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December 19, 2003

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Via U.S. Mail

Special Master Judah Gribetz
Holocaust Victim Assets Litigation
P.O. Box 8300
San Francisco, CA 94128-8300

In re: Holocaust Victim Assets Litigation

Dear Special Master Gribetz:

Disability Rights Advocates respectfully submits to the Court its' **Proposal for *Cy Pres* Award For the Class of "People who are Physically or Mentally Disabled or Handicapped" From the Allocation of Residual Unclaimed Funds**, together with supporting exhibits.

The **Declaration of Sid Wolinsky In Support of Proposal for *Cy Pres* Award For the Class of "People who are Physically or Mentally Disabled or Handicapped" From the Allocation of Residual Unclaimed Funds**, accompanies this Proposal.

Very truly yours,

Ki Kti

Kevin Knestrick

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIMS ASSETS;
WEISSHAUS, et al.

Plaintiffs,

v.

UNION BANK OF SWITZERLAND, et al.

Defendants.

CASE NO. 96CV4849

PROPOSAL FOR *CY PRES* AWARD FOR THE CLASS OF "PEOPLE WHO ARE PHYSICALLY OR MENTALLY DISABLED OR HANDICAPPED" FROM THE ALLOCATION OF RESIDUAL UNCLAIMED FUNDS

(Proposed Order and supporting Declarations filed concurrently)

Court: Honorable Edward Korman
Special Master Judah Gribetz

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Parties Represented

Disability Rights Advocates ("DRA")[1] represents the following organizations and individuals in this Motion for Cy Pres Award:[2]

National Federation of the Blind, USA
German Council of Centers for Self-Determined Living of Disabled People, Germany
Finist, Russia
Equal Ability Limited, United Kingdom
Through the Looking Glass, USA
Disabled Persons International, Canada
World Institute on Disability, USA
Center for Independent Living, Bulgaria
Disability Rights Education and Defense Fund, USA
Center for Independent Living, Berkeley, USA
California Foundation for Independent Living Centers, USA
Independent Living Resource Center San Francisco, USA
Computer Technologies Program, USA
The Ragged Edge/Avacado Press, USA
Legal Advocacy for the Defense of People with Disabilities, Japan
National Confederation of Disabled Persons, Greece
De juRe Alapitvany, Hungary
Miriam Rubin (Individual Survivor)
Doris Fedrid (Individual Survivor)
Helga Gross (Individual Survivor)

Summary of Proposal

This proposal, supported by each of the organizations and individuals listed above, has the following components (all would be carried out under direct orders of this Court): (a) the

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[1] DRA is a non-profit public interest law center with offices in Oakland, California and Budapest, Hungary which exclusively represents people with all disabilities – physical, psychological, developmental and sensory. Under a grant from the United States State Department, DRA conducts historical research on issues relating to the Holocaust and people with disabilities.

[2] In addition, leading disability organizations submitted letters in support of this proposal at a previous stage of the settlement. For the Court's reference, copies of these letters are attached as Exh. B to the Declaration of Sid Wolinsky (Wolinsky Decl."). For example, this proposal is supported by the European Disability Forum (EDF), the office of the European Union charged with development of disability policy and priorities. EDF is an umbrella organization comprised of over 70 European NGOs and 17 National Councils in the European Union and European Economic Area.

determination of a specific sum to benefit the subclass of "people who are mentally disabled or handicapped" ("The Disability Fund"); (b) the transfer of the Disability Fund in trust to a designated charitable foundation (the "Trustee"); (c) the establishment of a Disability Advisory Board representing the international disability community; and (d) the approval of grants made by the Trustee from the Disability Fund, in consultation with the Disability Advisory Board, and in accordance with directions and priorities specified by the Court. Each of these court-ordered components will assure that members of the deserving victim class of "People Who Are Physically or Mentally Disabled or Handicapped" receive a fair and just allocation from the residual unclaimed funds.

This proposal also provides specific information requested by the *Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess And Possible Unclaimed Residual Funds*, dated October 2, 2003, (hereinafter *Interim Report*). Information is provided regarding the nature of the proposed program (*See* Sec.I, Exhibit A); the estimated size, location and nature of the population to be served (*See* Sec. IV, V); an analysis of those who are in need within this victim group (*See* Sec. IV, V); an assessment of survivor needs (*See* Sec. V), a description of the lack of existing social safety nets (*See* Sec. V); a discussion of the poverty levels of members of the victim class; (*See* Sec.V); a recommendation that specifies the procedures for distributing funds by a recommended agency (*See* Sec.I, IV, Exhibit A); financial and programmatic reports from the recommended agency; (*See* Exhibit B); a description of the administrative costs associated with the cost of the program (*See* Sec.I, Exhibit A); and the names, addresses and affiliations of all persons and organizations associated with or endorsing this proposal. (*See* Sec. I, Exhibit C). A more detailed synopsis of the information provided in this proposal that responds to the requirements set forth in the *Interim Report* is provided in Section VII.

I. Introduction

Men, women and children with physical, mental, and emotional disabilities were subject to appalling acts of persecution during the Holocaust, including looting, forced labor, horrific medical experiments, sterilization and extermination.[3] Incredibly, the atrocities committed against untold hundreds of thousands of people with disabilities during the Nazi regime have long been shrouded in secrecy and the victims have never been adequately compensated. Moreover, the root causes of prejudice and marginalization that led to this extreme form of persecution have yet to be sufficiently addressed. The failure of history to chronicle the horrific treatment of persons with disabilities is a symptom of the underlying bias still faced by this victim group, which continues to suffer significant discrimination, based on enduring stereotypes and mistaken assumptions regarding the lives and abilities of persons with disabilities.

Seventy years after the events of the Holocaust began, persons with disabilities remain at the bottom rung of society, often isolated and segregated by involuntary institutionalization. The shared experience of isolation among persons with disabilities, imposed by the societies in which they live, places them at great risk of remaining left out of the comprehensive compensation efforts flowing from this litigation.

Despite the diligent work of this Court and the International Organization of Migration ("IOM"), Holocaust survivors with disabilities continue to be elusive beneficiaries of this settlement. The response of persons with disabilities to the initial notice of settlement in this

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[3] The widespread, vicious and systemic persecution of as many as one million people with disabilities during the Holocaust is detailed in *Forgotten Crimes: The Holocaust and People with Disabilities*; selections are attached as Exhibit A to the Wolinsky Decl. in support of this proposal. This manuscript, the product of over two years of research under a grant from the United States State Department, is the basis for a forthcoming book which will be commercially published by Ivan R. Dee in Spring, 2004.

case, and the subsequent search for Holocaust survivors with disabilities during the distribution period of the IOM's humanitarian aid program have proved to be disappointing and unsuccessful with regard to disabled class members. The massive administrative and financial efforts aimed at locating and identifying disabled beneficiaries have failed to secure adequate results, in large part because the disabled population, of which disabled Holocaust survivors are a part, remains isolated and cut off from the different societies in which they live, distanced from the mainstream channels of communication and the dissemination of information.

The lack of participation by Holocaust survivors with disabilities in the distribution phase of this settlement is most evident when compared to the otherwise successful distribution efforts thus far achieved, particularly with respect to the total sum of humanitarian aid distributed to the Looted Assets Class. For example, as of October 2003, $145 million had been allocated to this class and reserved for programs that serve Jewish, Roma, Jehovah's Witness, homosexual and disabled Nazi victims in need. However, despite the magnitude of that sum, IOM has to date requested funding for only one tiny program that serves the needs of class members with disabilities. That program contemplates the provision of aid to five individual Holocaust survivors for a total cost of $2,385. The relative lack of funded programs to benefit disabled Holocaust survivors reflects the understandable difficulty encountered thus far in the efforts to identify and locate Holocaust survivors with disabilities.

The victim class of men and women with disabilities are at a critical juncture in these proceedings. In light of the Special Master's notice indicating that the proposals approved in connection with the December 31, 2003 deadline will exhaust all remaining funds, the disabled victim class are at risk of failing to fairly benefit from the distribution of this extraordinary settlement, even though persons with disabilities are historically one of the largest in number among the victim groups. Because disabled people remain oppressed, isolated and segregated, and because organizations that represent persons with disabilities are not well funded or organized, the identification of individual class members has proved to be an extraordinary difficult, nearly impossible task.[4] In this situation, the continued distributions, additional allocations, and ultimate exhaustion of settlement funds to groups within the Looted Assets Class without a distribution that acknowledges and addresses the legacy of Holocaust survivors with disabilities, would be an unjust result that compounds the world's failure to address, record, and memorialize the extreme suffering experienced by men and women with disabilities under the Nazi regime.

Accordingly, both the individual survivors and the disability organizations represented here, respectfully suggest that a portion of the Settlement Funds (hereafter the "Disability Funds"), should be set aside as a *cy pres* remedy for this category of victim-claimants. A *cy pres* remedy is particularly appropriate here, under the extraordinary circumstances of this case; where continuing attempts to locate individual members of the class have become administratively unfeasible; and where the costs associated with continuing to search for individual class members will significantly outweigh the benefit received by identified beneficiaries, thereby inefficiently depleting the remaining settlement funds. "Typically, the court employs *cy pres* where the class members cannot be located or where individual recoveries would be so small as to make distribution economically impossible." *In re Matzo Food Products Litigation*, 156 F.R.D. 600, 605 (D.N.J. 1994). Here, the case for *cy pres* is made even

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[4] Numerous organizations that have submitted declarations in support of this motion have testified to their inability to locate individual survivors, as well as the pressing need for disability human rights funding, particularly in Central and Eastern Europe. *See* Declarations attached as Exh. C through G to Wolinsky Decl.

stronger because the difficulties faced by the attempts to locate individual survivors are not merely contemplated or hypothetical, but have instead become a reality. The window of opportunity for the Court to provide some form of compensation to these deserving beneficiaries is quickly closing.

Because the *cy pres* relief contemplated in this proposal is tailored to fund programs most likely to directly benefit the population of Holocaust survivors with disabilities and address harms similar to those at issue in this litigation, it is appropriate under all relevant case law. In a case such as this, where "a settlement fund is 'not sufficient to satisfy the claimed losses of every member' it is 'equitable to 'give as much help as possible to individuals...who are most in need of assistance." *In re Agent Orange Litigation,* 818 F.2d 145, 158 (2d Cir. 1987).

This motion respectfully requests that the Disability Funds be allocated under Court supervision to establish a short term Trust that will provide grants to disability oriented, non-profit, non-governmental organizations. As envisioned by this motion, the Trust will issue grants in a manner that gives priority to those proposals most likely to benefit Holocaust survivors with disabilities. This group of beneficiaries includes Holocaust survivors who were persecuted by the Nazi regime because of their disabilities as well as those people who now have disabilities as the result of Nazi persecution. Remaining funding from this Trust will be awarded to proposals that implement programs to improve the lives of people with disabilities in countries where known Holocaust survivors live. While the Court will retain total control of all funds, the Trust will receive the advice of disability leaders and organizations who sit as members on a Disability Advisory Board, so that disabled people will have a voice in articulating their own unique needs, priorities and solutions.

At all times during the administration of the proposed Trust, the funded grants will focus on the improvement of the lives of persons with disabilities and the protection and advancement of their civil and human rights.[5] The form of relief proposed here is more closely aligned with the specific and unique needs of the disabled class then is the provision of humanitarian aid. The preference for programs that will enhance the social integration of persons with disabilities and promote their equality within society is in accordance with the current international consensus regarding disability issues supported by the United Nations, the European Union, and innumerable organizations that serve the needs of individuals with disabilities.

Through this *cy pres* remedy, the Court will focus its relief on improving the lives of Holocaust survivors with disabilities, and at the same time ensure that this settlement addresses the root causes that led to the victimization of persons with disabilities during the Holocaust. The Court will thus create greatly-enhanced equality and a better life for Holocaust survivors with disabilities, as well as for persons with disabilities that live within countries which remain deeply affected by the Nazi legacy; those countries with known populations of Holocaust survivors. Significantly, the remedy will help eradicate the conditions that made the Holocaust possible for people with disabilities, while at the same time, help educate the world about this

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[5] The specific details of the recommendation for the *cy pres* distribution for the class of victims with disabilities are set forth in the Proposed Order, attached hereto as Exhibit A. The funds would be distributed upon Court Order, with guidance from the Trustee and a Disability Advisory Board. Past experience has shown that projects are most effectively guided by representatives of the population they serve, and therefore the Advisory Board would be composed of people with disabilities and representatives of disability organizations. Such advisors will be well versed in allocating resources and developing projects which make effective, positive and long-term improvement in the lives of people with disabilities. Priority will be given to projects that directly benefit Holocaust survivors with disabilities. Any remaining funds would be awarded to projects in countries with known population of Holocaust survivors, in order to address those areas in which the harms giving rise to the lawsuit were committed and where members of the victim class remain the most in need. The Trustee will award and distribute all Trust funds no later than three years after the inception of the Trust.

neglected corner of history. The proposed *cy pres* will contribute to a more thorough understanding of the source of persistent discrimination targeted at persons with disabilities and will help establish disability rights as a cause of societal concern in geographic areas where it is most needed.

