by the standards of any single culture.

American Anthropological Association (1948) in a statement officially denouncing the 1948 United Nation's Declaration of Human Rights.

Recently . . . so-called "liberal" medicine has revived the old rights of a clinic understood in terms of a special contract, a tacit pact made between one man and another. This patient gaze has even been attributed the power of assuming [a role in clinical decision making].

Miracles are not so easy to come by . . . .

Michel Foucault (1975, p. 5) [End Page 201]

### **An Overview of the Analysis**

International bioethics originated in the trauma of the Holocaust, specifically, in the 1946-1947 Nuremberg "Doctors Trial" when a tribunal of three American judges convicted Nazi medical researchers of "crimes against humanity." In justifying their judgment, the Nuremberg Tribunal cited 10 principles for morally permissible research, which, they

claimed, were based on "fundamental" principles that civilized societies "all agree" upon and accept as the foundations of their "moral, ethical, and legal" norms. Foremost among the principles was one stating that morally permissible human experiments require the informed voluntary consent of the subject. The Nuremberg judgment soon became associated with the ideal of human rights declared in the 1948 United Nations Charter. These two ideas--fundamental principles of morality and human rights--have been linked in all major formulations of international bioethics promulgated in the past 50 years, including the Council of Europe's 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Biomedicine (Council of Europe 1997; Dommel and Alexander 1997). In this paper, I explore the received justification for international bioethics--the idea that it is grounded in fundamental principles accepted in all societies--tracing it from its initial, almost off-hand, promulgation by the Nuremberg Tribunal, through its more thoughtful development by such bioethicists as Ruth Macklin, to its more complex use by the President's Advisory Committee on Human Radiation Experiments.

After a brief review of the evolution of the received justification, I discuss the viability of this justification in the face of the critique implicit in two important intellectual movements: multiculturalism and postmodernism. In the international context, multiculturalism asserts the claim that there are no common moral principles shared by all cultures. Postmodernism asserts a similar claim against all universal standards, moral and nonmoral. In the 1990s, bioethicists have attempted to respond to these claims in various ways. These responses are documented, analyzed, and then shown to be "bankrupt," in the sense that they undercut the most important objective of moral fundamentalism: the justification of transcultural moral judgments, such as the condemnation of the Nazi doctors.

A second article, which follows the present one in the same issue of the *Kennedy Institute of Ethics Journal*, revisits the contractarian tradition [End Page 202] of Hobbes and Locke, as it has been reinterpreted by David Gauthier (1986), John Rawls (1971, 1993), and Robert Nozick (1974), to develop the idea of negotiated moral order as the basis of international bioethics. When conceptualized as a negotiated moral order, international bioethics can accept the genuine insights of multiculturalism and postmodernism, while supporting a revised conception of human rights (as nonnegotiable primary goods) and justifying transcultural and transtemporal moral judgments, including the condemnation of the Nazi doctors.

Having outlined a theoretical model for international bioethics the analysis turns to the history of the Nuremberg Code and the development of the ethics of human subjects experimentation, in part to validate the conception of international bioethics as a continually renegotiated moral order and, in part, to assuage fundamentalist fears that any theoretical account that permits the revision of "fundamental" principles jeopardizes those areas of nonnegotiability that traditionally have been labeled "human rights."

### **Three Formulations of Moral Fundamentalism**

## The Moral Fundamentalism of the Nuremberg Tribunal

The three American judges who presided over the 1947 Nuremberg Tribunal passed judgment on the so-called "Nazi doctors," even though these doctors were from a different culture, the actions for which they were indicted occurred in a different nation state, and the laws of that nation did not explicitly proscribe their actions as criminal. The judges nonetheless claimed a right to pass judgment on the Nazi doctors because the "human experiments" they had conducted were "contrary to 'the principles of the law of all nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience'" (Nuremberg Tribunal 1948, p. 104). A traditional name for the position asserted by the Nuremberg Tribunal is "moral fundamentalism." <sup>2</sup> As the label "fundamentalism" suggests, the central tenet of this position is that certain basic or *fundamental* moral principles are accepted in all eras and cultures and thus are universally applicable to agents and actions in any era or culture. In the aftermath of World War II, after the discovery of the Holocaust, the international community readily embraced moral fundamentalism. It seemed self-evident, at the time, that the Tribunal was right; that there were indeed certain fundamental moral principles accepted by all civilized peoples and that the Nazi failure to [End Page 203] embrace these principles demonstrated that Germany had somehow "gone mad" during the Nazi era. The Nazi doctors' trial at Nuremberg thus was understood as evidence that the madness had spread to medical science; consequently, the Nuremberg principles were understood to have laid the foundations for a sane medical science governed by principles of international bioethics.

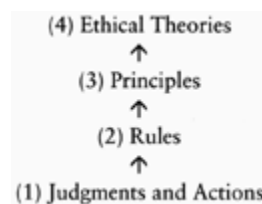
### Ruth Macklin's Reformulation of Moral Fundamentalism

A half century has passed since the Nuremberg Tribunal first promulgated fundamentalist theory to justify its verdict and, given the passage of time, it is not unreasonable to ask: does its grand rhetoric of morally fundamental principles still ring true in our current postmodern multicultural age? Or did it merely sound true in the immediate post-War era? Is there a genuine theoretical foundation underlying moral fundamentalism? Or was it merely an ad hoc theory, a form of rhetoric that served as a convenient excuse created to justify punishing the Nazi doctors and that still is useful for promulgating cross-cultural biomedical ideals? In 1992, in anticipation of the semi-centenary of the Nuremberg Tribunal, George Annas and Michael Grodin (1992) reconsidered these questions and related issues in *The Nazi Doctors and the Nuremberg Code: Human Rights and Human Experimentation*--a volume that combined documentary history with scholarly commentary. Ruth Macklin (1992) was assigned the task of reconsidering the validity of the Nuremberg Tribunal's appeal to moral fundamentalism and the possibility of cross-cultural and transtemporal moral judgments. Macklin concludes that if one is careful to distinguish between moral fundamentalism and two unacceptable philosophical positions--"radical subjectivism," in which "anything goes," and "moral absolutism," or realism--the form of moral fundamentalism asserted by the Nuremberg Tribunal is philosophically justifiable. Properly analyzed, Macklin (1992, p. 242) contends, moral fundamentalism is flexible enough to embrace comparative moral principles and "does not require a prior acceptance of some particular absolutist ethical theory in order to make cross-cultural or transhistorical judgments about comparative degrees of moral progress."

Terminology is important. Macklin (1992, p. 242) characterizes "absolutism" as the position that "there are moral commands, obedience to which is obligatory on all men, whether they know it or not, whatever their customs may be." Perhaps a more philosophically fashionable characterization of the absolutist position is "moral realism," the view that **[End Page 204]** moral statements are true or false independent of individual or cultural opinions about their truth or falsity. <sup>3</sup> Classic human rights theorists were moral realists. Thus, seventeenth-century English philosopher John Locke believed that it was self-evidently *true* that all human beings, by their very nature, had rights to life, liberty, health, and property (by which he meant a livelihood). Thomas Jefferson famously plagiarized Locke's words for the Declaration of Independence, retaining the idea of self-evident moral truths, but substituting a right to pursue happiness for the Lockean rights to health and property. Locke and Jefferson were realists. They believed in moral truths and that true moral principles function independently of individual and cultural opinions. As Macklin uses the term, they were "absolutists."

