

On Using Nazi Data: The Case Against

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The weather can be very cold at Dachau concentration camp, but Dachau was apparently not cold enough for some Nazi purposes. A camp doctor named Rascher wrote to Heinrich Himmler in February 1943, asking to be transferred to Auschwitz to continue his experiments—which involved freezing live prisoners. The letter reads: “Auschwitz is more suitable [than Dachau] as it is colder there and the camp itself is much larger, thereby attracting less attention to the test persons, who tend to scream while freezing.”

Robert Martin’s paper, “Using Nazi Scientific Data”, offers a thoughtful and perceptive discussion of many of the important issues and arguments concerning the use of morally tainted research data. Although he stresses the blatantly immoral means used by Nazi scientists in acquiring their data, he concludes that it is ethically permissible for contemporary researchers to cite or otherwise make use of the data so acquired.

It is worth noting that in the post-war period, many researchers have felt able to employ this ethically “tainted” data. Ms. Kristine Moe, a science and medicine reporter for the *Journal-American* newspaper in Bellevue, Washington, has enumerated at least forty-five research articles published since 1945 which draw upon scientific data from Nazi experiments, mostly concerned with hypothermia research.¹

In this commentary on Martin’s paper, I shall argue that he seriously underestimates the force of the arguments against using such data and overestimates the force of the arguments in favour of use. I believe that, on balance, the moral considerations against using the Alexander report

1 Kristine Moe, “Should the Nazi Research Data Be Cited?”. *Hastings Center Report* (December 1984).

are of greater weight than the arguments in favour and that, in consequence, the data ought not to be used.

My general position is not that it is always morally wrong to make use of data which have been wickedly acquired. Rather, I shall argue that when the wickedness of the means used to acquire the data has been very great, then only a transcendently important end/goal/objective could justify their use. The conclusion I reach is that those who wish to make use of scientific data acquired by immoral means must satisfy a burden of proof, which burden becomes heavier in proportion to the wickedness of the means used to acquire it. They must demonstrate that there exists an overriding need to employ such data. In the case of the hypothermia data contained in the Alexander report, no such demonstration has been produced by Martin.

The Utility of the Nazi Hypothermia Data

At the Nuremberg War Crimes Trial, Telford Taylor, chief counsel for the prosecution, claimed that the Nazi hypothermia experiments were of no scientific value. Many scientists, including John Hayward of the University of Victoria, disagree.² I will follow Robert Martin in assuming (at least for the sake of argument) that the Nazi data, despite the unethical manner in which it was obtained, *may* be of sufficient scientific reliability to make it useful to present-day researchers. Alas, given the way in which the world is organized, there is no necessary coincidence of good science with good ethics (though there may well be a strong contingent connection between the two).

Martin identifies the basic moral issue raised by the Alexander report as: "should scientists use data that were obtained in a way that was so clearly immoral?" Martin develops his position by considering, *seriatim*, the arguments, consequentialist and deontological, which might be offered against using the data. He attempts to demonstrate that none of the arguments has much cogency. I shall attempt to show that he is mistaken in this assessment.

Consequentialist Arguments

Martin argues, first, that the *individual* deterrent effect of non-citation, in the case of the Nazi hypothermia experiments, can be only minimal. The scientists who did the experiments are either dead or are too old still to be practising their profession. Clearly they cannot be deterred.

I have no disagreement with Martin on this point. But the consequentialist argument based upon the need to prevent future crimes of this sort seems to me very much stronger than he recognizes. Martin concedes that "one should try to discourage future Alexanderesque nightmares", but he wonders whether "ignoring the data in this case [would] do that".

2 Ibid., 5.

He contends that it is unlikely that someone whose government encourages a certain kind of experimentation would refrain from such activity because he fears that in some *other* society, where it is deemed immoral, his data will not be cited. That is, the case for *general* deterrence appears to be no stronger than was the case for individual deterrence. Where Martin's argument goes wrong, it seems to me, is in his failure to recognize an alternative manner in which action by the scientific community might decrease the likelihood of future unethical research.

The most effective way to prevent future unethical research may well be, not through the threat of punishment, but through inculcating and reinforcing the values prohibiting such research. When society stigmatizes research which conscripts involuntary subjects or which unethically exploits or injures subjects, an important part of what it is accomplishing is the promotion of an enhanced ethical awareness amongst members of the scientific community. It seems plausible to hypothesize that the internal weight which an individual assigns to a value (such as the value of respect for the bodily and mental integrity of research subjects) will, in part, be a function of the penalty which society attaches to violations of the value. When we pronounce an anathema against unethical research, when we stigmatize it as shameful and unworthy, part of what we accomplish is to shape the conscience of society in general and the research community in particular. We thereby enhance the likelihood that scientists will recognize the immorality of certain kinds of research and will feel a strong disinclination to participate in such research.