No amount of money can undo the tragic injustice of these violent and inhumane acts of the Holocaust, or alter the legacy of these horrific events. However, for the first time in history this Court has the opportunity to acknowledge, in a meaningful way, the suffering and cold-blooded exploitation of the hundreds of thousands of disabled victims of the Nazi regime. In addition, these funds can accomplish a dramatic improvement in the daily lives of people with disabilities today, lives that are still lived amidst stereotypes and prejudice, and through which runs the echo of the Nazi phrase "life unworthy of life."

Both the concept of such an allotment to people with disabilities for these purposes and the specific plan for its administration and use have been discussed in detail with class counsel Burt Neuborne and class counsel Morris Ratner. Both of these counsel continue to endorse and support the proposal; they agree that funds should be set aside as a *cy pres* remedy for the class of people with disabilities and dedicated to protection and human rights work for this category of men, women and children. The precise mechanism proposed here (paying of Disability Funds to a foundation that will, with a Disability Advisory Board, recommend payments to specific organizations serving and advocating for the disability community) was also specifically discussed with and is supported by Professor Neuborne and Mr. Ratner. Prior to the distribution to individuals, Professor Neuborne and Mr. Ratner agreed to recommend and support an allocation of one percent (1%) of the Settlement Funds (i.e., the amount of $12.5 million dollars). It now appears that the individual distributions have not been as great as the level initially anticipated. If this is in fact the case and funds are sufficient, DRA respectfully requests that a *cy pres* allocation for people with disabilities be set at two to three percent, or some other appropriate amount in excess of one percent of the total Settlement Fund.

An allocation at this level, although modest in terms of either the overall settlement or the heinous nature of the crimes committed, will be of substantial importance both in terms of its historic symbolism and its potential for dramatic change in the daily lives of people with disabilities.

II. The Extraordinary Difficulty of Reaching Survivors with Disabilities Makes *Cy Pres* Relief Particularly Appropriate.

A. *Cy Pres* is Necessary Because Holocaust Survivors With Disabilities Are Inherently Difficult To Locate And Contact Due To Their Isolation From Traditional Means of Communication, Lack Of Effective Organizations, and the Limitations Caused by Their Disability.

People with disabilities who survived Hitler's eradication attempts are inherently difficult to reach. This group is extremely difficult to locate, identify or notify not only because they are widely scattered and elderly, but because they tend to be isolated, living in poverty, and institutionalized. The experience thus far in this litigation reflects these factors. The lack of response by men and women with disabilities to the initial Notice of Settlement and the difficulties encountered by the IOM in its effort to locate and identify potential beneficiaries, reflects distressing characteristics of the disabled victim class that have repeatedly resurfaced throughout this litigation: persons with disabilities continue to be segregated from society at large, suffer from social stigma, fail to enjoy the most basic access to their own societies, and continue to suffer from unwarranted prejudice and discrimination.

There are multiple factors (several of which are unique to the disability victims) which have made it so difficult to locate and notify disabled Holocaust survivors. One major obstacle is the fact that virtually no disability organization, other than DRA, deals with individual survivors, or organizations of such survivors. *See* Declarations of Disability Organizations, attached as Exh. C through G to Wolinsky Decl. Yet even Disability Rights Advocates' concerted efforts to reach these individuals have yielded limited results. Organizations in Europe and the United States, contacted by DRA, had no knowledge of the location or identity of survivors who were persecuted on the basis of disability, nor any knowledge regarding networks of survivors or other organizations that work with disabled survivors. *See Id.* Particularly because people with disabilities were not recognized as a class of victims of the Nazi regime until fairly recently, survivors who were persecuted on the basis of disability have not established survivor support organizations or networks. In addition, major data banks of Holocaust survivors such as those maintained by Yad Vashem, Simon Weisenthal Center and the Shoah Foundation, do not use disability as an index, thereby limiting the usefulness of these traditional methods of identification.

Furthermore, a significant number of survivors with disabilities are institutionalized in nursing homes, hospitals, and disability homes throughout the world. Due to advanced age as well as their disability needs, they do not have access to the news sources that are available to non-institutionalized survivors. Institutionalized survivors also are frequently unable to access the numerous, extensive Internet websites that have been created to provide notice to survivors. The broader disability community, with its representative organizations fragmented and severely underfunded, cannot easily overcome these obstacles.

Reliance on "word of mouth" to spread news of the settlement has also been ineffective for at least two reasons. First, disability continues to be heavily stigmatized and viewed as somehow shameful and consequently disabled survivors have been treated with scorn and contempt throughout their lives. Thus, many survivors with disabilities have been unwilling to reveal their ordeals to others. For example, only a few disabled survivors testified at the war crimes trials or have publicly shared their experiences. Second, due to the horrific and systemic forced sterilization of people with disabilities in Nazi Germany, many survivors with disabilities have no children to alert them to the ongoing settlement proceedings, to represent their interests, help fill out their claim forms, or advocate on their behalf.

In addition to the problems associated with the history of social isolation of persons with disabilities, an individual's actual disability can present significant barriers to the delivery of effective notice.[6] Many survivors need special accommodations to effectively receive notice, such as notification in braille for blind survivors, large type for the elderly, audio formats, and captioned notices for the deaf or hard of hearing.

Because of the nature of their disabilities, many disabled people are unable to read or are able to read only with great difficulty. This is true not only for blind and low vision survivors but also for substantial numbers of people with learning and mental disabilities. Others have low levels of literacy because they were excluded from educational opportunities under Nazi Germany's segregationist regime. Moreover, the deaf community, as a result of the failure of public education systems, has a notoriously low level of reading literacy. Even in the United States, the average reading level for a deaf high school graduate is less than third grade. As a result, it is highly unlikely that most deaf survivors regularly read the publications in which the

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[6] As the European Disability Forum has noted: "Despite the settlement's specific designation of people with disabilities as one of four Holocaust victim groups, the Notice plan made no specific provisions to publish notice in even one disability publication, or work with even one disability organization, or provide notice in any alternative format (such as large print or braille), or use any assistive technology whatsoever for disabled people, such as accessible computers or telecommunications devices for the deaf." *See* Exhibit C to Wolinsky Decl.

legal notice of the submission process was published. The deaf survivors with whom DRA regularly communicates often communicate through friends who are also deaf (but for whom American Sign Language (ASL) is their first language), or via TDD (Telecommunications Device for the Deaf). For example, for one survivor who communicates through her deaf daughter, multiple, hour-long TDD calls were required with the daughter to assist the survivor in completing the individual claim form in this case.

In addition to the challenges that affected the original notice procedure, the IOM, in spite of strenuous and good faith efforts, has since learned first hand how extremely difficult the task is of identifying and locating Holocaust survivors with disabilities. According to its reports to this Court, IOM has contacted no fewer than 23 non-governmental organizations representing persons with disabilities, but has had little success locating disabled survivors.

All of the factors affecting survivors with disabilities – high levels of poverty, low literacy rates, institutionalization, low levels of employment, segregation, non-use of communication aids (such as braille and TTDs), special literacy needs, lack of news sources specifically targeted at disability groups, insufficient networking, underfunded and uncoordinated organizations, geographical dispersion, and a sense of shame – are significant if not insurmountable barriers to effective delivery of both humanitarian aid and legal notice to this group of claimants. Because of the pervasiveness of these barriers, there is no easy solution to this problem. In sum, many survivors with disabilities likely did not receive notice, have not filed claims, and could not be identified and reached with humanitarian aid. In the absence of an effective method to overcome the barriers described, the appropriate resolution is the proposed *cy pres* remedy for persons with disabilities.

B. Because People with Disabilities Have Historically and Repeatedly Been Excluded from Compensation Programs, It is Especially Important That Their Needs Be Fairly Addressed.

Disabled victims historically have been excluded from reparations and have never received sufficient compensation for the terrible wrongs committed against them. As the Special Master noted when he developed the current allocation plan for the settlement funds, compensation for disabled victims has "been more limited in scope and beset by difficulties, including continuing prejudice and mischaracterization of the victims." *Special Masters' Proposed Plan of Allocation and Distribution of Settlement Proceeds* (hereinafter "*Proposed Plan*") at 141 n. 386.

The Special Master also documented the historic exclusion of people with disabilities from previous claims processes. He specifically noted that "in contrast to the extensive programs designed to assist Jewish Holocaust victims...the Special Master is aware of no currently existing humanitarian or non-governmental programs specifically aiding survivors of Nazi persecution from among the ... disabled ... communit[y]." *Proposed Plan* at 138 (emphasis added). The Special Master's observation is historically accurate. For example, disabled victims of the Nazis have been wholly excluded from recovering reparations under the requirements imposed by German compensation provisions. Under that criteria, victims with disabilities have not traditionally been "recognized as persons persecuted by the Nazi regime," resulting in the fact that "[t]o this day, the German state has not fully recognized and compensated the disabled...for their persecution during the Nazi period." Horst Biesold, *Crying Hands: Eugenics and Deaf People of Nazi Germany*, (Washington D.C.: Gallaudet Univ. Press 1999) at 11-12.

The only evidence of any actual compensation to people persecuted on the basis of their disability (prior to this settlement and the German Agreement) is the thirty-two people compensated by the Swiss Humanitarian Fund for a total of only approximately $35,000 in humanitarian aid. *See Proposed Plan*, Annex E at E-113, and Annex K at K-29. As the Special Master aptly observed, "[a] central reason for the apparent lack of such programs is that, until very recently, the suffering of these...groups was not well recognized, as evidenced by the absence of scholarship concerning these victims and in the dearth of compensation programs for their benefit." *Proposed Plan* at 139.

Because of ongoing segregation, marginalization and discrimination against people with disabilities, and the historic neglect of the disabled victims of the Nazi regime, people with disabilities are far less likely to have made claims through the individual distributions process, or (because of the Nazi disability sterilization problem) to have heirs who can be claimants. For each of the above reasons, a *cy pres* remedy dedicated to advocacy for people with disabilities is a just resolution under all legal and ethical principles.

People with disabilities who were victimized under the Nazi regime should not be denied justice yet again. The Special Master has already more than adequately documented the dearth of recognition of, and compensation for, the horrible crimes committed against people with disabilities. The establishment of a Trust that will fund grants seeking to promote and enforce the civil and human rights of persons with disabilities will go far toward remedying this injustice and filling this regrettable void.

III. A Two to Three Percent *Cy Pres* Remedy Will Be an Appropriate Acknowledgment of the Nazi Persecution of People with Disabilities and is a Fair Allocation Given the Large Numbers of People with Disabilities Who Were Persecuted or Became Disabled because of Nazi Persecution.

During the Holocaust, the Nazis were able to establish an efficient system of identifying, transporting, exploiting and killing people with disabilities.[7] Because of the the nature and extend of the Nazi operation, it is impossible to know how many people with disabilities were killed in the mass exterminations of World War II. Most scholars estimate that a minimum of 275,000 were killed solely because of their disability in the formal euthanasia program in Germany alone (Aktion T-4). Although the Aktion T-4 euthanasia program was "officially" halted in August of 1941, the exterminations continued unabated (in part because the stop order applied only to the official German killing centers and the use of poison gas). Furthermore, the stop order did not apply to the program specifically developed to target the most vulnerable – children with disabilities. In the twisted logic of the Nazi regime, the killing of newborns was of the highest priority in order to prevent a new generation of people with disabilities.

After the official halting of the Aktion T-4 program, the mass murder of people with disabilities took place in other institutions and by other means, and the rate of murder actually increased. Murders of people with disabilities continued throughout the areas occupied by the Nazis, such as Poland, Russia, the former Czechoslovakia, Romania and Hungary, resulting in the unrecorded murder of a vast number of people with disabilities. Tens of thousands of concealed and undocumented deaths occurred in and out of concentration camps, and the killing continued in the years between the termination of the official killing programs and the actual end of the war (and beyond). Others were gassed or shot when they became disabled, and it is likely that countless more people later died from complications arising from their persecution at the hands of the Nazis.

In addition to the murders and exterminations, the Nazis conducted gruesome "medical research" on disabled children and implemented a massive forced sterilization program that effected approximately 400,000 persons with disabilities. The sterilization program was one of the first acts of the Nazi Government which furthered its preoccupation with the ideology of racial hygiene. Genetic Health Courts were so eager to purge the population of the human

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[7] For a more complete history of the persecution of people with disabilities under the Nazi regime, see *Forgotten Crimes*, Exh. A to Wolinsky Decl.

beings they perceived as tainted that they returned affirmative sterilization decisions in 95% of the cases they heard.

The Nazis further capitalized on large segments of the disabled population by using them as slave labor and confiscating untold number of assets from the disability population. The use of institutionalized patients as a means of forced labor was a widely accepted practice, often rationalized under the rubric of "therapy". Deaf people were particularly exploited as slave labor because of their ability to function in high noise industrial or military settings.

A distribution that reflects the suffering of the disability community at the hands of the Nazi regime is appropriate and will help address the continuing exclusion of people with disabilities from the "story" of the Holocaust. While important recent scholarship has developed, the overall effect of the Holocaust on the disability population has yet to be fully documented or understood. The under-representation of the historical experience of this victim group is not altogether surprising, because the very act of writing history is intimately shaped by the political and social climate in which that history is written. The prevailing negative attitudes and stereotypes of various societies and populations at large toward this particular victim group of people has resulted in their striking absence from the pages of history.