One of the singular virtues of absolutism or moral realism is that it legitimates transcultural and transtemporal moral principles and moral judgments. Slavery, for example, is violation of human liberty that is wrong in principle, not only today, but yesterday, and not only in America, but in all cultures. A moral realist would have no problem condemning the Nazi enslavement of innocent individuals in concentration camps, or the unlawful expropriation of their property, or their involuntary use in experiments that would endanger their health or their lives.

Bioethicists, on the other hand, traditionally have eschewed commitments to theories such as moral realism. From the first formulations of "bioethical" principles in works like the Belmont Report (National Commission 1978) and Tom Beauchamp and James Childress's classic textbook, *Principles of Bioethics* (1979, especially the 1983 and 1989 editions, 1994), bioethicists have held that, despite the divergence of philosophical thought at the level of ethical theory, there is *convergence* of reflective ethical analysis on common mid-level principles. Perhaps the most important aspect of the famous diagram that came to epitomize the Beauchamp and Childress's "applied ethics" model is that the arrows in the diagram point upward, rather than downward (*viz.*):



**[End Page 205]**

As Beauchamp and Childress (1979, p. 5; 1983, p. 6) explain: "According to this diagram, judgments about what ought to be done in particular situations are justified by moral rules, which in turn are grounded in principles and ultimately ethical theories." Their theory of "mid-level convergence" (fleshed out in the 1983 and 1989 editions) recognizes the possibility of philosophical disagreement at the level of ethical theory (4) and of differences

at the policy-setting level of rules (2) and clinical conduct (1). Consensus emerges, however, at the level of principles (3). This ingenious and remarkably productive strategy liberates bioethics from internal philosophical debates over ethical and metaethical theory, since, irrespective of which theory happens to be in vogue at level 4, all theories are held to converge at level 3. As a practical matter, consensus at level 3 provides all the justification that bioethicists need to address level 1 and 2 problems of policy and conduct, even as it insulates them from the seemingly interminable philosophical debates at level 4.

Macklin's analysis falls squarely in this tradition. Eschewing any specific ethical theory, including the "absolutism" of classical human rights theory, Macklin attempts to justify the Nuremberg Tribunal's moral judgments in terms of mid-level, cross-cultural principles, such as the principle of *humaneness*. This principle states that "one culture, society, or historical era exhibits a higher degree of moral progress than another if the first shows more sensitivity to (less tolerance of) the pain and suffering of human beings than does a second, as expressed in its laws, customs, institutions, and practices" (Macklin 1992, p. 242). Macklin's principle has the virtue of recognizing a degree of multiculturalism, since it allows that different cultures will have different (level 2) moral rules and laws, which, in turn, justify different (level 1) moral judgments. This level of flexibility also accommodates the idea of moral progress, yet the principle still seems strong enough to condemn "The Nazi era in general and the behavior of the Nazi doctors in particular [which] show . . . egregious regressions and moral backsliding" (Macklin 1992, p. 243).

The principle of humaneness itself rests on another fundamental moral principle: the wrongness of inflicting unnecessary pain and suffering. Thus since "the Nazi doctors violated *fundamental* moral principles governing the conduct of human beings towards one another, specifically, that it is wrong to inflict unnecessary pain or suffering" (Macklin 1992, p. 246, emphasis added), the Nuremberg Tribunal could properly dismiss the Nazi doctors' protests that German law did not explicitly prohibit the experiments they had performed. "The Nuremberg Code," Macklin (1992, p. 245) **[End Page 206]** observes, "contains ethical principles that ought to have applied to biomedical research, whether or not Nazi Doctors acknowledged or recognized them."

Macklin's careful defense of moral fundamentalism as convergence or agreement at the level of a fundamental principle seems supple enough to sustain ideas of comparative moral judgment and yet strong enough to justify the cross-cultural and cross-temporal use of the Nuremberg Code. It is also an excellent exemplar of the theoretical strategies bioethicists employ to cope with the absence of consensus at the level of ethical theory and to develop consensus-generating mid-level principles that support policy development, rule generation, and specific moral judgments, including, in this case, the cross-cultural and cross-temporal condemnation of the Nazi doctors at Nuremberg.

### **The President's Advisory Committee's Formulation of Moral Fundamentalism**

The foundational role of moral fundamentalism was reassessed in the context of the 1995 report of the President's Advisory Committee on Human Radiation Experiments. The "Radiation Committee" had been established a year earlier by President William J. Clinton to investigate reports that, in the early decades of the Cold War (after the Nuremberg

Tribunal had pronounced its judgments and proclaimed an international code of research ethics), American physicians and scientists had injected hospitalized patients with plutonium, had subjected cancer patients to total body irradiation, had fed radioactive oatmeal to retarded patients, and had irradiated the testicles of prison inmates, *without* the knowledge or consent of the experimental subjects or their surrogates (ACHRE 1996, p. xxii).

President Clinton's mandate to the Radiation Committee was not only to "uncover the history of human radiation experiments," but also "to identify ethical . . . standards for evaluating these events" (ACHRE, p. xxi). This second request involved judging experiments on human subjects conducted in an earlier and different era, thus resurrecting some of the questions faced by the Nuremberg Tribunal. Not surprisingly, the 14-member committee, headed by Ruth Faden, included Jay Katz, Ruth Macklin, and other scholars expert on the Nuremberg Tribunal.

Following the Nuremberg precedent, the Radiation Committee members turn to the theory of moral fundamentalism--the position that certain "basic" <sup>4</sup> or "fundamental" moral principles are common to all cultures [End Page 207] and, more importantly in this case, to all *eras*--to justify their right to make moral judgments about actions undertaken in an earlier era. They

identified [various] kinds of ethical standards as relevant to the evaluation of the human radiation experiments [including]: (1) *Basic ethical principles* that are widely accepted and generally regarded as so *fundamental* as to be applicable to the past as well as to the present. . . . *Basic ethical principles* are general standards or rules that *all morally serious individuals accept*. (ACHRE 1996, p. 114, emphasis added)

The Radiation Committee, moreover, expressly states that these common, basic, or fundamental principles could justify cross-temporal, as well as cross-cultural, moral judgments: "We commonly judge agents in the past by these standards. For example, the passing of fifty years in no way changes the fact that Hitler's extermination of millions of people was wrong, nor does it erase or even diminish his culpability" (ACHRE 1996, p. 115).

The Nuremberg Tribunal may have used fundamentalist language as high-minded rhetoric that served to excuse philosophically questionable retroactive moral judgments, but the Radiation Committee makes it clear that it is turning to fundamentalism as a philosophical justification for cross-temporal and cross-cultural moral judgments. It endorsed fundamentalism as a serious bioethical theory.