Thus, by severely punishing many of the German scientists who participated in unethical medical experiments, the court at Nuremberg was affirming the importance of respecting fundamental norms. The verdict of the Nuremberg court and the punishments which ensued were, in part, intended to reinforce certain ethically important attitudes and values amongst the scientific community. It is not implausible to suppose that they achieved this objective, at least to some significant extent. Further, when the contemporary scientific community stigmatizes the research which resulted from the Nazi hypothermia experiments by refusing even to countenance its citation in respectable scientific journals and by publicizing this refusal, the inculcation of ethical standards for research is further reinforced.

Martin is undoubtedly correct when he argues that the mere threat of non-citation is unlikely to be efficacious with those scientists whose research is motivated by money or some other immediate practical goal. But even scientists with this sort of motivation may be inhibited from pursuing unethical research, not by the threat of non-citation, but by the internalized constraint of the attitudes and values which non-citation may promote.

Henry Beecher has argued³ that medical journals should adopt a policy of refusal to publish research data obtained in an unethical manner, and, indeed, the policy of some scientific journals is now to suppress such data, even though suppression would constitute a loss to medicine. In my view, such a policy is justified both by its general deterrent effect and by its likely effect in promoting the internalization of high ethical standards within the research community. Similar considerations would apply to the citation of unethically obtained data which had already been published elsewhere (as was the case with the Nazi hypothermia research).

On the other hand, even if one concedes that there are important benefits to be gained by refusal to publish or cite unethical research data, a consequentialist would have to balance these benefits against the disutility of losing valuable data which, in the case of the Alexander report, may not be otherwise obtainable in a morally permissible manner. It is possible that human lives might be saved if we make use of the Nazi data.

Where does this argument leave us? As an empirical matter, it should be noted that some valuable data about hypothermia are otherwise available, e.g., from medical reports of cases of accidental exposure to subfreezing air temperatures, suffered predominantly by inebriates. The reliability of such data is diminished by the possibly unrepresentative nature of the victims. But evidence from the Nazi hypothermia experiments may suffer from worse contamination for, not only were the research subjects emaciated (as a result of near-starvation), but the racist assumptions of the Nazi experimenters may have biased their results. Even if one were to suppose that the Nazi data are in some ways of superior utility to alternative data, one may doubt that the extra benefits are so great as to outweigh the disutility which would be produced by using the Nazi data and thereby legitimating to some extent the research which generated it. If the argument based on prevention of future unethical research through the inculcation of ethical values is sound, then the onus of proof rests with those who wish to justify using the Nazi data. Martin has not met this onus.

The Retributive Argument

The retributivist case against using Nazi data is based upon the principle that the wicked deserve to suffer. (And, one might add, *pace* Martin, this principle has much more to do with justice in the allocation of benefits and burdens than it has to do with "simple revenge".)

Martin's attempted refutation of the retributivist case rests largely upon his claim that "the Alexander scientists, even if they are still alive,

3 Henry K. Beecher, "Ethics and Clinical Research", *New England Journal of Medicine* 274 (1966), 1354-1360.

would hardly be significantly hurt when some scientist ... ignores their data''.

Again, however, I think that Martin's rebuttal attacks a weak version of the retributivist argument when an alternative and much stronger version is available. Part (though only part) of the condign punishment for scientists who conduct unethical research is that their data should not be used by other scientists. But the significance of this refusal, as we have seen, is that when the refusal is widely publicized it serves to stigmatize the research and confers shame upon the researcher. The unethical researcher should certainly not be allowed to say to himself/herself, "my colleagues have publicly recognized the usefulness of my work". Quite the opposite should be the case.

Martin attempts to buttress his rejection of the retributivist argument for non-citation by pointing out that, according to retributivism, there ought to be a proportion between the treatment of an offender and the seriousness of his crime. Since the non-citation of Nazi research would constitute a "ridiculously small punishment" for the scientists who were responsible for doing the experiments, Martin suggests that such a punishment would be "nearly as inappropriate as none at all".

It is true that retributivists accept some version or other of the principle that "the punishment should fit the crime". But I take this to mean that retributivists ought to have proportionality as their objective, and should strive to achieve this objective insofar as this is practicable in the circumstances. From the retributivist point of view, when it is impossible to deliver a condign punishment to an offender, one ought to come as close to that goal as possible. Some punishment would almost always be better than none. Martin's interpretation of retributivism foists upon it the ridiculous consequence that one ought never to administer any punishment to mass murderers since any punishment for such a great evil is certain to fall far short of that which is deserved. I doubt very much if any retributivist has ever taken this view.