The emergence of a collective consciousness, and an awareness of their own unique history, only significantly began to coalesce among members of the disability community within the United States during the 1960s and 1970s. Within the countries of Central and Eastern Europe, this consciousness has developed much later, primarily within the last decade, following the extensive period of Soviet domination. Within the context of this burgeoning movement, attempts by the disability community at large to fully comprehend the effect of the Holocaust remain in their nascent stage. The relative youth of the disability movement contributes to the under-appreciation of the experience of men and women with disabilities in the Holocaust.

By way of contrast, the Jewish community as a whole has struggled to come to terms with the horrific persecution they suffered during the Holocaust in a more thorough and consistent manner, and over a longer period of time then have members of the disabled class. Jewish scholars have long recognized, the key to "Never Again" is never forgetting. The disability community must also learn this valuable lesson. So long as history fails to recognize in a meaningful way the persecution of people with disabilities, there is little assurance that it will not be repeated. "Never Again" for people with disabilities can only be achieved by using reparations to provide people with disabilities and the organizations that serve them with the resources needed to achieve empowerment, and to combat the demeaning segregation and marginalization that they still endure. For disabled people, only in this way can the true purpose of this litigation be realized. Moreover, by allocating a settlement distribution that recognizes the magnitude of the suffering of this victim group and allowing a fluid recovery scheme that will provide the greatest benefit to these class members and their community, the Court will fulfill its "fiduciary responsibility to protect the rights of absentee class members," *In re Matzo Food Products Litigation*, 156 F.R.D. 600, 607 (D.N.J. 1994).

IV. The Cy Pres Remedy Proposed Will Target Survivors, Give Priority to Programs Designed to Assist Holocaust Survivors with Disabilities and Will Use the Remaining Allocation to Fund Disability Programs in Countries Where Known Populations of Holocaust Survivors Live.

The proposed *cy pres* remedy will prioritize the distribution of funds to grant proposals that will most directly benefit Holocaust survivors with disabilities. By placing a priority on the funding of programs intended to benefit Holocaust survivors, the Trust will ensure that survivors' Looted Assets claims are addressed to the fullest extent possible.

For the numerous reasons explained in this proposal, the precise number of Holocaust survivors with disabilities is impossible to know at this time. The subset of information requested is not available because even general statistical information regarding persons with disabilities has not yet been compiled for most countries. As the Secretary-General of the United Nations has recently noted, "20 years after the adoption of the World Programme of Action, it is still not possible to state with precision what percentage of the population is disabled." *Issues and Emerging Trends Related to the Advancement of Persons with*

Disabilities, Report of the Secretary-General, U.N. Doc A/AC. 265/2003/1, (hereinafter *Issues and Emerging Trends*) submitted at the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities at ¶19 (June 2003).[8] Another commentator correctly described the situation when she stated that "knowledge about disability *per se* in developing countries is limited: figures are sketchy - and limited by and large, to very divergent rough estimates based on census, survey, and registration information, and on aggregated estimates of the epidemiology of specific conditions." Ann Elwan, *Poverty and Disability: A Survey of the Literature*, World Bank Social Protection Discussion Paper No. 9932, (1999) at p.2 (available at <www.worldbank.org>).

To date, the most complete synthesis of the disability statistics work of the United Nations is published as the *Disability Statistics Compendium of the United Nations*, Department of International Economic and Social Affairs, U.N. Sales No. E.90.XVII.17 (1990) (available at <http://unstats.un.org/unsd/disability>. However, in this report, which is periodically updated on the United Nations website cited above, the only countries that are included which are central to this litigation and proposal are Germany (1992) and Austria (1986). For the age range of over 60, these countries report an incidence of disability ranging from 25.7% to 46.1% respectively. *See Id.*

Despite the lack of available data, as a general matter, it is well accepted that 10 to 20 percent of any population has a disability. Deborah Stienstra, Yutta Fricke, April D'Aubin, *Baseline Assessment: Inclusion and Disability in World Bank Activities*, Canadian Centre on Disability Studies, (June 2002) (hereinafter *Baseline Assessment*) at 65 (available at <www.worldbank.org>). This figure is consistent with the estimates of Dr. Mitchell LaPlante, who has already submitted a declaration in support of DRA's proposal. *See* Declaration of Dr. Mitchell LaPlante Re: Class Members with Disabilities, dated February 23, 2000 at ¶ 8, attached as Exhibit H to Wolinsky Decl. (estimating that between 10 and 20% of the 1950 population in

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[8] Also available at <www.un.org/esa/socdev/enable/rights/a_ac265_2003_1e.htm>

German and Austria may have been disabled at the time of World War II). Assuming a 40% survival rate, Dr. LaPlante estimates that there are 600,000 to 1.2 million survivors with disabilities. *Id.* at ¶ 12.

One aspect of the Holocaust survivor population that is certain is that the class of persons who are Holocaust survivors with disabilities has undoubtedly enlarged in the decades since the Holocaust took place. Given the average age of today's Holocaust survivors (now 83 in most of the world, *See Proposed Plan* at C-12) and the prevalancy rates for disability which rise dramatically with advancing age, it is reasonable to assume that well over 90% of all Holocaust survivors are also now persons with disabilities. In addition, conditions of the Holocaust also are certain to have created an increased rate of disability of psychological, emotional, and physical dimensions, among a once able bodied population. It is impossible to know with precision how many of these individuals survive today.

The precise location of disabled survivors also is difficult to ascertain. The population of Holocaust survivors with disabilities is likely scattered throughout the world in similar proportions to Holocaust survivors generally, with the exception of the United States. The United States immigration policy which affirmatively rejected immigrants with disabilities during the years surrounding WWII, resulted in a higher percentage of survivors with disabilities likely residing in Central and Eastern Europe. Taking all factors into account, DRA estimates that 65% of Holocaust survivors with disabilities remain in the countries of Central and Eastern Europe (including the countries within the former Soviet Union),[9] 10% in the countries of Western Europe, 10% in Israel, 10% in the United States, and 5% in other countries.

Those Holocaust survivors who were disabled during the War and those survivors who became disabled after the conclusion of the War have all likely suffered from the same root cause of prejudice and discrimination experienced by those persons who had disabilities during the Nazi era. In the majority of countries where Holocaust survivors live, persons with

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[9] All references to Central and Eastern Europe throughout this proposal include the countries within the former Soviet Union.

disabilities have continued to be the target of social stigma and prejudice. These forms of discrimination have resulted in the total exclusion of persons with disabilities from full participation in the societies in which they live. In fact, many of the prevalent stereotypes and prejudices that were the foundation of the Nazi's persecution of people with disabilities – that disabled people are unproductive and second class citizens at best, and unworthy of life at worst – continue to underlie the persistent human rights violations committed against this same group today. Indeed, the larger population of people with disabilities, of which Holocaust survivors are a part, continue to face widespread discrimination and dehumanization in every country in the world, resulting in the widespread institutionalization and segregation of people with disabilities and their isolation from societal benefits.

The prioritization of *cy pres* funds to fund proposals most likely to effect Holocaust survivors with disabilities will ensure that members of this class receive a form of compensation that reduces the ever-present barriers erected and maintained by societal standards. Advocacy programs for these members of the class, in areas where they remain the most in need will address the root source of harm directly related to the issues raised in the instant litigation.

V. The Proposed *Cy Pres* Remedy Will Allow Remaining Funds to be Allocated to Proposals in Countries with Known Holocaust Survivor Populations.

A. Current Human Rights Violations and Discrimination Against People with Disabilities In Those Countries With Known Holocaust Survivors Are Founded Upon the Same Stereotypes and Prejudices That Formed the Basis of the Nazi Persecution of the Disabled.

Although many of the nations of Central and Eastern Europe stand poised to assume their places as essential political and economic partners with Western Europe and the United States, many remain like third world countries in their treatment of people with disabilities. Many of the stereotypes and prejudices that in their extreme form fostered the horrors inflicted by the Nazi regime on people with disabilities, continue to precipitate discrimination and dehumanization against this same population today. Throughout Europe, in the same places that gave rise to the harms at issue in this lawsuit, very few people with disabilities have the opportunity to lead a full and independent life.

Eastern and Central Europe likely houses the majority of survivors with disabilities, since many fewer people with disabilities escaped to the United States (because U.S. immigration law prevented most, if not all, people with disabilities from entering the country). *See*, Joren Lyons, *Mentally Disabled Citizenship Applicants and the Meaningful Oath Requirement for Naturalization*, 87 Calif. L.R. 1017, 1022 (1999) (outlining a "history of discrimination against disabled immigrants that has unfortunately characterized American immigration law since its inception."); and John F. Stanton, *The Immigration Laws From a Disability Perspective: Where We Were, Where We Are, Where We Should Be*, 10 Geo. Int'l L.J. 441, 449-50 (1996) (citing multiple cases in which people with hearing and mobility disabilities were denied entry into the U.S. and/or denied citizenship). Indeed, one survivor with whom DRA is in contact was left behind when the rest of her family immigrated to the United States because of the fear that her deafness would cause her to be rejected.

As a group, persons with disabilities particularly in Central and Eastern Europe are immobilized by pervasive architectural barriers. They are also poor, without necessary assistance or assistive devices, discriminated against, and lack sufficient information or governmental support to improve their situation. They suffer from massive unemployment and social, political and economic exclusion. In addition, far too many disabled Europeans are institutionalized in hospital like settings or isolated in mini-ghettos in which they lack privacy, freedom or the chance to live out their human potential. In sum, people with disabilities throughout the world continue to struggle against attitudinal, institutional and social barriers – barriers founded upon the same prejudices exploited by the Nazi regime.

One of the most disturbing characteristics of the attitudes held by the Nazi regime towards persons with disabilities are their persistence; Holocaust era myths about people with disabilities continue to this day. The same notions of genetic engineering, "imperfect" human beings, and the unproductivity and unworthiness of men and women with disabilities lie at the root of current discrimination and human rights violations against people with disabilities. The crude propaganda posters created by the Nazis only make explicit centuries of ongoing prejudice against people with disabilities. Throughout much of the world, and particularly in countries with populations of known Nazi survivors, people with physical, sensory and mental disabilities continue to live lonely lives in institutions or shut in at home, with little access to the outside world. In order not to repeat the persecution of persons with disabilities that occurred during the Holocaust, significant efforts must be made to promote and enforce the human rights of persons with disabilities in a manner that will elevate their societal status, and increase their degree of integration in the communities in which they live.

The financial effect of the current prejudice towards persons with disabilities throughout the countries of Central and Eastern Europe is devastating. The overwhelming need of members of this victim class becomes glaringly evident when one examines the conditions in which persons with disabilities live their daily lives. Persons with disabilities in the developing world are among the "poorest of the poor." *Baseline Assessment* at 73. Commentators from the World Bank who have studied the link between poverty and disability note that "disabled people are poorer, as a group, than the general population and that people living in poverty are more likely than others to be disabled." Elwan, *supra,* at p.i. The European Disability Forum has similarly reported that "disabled people are among the most vulnerable groups to poverty," noting that the "great majority of disabled people appear to confront serious or very serious difficulties (77.5%) in meeting their basic needs." European Disability Forum, *Disability and Social Exclusion in the European Union - Time for Change, Tools for Change,* Final Study Report (2002) at 65 (available at <www.edf-feph.org>).

According to some estimates, more than a million people in Central and Eastern Europe remain institutionalized, often in inaccessible settings, where they are confronted with daily human rights violations. For example, a report by Mental Disability Rights International, found that Hungarians with mental disabilities are routinely placed in long-term institutions, often for a lifetime. Mental Disability Rights Int'l, *Human Rights & Mental Health: Hungary*, Washington College of Law, American University (1997) (available at <www.mdri.org>). This process begins with disabled children, who are frequently forced into segregated schools and institutions, many times leading to a lifetime of institutionalization and to an unnecessary breakdown in ties with the community. MDRI found that "people are vulnerable to the most serious human rights violations," because they are "[c]losed from public view in institutions without human rights oversight or advocacy available to them." *Id.* at xix. In fact, throughout the countries formerly under Soviet dominion, severely disabled babies are commonly abandoned at the maternity wards, sometimes when medical personnel warn the recuperating mothers of the hardships if they keep a "defective" child. Diagnostic procedures for disability are also a source of concern. Because institutionalization itself causes deterioration, the label of mental retardation can become a self-fulfilling prophecy.

The Romanian State also continues to institutionalize persons with disabilities. As the U.S. State Department has noted, "(o)utside of large institutions, social services for persons with disabilities were almost nonexistent...(a)ccording to official statistics, there were 3,500 children with disabilities living in state institutions" where conditions "ranged from adequate to harsh." *See* U.S. State Dept. Country Reports, Romania (2002).[10] A World Bank report places the number of children with disabilities living in institutions at 62,230, or 11% of all children with disabilities in Romania. David Tobis, *Moving from Residential Institutions to Community-Based Social Services in Central and Eastern Europe and the Former Soviet Union,* The World Bank, at 24 (2000)(available at <www.worldbank.org>). The vivid images of Romania's disabled orphans, first seen during the fall of Communist Europe, still reflect the reality of thousands of children living in Romania today. Adults with disabilities continue to face significant barriers in Romania as the law does not mandate accessibility for persons with disabilities to buildings and

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[10] All County Reports cited throughout this proposal are available at <www.state.gov/g/drl/hr/c1470.htm> Country Reports are published by the U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor.

public transportation. *See* U.S. State Dept. Country Reports, Romania (2002).