## **The Multiculturalist Challenge to Moral Fundamentalism**

### **Multiculturalism: A Characterization**

Can the justificatory framework provided by moral fundamentalism withstand the challenge of multiculturalism? The term "multiculturalism" has a number of meanings: it is often used

to designate challenges to the American ideal of a cultural melting pot (see Gutmann 1994). In the context of international bioethics, however, moral multiculturalism <sup>5</sup> can be characterized in terms of the acceptance of three propositions: (1) *the acceptance postulate*, moral principles are binding upon people because they are, in some sense, accepted by those whom they would bind; (2) *the difference claim*, different cultures and eras accept different moral principles as binding; consequently (3) *morality is multicultural*, for if, as stated in (1), a principle that is not accepted by a culture or an era is not binding on those acting in that culture or era and since, as stated in (2), different eras and cultures accept different principles, it follows that different eras and cultures are bound by different moral principles. **[End Page 208]**

Parsed in this way it would seem that multiculturalists and moral fundamentalists only disagree about the truth of (2), the difference claim. Recall that the Nuremberg Tribunal endorsed (1), the acceptance postulate, when it asserted that fundamental principles are binding because they are principles upon which "all agree" (Nuremberg Tribunal 1948, p. 102), and the Radiation Committee endorsed the acceptance postulate when it characterized basic or fundamental principles as those that "all morally serious individuals accept" (ACHRE 1996, p. 114). Since fundamentalists and multiculturalists come to different conclusions about (3), multicultural morality, their differences seem to stem from a factual dispute over the truth of (2), the difference claim. Thus the dispute between moral fundamentalists and multiculturalists appears to be straightforwardly empirical: they differ over the truth of the claim that there are shared basic or fundamental ethical or moral principles.

Yet, when Macklin and the Radiation Committee consider the challenge of moral multiculturalism, they construe this challenge, not as dispute about anthropological *fact*, but as a dispute about philosophical theory. More specifically, they treat any assertion of the difference claim as a form of "ethical relativism" or "historical ethical relativism." They thus respond to the multiculturalist's *factual* observations--even to factual observations by anthropologists--as if they were *philosophical* analyses. Macklin, for example, characterizes anthropologist Ruth Benedict's empirical observation that "morality differs in every society" as "ethical relativism" (Macklin, p. 240).

Having transformed a factual observation into philosophical theory, Macklin then counters it by citing philosopher Bernard Williams's remark that ethical relativism is "possibly the most absurd view to be advanced even in moral philosophy" (Williams 1972, p. 20, quoted at Macklin 1992, p. 241). Williams rejects ethical relativism by arguing that relativists espouse two mutually incompatible claims; namely, that "there are no cross-cultural ethical principles" and that "it is wrong for people in one society to condemn, interfere with, etc. the values of another society." Since the latter claim--that "it is wrong for people in one *society to condemn . . . another society*"--is itself a cross-cultural principle (as the italics indicate), this formulation of relativism is self-contradictory. Williams's anti-relativist argument, however, seems irrelevant to Benedict's assertion of the difference claim as a straightforward *empirical* observation. Logically, as long moral fundamentalism is grounded upon the *fact* of the universal acceptance of basic or fundamental moral principles, **[End Page 209]** multiculturalists need not embrace any philosophical theory to challenge it; they need only deny the proposition that certain moral fundamentals are accepted in all cultures

and eras. Thus Benedict's simple, straightforward and, I might add, seemingly true *empirical* observation, suffices to challenge moral fundamentalism.

### **The Irrepressibility of the Difference Principle**

It is difficult to ignore Benedict's empirical observations entirely. Macklin and the Radiation Committee were forced to contend with protests, on the part of those accused of wrongdoing, that they knew nothing of the supposedly "basic" or "fundamental" principles by which they were being judged. Consider, for example, Macklin's response to the following statement by Dr. Sauter, defense counsel for two of the doctors indicted before the Nuremberg Tribunal.

In the evaluation of German defendants . . . the decisive question is . . . in 1942, when the altitude experiments were undertaken at Dachau, what the attitude of the medical profession in Germany was . . . the ethical attitude of the medical profession in the United States was [irrelevant]. . . . 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 1946 for future use; it can also have no retroactive force. (Sauter, as cited in Macklin 1992, p. 246).

Dr. Sauter here forcefully and succinctly states the argument against transcultural and transtemporal moral judgments.

Macklin dismisses Sauter's point as a "truly bizarre" instance of the "doctrine of relativism" since "a gap of 3 or 4 years is presumed to justify a variation in ethical standards. If ethical standards changed so radically in so short a time, how could anyone be expected to keep up?" (Macklin 1992, p. 246). Having contended that morality is immutable--at least in the short run--Macklin (1992, pp. 246-47) continues:

To accept Dr. Sauter's contention that standards developed later can have no retroactive force would mean that practices in earlier times could never be subjected to subsequent ethical judgments. We could not morally condemn slavery . . . or other inhumane practices to which history bears witness. The human experiments carried out by the Nazis were not the sort of behavior that might be ethically defended by pointing out that the rules for conducting biomedical research were developed later. **[End Page 210]**

Yet, as much as one would like to concur with Macklin about the indefensibility of slavery and the Nazi experiments, her argument is problematic. Macklin may claim that the "Nazi experiments violated fundamental moral principles known to the Germans and applicable throughout the Western world for centuries," but evidence presented at the trial indicates just the opposite. Macklin has reduced the question to factual dispute and, however deeply one might detest Dr. Sauter's clients, he is right on the facts: the Nazis never accepted that the principles of the Nuremberg Code (or the 1931 German *Reichsgesundheitsrat* regulations from which the Code was derived) were applicable to the *Untermenschen* upon whom they experimented. <sup>6</sup>

Macklin is ultimately too thoughtful a philosopher to ignore the challenge of cross-cultural

moral differences. Although she declines to explore these issues in the context of the trial of the Nazi doctors, she carefully raises the question of cross-cultural moral judgments when she reflects on "the common practice in some developing countries" of "public[ly] posting . . . highly personal information about the individual's health status, inoculations, [and] women's menstrual cycles." Macklin observes that when physician Victor Sidel attempted to ask a Chinese colleague "don't [people] consider [this] an invasion of their privacy?" his Chinese interpreter replied that the concept of privacy did not have a Chinese equivalent. The interpreter could not translate the question" (Macklin 1992, p. 249). "If, like China, societies do not even have a concept of privacy or confidentiality," Macklin asks, "can such practices be wrong?" Her conclusion is they cannot be wrong since wrongness presupposes an acceptance of some principle employing the concept of privacy or confidentiality. Hence Macklin is led to reformulate her views by characterizing "privacy" as "a derivative rather than a fundamental moral concept" (Macklin 1992, p. 249; I shall analyze this case further in the following article).

Macklin thus retreats from cross-cultural moral principles in the face of evidence of their nonacceptance by claiming that principles involving privacy have been misclassified as "fundamental," they are really "derivative." This strategic retreat preserves the idea of fundamentalism for other, presumably more deserving, cross-cultural moral principles.

### **Cross Principles and Trans Judgments**

Macklin's retreat illuminates a problem inherent in the fundamentalist strategy. By focusing on (level 3) principles and by seeking what I hereafter **[End Page 211]** shall refer to as "cross-cultural" or "cross-temporal" moral principles in order to justify "cross-cultural/temporal" moral judgments, the strategy necessitates a search for principles so "basic" or "fundamental" that they *cross* the gap between the societies in question and thus can meaningfully be said to be "accepted" by all societies. The principlist strategy, however, becomes quixotic in the context of rebel societies like Nazi Germany--a society that, acting out many of the precepts contemplated by its official philosopher, Friedrich Nietzsche,<sup>7</sup> actually defined itself in terms of the *rejection* of the traditional principles and core values of Western culture. Principlism is also futile, as Macklin seems to realize with respect to "privacy," when the principles in question are formulated in terms of concepts alien to a society and incomprehensible from within its cultural framework. No principles are fundamental enough to cross the moral gap between the Nazis and the rest of Western culture, or between Western individualism and non-Western communalism. This means that the foundations of international bioethics must be sought elsewhere. It must be sought, not at the enmired domain of level 4 discussions of ethical theory, but at what might be characterized as a level 5 metaethical analysis of the nature of moral principles or theory.