The Argument from Ceremony

Martin's discussion of the important ceremonial role which is played by the shared expression of moral attitudes and values is subtle and interesting. I can here offer only a few comments.

As noted above, ceremonies which give social expression to society's abhorrence of seriously unethical conduct have a function which is more than merely "ceremonial". The expression of collective attitudes and values and the reinforcement of this expression through punishments and rewards both exert a powerful influence on the shaping of the values of a culture. For this reason, both consequentialists and deontologists should recognize and support appropriate ceremonies.

I agree with Martin when he claims that "perhaps what's really bothering people about using the Alexander data is that this would constitute some sort of ceremony of respect, or of scientific acceptability, and of disrespect toward the experiments' victims". But Martin misses the importance of this point because he appears not to recognize that it has both consequentialist and deontological significance.

I think that Martin is correct when he insists that "some forms of 'proper' expression of moral views are neither psychologically nor conceptually bound to those [views]". But I should add that there is probably a strong connection (albeit a *contingent* one) between our moral attitudes and values, on the one hand, and our behaviour, on the other. When ordinary folk are asked to believe that a person who displays in his home a lampshade made from the skin of Jewish concentration camp victims nevertheless genuinely deplores Naziism, they feel a certain uneasiness. Frankly, I share that dis-ease. Martin urges us to accept a more pluralistic outlook. "Each to his own ceremonies", might be his motto. For myself, I find this application of liberal tolerance a virtual *reductio ad absurdum*. We are not isolated atoms bouncing around in the void. We are social creatures, defined in large measure by the conventions and rituals and ceremonies whose shared significance constitutes our culture.

I agree with Martin that "the use of this [Nazi] data to prevent future suffering and death could be taken to be a dignified and worthwhile memorial to the Nazi's victims...". It *could* be taken in this way. But the point of Martin's discussion of the lampshade man is that he (Martin) concedes that in our society, at this time, it is more likely to be taken as conferring some legitimacy on the Nazi experiments. I think that he is correct in his surmise. This is the symbolic interpretation most likely to result from the use of Nazi data. Twenty or fifty or a hundred years from now, the situation may well be different. Then, but not before then, we might wish to reconsider using this poisoned gift.

The Best of Both Worlds?

In an attempt to escape from the difficult choice posed by the conflicting case for and against using the data, some people are bound to feel attracted by a compromise solution. Why should we not make full use of the Nazi data (thereby benefiting mankind) and, at the same time, deplore and condemn the unethical manner by which they were originally acquired (thereby promoting sound moral values)? This would appear to give us "the best of both worlds".

Attractive as this solution may at first appear, it is not without problems. An analogy may help. Before the adoption of the new *Canadian Charter of Rights*, it was not uncommon for the courts to admit illegally obtained evidence (say, evidence acquired by police as a result of

torturing an accused person) and, at the same time, to deplore the manner of its acquisition. The obvious drawback of such a policy was that it did not discourage police from repeating this kind of morally objectionable conduct. Suppose, however, that the courts had used the evidence but also took steps to ensure that those police who were guilty of unethical conduct were appropriately punished. Similarly, suppose that the scientific community were to use the Nazi research data but punish those guilty of unethical research practices by publicly condemning the manner in which they acquired their data. Should such a policy not satisfy both consequentialists and deontologists?

Despite its attractions, this policy seems to carry with it more than a touch of moral hypocrisy. When a court makes use of tainted evidence or the scientific community makes use of tainted Nazi data, legitimacy is indirectly conferred upon the manner by which the evidence/data were acquired. To some extent, then, official statements which deplore the means used to acquire the data are undercut by the fact of their use. This may not always give us the "best of both worlds".

When the method by which the data were acquired is particularly evil, and when the value of the data is doubtful or not very great, the morally appropriate policy to adopt would seem to be denunciation of the method of acquisition together with a refusal to use the data in any way. On the other hand, when the method used was only mildly objectionable and/or the value of the data acquired is of great value to mankind, then the morally appropriate policy to adopt would seem to be one which makes use of the data but explicitly condemns the breach of ethics involved in its acquisition.

Moreover, the length of time elapsed between the unethical conduct and the proposed utilization of the data is a further factor to be assigned some weight. There may be a moral "statute of limitations" operating here. In fifty years' time, the negative ceremonial impact of using Nazi hypothermia data may be so diminished that the utilitarian case against its use is outweighed by the positive benefits anticipated. The method of data acquisition will not have become less evil, but the social and psychological impact of its use may well have diminished significantly. On the other hand, one might also expect that the utility of the data will have significantly diminished with the passage of time (as alternative, morally acceptable, methods of obtaining data become available). Thus, the permissibility of using Nazi data may remain problematical even in the distant future.