The enforcement and recognition of the civil rights of persons with disabilities is a slow process in even the most developed countries. *See, e.g.* Danielle Haas, "Lost in the Holocaust," *San Francisco Chronicle*, May 28, 2001 (describing plight of survivors with significant mental disabilities who were institutionalized in Israel upon arrival, and have remained in institutions ever since). In fact, it was not until March 31, 2003 that the U.S. State Department released versions of its Country Reports which included a separate category to address the status of persons with disabilities. Unfortunately, this lack of attention by the world's most developed countries only contributes to the ongoing neglect of the rights of persons with disabilities throughout the world.

Where laws protecting those with disabilities do exist on paper, the lack of meaningful enforcement often makes those laws a nullity. For example, in Austria, "(f)ederal law mandates access for persons with physical disabilities; however low fines and insufficient enforcement resulted in the inaccessibility of many buildings to persons with disabilities." *See* U.S. State Dept. Human Rights Report, Austria (2002). Sadly, the continued involuntary sterilization of women with mental disabilities continues in Austria and mentally retarded women can be sterilized involuntarily at the request of parents in the case of minors, or by the request of a family member or court order, in the case of adults. *See* U.S. State Dept. Human Rights Report, Austria (2000).

The archaic practice of routinely institutionalizing young persons with disabilities continues in other areas as well. For example, in Russia, lifes without a family often await children with disabilities because "(m)any children with physical or mental disabilities, even those with only minor birth defects, were considered uneducable." *See* U.S. State Dept. Country Reports, Russia (2002). Once they are confined to an institution, these Russian children have little hope of ever leaving in part because "(t)he stigma of abandonment or disability, when deepened by an official diagnosis of mental retardation subjects Russian children to prejudicial stereotypes of ineducability and inherited deviance." Amnesty Int'l, *Abandoned to the State:*

Cruelty and Neglect in Russian Orphanages, Human Rights Watch Report (1999), at 144 (available at <www.amnesty.org>). In fact, over 231,000 children with disabilities have been recently reported to live in Russian institutions. Tobis, *supra* at 24. Adults with disabilities also face significant barriers in Russia because "(a)lthough laws exist that prohibit discrimination, the Government did not enforce them" nor did the Government "mandate special access to buildings for persons with disabilities," thereby ensuring that "access to buildings was a problem." *See* U.S. State Dept. Country Reports, Russia (2002).

At the Bulgarian "home" for disabled adults visited by delegates from DRA (considered to be one of the better such homes in Bulgaria) the disabled residents of the institution were living under appalling and inhumane conditions as a result of under staffing, a grossly inadequate and deteriorating physical plant, and a fundamentally flawed governmental approach toward dealing with people with disabilities. Amnesty International has also recently documented deplorable conditions in homes for the mentally disabled. For example, in 2001, in one home for men with mentally disabilities, 22 residents died of mistreatment and pneumonia. Amnesty Int'l, *Bulgaria: Far From the Eyes of Society, Systematic Discrimination Against People With Mental Disabilities,* AI Index, EUR 15/05/2002, (October 2002) (available at <www.amnesty.org>). For those fortunate enough to be out of institutions, the presence of "architectural barriers" remained "a great hindrance in most older buildings, including schools and universities." *See* U.S. State Dept. Country Reports, Bulgaria (2002).

Poland is reported to have the highest incidence of disability in the world. Tom Hoopengardner, *Disability and Work in Poland*, World Bank Social Protection Discussion Paper No. Sp. 0101, (2001) at v (available at <www.worldbank.org>). In Poland, members of the disability community continue to face significant barriers throughout their lives as over 57% of the disabled population has less than a secondary school education. Physical barriers are still prevalent as, "public buildings and transportation generally are not accessible to persons with disabilities." U.S. State Dept. Country Reports, Poland (2002).

In sum, there is a critical need for disability human protection and advocacy throughout the world, and particularly in the countries of Central and Eastern Europe. Continuing to confront centuries of misunderstanding and discrimination, the disability community stands poised to continue the existing human rights movement on behalf of persons with disabilities in order to combat the daily violations committed against them. At the same time, however, the challenge is great, as many of these human rights abuses have gone on unchecked for decades.

Those disabled persons who are not institutionalized must struggle to obtain a basic education and overcome cultural and architectural barriers in their efforts to gain a minimum level of acceptance within their community. Persons with disabilities also are frequently deprived of assistive devices, such as affordable and effective wheelchairs, and adaptive technology. Barriers such as these, that infringe upon the human rights of persons with disabilities are fostered by the same stereotypes and prejudices that facilitated the events of the Nazi regime – that people with disabilities are "burdens," worthy only of pity and unable to live independently as full contributing members of society.

The *cy pres* remedy proposed here is a just and appropriate utilization of the available funds because at all times, the funds allocated will be targeted at the same class of people as were persecuted by the Nazis, those with physical and mental disabilities. It will include those with physical disabilities, such as those who use wheelchairs, walkers and crutches; those with sensory disabilities, such as vision and hearing disabilities; and those with mental disabilities, such as learning disabilities, developmental disabilities, and mental health issues. Because the proposed *cy pres* remedy will aid the same population as that persecuted by the Nazis, members of that group who remain in Europe (as noted previously, certainly a high percentage) will also benefit from this allocation.

B. People with Disabilities Continue to Face Extreme Persecution on the Basis of Disability in Violation of International Law and International Norms.

Throughout most of Europe, particularly Central and Eastern Europe, treatment of people with disabilities is still dominated by the medical model[11] and outmoded concepts of charity and pity. Because of this situation, the treatment of men, women, and children with disabilities in most countries fails to meet the relevant standards for equal and integrated treatment of disabled people which have been articulated by international groups such as the European Union in such documents as the new Article 13 of the Treaty Establishing the European Community, and the United Nations in its Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

Thus, ongoing systemic neglect of people who use wheelchairs, the blind and the deaf, as well as those with emotional, intellectual and psychological disabilities, is not merely inhumane and unjust, it also violates fundamental principles of international law. Every government has a legal duty to ensure that its citizens with disabilities are treated fairly. Basic human rights are described in numerous international instruments.[12] Indeed, Article 1(3) of the Charter of the

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[11] This is the conceptual model in which persons with disabilities are seen as "sick" and in need of being "cured," cared for, or told how to best live by professionals, including nurses, social workers, doctors and health administrators.

[12] *See* e.g., Declaration on the Rights of Disabled Persons, G.A. res. 3447 (XXX), December 9, 1975, 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975); Principles for the protection of persons with mental illness and the improvement of mental health care, A/RES/46/119, 75th plenary meeting, 17 December 1991 Adopted by General Assembly resolution 46/119 of 17 December 1991. These instruments include the Universal Declaration of Human Rights, G.A. res. 217 A(III), U.N. Doc. A/810 at 71 (1948); International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/ 6316 (1966), 993 U.N.T.S. 3, *entered into force* January 3, 1976; International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23,

United Nations proclaims the "fundamental freedoms for all." Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. NO. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. By ratifying Article 55[13] of this same charter, each member state of the U.N. has accepted obligations to fulfill the goal of Article 1(3).

In addition, the U.N. also recognizes the specific plight of people with disabilities in its Declaration on the Rights of Disabled Persons, G.A. res. 3447, 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975). This Declaration guarantees people with disabilities the same civil and political rights as others. It requires that measures be enacted with the goal of optimum self-reliance in mind; that persons with disabilities have medical and psychological treatment; that persons with disabilities receive economic and social security; and that persons with disabilities be protected from treatment of a discriminatory, abusive, or degrading nature.[14]

1976;Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* September 2, 1990; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982).

[13] Article 55 states the following:

> . . . [T]he United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
>
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[14] *See*, "Declaration on the Rights of Disabled Persons"G.A. res. 3447 (XXX), 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975).

C. Humanitarian Aid is Not the Primary Need of the Disabled; Other Projects That Can Be Funded by a Disability *Cy Pres* Allocation Will Best Fill Their Unique Needs, are the Choice of the Disability Community and Will Be the Most Effective Methods To Improve the Lives of People with Disabilities.

Throughout the world, disability organizations and international institutions are increasingly approaching the issue of helping people with disabilities from a human rights and equality perspective and are discarding the outmoded social protection model. *Issues and Emerging Trends*, *supra*, at "Executive Summary" (noting the shift in emphasis from biomedical and social welfare service approaches to persons with disabilities to the recognition of persons with disabilities as agents and beneficiaries of development of the societies in which they live). Disability leaders have for decades been actively seeking to change the mode of thinking that considers persons with disabilities to be objects of charity and pity, instead preferring to see persons with disabilities as people first, who desire equal rights, opportunities, and their access equal to the benefits of the societies within which they live. Indeed, the major thrust of disability groups working through international organizations, such as the United Nations and the European Union, for the last thirty years has been to promote independent living, social access, and advocacy over charity and dependence, which tends to relate disability to an inferior status and undermine dignity.

Because of their unique history, contemporary status and character of the discrimination that they experience, persons with disabilities are different in many respects from the other victim groups in this litigation. As a group, the most pressing need of persons with disabilities is the fulfillment of their desire to live lives with a maximum of dignity, integrity and independence. Unfortunately, the provision of humanitarian aid, in the form of relief, often conflicts with this desire for independence and full social participation. In some cases, the provision of aid can in fact reinforce the cycle of dependance of persons with disabilities upon the very society that has chosen to segregate them in institutions, thereby preventing the integration of the disability community within the broader society. More than aid, disabled men and women need curb-cuts, accessible transportation, legal and social advocacy and protection, paratransit, accessible medical care, protective legislation, and independent living centers.[15] Many more persons with disabilities need assistance to break free of this cycle of dependance so that they can lead integrated, fulfilling, and independent lives together with other citizens in their respective communities.[16]

Humanitarian aid can also unintentionally reinforce a discriminatory institutional system. As one commentator has noted, "humanitarian aid has been a double edged sword." Tobis, *supra* at 26. It has briefly "improved conditions" yet "created the false impression among policymakers, donors, and the public that large residential institutions were not so harmful to children and people with disabilities." *Id.*

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[15] An Independent Living Center is a centralized, multiple resource center providing a variety of needed services on an ongoing and daily basis to people with disabilities who live within the area. It is not a place where disabled people reside; instead it is a non-profit center which provides access for disabled people to a greater number of community services and many types of professional assistance, including peer group counseling, benefits counseling, access to health services, individualized accessible transportation and access to in-home services to maintain independent living. Independent living centers also serve as informational, educational and political centers for men and women with disabilities.

[16] In a report recently issued by the European Disability Foundation, disabled participants ranked the most important factors contributing to social exclusion for people with disabilities in the following order of importance: (1) Lack or limited access to social environment and unemployment (94%); (2) Lack or limited access to services (85.4%); (3) Stigmatization of disabled peoples (83.3%); (4) Lack of adequate training (81.2%); (5) Lack of specialized services (80%); (6) Inadequate education systems (77.1%); (7) Lack of economic policies to compensate for the extra cost of disability (75.7%); (8) The structure of the benefit system (75%); (9) Living in institutions (60%). European Disability Forum, *Disability and Social Exclusion in the European Union - Time for Change, Tools for Change,* Final Study Report (2002) at 62 (available at <www.edf-feph.org>).

For these reasons, the proposed *cy pres* remedy will seek to provide disabled people with the societal access they desire. It will also help remove the root cause of isolation and discrimination which helped lead to the disability Holocaust by generating institutional reform and by funding programs that chip away at the artifices of discrimination, through the creation of independent living centers, the removal of architectural barriers, and the provision of legal services and protection.

D. The Lack of Traditional Sources of Funding for Disabled People and Disability Organizations Makes the Award of a Cy Pres Remedy Particularly Appropriate.

As a group, people with disabilities worldwide rank among the poorest of the poor. The unemployment rate for the severely disabled is over 90%. Their expenses are high, their options are severely limited, and their educational attainments are minimal. Many have been institutionalized for much of their lives under oppressive conditions that fall far below international human rights standards. Because of the poor financial situation of households, the barriers and attitudinal obstacles in architecture and transportation, many families are unable or unwilling to support their disabled parents. One result is the frequent institutionalization of the severely physically disabled, as well as developmentally disabled children and adults. Such institutions are often characterized by a hospital-like and depressing atmosphere, domineering directors and rigid rules. Isolation from the community on the outskirts or away from urban centers is common.

People with disabilities have very few alternative sources of funds available to them. Having been marginalized, dehumanized and discriminated against for centuries, men, women and children with disabilities have very limited access to resources. Most have woefully inadequate incomes, and many live far beneath the poverty line in the country in which they reside.