In the following article, I will suggest how an analysis at this level can support "transcultural" and "transtemporal" moral judgments, including the condemnation of the Nazi doctors at Nuremberg. By a "trans" judgment, I mean a judgment in which agents and/or their actions are judged or held accountable to a standard irrespective of whether that standard was explicitly accepted at the time or place that the agents performed the actions being judged. By their very definition, "trans" judgments must be justifiable by standards other than commonly accepted cross-cultural/temporal principles. They are however,

justifiable by the limits of morality. I shall argue that Nazism generally, and the actions of the Nazi doctors in particular, are transculturally and transtemporally condemnable, not because they violate some specific basic or fundamental *principle* of moral conduct, but because they are incompatible with *the very idea of morality itself*. By contrast, as Macklin intuitively appreciates, moral frameworks that do not accept certain norms, such as privacy or confidentiality, are *not* inconsistent with the very notion of morality itself.

From the perspective of conventional bioethical theory this leap from level 3 into the higher realms of metaethical theory may appear extreme. To justify the need for such a leap, I shall review the most recent fundamentalist [End Page 212] effort to justify transtemporal and transcultural biomedical ethics--the report of the Radiation Committee--and demonstrate that the results are so inadequate that they reasonably can be pronounced theoretically bankrupt.

### **The Radiation Committee's Theory of Moral Ignorance and Cultural Blindness**

It was not a philosophical theorist but President Clinton who raised the question of transtemporal judgments. He charged the Radiation Committee to "identify . . . ethical standards for evaluating" the Cold War radiation experiments and the conduct of the researchers who had performed them. Prior to the 1970s, however, the U.S. government never officially had endorsed the stringent research standards in place today. Thus, like the Nuremberg Tribunal, the Radiation Committee faced the task of judging the misdeeds of researchers from an earlier era in which the standards being applied had not been accepted by the researchers being judged. Following the Nuremberg precedent, the Radiation Committee dealt with the problem by turning to fundamentalism, postulating the universal "acceptance" of certain basic or fundamental moral principles that were applicable to the earlier era despite the absence of specific regulations prohibiting the actions in question. This, in turn, forced the Radiation Committee to confront researchers who *denied* any awareness of the "basic" or "fundamental" principles they were accused of violating. The Radiation Committee responded to this situation by characterizing such individuals as "ignorant" of, or "blind" to, these basic or fundamental principles.

The rhetoric of "blindness" and "ignorance" opened the door to the prospect of excusing or mitigating the "blameworthiness of agents" who acted out of "ignorance," while still permitting the Committee to condemn the "wrongness of [their] actions." Since this discussion marks a pivotal point in the development of moral fundamentalism, it is quoted almost in its entirety.

Even in cases where actions or policies are clearly morally wrong, it may be uncertain how blameworthy the agents who conducted or promulgated them are, or in fact, whether they are blameworthy at all. Some factors can make it difficult to affix blame; other factors mitigate or lessen the blame actors deserve. Four such factors are . . .

1. Factual ignorance;
2. Culturally induced ignorance about relevant moral considerations; [End Page 213]
3. Evolutions in the interpretations and specifications of moral principles . . .
4. Indeterminacy in an organization's . . . responsibility . . .

Sometimes cultural factors can prevent individuals from discerning what they are morally

required to do and can therefore mitigate the blame we would otherwise place on individuals for failing to do what they ought to do. . . . An individual may . . . be *morally* ignorant. Because of features of his or her deeply enculturated beliefs, the individual may be unable to recognize, for example, that certain people (such as members of another race) deserve equal respect or even that they are people with rights. . . . In extreme cases, a culture may instill a moral ignorance so profound that we may speak of *cultural moral blindness*. . . . Some of those committed to the ideology of slavery may have been morally blind in just this way, and their culture may have induced this blindness. . . .

Only if an agent could not be reasonably expected to remedy his or her culturally induced moral ignorance would such ignorance exculpate his conduct. But even in cases in which the individual could not be blamed for persisting in ignorance, this would do nothing to show that the actions . . . resulting from his or her ignorance was not wrong. *Nonculpable moral ignorance only exculpates the agent; it does not make wrong acts right.* (ACHRE 1996, pp. 121-22)

As one might anticipate, any analysis that exculpates the guilt of slaveholders also provides the Radiation Committee with grounds for excusing individual Cold War radiation researchers for most of their actions, even though--as the Committee emphasizes--to exculpate the wrongdoer "does not make wrong acts right." Thus the Committee found that although what was done to the *subjects* of radiation experiments was undeniably and cross-temporally *wrong*, the wrongdoers were blameless. More perplexingly, the Committee also found that, even though the individual researchers were blameless, the U.S. government was both *wrong* and *blameworthy* for not having developed adequate policies for the protection of research subjects. Consequently, unlike the individual researchers, the U.S. government owed many of the subjects of the radiation experiments an apology and, of more direct practical import, financial compensation (ACHRE 1996, pp. 512-15 (Recommendations 1, 2, 3); p. 520 (Recommendation 7)).

To reiterate, with respect to the researchers themselves, the Committee held, in a complexly worded finding (Finding 11), that although members of "the medical profession and biomedical scientists are morally responsible for instances in which they failed to adhere to the professional norms [End Page 214] and practices *of the time*," they are "less blameworthy for not having had protections and practices" of the 1970s and the 1990s (ACHRE 1996, p. 503, emphasis added). In fact, the Radiation Committee did not blame any individual American Cold War radiation researcher and, not coincidentally, it did not find that the researchers owed an apology to the people they had used as unconsenting, uninformed, experimental subjects--not even to those subjects who had suffered harm great enough to justify compensation from the U.S. government.

### **The Bankruptcy of Fundamentalism**

To focus on compensating the victims of the radiation experiments was a humane response to moral tragedy. Attempting to affix blame on individual researchers might have distracted attention from the question of reparations, and so it is easy to appreciate how an assessment of practical politics might well have influenced the Committee's complexly-worded findings and recommendations. Moreover, unlike the Nuremberg Tribunal, the Radiation Committee

was not a judicial body replete with resources designed to determine guilt and protect innocence. <sup>8</sup> Nonetheless, the Committee offered *principled* reasons for excusing the Cold War radiation researchers that are integral to its formulation of fundamentalist theory. These arguments require analysis; for what is at issue is whether moral fundamentalism really provides a philosophical foundation for cross-cultural and cross-temporal moral judgments-- or whether it merely serves as high-minded rhetoric, ringing with moral resonance but devoid of philosophical substance.

According to the theory of exculpation developed by the Radiation Committee, the American Cold War radiation researchers were excused in principle because they violated no rules or laws in place "at the time" and because they were "ignorant" or "culturally blind" to the immorality of their conduct. Thus the Radiation Committee, having recognized ignorance and blindness as excuses, excused the researchers on the grounds of ignorance and cultural blindness.