Moreover, many of the traditional sources of funding are not available. Many major foundations (such as the Ford Foundation) explicitly (but inexplicably) have stated that they do not fund disability issues. Still other foundations do not specifically exclude disability, but, in fact, give only to more "traditional" causes such as racial minorities, the environment and women's rights. Such limited funds as have been granted in the area of disability have historically gone to support research on "cures" for various diseases. The actual result is to provide funds for the medical and research professions and virtually nothing to alter societal attitudes or improve the daily lives of men, women and children who already have disabilities.

In contemporary societies, no minority individual is safe or can be expected to fully participate in the life of the community unless the at risk group is organized and has effective representation. Disability organizations urgently require financial support to make them viable, and such organizations are desperately needed by the disability population. The organizations, in turn, cannot be effective without financial resources. Yet outside of the most economically well developed countries, the organizations representing people with disabilities are very few in number and are drastically underfunded and under-resourced. They operate on shoestring budgets and are forced to rely on sporadic volunteerism and archaic equipment.

As illustrated by the Proposed Order attached hereto as Exhibit A, procedures and priorities can be established to ensure that the Disability Funds are used for projects that (a) support and improve the lives of people with disabilities (b) with emphasis on areas where the need is greatest and (c) with priority given to practical and high impact projects. In particular, by ensuring that people with disabilities themselves and members of disability organizations participate in the decision making, the Court can ensure that the funds will be distributed in the most effective manner, and dedicated to the most needed projects. The plight of people with disabilities will be addressed worldwide, and the focus will not be limited to any one region. However, because of the likely location of most survivors and the relative need, geographical priority should be given to projects in Central and Eastern Europe.

There are multiple reasons why the proposed Trust will be an effective utilization of the remaining settlement funds. For example, to the extent that the Disability Funds support projects in areas of greatest need, it is likely to be operating in geographical areas which are less economically developed. Accordingly, its grants will be heavily leveraged. One thousand U.S. dollars, going to an organization in the most developed countries, will achieve little. The same sum can cover substantial costs at a Center for Independent Living in a country formerly within the Soviet bloc. Similarly, it is difficult to imagine holding a 3-day conference of disabled people in the United States for an expenditure of less than $100,000. However, disability groups in Hungary each year put on a major training, networking and leadership conference for disabled people at a total cost of less than $30,000. In this context, the Disability Funds will have an extraordinary impact. It can turn disability organizations from struggling and overwhelmed groups into effective voices which dramatically improve the status of people with disabilities and hasten their integration into general society and access to resources.

Moreover, many societies are still transitioning toward more democratic and free enterprise modes of operation, thus providing windows of opportunity for people with disabilities to participate in the political, social and economic life of their countries. Increased resources, improved training, and the creation of local service and legal disability centers can be instrumental in changing the lives of people with disabilities in countries that do not yet recognize their rights and have not made meaningful advances for disabled people in the areas of legislation, technology, or architectural design. Encouraging development of non-profit groups, as well as short-term individual projects, the Disability Funds can be critically effective in promoting equal opportunities for people with disabilities.

VI. Cy Pres Relief Is the Most Appropriate Remedy for the Class of "People Who Are Physically or Mentally Disabled or Handicapped."

A. *Cy Pres* Is The Most Appropriate Remedy Given The Infeasibility of Locating and Distributing the Settlement Funds to Individuals with Physical and Mental Disabilities Who Were Persecuted by the Nazis.

Where distribution of class funds to class members is infeasible or extremely difficult, *cy pres* principles guide courts in determining an appropriate use of the funds. *See Jones v. National Distillers*, 56 F.Supp. 2d 355, 357 (S.D.N.Y. 1999) (citation omitted); *cf.* James R. McCall et al., *Greater Representation for California Consumers – Fluid Recovery, Consumer Trust Funds, and Representative Actions*, 46 Hastings L.J. 797, 807 (1995) (explaining that the fluid recovery procedure allows funds that cannot be directly distributed to class members be awarded in a manner that puts those funds to their "'next best' use and produce[s] benefits for as many class members as possible"). Applying the funds to the "next best" class realizes, as nearly as possible, the intended use of the funds by maximizing the number of plaintiffs compensated. *See Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 84 F.3d 451, 455 (D.C. Cir. 1996).

Typically, courts employ *cy pres* principles in the class action context to distribute settlement funds for the indirect benefit of the class members because direct distribution to class members is not practical or is very difficult. *See In re Matzo Feed Products Litigation*, 156 F.R.D. 600, 605 (D.N.J. 1994). Numerous Courts have approved the application of *cy pres* principles, which have guided the distribution of class funds in a broad range of cases. *See, e.g., Powell v. Georgia-Pacific Corp.* 119 F.3d 703, 706-07 (8th Cir. 1997) (affirming the district court's *cy pres* distribution of unclaimed funds to support scholarships for black high school students living in the counties in which most of the class members had resided); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990) (holding that the district court properly considered the use of fluid recovery for the purpose of distributing unclaimed funds but rejecting the district court's specific proposal); *Nelson v. Greater Gadsen Hous. Auth.*, 802 F.2d 405, 409 (11th Cir. 1986) (approving the district court's order directing the defendant housing authority to use unclaimed compensatory damages to improve energy efficiency of apartment units or to improve defendant-supplied appliances in those units); *Simer v. Rios*, 661 F.2d 655, 676 (7th Cir. 1981) (adopting a case-by-case approach to determining the propriety of using a fluid recovery mechanism but concluding that such a mechanism was unnecessary to further the substantive policies at issue); *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359-60 (S.D.N.Y. 1999) (authorizing the charitable donation of remaining class settlement funds to a legal services organization); *State v. Levi Strauss & Co.*, 715 P.2d 564 (Cal. 1986) (allowing the implementation of fluid recovery in the class action context and specifically approving the creation of a consumer trust fund in a consumer fraud class action); *Gordon v. Boden*, 586 N.E.2d 461, 510 (Ill. App. 1991) (concluding that fluid recovery is appropriate in a consumer fraud class action).

Here, the infeasibility of locating and communicating with individual disability survivors, especially given the lack of success thus far, makes *cy pres* relief particularly appropriate.

B. The Characteristics of This Case and of the Class of Survivors with Disabilities Call for the Proposed Distributions Which Will Ensure That the Maximum Number of The Class Benefits from the Settlement.

The Second Circuit has explicitly approved the *cy pres* approach to class relief in crafting a pretrial settlement. *See In re "Agent Orange" Product Liability Litigation*, 818 F.2d 179, 184-85 (2d Cir. 1987) (noting that "a district court may 'provide broader relief [in an action that is resolved before trial] than the court could have awarded after a trial'" (citation omitted)); *see also West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (approving a settlement of sixty-six consolidated antitrust class actions, based on the sale of antibiotic drugs, that allowed the expenditure of unclaimed funds for a public health purpose); National Association of Consumer Advocates, *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, 176 F.R.D. 375, 392 (1997) (observing that it is permissible to create a settlement that includes a *cy pres* provision). Indeed, the leading class action treatise advises:

> [C]ourts are not in disagreement that cy pres distributions are proper in connection with a class settlement, subject to court approval of the particular application of the funds. Thus, even in circuits that have ruled that cy pres or fluid class recovery distributions are not valid in contested adjudications, these distributions have obtained a stamp of approval as part of a class settlement.

Newberg on Class Actions § 11.20 (footnotes omitted). Thus, there is no doubt as to the propriety of applying *cy pres* principles to fashion a fair settlement in the instant action.

The characteristics of both the instant litigation and this specific disability victim group are precisely those that call for the *cy pres* approach suggested here. "The fluid recovery is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case." *Simmer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981); *see Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997) (noting that *cy pres* recovery is "ideal for circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed"); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990) (observing that federal courts have frequently employed *cy pres* distributions "in the settlement of class actions where the proof of individual claims would be burdensome or the distribution of damages costly").

The *cy pres* approach to providing relief for survivors with disabilities is also particularly tailored to their contemporary and historical situation. Although all victims were subject to unspeakable horrors, the position of people with disabilities during the Holocaust was dramatically different from that of other victims. As described previously, it is also different now. The wrongs inflicted on people with disabilities, and their individual and collective situations are all distinct from many other Holocaust victims involved in this settlement fund. Given the special circumstances of survivors with disabilities including isolation, absence of children, segregation, difficulties with communication, type of stigmatization, failure to provide targeted notice, and institutionalization, a *cy pres* approach is the only feasible way to ensure that these class members benefit fairly from the settlement funds.[17]

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[17] In fact, courts have allowed *cy pres* distributions that have little bearing on the plaintiff class. As one court in this circuit recently observed:

> The absence of an obvious cause to support with the funds does not bar a charitable donation . . . . "In recent years, the doctrine appears to have become more flexible. . . . [W]hile use of funds for purposes closely related to their origin is still the best cy pres application, the doctrine of cy pres and courts' broad equitable powers now permit use of funds for other public interest purposes by educational, charitable, and other public service organizations."

Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (citations omitted). In keeping with this observation, the *Jones* Court allowed the charitable donation of settlement funds to The Legal Aid Society while acknowledging that the connection to the settlement fund's intent was "thin." *Id.*

In this case, the tie between the proposed *cy pres* distributions and the large subclass of circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed"); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990) (observing that federal courts have frequently employed *cy pres* distributions "in the settlement of class actions where the proof of individual claims would be burdensome or the distribution of damages costly").

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These *cy pres* distributions will benefit both directly and indirectly the very persons who were persecuted or damaged during the Holocaust because of their disabilities. *See supra,* Section IV. Every individual who will benefit from the Disability Funds is linked to the subclass of disabled survivors and to their suffering.

As the settlement in this case recognizes, this victim group is entitled to a share of settlement funds that fairly accounts for their widespread persecution during the Holocaust as well as their continuing suffering as a result of contemporary discrimination against people with disabilities. The *cy pres* distributions proposed for this subclass will ensure that settlement funds inure to the benefit of as many disabled survivors as possible. In this regard, applying the *cy pres* doctrine also will reach the many survivors with disabilities who failed to receive notice of the settlement or who, because of their disability and situation, could not respond.

VII. Summary of Responses to Requests for Information in the *Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds.*

A. Source Materials

The process of compiling information regarding persons with disabilities is still at an early stage throughout the world. DRA has relied upon the best available data, reports, and papers to reach the conclusions put forth in this proposal. DRA has utilized information generated by the World Bank, the United Nations, the United States State Department, the National Council on Disability, the European Disability Forum, Amnesty International, and Mental Disability Rights International, as well as the expert opinions of Dr. Mitchell LaPlante and Dr. Hugh Gregory Gallagher.

B. Number and Location of Disabled Class Members

The number and location of people in the proposed victim group who will be served by this proposal is large, but difficult to ascertain with precision. Because the proposal will enhance the social integration and protect the human and civil rights of persons with disabilities, the benefits of this proposal will positively affect innumerable lives of men and women with disabilities. However, reliable information about members of this victim group is scarce.

Based on the best available data, it is estimated that between 600,000 and 1.2 million Holocaust survivors with disabilities are still alive. *See* Exhibit G to Decl. of Sid Wolinsky, Decl. of Dr. Mitchell La Plante (Director, Disability Statistics Center, U.C.S.F., former U.N. Expert - Committee on Disability Statistics) at ¶12. DRA further estimates that Holocaust survivors with disabilities reside in the geographic areas listed below in the following percentages: Central and Eastern Europe (including the countries of the former Soviet Union) (65%); Western Europe (10%); Israel (10%); United States (10%); and other (5%).

C. Number and Location of Needy Disabled Class Members

Members of the disabled victim group are by definition needy. The Special Master has previously explained the concept of need in detail in Annex F ("Social Safety Nets"); and Annex K ("Swiss Humanitarian Fund"). In his analysis of the social safety nets available to Jewish survivors, the Special Master described the concept of "need" by reference to the economic condition of Holocaust survivors in specific geographic areas. The Special Master explained that "the lives of (survivors of Nazi persecution) in the former Soviet Union and many Central and Eastern European nations generally are marked by extreme deprivation of income, medical and social support." Annex at F-2. The Special Master further noted that in the Swiss

Humanitarian Fund, the concept of "need" was more specifically defined in each country that Holocaust survivors were found, taking into account local and community economic conditions. At a minimum, a Holocaust victim had to live at or below the local poverty line in order to be deemed "needy." Annex at K-6.

Given the definition of "need" described by the Special Master, the proposed disabled class members who will benefit from this proposal clearly qualify for the financial assistance that the proposed Trust will provide. Worldwide, people with disabilities are among the poorest of the poor. In every country where Holocaust survivors live, most if not all of disabled survivors live at or below a subsistence level. The relative poverty levels of members of this victim class are extensively documented in the numerous reports cited within the proposal.

Among the major regional areas where Holocaust survivors are dispersed, those who reside in Central and Eastern Europe are likely the most in need. Because those countries are relatively poor as shown by economic indicators, persons with disabilities who live in those countries are needier when compared to their counterparts in the developed nations of Western Europe, Israel, or the United States.

D. Assessment of Needs

The primary needs of Holocaust survivors with disabilities are social programs and services that will enhance the integration, equality, dignity and independence of the victim class. Social safety nets for Holocaust survivors with disabilities that provide these services are non-existent or extremely limited. As detailed throughout the proposal, organizations that serve the disability community are still very limited in many countries and lack significant sources of funding to provide these services.

Estimates of survivor longevity are necessarily speculative. However, Dr. Hugh Gallagher has noted that people with disabilities "are not necessarily unhealthy, nor do they face dramatically shortened life expectancies." *See* Exhibit H to Decl. of Sid Wolinsky, Decl. of Dr. Hugh Gregory Gallagher at p.5.

E. Recommendation for Distribution

The seventeen disability organizations and individual Holocaust survivors represented here, as well as the organizations expressing support, recommend that a portion of the residual unclaimed funds be distributed to a Trust that will fund disability projects that improve and protect the civil and human rights of persons with disabilities. Projects will be funded in accordance with the priorities set forth in the Proposed Order, submitted as Exhibit A to the proposal. We estimate that at least fifty thousand individuals will immediately benefit from programs funded by the Trust if the Trust is funded at the maximum level requested (i.e. 3% of the total settlement fund). In accordance with the Proposed Order, all funds will be distributed within three (3) years of the date the Court transfers funds to the Trust. DRA estimates that at no time will the cost of evaluating proposals and administering funds rise above 1% of the total amount transferred to the Trust.

F. Recommended Distribution Agency

DRA recommends that Open Society Institute ("OSI"), a non-profit charitable foundation, act as Trustee and oversee the distribution of awarded funds. OSI has extensive experience working on programs that benefit persons with disabilities and other at risk communities. OSI also has administered numerous charitable grants throughout the countries of Central and Eastern Europe. Detailed information about OSI can be found in its Annual Report, submitted as Exhibit B to the Proposal, as well as at <www.soros.org>.

G. **Proposal Supporters**

The names, addresses and affiliations of all persons and organizations affiliated with and supporting this proposal are attached as Exhibit C to the proposal.

VIII. Conclusion

Through all of recorded history, people with disabilities have been regarded as sub-human. At worst, they have been left to die as beggars or killed. At best, they have been kept alive through subsistence aid and charity, often in the most isolated and demeaning circumstances. This proposal for a *cy pres* remedy is directed at the root causes of disability prejudice and neglect, and at countering the conditions which led to the Holocaust for people with disabilities.

The overwhelming physical and attitudinal barriers faced by men and women with disabilities, stem not from any individual disability or absence of humanitarian aid, but rather from arbitrary societal constructs and deficiencies in the legal and political structures that can and must be changed to accommodate the full spectrum of human abilities and disabilities. In the more industrialized countries of the world, the years since the Holocaust have seen the development worldwide of the working concept of "independent living." That concept does not imply that people with disabilities would be completely self-sufficient, but rather that they would be full participants in an interdependent society. The focus of international organizations (such as the United Nations and the European Union) working with disability groups for at least 30 years now has been to move away form charity and pity and to enable people with disabilities to gain control over their lives and to provide access to societal benefits. This in turn enables disabled people to be self-directed and to lead lives of dignity rather than under the control of others. This model gave birth to the disability rights movement in the 1970s. In the last few decades, for the first time, a true community of people with disabilities, directing their own destiny (and with their own agenda and priorities) has emerged.

The Holocaust represents a massive failure on the part of multiple institutions to recognize and protect the infinite value, equality and dignity of human life. The blunting of sensibilities toward people with disabilities, and the contagion of indifference during the Nazi regime are relevant in a deeply disturbing way to their present situation. The distribution requested here will be a significant step in helping disabled people bear witness to the monstrous crimes of the Holocaust and to carry out their duty of remembrance in the most important and lasting manner-by building a more humane society in which people with disabilities can live with safety and dignity.

Reason and justice make it appropriate that a meaningful percentage of the settlement be allocated to people with disabilities who, like other victim groups, were subject to looting, forced labor, horrific medical experiments, sterilization and extermination. In addition, these funds should be allocated to projects that advance the human rights of people with disabilities. Doing so will dramatically improve the daily lives of men, women and children with disabilities, who, throughout the world, are trapped by architectural and attitudinal barriers or who are grossly over-institutionalized in inadequate, demeaning and hospital-like settings. Although no amount of money will ever erase this history, the gains that can be made under the proposed distribution, including those directed at the root causes of persecution of people with disabilities, will be the ultimate memorial to those who suffered under Nazi rule.

DATED: December 18, 2003 Respectfully Submitted,

SID WOLINSKY

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Exhibit A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIMS ASSETS;
WEISSHAUS, et al.

Plaintiffs,

v.

UNION BANK OF SWITZERLAND, et al.

Defendants.
_______________________________________/

CASE NO. 96CV4849

[PROPOSED] ORDER FOR DISTRIBUTION OF SETTLEMENT FUNDS TO ESTABLISH *CY PRES* REMEDY FOR PHYSICALLY OR MENTALLY DISABLED OR HANDICAPPED

Court: Honorable Edward Korman
Special Master Judah Gribetz

1. The Court finds that the category of victim-claimants in this litigation designated as persons physically and mentally disabled or handicapped has characteristics which make it particularly appropriate to provide *cy pres* relief to this category of victims. Like other victim groups, persons with disabilities endured great suffering during the Nazi regime including forced labor, horrific medical experiments, looting, sterilization and extermination.

2. Persons with disabilities as a group continue to face widespread discrimination and marginalization. This discrimination results in the institutionalization and segregation of people with disabilities, their isolation from traditional means of communication and dissemination of information, and an absence of resources and coordination among their representative organizations. The relative isolation of persons with disabilities within different societies has resulted in great difficulty and expense in attempting to locate such members of the victim class.

3. In addition, the physical characteristics of people with disabilities, including restrictions on their sight, hearing, cognitive abilities, and mobility, increase the difficulty of

locating and communicating with such Holocaust survivors.

4. As a result, during the period of distribution of this settlement, thus far, and in spite of strenuous efforts to reach them, disabled people as a group have not submitted claims and recovered humanitarian aid proportional to the needs and numbers of this victim class.

5. Accordingly, a portion of the settlement funds, in accordance with the procedures described below, shall be set aside as a remedy for this category of victim-claimants. Said *cy pres* distribution shall be in addition to any payments made to individual claimants and shall not limit individual claims that may have been or will be filed by persons who are individual class members and who have specifically identified themselves as a class member who is "physically or mentally disabled or handicapped." Such claims shall be handled pursuant to the claims process established in these proceedings for individual claimants and their heirs.

6. From the settlement funds, a total of ___________________________ ($____________) (hereafter the "Disability Funds") shall be set aside under Court supervision as specified herein, to establish a trust that will provide grants to disability oriented, non-profit, non-governmental organizations for purposes most likely to directly benefit Holocaust survivors with disabilities as described below.

7. The Disability Funds shall be paid in trust to the ____________________________, an established nonprofit private foundation, for the purposes set forth in this Order.[1] Should such foundation be unwilling or unable to act as the Trustee, the Court will solicit alternate recommendations from one or more disability organizations and will appoint as Trustee another

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[1] Disability Rights Advocates recommends that Open Society Institute ("OSI") fulfill the role of Trustee based on OSI's extensive experience (a) working on programs that benefit persons with disabilities and other at risk communities, and (b) in administering charitable grants throughout the countries of Central and Eastern Europe. OSI is one of the leading U.S. foundations with experience administering such international advocacy programs and has indicated its willingness to accept the responsibility to act as Trustee in this case.

non-profit charitable foundation. The Trustee is authorized, under the Court's supervision, to take all lawful measures as may be reasonable or necessary to fulfill the requirements set forth in this Order. The Disability Funds shall be kept in trust in the United States, and administered through the Trustee's offices in the United States, but procedures shall be established by the Trustee to ensure that grants can be administered worldwide.

8. The Trustee will, in consultation with Disability Rights Advocates, determine the composition of a Disability Holocaust Class Advisory Board ("Advisory Board"), which shall consist of five to nine persons. Members of the Advisory Board shall serve without compensation. The composition of the initial Board and changes in the Board shall be subject to final approval of the Court (or the Special Master or other person designated by the Court). The initial composition of the Board shall be determined no later than 60 days from the date of this Order. The Trustee will use its best efforts to assure that (a) the Board primarily be composed of representatives of organizations of and for people with disabilities, and (b) that the Board represents a spectrum of disabilities, disability organizations and geographic areas.

9. The Trustee, working with the Advisory Board, shall solicit and evaluate proposals for utilization of the Disability Funds (in accordance with the priorities and procedures set forth by the Court herein) from non-governmental organizations which serve and advance the interests of people with disabilities.

10. The Trustee will make all funding decisions in consultation and with the approval of the Advisory Board, subject to final approval by the Court. Should the Trustee find it necessary and efficient to appoint a specific Program Officer to assist it in administering this trust, it may appoint such a Program Officer and small staff as may be necessary, and, subject to Court approval, use a small portion (i.e., no more than _______%) of the Disability Funds for

this and any other administrative purposes.

11. The Court will exercise direct judicial supervision of expenditures. All grants over $25,000 will be made only on Court Order. The Court may consult with the Trustee, Advisory Board, and such other advisors as the Court may designate. All investment decisions will be subject to the authority of the Court with the advice of the Trustee and any investment manager or managers the Court may designate.

12. In order to maximize the funding of proposals most likely to benefit Holocaust survivors with disabilities, the Trustee is directed to prioritize the award of Disability Funds among the submitted proposals. The Court directs the Trustee to place the highest priority on funding proposals for programs that will protect and enforce the rights of disabled Holocaust survivors who were either persecuted during the Nazi regime because of their disability or who have become disabled as the result of persecution experienced during the Holocaust, to the extent that such disabled survivors can be reached.

13. The Trustee shall place the next highest priority on funding proposals that promote and protect the rights of persons with disabilities in countries where the Court has identified known populations of Holocaust survivors, taking into account the relative degree of need of persons with disabilities in those countries. Given the pattern of distributions to Holocaust survivors thus far in this settlement and identification of the geographic areas where disabled Holocaust survivors are most in need, the Court anticipates that the funding for proposals that will benefit persons with disabilities will be apportioned geographically in approximately the following percentages: Central and Eastern Europe (including the countries within the former Soviet Union) (65%), Western Europe (10%), Israel (10%) the United States (10%), and other (5%).

14. The overall grant program to fund proposals shall not be limited to any one disability or category of disabilities. The Trustee shall seek to fund high impact practical proposals that facilitate social change or institutional reform to benefit persons with disabilities, such as proposals that seek to create independent living centers, provide legal services, remove architectural barriers, and provide enhanced access to societal benefits.

15. The Trustee shall encourage and solicit such proposals in order to directly address the root causes of discrimination against persons with disabilities in countries where Holocaust survivors currently live by attempting to reduce the stigma and prejudice experienced by persons with disabilities. In accordance with the principle of awarding Disability Funds to proposals that seek to promote the independence and integration of persons with disabilities, the Disability Funds shall not be used to support projects or entities that promote or rely upon concepts of pity or charity for people with disabilities or for medical research.

16. Any funding priorities and procedures, in accordance with these general guidelines, will be determined by the Trustee in conjunction with the Advisory Board. Specific guidelines shall be adopted and publicly promulgated by the Trustee no later than 120 days from the date of establishment of the Advisory Board.

17. The Court notes that no museum or monument in the world is devoted primarily to memorializing the suffering of the disabled victims of the Holocaust. Therefore, the Trustee may solicit and consider proposals for one or more disability remembrance and education centers, exhibits, or conferences. Up to ten percent (10%) of the Disability Funds may be used (in the discretion of the Trustee and Advisory Board and subject to final approval of the Court) for the purpose of providing a grant or grants for disability commemorative, remembrance, and memorial purposes. These funds may be used for projects which further public awareness of

disability history, culture and remembrance, specifically including memory of the atrocities committed against people with disabilities during the Holocaust. Projects designed to counter discrimination, bias and negative myths and stereotypes about people with disabilities may be considered to fall within the purposes of this section.

18. Unless otherwise required by applicable laws, including tax laws and regulations, the funds not immediately allocated to specific programs will be retained in reserve for future expenditures on new or existing programs.

19. Because this program has the potential to make a unique and dramatic difference in the lives of people with disabilities, and can have a substantial leveraged effect in bringing about better lives for people with disabilities, the Trustee is encouraged to solicit funds from other sources to match or enhance the Disability Funds. The Trustee may receive and administer grants or funds received from sources other than the Holocaust Victims Assets distribution, so long as such funds and grants are administered consistent with this Order.

20. All actions taken by the Trustee shall at all times be undertaken in accordance with this Order and subject to the supervision of this Court. The Court reserves jurisdiction to implement such reporting, monitoring and accounting directives as may be necessary to ensure that the Court maintains effective supervision of the Disability Funds and their use. To ensure that the Disability Funds are used to benefit the maximum number of disabled Holocaust survivors the distribution of said funds shall be concluded no later than three (3) years from the date of transfer of the Disability Funds to the Trustee.

IT IS SO ORDERED.

DATED: __________, 2004

Honorable Edward Korman
U.S. District Court Judge

Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIMS ASSETS;
WEISSHAUS, et al.

Plaintiffs,

v.

UNION BANK OF SWITZERLAND, et al.