These excuses contrast strikingly with the Nuremberg Tribunal's refusal to excuse the 16 individual Germans who they convicted of crimes against humanity: seven of these individuals were sentenced to the gallows and were hung on 2 June 1948. This contrast is significant, for had the Nuremberg Tribunal accepted the sort of excusing conditions recognized by the Radiation Committee, it would have had to excuse the Nazi doctors. Whatever one's assessment of German culture generally, it is one [End Page 215] of the best-known facts about *Nazi* culture that it induced "blindness" to the humanity of gypsies, homosexuals, Jews, and mentally retarded and physically handicapped individuals. From the Nazi perspective, members of these groups were conceptualized as *Gemeinschaftfremde* (enemies of the community), *lebensunwerten Lebens*, (life unworthy of living), and *Untermenschen* (subhumans). According to *Rassenhygiene* (the science of racial hygiene), moreover, physicians had a *Gesundheitspflicht* (obligation to health) to preserve the *Volksgemeinschaft* (a community bonded by traditions, history, and race) by purging these alien, unproductive, and unhygienic elements (Aly, Chroust, and Pross 1994; Burleigh 1994; Procter 1988). Nazism was a *Weltanschauung*, a comprehensive worldview. Thus if *anyone* could lay claim to the excuse of cultural moral blindness, the *Nazi* doctors could. This, however, entails the counterintuitive conclusion that the Nazi doctors were not blameworthy because they were living in Nazi culture and thus could not be blamed for acting as Nazis.

Furthermore, moral fundamentalism's *raison d'être*, the very reason why the Nuremberg Tribunal had propounded fundamentalism, was to provide a rationale for condemning the Nazi doctors, thus, if moral fundamentalism cannot justify the Nuremberg verdict, it has no *raison d'être* and moral fundamentalism is philosophically bankrupt.

### **Fundamentalism's Inability to Justify Transcultural Moral Judgments**

One might try to defend moral fundamentalism by suggesting that, even though it does not work well in transtemporal cases, such as those considered by the Radiation Committee, it nonetheless provides a basis for transcultural responsibility and hence for international bioethics. Unfortunately, any analysis that is unable to assign transtemporal blame will also be unable to assign transcultural blame. The only significant difference between transtemporal and transcultural moral judgments is that in the former case the problematic

absence of shared principles is an artifact of time, whereas in the latter case it is an artifact of geography. Structurally the two positions are identical: thus any analysis incapable of justifying transtemporal blameworthiness will also be incapable of justifying transcultural blameworthiness. This means that the excusing conditions designed by the Radiation Committee are so strong that they excuse not only the Cold War radiation researchers and the Nazi doctors, but also contemporary researchers who conduct experiments in countries other than their own in violation of international guidelines. For who has a better claim to cultural blindness than a researcher from another culture? **[End Page 216]**

Consider again Macklin's example of the society "blind" to the idea of privacy. Since one cannot accept what one cannot see, Macklin quite sensibly holds that people in that society cannot be blamed for ignoring Western ideals of privacy. Analogously, were a society "blind" to Western ideals of individualism, researchers in that society could not be blamed for ignoring the Western requirements of the informed consent articulated in the Council for International Organizations of Medical Science's (CIOMS) guidelines and those in other international bioethics documents (CIOMS 1993, in Spicer 1995, pp. 2797-800 ). To reiterate, any excusing condition that mitigates transtemporal moral judgments will also mitigate transcultural moral judgments.

Fundamentalists may contend that, at some subconscious, "basic," or "fundamental" level, all cultures accept Western ideals of individualism. But even if this claim is not patently question begging, it remains problematic, absent some culturally neutral basis for establishing certain principles as basic or fundamental. On what grounds, other than cultural bias, can the Nuremberg Tribunal, the Radiation Committee, CIOMS, or anyone else claim that individualism is basic or fundamental? Why are not non-Western values fundamental? Perhaps family and community are primary. Perhaps Westerners suffer "cultural blindness" for failing to recognize the basic principles of community.

Leaving such issues aside, the problem presented by the form of fundamentalism adopted by the Radiation Committee is that once one acknowledges "cultural blindness" as an excusing condition in cross-temporal judgments, parity of argument forces the acknowledgment of "cultural blindness" as an excusing condition in cross-cultural moral judgments. And this, in turn, undermines the fundamentalist justification for enforcing international codes of ethics on researchers in non-Western cultures. Moral fundamentalists (and bioethicists generally) seek to eschew moral "absolutism" (and moral realism) by grounding cross-cultural and cross-temporal moral judgments in the universal acceptance of certain basic or fundamental principles (or in the "convergence" of common mid-level principles). Yet, even if multiculturalists are wrong and certain fundamental moral principles are, in some sense, "accepted" by all other cultures and eras, it is evident that the individuals in these other cultures and eras seem to be unaware, or, to use the Radiation Committee's language, "culturally morally blind" or "ignorant" of these fundamental principles. Thus, since the enforcement of fundamental principles is justified by their presumed acceptance, insofar as individuals suffer from culturally induced "ignorance" **[End Page 217]** or "blindness," they cannot be blamed. Hence, the Radiation Committee's conclusion that "cultural ignorance" and "cultural moral blindness" are valid excusing conditions has the effect of replicating the very forms of historical and cultural "relativism" and "multiculturalism" that moral fundamentalism was designed to remedy. Apparently no one from an era or a culture "blind"

to "fundamental" moral principles can be blamed for violating them, not a researcher from an non-Western culture, not the American Cold War radiation researchers, not even the Nazi doctors.<sup>9</sup>

### **Postulated Acceptance: A Philosophically Problematic Concept**

There seems to remain one significant difference between multiculturalists and moral fundamentalists. Although moral fundamentalists cannot make cross-cultural or cross-temporal judgments about *agents*, they claim that they can justify cross-cultural and cross-temporal judgments about *actions*. This appears to be an important distinction; for, insofar as the *action* itself was "wrong," it can be unequivocally denounced as reprehensible, and victims of the wrongdoing can claim compensation. Thus, there are grounds for compensating victims of the experiments conducted by the Cold War radiation researchers and the Nazi doctors. Yet, as judicious and satisfying as these results may seem, they embody two conceptual oddities. First, they presume a conception of wrongdoing that is disassociated from the blameworthiness of the wrongdoers and a theory of compensation that is disassociated from the concept of responsibility. Second, the results rest on a meaningless notion of "acceptance" and "agreement." The problems that arise when wrongdoing is separated from wrongdoers and when compensation is detached from responsibility are significant, but they will not be explored here. The problematic nature of acceptance, however, is central to this analysis and needs further exploration.

In the ordinary sense of the terms "accept" and "agree," it is meaningless to claim that someone *accepts* or *agrees to* an obligation if they are ignorant of that obligation, or cannot understand it, or expressly deny it. Yet, in order to justify cross-cultural and cross-temporal judgments, moral fundamentalists presume that a culture or era *accepts* or *agrees to* "basic" or "fundamental" principles of which its members are ignorant, or that may be incomprehensible within the culture, or that (as is clear in the Nazi case) are inconsistent with principles that the culture forthrightly avows. "Acceptance" and "agreement," in this sense, is morally meaningless. Had the Nazi doctors appealed to this sense of the terms to justify **[End Page 218]** their experiments, their claims would have been rejected summarily. No court would admit that an experimental subject had "accepted" the role of research subject or had "agreed to" participate in research if that subject was ignorant of the agreement, or if the agreement was incomprehensible to the subject, or if the implicit agreement was inconsistent with the forthrightly avowed statements of the subject. To quote the Nuremberg Tribunal (1948, p. 102): it is "absolutely essential" that the assenting or agreeing party "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." If the weak sense of "agree" or "accept" is held to be meaningless in the courtroom, how can it be used to justify the legitimacy of the cross-cultural aspects of the trial? Or of the judgment? Or of international bioethics generally?

## **The Challenge of Postmodernism**

### **Postmodernism: A Characterization**

Postmodernism poses a challenge to moral fundamentalism that is even more formidable than multiculturalism. The expression "postmodern" first was used to characterize a rebellion against the International School of Modern Architecture, whose "modern," seemingly functional, glass and steel buildings were based on "fundamental" principles of architectural design--e.g., "form follows function"--that are purportedly applicable at all times, in all places, and in all cultures. Postmodern architects challenged the universality of modernism's glass and steel boxes, observing that Mies van der Rohe and other "modernists" were merely rebelling against the architecture of an earlier era. Like all other forms of good design, "modernism" was particular to a specific time, place, era, and culture. The rhetoric of the "postmodern" architectural rebellion soon was appropriated to characterize the work of certain philosophical rebels who were pronouncing "modernism" a failure in their field as well. H. Tristram Engelhardt, Jr., argues that the movement characterized by postmoderns as moral or philosophical "modernism" arose in response to "the fragmentation of moral perspective" that occurred "when Martin Luther nailed his ninety-five theses to All Saints Church in Wittenberg on Halloween in 1517." These theses "signal the crumbling of the presumed possibility of a uniformity of religious moral viewpoint," by questioning the very ideal of "a society that could aspire to a single moral viewpoint grounded in faith, governed by a . . . single moral authority" (Engelhardt 1996, p. 4). **[End Page 219]** "Modernism" was an attempt to replace the defunct moral authority of *religion* with the moral authority of *reason*, specifically, the theories of rational calculation championed by Bentham and Mill and the ethics of rational deontology developed by Kant. In the end, the postmoderns claim, this Enlightenment ethics project failed. Reason never produced standards of morality that effectively replaced the universal morality once so authoritatively pronounced by the church and so compliantly accepted by its flock. Consequently, as postmodern theorists tell the tale, we have entered the age of postmodernism, an age in which all perspectives are equal in principle, if not in power.

For present purposes, moral postmodernism can be characterized in terms of the following propositions: (1) the Enlightenment ethics project--the ethics of rationality propounded by Bentham, Mill, and Kant--has failed; "a canonical, content-full secular morality cannot be discovered" (Engelhardt 1996, p. 8); (2) in the absence of any canonical morality, there is no common moral culture, only a set of competing moral perspectives (discourses, "gazes," interpretive structures, narratives, and so forth), thus, "one is left with a polytheism of moral perspectives, none with the capacities sought from the univocal perspective of God" (Engelhardt 1996, p. 12); and (3) the hegemony or dominance of any particular perspective (discourse, gaze, interpretive structure, narrative) is a function of power, not of principle.

For example, Michel Foucault, a French philosopher whose work is typically deemed postmodern, opens his 1963 book, *Naissance de la Clinique*, (translated as *Birth of the Clinic*, 1973, 1975), with the following denial of the universality of medical science.

For us the human body defines, by natural right, the space of origin and distribution of disease. . . . But this order of the solid, visible, body is only one way--in all likelihood not the first, nor the most fundamental--in which one spatializes disease. There have been, and will be, other distributions of illness. (Foucault 1975, p. 3).

Foucault's point--which anticipates the development of risk-factor and genetic conceptions

of diseases by several decades--is that although in the 1960s physicians perceived "disease" to be physically located in the human bodily organs, there were other and perhaps more fundamental ways of conceptualizing, interpreting, or perceiving diseases.

Foucault refers to these conceptual-interpretive-perceptual frameworks as "gazes." The central theme of *Naissance de la Clinique* is that the [End Page 220] modern "clinical gaze" was born when nineteenth-century physicians learned to see their patients as living cadavers, that is, as bodies evincing clinical symptoms caused by underlying pathological organs and tissues. This perception of patients in terms of clinico-pathological correlations gave rise to modern medicine and its characteristic diagnostic tools, like stethoscopes, X-rays, and MRIs, which are designed to look through the patient to "see" the disease. Recognizing the foundational force of the clinical gaze in modern medicine, Foucault automatically dismissed the nascent bioethics movement's aspirations of empowering "the patient's gaze" through ideas of contract and informed consent. "Miracles are not so easy to come by," Foucault sneered. Having been taught to see their patients as symptom-bearing breathing cadavers, physicians are not likely to heed the voices, or the wishes, of those they perceive to be "dead." For Foucault, the clinic is a world of competing "gazes"--the physician's, the nurse's, the family's, the patient's, the ethicist's, and, one might add, the managed care administrator's--each striving for hegemony. Each gaze interprets the clinical world from its own perspective and in the consequent struggle for hegemony, power, not principle, prevails. And in the world of the clinic it is the clinician, not the patient, and certainly not the bioethicist, who is hegemonic.

Postmodernism poses a profound challenge to international bioethics, and to bioethics generally, because of its emphasis on the primacy of conceptual-interpretive-perceptual frameworks (gazes, discourses, narratives, and so forth). Multiculturalism is significantly less threatening for, despite their differences, fundamentalists and multiculturalists at least can agree that the issue in cross-cultural and cross-temporal moral judgments is whether two or more cultures or eras accept common moral principles. Postmoderns, in contrast, deny even the commonality of culture; that is, they deny that there is a common morality even within a given culture or era.

A postmodern appraisal of the judgment of the Nuremberg Tribunal is straightforward. The Allied Powers had won the war; consequently, the Allies' gaze and the Allies' recognition of the victims' gaze had hegemony. The so-called "civilized" gaze prevailed at Nuremberg, not by the superiority of its principles, but by right of conquest. Thus, there was more than a measure of truth in the Nazi doctor's protest that the trial was "nothing but political revenge" (Mitscherlich and Mielke 1992, pp. 105-6). Fifty years later, when the Radiation Committee considered the culpability of the American Cold War radiation researchers, aspects of the [End Page 221] researcher's gaze were shared by the Committee, which thus ingenuously accepted the very sort of excusing conditions that had been dismissed at Nuremberg. Postmodern theory concludes that even as a hegemonic gaze dominates and, in doing so, determines and justifies, as a gaze loses dominance, actions that had appeared to be unjustifiable may gain a certain credibility.

### **The Nazis on Humanity and Humaneness: A Postmodern Reading**

The power accorded to interpretive structures in postmodern theory seems to subvert all cross-cultural and cross-temporal moral standards. To illustrate this point, I shall reconsider both the received scholarly view that the Nazi medical experiments violated earlier German research standards and Macklin's claim that they violated a cross-cultural principle of humaneness.