Defendants.
_____________________________________/

CASE NO. CV 964849

DECLARATION OF SID WOLINSKY IN SUPPORT OF PROPOSAL FOR *CY PRES* AWARD FOR THE CLASS OF "PEOPLE WHO ARE PHYSICALLY OR MENTALLY DISABLED OR HANDICAPPED" FROM THE ALLOCATION OF RESIDUAL UNCLAIMED FUNDS

Court: Honorable Edward Korman
Special Master Judah Gribetz

I, SID WOLINSKY, declare:

1. I have personal knowledge of the facts contained in this declaration and, if called as a witness, am competent to testify as to those facts.

2. I am the Director of Litigation and co-founder of Disability Rights Advocates. I have been the lead lawyer for Disability Rights Advocates throughout the above-captioned proceedings.

3. Attached hereto as Exhibit A is a true and correct copy of selected portions of the forthcoming manuscript *Forgotten Crimes: The Holocaust and People with Disabilities*, by historian Suzanne E. Evans. The manuscript is the basis for a book that will be commercially published by Ivan R. Dee in Spring, 2004.

4. Attached hereto as Exhibit B are true and correct copies of selected Holocaust photographs.

5. Attached hereto as Exhibit C are true and correct copies of letters previously submitted to the Court in October, 2000 by various disability organizations. These letters are in support of a *cy pres* allocation to the class of people with physical or mental disabilities, and are from (1) European Disability Forum, (2) California Foundation for Independent Living Centers, (3) Legal Advocacy for Defense of People with Disabilities, and (4) German Council of Centers for Self-Determined Living of Disabled People.

6. Attached hereto as Exhibit D is a true and correct copy of the Declaration of Ottmar Miles-Paul, Public Relations Officer for Netzwerk Artikel 3, confirming the lack of networks serving Holocaust survivors with disabilities and supporting the need for funding of projects to advance the human and civil rights of persons with disabilities.

7. Attached hereto as Exhibit E is a true and correct copy of the Declaration of Susan Henderson, Director of Administration at Disability Rights Education and Defense Fund (DREDF), confirming the lack of networks serving Holocaust survivors with disabilities and supporting the need for funding of projects to advance the human and civil rights of persons with disabilities.

8. Attached hereto as Exhibit F is a true and correct copy of the Declaration of Yannis Vardakastanis, President of the European Disability Forum, confirming the lack of networks serving Holocaust survivors with disabilities and supporting the need for funding of projects to advance the human and civil rights of persons with disabilities.

9. Attached hereto as Exhibit G is a true and correct copy of the Declaration of Vladimir Cuk, Coordinator of the Association of Disabled Students of Yugoslavia, confirming the lack of networks serving Holocaust survivors with disabilities and supporting the need for funding of

projects to advance the human and civil rights of persons with disabilities.

10. Attached hereto as Exhibit H is a true and correct copy of the Declaration of Dr. Mitchell LaPlante Re: Class Members with Disabilities, dated February 23, 2000, previously submitted in connection with Disability Rights Advocates' proposal for a *cy pres* allocation.

11. Attached hereto as Exhibit I is a true and correct copy of the Declaration of Dr. Hugh Gregory Gallagher Re: Class Members with Disabilities, dated February 11, 2000, previously submitted in connection with Disability Rights Advocates' proposal for a *cy pres* allocation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of December, 2003 at Oakland, California.

Sid Wolinsky

SID WOLINSKY

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Exhibit A

DRAFT

Forgotten Crimes: The Holocaust and People with Disabilities

by Suzanne E. Evans

INTRODUCTION

Between 1939 and 1945 the Nazi regime systematically murdered hundreds of thousands of children and adults with disabilities as part of its so-called "euthanasia" programs. These programs were designed to eliminate all persons with disabilities who, according to Nazi racialist ideology, threatened the health and purity of the German race. The first category of people the Nazis began exterminating as part of their quest to build a master "Aryan" race was the so-called *Ausschusskinderer,* "garbage children" or "committee children," who had been born with certain supposedly hereditary disabilities. Pursuant to a decree issued by Hitler in the fall of 1939, German doctors, nurses, health officials, and midwives were required to report, in exchange for a fee, all infants and children up to the age of three who showed signs of "mental retardation" or physical deformity. Based on this information, a panel of "medical experts" decided which of those children should live or die. The children selected for death were then transferred from their homes or home institutions to a pediatric killing ward. There, shortly after their arrival, they were killed by lethal injection or placed in so-called "hunger houses" where they died slowly and painfully from malnutrition.

Ridding Germany of children born with disabilities was central to Hitler's vision of the volkish (people's) state. Because the children represented Germany's future, Hitler considered the elimination of all mentally and physically "defective" children as a crucial step in his quest for racial purification. Scholars disagree on exactly how many children with disabilities were exterminated by the Nazi regime, but most agree that the number falls somewhere between 5,000 and 25,000.

With the extermination of Germany's disabled children underway, Hitler was asked by Dr. Karl Brandt and Phillip Bouhler, the two men in charge of the children's killing program, to sign a decree that would expand the authority of German physicians to provide a "mercy death" to all German adults suffering from "incurable" diseases and disabilities. Shortly after Hitler signed this order in October 1939, Nazi officials began disseminating questionnaires and registration forms to all German hospitals, asylums, and institutions that cared for the chronically ill. The forms required hospital officials to report all patients who were suffering from conditions such as schizophrenia, epilepsy, paralysis, encephalitis, Huntington's disease, and severe physical deformities. Based on the information provided on the forms, Nazi doctors decided, pursuant to procedures similar to those used in the children's killing program, which patients should be killed. The men and women selected for death were transported to one of the six official "euthanasia" centers, where they were gassed to death in chambers built to resemble large shower or "therapeutic inhaling" rooms. Between January 1940 and August 1941, at least 275,000 Germans with disabilities were exterminated as part of the Nazi regime's so-called T-4 euthanasia program, named for the location of the program's central offices at Tiergartenstrasse No. 4 in Berlin.

Despite attempts to disguise the true purpose of the T-4 program, the secrecy surrounding the killings eventually broke down. Some staff members spoke of the killings while drinking in local pubs after work; women's hairpins turned up in urns sent to the relatives of murdered male victims; or the cause of a victim's death was listed as appendicitis when the victim's appendix had been previously removed. By the summer of 1941 a small coterie of concerned parents and priests began publicly protesting the killings. On August 3, 1941, for example, Bishop Clemens August Graf von Galen delivered a sermon to his parishioners in which he detailed everything he knew about the murders. Around the same time, grieving parents began turning to the courts or placing public notices in local newspapers about the sudden and unexpected deaths of their children who had died from mysterious ailments while under the "care" of Nazi physicians.

In response to such public criticism, Hitler ordered, on August 24, 1941, the immediate halt of all "mercy killings" at the six official euthanasia centers. Despite this official stop order, the Nazi regime continued exterminating people with disabilities in other regions and by other means. During this period of decentralized mass killings, sometimes referred to as the period of "wild euthanasia," Nazi doctors decided, according to their own arbitrary standards, which patients should live or die. Indiscriminate mass murder thus became part of general hospital routine as hundreds of thousands of patients with disabilities in Germany, Austria, and the occupied territories were shot, burned, frozen, starved, tortured, or poisoned to death.

Meanwhile, in the wake of Hitler's stop order, a new killing program code-named Aktion 14f13 was established in order to "weed out" from the overcrowded Nazi concentration camps all "asocial" prisoners who were too sick or disabled to work. After brief medical exams, these prisoners were transferred to nearby killing centers where they were gassed to death simply because they were unable to work.

But even before the T4 and Aktion 14f13 programs began, Nazi officials had begun killing psychiatric patients in the Prussian provinces, occupied Poland and the former Soviet Union. Between September 29 and November 1, 1939, for example, special Einsatzgruppen squads shot 3,700 patients in asylums in the region of Bromberg, Poland.

And between December 1939 and January 1940, special SS units gassed 1,558 patients from Polish asylums in specially adapted gas vans in order to make room for anticipated wartime casualties and military barracks. By 1945, as many as 750,000 people with disabilities had been murdered by the Nazi regime.

In addition to the mass slaughter, the Nazi regime also forcibly sterilized nearly a half-million Germans with disabilities pursuant to the Law for the Prevention of Offspring with Hereditary Diseases. Enacted by the German government in July 1933, the law called for the compulsory sterilization of all persons suffering from supposedly "hereditary" diseases, such as congenital feeblemindedness, schizophrenia, manic-depressive psychosis, hereditary epilepsy, Huntington's chorea, hereditary blindness, hereditary deafness and physical deformities. Thousands of young German men and women died as a result of botched sterilization procedures and experiments involving the injection of corrosive chemicals into their reproductive tracts.

After the war, disabled victims were not recognized by government aor legal authorities as persons who had been persecuted by the Nazi regime. Survivors of the euthanasia and sterilization programs received no restitution for time spent in the killing wards or for having been forcibly sterilized. Although the sterilization law had been declared invalid by the Allies, the postwar German state did not recognize sterilization under the Nazi era as racial persecution, and postwar German courts consistently held that forced sterilization under the law had followed legally proper procedures. Disabled persons challenging such rulings consistently lost their cases in court. The appeal of a sterilized deaf person, for example, was denied in 1950 after two court-appointed physicians certified that the original finding of congenital deafness had been correct and that his sterilization was therefore legally permissible under the then-existing law. Similarly, in 1964, the appeal for restitution from another survivor who had been sterilized during the Nazi era was denied on the grounds that since he was deaf, his sterilization did not constitute Nazi persecution. To this day the German state has not fully recognized or compensated disabled persons for the atrocities committed against them by the Nazi regime. To this day, few people are aware that such atrocities happened.[1]

Though the crimes described in this book were unique to Nazi Germany, inhumane and degrading treatment of people with disabilities is endemic in contemporary society. For example, Greek authorities recently ignored a concentration camp for the insane on the island of Leros until several western European television stations made a public issue of it. And in Britain, patients in secure hospitals such as Ashworth or Rampton have been regularly abused, particularly if they are of Afro-Caribbean origin. In addition, the recent debates over the ideas of moral philosopher Peter Singer, who maintains that "killing…a chimpanzee is worse than the killing of a gravely defective human" serve as a chilling reminder that the very same ideas and attitudes that led to the Holocaust are still prevalent in the world today.[2]

Remembrance of the mass slaughter of people with disabilities during the Holocaust is therefore crucial to an understanding of (1) how and why people with disabilities continue to be marginalized in contemporary society and (2) the attitudes and

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[1] See Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (University of North Carolina Press: 1995).

[2] , Michael Burleigh, *Death and Deliverance: "Euthanasia" in Germany, 1900-1945"* (Cambridge: 1994).

moral failures that allowed the Holocaust to happen. Until a full account of the Nazi horrors is acknowledged and remembered, we all remain at risk.

(Pages 7-65 omitted)

men and women in its forced labor program between 1939 and 1945. Siemens obtained most of its work force from among the prisoners of at least 20 death camps set up by the Nazis, including Auschwitz, Flossenberg and Gross Rosen.

Exploitation and Plunder

In retrospect, it is clear that the Nazi regime, German industry and various Swiss entities profited substantially from the persecution and exploitation of people with disabilities. According to Hugh Gallagher, the economics of euthanasia for the chronically disabled were widely recognized and discussed. "It was wartime, budgets were sky-high, deficits were extraordinary, [and] health resources were limited," Gallagher wrote. And "it was argued that expenditures for long-term care of patients, who might never again be economically productive citizens, made little economic sense in cost/benefit terms as compared with similar expenditures on improved public health programs to keep the able-bodied healthy." In short, scarce health care resources had to be rationed.[95]

The belief that people with disabilities were categorically non-productive and impoverished is false. Many people with disabilities led normal lives with families, homes, property and businesses. The exploitation of people with disabilities contributed in multiple ways to the Nazi war effort and substantially enriched the Nazi regime. As we

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[95] Current discussions of the need to "control costs" and to ration and prioritize health care based on economic rather than medical considerations (especially when accompanied by discussions of assisted suicide for the disabled) have a chilling resonance for people with disabilities today. Disability Rights Advocates, *Forgotten Crimes*, p 23.

have seen, gold watches, gold fillings, spectacle frames, and other personal assets were plundered from victims; their bodies were used for so-called "medical research"; the families of victims were deceived into paying fraudulent expenses; and savings from exterminating rather than caring for the disabled population were tallied. Moreover, people with disabilities were forced to work under inhumane conditions throughout the Nazi era in disability institutions, concentration camps, local industry and for the German military.[96]

Even the extermination of people with disabilities contributed to the German war effort and substantially enriched the Nazi regime. Relatives of murdered victims were forced to pay fraudulent expenses not only while their loved ones were institutionalized but long after they were killed. Families were charged (at least through the day of the victim's death) for food, lodging and "health care." In most cases, families in fact paid beyond the day their loved one was killed because of falsified death certificates. The institutions often falsely added several months onto the lives of patients, generating from two hundred to three thousand extra reichmarks per patient. And since these patients were starved and neglected in their final days, they incurred little to no actual cost for the institutions. The development of entire starvation wards allowed Germany to benefit financially by literally taking food from the mouths of helpless people. The looting methods developed in euthanasia centers were later used in the concentration camps, which also included thousands of people with disabilities.[97]

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[96] DRA, *Forgotten Crimes*

[97] "Trusteeship Office East maintained branches in nearly all ghettos. Like other looted gold, what they collected was conveyed to Berlin, deposited at the Reichsbank, and melted down. Although precise figures are unavailable, most of it was shipped off to

Eradicating these "useless eaters" and "social burdens" ultimately saved the government and the German war machine millions of reichmarks. Overall, the Nazis expected to save 885,439,800 reichmarks by September 1, 1951. For example, government officials calculated that each murdered patient would have consumed 700 grams of marmalade a month, with each kilo of marmalade costing 120 recihmarks. From this they concluded that the extermination program saved 5,902,920 kilos of marmalade, which translated into a savings of 7,083,504 reichmarks over ten years. Savings were similarly tallied from expenditures for cheese, bread, meat and other essentials.