Scholars of research ethics--e.g., Grodin (1992) and Sass (1983)--often claim that the Nazi medical experiments violated the rules for human experimentation that had been issued by the German Health Ministry in 1931. Yet, as postmodern theory correctly predicts, the Nazi doctors could not, and, in fact, did not see the 1931 *Reichsgesundheitsrat* rules as prohibiting their research. The reason is apparent: the rules regulate *human* subjects research, that is, research on *Menschen* (Sass 1983, pp. 104-9, §1, 2, 3, 12). As rules governing *human* subjects research, they do not apply to animal research; no one would consider a Nazi researcher remiss for ignoring the rule requiring informed consent when experimenting on animals. As Nazis, however, the Nazi doctors not only distinguished between *Menschen* (humans) and animals, they also distinguished *Menschen* from sub-humans or *Untermenschen*. They thus would consider the 1931 rules to be irrelevant to experiments on Jews and other *Untermenschen* just as they were to experiments on animals. As postmodern theory would predict, the Nazi gaze subverts the Allies' reading of these rules.

A similar problem affects Macklin's evocation of the principle of humaneness. We are all the heroes of our own autobiographies and similarly of our own conceptual-interpretive-perspectival frameworks, "gazes," or narratives. The Nazis not only were heroes within their own narratives, they actually saw themselves as particularly compassionate and humane, especially in the area of medical experimentation. As bioethicist Lance Stell (1995) has observed, the Nazi cultivation of feelings of compassion and humaneness ultimately culminated in a campaign to prohibit scientific research on animals. **[End Page 222]**

Almost immediately upon coming to power, Nazi representatives to then Prussian parliament met to ban animal experimentation. . . . The announced purpose of the law was "to awaken and strengthen compassion as one of the highest values of the German people." In August of 1933 Herman Goering made a radio address in which he proclaimed as follows:

. . . among all civilized states, Germany is the first to end the shame of vivisection. . . . [we shall] commit to concentration camps those who still think that they can continue to treat animals as inanimate property. . . . What Reich's Chancellor Adolph Hitler . . . did and will do for animals stands as a guideline to the leaders of all civilized states.

The fact that German law aimed to protect animals for their own sakes and not merely because of the interest that humans take in them was described as a novel legal concept. . . .

The extensive legal protection given to animals by German law meant that vulnerable humans [*lebensunwerten Lebens*, *Untermenschen*] who lacked such protection became especially tempting candidates for experimentation to the Nazi doctors [who] offered moral reason for doing so; that these individuals were lesser quality beings [*Untermenschen*] was among those reasons. (Stell 1995, p. 45)

Stell also observes that the Nazi scientists' readiness to use *Untermenschen* as guinea pigs was necessitated partially by their humaneness towards animals, which precluded the use of guinea pigs as "guinea pigs." Since the 1931 research rules had circumscribed the permissibility of experimentation on humans (*Menschen*), and since the Nazi humaneness rules proscribed research on animals, the only readily available source of research material was *Untermenschen*. Moreover, since the *Untermenschen* in the concentration camps had been condemned to death by the racial hygiene laws, from a Nazi perspective there was no conceivable reason not to use them as research subjects.

In a sense, the non-Nazi complaint against the Nazi doctors was that they treated "*Untermenschen*" as other researchers treated guinea pigs. Macklin, for example, cites the Dachau decompression experiments--designed to discover the effect of high-altitude flight on aviators--as an example of the inhumanity of the Nazi doctors; she quotes the following research note.

[The subject] was a 37-year-old Jew in good general condition. . . . Breathing continues up to 30 minutes. After 4 minutes, the experimental subject began to perspire and wiggle his head, after 5 minutes cramps occurred, between 6 and 10 minutes breathing increased in speed and the experimental [End Page 223] subject became unconscious; from 11 to 30 minutes breathing slowed down to three breaths per minute, finally stopped altogether. (Macklin, p. 246)

As inhumane as these notes seem, when one substitutes "37-week-old guinea pig" for the expression "37-year-old Jew," this becomes a standard characterization of biological research.

Just as moral principles regulating *human* subjects research could not penetrate the Nazi gaze, neither can any cross-cultural principle of *humaneness*. Macklin condemns the Nazi researchers, and Nazism generally, by evoking the principle that "one culture, society, or historical era exhibits a higher degree of moral progress than another if the first shows more sensitivity to (less tolerance of) the pain and suffering of human beings than does a second, as expressed in its laws, customs, institutions, and practices." Yet, interpreted from the Nazi perspective, Macklin's principle is entirely compatible with Goering's claims of Nazi humanism. The principle of humaneness addresses "the pain and suffering of human beings." Yet, to reiterate, from the Nazi perspective *Untermenschen* were no more human (*Menschen*) than animals; thus the Nazis did not see the principle of humaneness as a prohibition on experimentation on *Untermenschen*.

The foregoing exploration of the Nazi conceptions of *Menschen*, *Untermenschen*, and "humaneness" are designed to illustrate the power of the postmodern critique. Postmodern philosophy insists that even if fundamental principles could be found, they necessarily would be read through different conceptual-interpretive-perceptual gazes or narrative frameworks. As the example of Nazi humaneness illustrates, alternative frameworks create alternative readings of principles. Thus, even the long-sought panacea of universally accepted fundamental moral principles does *not* suffice to guarantee universal agreement in moral judgment. One might try to respond to this problem by postulating common cross-

cultural frameworks. Yet it was precisely the absence of such common frameworks--between, for example, the Allies and the Nazis--that initially created the problem of cross-cultural and cross-temporal moral judgment. Moral fundamentalism's strategy of attempting to resolve the problem by postulating ever more basic, ever more fundamental, cross-cultural or cross-temporal principles seems futile. As the preceding examples illustrate, even though moral fundamentalism initially was invented to condemn Nazism and the Nazi doctors, the postmodern critique renders the fundamentalist [End Page 224] principles incapable of supporting such a condemnation. It thus renders fundamentalism philosophically bankrupt.

### **Lessons Taught by the Bankruptcy of Moral Fundamentalism**

If international biomedical ethics is to respond successfully to the challenges of multiculturalism and postmodernism, it must abandon moral fundamentalism. It also must take stock of the three lessons to be learned from the failure of fundamentalism: (1) the difference claim cannot be explained away; there are fundamental differences in moral principles and values both between and within cultures; (2) any attempt to obviate these cultural or interpretive differences by postulating an acceptance of common or universal principles at some more "basic" or "fundamental" level is ultimately question-begging; (3) international biomedical ethics must rest on a theoretical framework that can bridge perspectives even as it justifies genuine transcultural and transtemporal moral judgments.

In the article that follows in this issue of the *Journal*, I will argue that the contractarian theories of David Gauthier, Robert Nozick, and John Rawls provide a theoretical framework for international bioethics that *can* bridge moral perspectives and *can* justify transcultural and transtemporal moral judgments in a way that withstands the multicultural and postmodern critique. I will show that the fundamentalists err in their attempt to postulate "basic" or "fundamental" principles that were shared by the Nazis and their victims. In fact, there is no need to postulate such principles, for the issue is not principles but a sphere of moral impermissibility that lies outside the scope of principles.

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#### **Notes**

1. This essay originated in a 1996 presentation entitled "Transcultural Medical Ethics and Human Rights" delivered at a workshop-conference held at Albert-Ludwigs-Universität, Freiburg (published in German as Baker 1997b). That paper, in turn, served as the basis for reflections on the relationship between multiculturalism, postmodernism that were presented at the Fall 1996 San Francisco joint meeting of the American Association of Bioethicists and the International Association of Bioethics (published in Spanish as Baker 1997a). Eventually, what had started out as a critique evolved into an outline of a theory of international bioethics. The development was incremental: the expressions "moral fundamentalism" and "negotiated moral order," which are central to this paper, were first introduced at the European Society of Philosophy and Medicine meeting in Padua in August 1997 and were later refined when I presented this theory at Union College in Fall 1997.

Various drafts of my essays have been sharpened by comments offered at the Freiburg meetings, at the AAB/IAB, at Padua, and by colleagues at the Center for Bioethics of the University of Pennsylvania and at Union College. I should like to acknowledge the insights of Ronald Carson, Paul Honigmann, Stuart Horner,

Rihito Kimura, David Rothman, Onora O'Neill, and William Winslade. I also thank Karl-Heinz Leven, Donald Light, Jon Merz, Jonathan Moreno, Linda Patrik, and Maurice de Wachter for their perceptive written comments on various drafts of the paper. The insightful comments of the external reviewers for the *Kennedy Institute of Ethics Journal* served to sharpen the presentation of the analysis, and I owe a special debt to my colleague at Union, Felmon Davis, who has engaged me in ongoing dialogue on these issues and by so doing has significantly deepened my understanding of them. Finally, I thank Ulrich Tröhler for inviting me to turn my attention from the history of medical ethics to focus on the possibility of validating the transcultural judgments of the Nuremberg Tribunal.

2. The claim that there are universal principles of law is often characterized as "natural law theory." The central tenet of this theory is that certain laws--which are grounded in the nature of humanity, or in reason, or which are given by God--are universally applicable and binding on all humans or rational agents. It is also usually claimed that the positive laws of the state are invalid if they are incompatible with natural law. Some scholars claim that Nuremberg justices were appealing to the natural law tradition, yet the judges themselves are quite circumspect about their commitments to theory. In fairness to the actual language of the justices, therefore, the present analysis focuses on moral fundamentalism. The critique of fundamentalism, however, would apply to natural law theory, *mutatis mutandis*.

3. For a review of moral realism see Geoffrey Sayre-McCord (1988); the characterization of moral realism I employ here is taken from Richard Boyd's essay "How to be a Moral Realist" in that volume. Boyd adds a further condition to his definition: "ordinary moral reasoning . . . constitutes a reliable method for obtaining moral knowledge" (Sayre-McCord 1988, p. 182).

4. There is a slight terminological difference in characterizing foundational principles: Macklin and the Nuremberg Tribunal characterize these principles as "fundamental," whereas the Radiation Committee identifies them as "basic" or "fundamental." The expression "basic liberties" was used by John Rawls in his 1971 book *A Theory of Justice* and also by the authors of the 1978 *Belmont Report*, the foundational document for the United States government's regulation of experiments on human subjects. By linking the "basic" principles of the *Belmont Report* to the "fundamental" principles of the Nuremberg Code, the Radiation Committee grounds the U.S. regulations in the fundamental principles of the Nuremberg Code (compare ACHRE 1996, p. 114, and Spicer 1995, p. 2768).

5. Although legal issues were involved both at Nuremberg and in the questions addressed by the Radiation Committee, I consider only ethical or moral issues. This focus is justified because the Nuremberg Tribunal and the Radiation Committee ground their legal analysis in moral fundamentalism. It is also justified because international bioethics has developed primarily as a form of professional ethics articulated by such bodies as CIOMS and the WMA, yet heeded by the WHO and by governmental agencies worldwide.

6. Macklin sometimes suggests that the fundamental principle at issue at Nuremberg was the principle that it is wrong to inflict unnecessary pain or suffering. There are two problems with this account: first the fundamental principle asserted by the Tribunal was "the voluntary consent of the human subject," which it declared to be "absolutely essential" (Nuremberg Tribunal 1948, p. 102); second, the specific experiments Macklin discusses, the high altitude experiments undertaken at Dachau, were necessary to the development of airplanes capable of functioning at high altitudes. However deplorable the means, the information developed by the Nazis was useful and was used by both sides in the Cold War to develop modern aviation. As Robert Procter (1988) warns, it is a fundamental mistake to read the Nazi doctors and scientists as sadistic torturers masquerading as physicians and scientists; they were, in fact, among the best and the brightest of their day.

7. Although his sister was a Nazi and was influential in persuading the Nazi party to proclaim her brother its official philosopher, Freidrich Nietzsche died in 1900, well before the formation of the Nazi party. Several aspects of Nietzsche's work lent themselves to the Nazi's purposes: Nietzsche's oft-proclaimed "immoralist" rebellion against Western morality, including both Judeo-Christian morality and the ethics of the Enlightenment, as formulated by such figures as Jeremy Bentham and Immanuel Kant; and Nietzsche's "social Darwinism," which evinced itself in comments like "the sick man is a parasite on society. In certain cases it is indecent to go on living...the right to life has been lost [and he] ought to be regarded with the greatest contempt by society. The doctors, for their part, should be the agents for imparting this contempt--they should no longer prepare prescriptions but should every day administer a fresh dose of disgust to their patients" (Nietzsche 1927, p. 88).

8. Allen Buchanan (1996) and Ruth Macklin (1996) discuss the conflicts and compromises involved in

generating the Radiation Committee's *Report*.

9. In his perceptive critique of the Radiation Committee's *Report*, Tom Beauchamp (1996, p. 259) fully recognizes the dangerous precedent set by the Committee's use of the concept of "culturally induced ignorance" to avoid making "judgments of agent culpability." He argues that in evoking this concept to exculpate individual medical institutions and individual persons from blame, the Committee misapplied its own standards for exculpation. He cites the following passage:

Just because an agent's ignorance of morally relevant information leads him or her to commit a morally wrong act, it does not follow that the person is not blameworthy for that act. The agent is blameworthy if a reasonably prudent person in that agent's position should have been aware that some information was required prior to the action, and the information could have been obtained without undue effort or cost on his part. (ACHRE 1996, p. 121).

Beauchamp then argues (citing Lederer and Moreno 1996) that there "had long been present in the medical community" the view that nontherapeutic experiments that were potentially harmful to patients were "valid only if the patients consented" (Beauchamp 1996, pp. 264-65).

Yet, despite the precedents for treating "volunteerism" as a prerequisite for ethically valid nontherapeutic experiments noted by Beauchamp, as the Radiation Committee documents in dismaying detail, prior to the 1970s it was standard practice to use patients in American teaching hospitals as experimental material without asking them to volunteer or to give consent, informed or otherwise. Patients were presumed to have volunteered to serve as potential subjects simply by choosing to be treated in a teaching hospital. The sole constraint on the medical researcher's conduct was thus his or her personal integrity and sense of propriety. In the era before bioethics--before IRBs, before medical ethics courses were required by medical colleges, and before the publication of bioethics textbooks--there was no countervailing source of moral guidance, and, specifically, no source of "information" of which "a reasonably prudent person in that agent's position should have been aware" or could have reasonably consulted.

Beauchamp is searching for fundamental cross-temporal principles, but the historical fact of the matter is that there were no such principles reasonably available to researchers at the time. The Cold War radiation researchers are culpable, not because they failed to consult prevailing moral norms, but because, acting in accordance with the standard practices of the day, they nonetheless acted wrongly. I believe that many of these researchers were culpable for their actions, and that, at the very least, they owe their victims an apology. Beauchamp agrees, but despite his valiant efforts to rescue fundamentalist theory, because fundamentalism must depend upon cross-temporal principles, it lacks the resources to justify the very transtemporal moral judgments Beauchamp believes to be appropriate.

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