Even school textbooks asked German students to calculate such costs of maintaining people with disabilities. One such "problem" presented in a textbook read as follows: If "[t]he construction of an insane asylum requires 6 million reichmarks, [h]ow many housing units @ 15,000 reichmarks could be built for the amount spent on insane asylums?"

Another "problem" read:

> A mental patient costs about 4RMs a day to keep, a cripple 5.50 RMs, a criminal 3.50 RMs. In many cases a civil servant only has about 4 RMs, a salaried employee scarcely 3.50 RMs, an unskilled worker barely 2 RMs for his family. (a) illustrate these figures with the aid of pictures. According to conservative estimates, there are about 300,000 mental patients, epileptics etc. in asylums in Germany. (b) What do they cost together per annum at a rate of 4 RMs per

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Switzerland…Looted valuables were also consigned to safe-deposit boxes rented from…mostly Swiss, private banks." Ziegler, *The Swiss, the Dead and the Gold,* p. 208.

> person? c) How many marriage loans at 1,000 RMs each could be awarded per annum with this money, disregarding later payment?[98]

A similar accounting problem was expressed in an internal T4 document found in Hartheim in 1945:

> Assuming an average daily outlay of 3.50 RMs there hereby results:
> 1. a daily saving of RM 245.955
> 2. an annual saving of RM 88.543.980
> 3. assuming a life expectancy of ten years
>
> RM 885.439.800….i.e, this sum will have been, or has already been, saved by 1 September 1951 by reason of the disinfection [extermination] of 70.273 persons which has been carried out to date.[99]

In addition to the routine looting of valuables from murdered disabled victims, the staff in the killing centers would often kill patients merely to plunder their assets. "Sometimes the nursing staff just wanted to lay hands upon a watch, a nice suit or a good pair of shoes belonging to a patient, who was then killed to satisfy their cupidity.[100]

The looting methods developed in euthanasia centers were later used in the concentration camps, which also included disabled people. Switzerland also reaped direct and substantial benefits from the Nazi persecution and exploitation of people with disabilities. German officials laundered stolen money through Swiss banks by offering

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[98] From Adolf Dorner, ed., *Mathemtik im Dienste der nationalpoliticschen Erziehung mit Anwendungbeispielen aus Volkswissenschaft, Gelandekunde und Naturwissenschaft* [Frankfurt am Main 1935], p. 42. Quoted in Burleigh, preface.

[99] T4 internal statistical digest found at Schloss Hartheim in 1945. National Archives, Washington, D.C., T 1021, Heidelberger Dokumente, Roll 18, Item Nr. 100-12-463, Exhibit 39, p. 4. Contained in Burleigh, preface.

[100] Ibid.

looted assets at discount prices in exchange for secure deposits. In order to finance intelligence operations, the German Foreign Office also deposited in Swiss banks funds extorted by the Gestapo and profits from sales of looted diamonds and gold. Essentially, the Swiss safeguarded the profits of slave labor and the vast sums of money that the Nazis looted from their victims.[101]

Killing Jews with Disabilities

As Henry Friedlander shows, Viktor Brack lied under oath at Nuremberg when he testified that no Jews with disabilities had been killed in the euthanasia centers. Like Brack, hundreds of rank-and-file doctors involved in the euthanasia killings deliberately lied when asked about the fate of their Jewish patients. According to Friedlander, these lies were part of an elaborate attempt to falsify the record. Even today, their "lies continue to…obscure our understanding of the fate of handicapped Jews" in the Nazi euthanasia program.[102]

The treatment of institutionalized Jews in Germany deteriorated steadily after Hitler assumed power in 1933. At that time, the overwhelming majority of Jewish patients were being treated in non-Jewish German or Austrian hospitals since there were very few Jewish hospitals for disabled patients. Only one Jewish institution served as a psychiatric hospital in the region: The Jacoby Hospital and Nursing Home. Located in Sayn (today Bendorf-Sayn) near Koblenz on the Rhine, the institution was acquired in late 1939 by the Reich Association of Jews in Germany. Additional beds were available in the psychiatric

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[101] Ibid.

[102] This section is based on Friedlander, pp 263-283.

ward of the Berlin Jewish hospital and in the Jewish ward of the Lohr hospital in Bavaria, and throughout the country, Jewish communities maintained a number of old-age and nursing homes that also housed patients with disabilities.[103]

On November 19, 1938 the Reich ministers of the Interior, Labor and Finance issued a joint decree excluding Jews from public assistance. Pursuant to the decree, Jews were entitled to "assistance only from Jewish welfare agencies." But if those private agencies were unable to pay the full amount, public welfare would continue to provide Jews with assistance for "shelter, food, clothing, nursing care, aid for the infirm, as well as pregnant women, maternity cases, midwife services, medical treatment as needed, and burial if necessary." Eight months later, on July 4, 1939, the Tenth Decree to the Reich Citizenship Law imposed on the Reich Association of Jews in Germany the obligation to finance Jewish education and welfare. Thereafter local public welfare offices worked to remove Jews from the safety net of public assistance and to shift the financial burden to private Jewish welfare agencies financed by the Reich Association. This decision to require private citizens to perform the public function of providing for the needy applied also to institutionalized Jews.[104]

The limitation of welfare payments was not the only form of exclusion confronting institutionalized Jewish patients during the 1930s. Private institutions also began discriminating against them. Most private institutions in Germany were church related, belonging either to the Catholic Charity Association or the Protestant Home

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[103] Ibid, p. 263.

[104] Ibid., p. 264

Mission. These private Christian hospitals had always admitted Jews, but in the late 1930s many of them began to exclude them.[105]

In March 1937 the German Supreme Administrative Court for Finances, in a decision concerning the tax-exempt status of non-profit institutions, ruled that "nonprofit exemption cannot be granted to institutions and for purposes designed to benefit Jews." Although this ruling was issued in a case involving a Jewish nonprofit institution, private Christian hospitals claimed that possible loss of nonprofit status made it impossible for them to keep Jewish patients or accept new ones.

A year later, in June 1938, the German government launched another attack against Jewish patients in German hospitals. Emphasizing the supposed "danger of race defilement," the Ministry of the Interior demanded that Jews "be physically separated from patients of German or related blood" and that particular attention be paid to enforcement at state hospitals and nursing homes.

The onset of the euthanasia killings also had obvious implications for Jewish patients. As Friedlander argues: "It is inconceivable that handicapped Jews would not have been included in the euthanasia killing operation, but that is exactly what Brack and other T4 functionaries claimed at Nuremberg. They argued that Jews were excluded from the benefit of 'mercy death' granted German handicapped patients. But they could not deny that in 1940 groups of Jewish patients were transported from German institutions and did not return, as demonstrated by prosecution documents submitted at Nuremberg by the United States that included the transport list of Jews taken from Elgfing-Haar."[106]

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[105] Ibid.

[106] Ibid., p. 270.

Jews were in fact victims of the euthanasia killings from the very beginning. Although they had been excluded from any therapy that could be considered positive, they had been included in every type of negative eugenic measure. Regardless of the euphemistic allusion to "mercy deaths" the Nazi regime considered euthanasia to be the most radical form of exclusion, and Jews were therefore never exempted from this negative type of selection. The exact number of Jews killed in the T4 program will never be known, but Friedlander and other scholars have concluded that the number undoubtedly exceeded several thousand. In early 1940 the Reich Association of Jews in Germany estimated that there were "at least" 2,500 Jews in German public institutions. Since this number represented the lowest possible verifiable figure, and since it did not include Jewish patients in Austria and in private institutions, one can estimate that as many as 5,000 Jews became victims of the euthanasia killings.

The decision to systemically murder handicapped Jewish patients still in German hospitals was apparently made in March or April 1940. Around that time, local offices of the Gestapo as well as T4 began to collect statistics on institutionalized Jewish patients. On April 15, 1940, Herbert Linden of Interior Ministry asked all local authorities to report the number of Jewish patients. His letter to state and provincial agencies administering state hospitals and nursing homes required them to submit within three weeks lists of Jewish patients "suffering from mental illness or feeblemindedness."[107]

The purpose of Linden's circular soon became clear: Jewish patients in various hospitals and homes were transferred to several institutions serving as "assembly centers." From there they were collected by T4's Gekrat and transported to one of the killing

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[107] Quoted in Friedlander, p. 272.

centers. In Bavaria, for example, the Eglfing-Haar hospital served as an assembly center for Jewish patients. There patients were assembled in mid-September 1940 and housed in two isolated buildings. On September 20, T4 officials collected at least 191 handicapped Jewish patients. That same day Dr. Hermann Pfannmuller sent the list of the transferred Jews to the Ministry of Interior in Munich, along with a note: "I herewith report to the State Ministry that henceforth my institution will accommodate only Aryan mental patients."[108] The same process took place in other institutions throughout Germany and Austria. As Friedlander argues, the decision to murder Jewish patients with disabilities formed an important link between the T4 euthanasia program and the "final solution" because "it reveals the accelerated efforts to draw more targeted groups into the killing enterprise." Although we have no evidence about who made the decision to transfer and kill the Jewish patients as a group, Frieldander assigns responsibility to Karl Brandt and Phillip Bouhler. Because they held decision-making sessions at Hitler's headquarters, it is likely, as Friedlander argues, that Hitler was consulted before the order to kill handicapped Jews as a group was issued. That decision, made in the spring of 1940, foreshadowed and possibly foreordained the final solution of 1941.[109]

The Beginning of the End

In the spring of 1945, forensic pathologists attached to the Red Army were dispatched to the asylum at Orbawalde to investigate reports from troops who had been first on the scene

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[108] Ibid., p. 274.

[109] Ibid., p. 282.

at the end of the war. The pathologists interviewed 10 of the surviving prisoners, who later testified that between 30 and 50 patients had been murdered at the asylum every day for several years. Upon inspecting the asylum the Russians discovered large quantities of morphine and scopolamine, thousands of syringes and a storeroom loaded with discarded clothing and hundreds of pairs of shoes. They ultimately exhumed the corpses of 42 patients, ranging in age from 2 to 62. Half of the corpses showed signs of having been injected with some sort of medication, and the organs in 95 percent of the corpses revealed traces of morphine and scopolamine. Based upon information contained in the asylum's death register, the Russian investigators concluded that 18,232 patients had been murdered at Obrawalde in the previous three years.[110]

On May 29, 1945, four-year-old Richard Jenne became the last official victim of Nazi euthanasia. He was killed by the staff of the children's ward at Kaufbenren hospital at 1:10 in the afternoon. His cause of death was listed as "typhus." When American forces investigated Kaufbenren the next month, they were shocked to discover a "wholesale extermination plant" with deplorable conditions. "Scabies, lice, and other vermin were encountered throughout, linens were dirty and quarantine measures non-existent" upon the investigators' arrival.[111]

Althogh it is impossible to determine precisely how many Europeans with disabilities perished during the Nazi era, the following statistics are usually accepted: adult patients killed as part of the T4 program, 270,000 to 400,000; children in institutions,

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[110] Burleigh, p. 270.

[111] Ibid.

5,000-10,000; special actions against Jews in institutions, 10,000; concentration camp inmates killed as part of the "Aktion 14f13" program, 20,000 to 40,000.

Deception, denial and the deliberate destruction of records make precise totals impossible. The same is true concerning the number of people with disabilities murdered at each of the T4 killing centers. For example, Hartheim victims of both ordinary "euthanasia" and under the 14f13 program are variously estimated from 20,000 (by Dr. Georg Renno, Lonauer's successor as director), to 400,000 (by Franz Ziereis, the former commandant of Mauthausen, on his deathbed).

But even these figures seem low. Given the fact that Hitler and the Nazi regime were committed to liquidating the entire disabled population in Germany, Austria, Poland, the former Soviet Union and every occupied territory, it is not unreasonable to suggest that as many as three quarters of a million people with disabilities were systemically exterminated during the Nazi era.

(Pages 77-90 omitted)

The Law for the Prevention of Offspring with Hereditary Diseases

In June 1933, Reich Interior Minister Wilhelm Frick announced the formation of an expert committee on questions of population and racial policy to help plan and implement the future course of Nazi racial policy. At the committee's first meeting, Frick called for a new German population policy to combat the threats that were endangering the "health" of the German people. Among Frick's gravest concerns was the "fact" that the number of "genetically diseased" people was growing rapidly in the population due to the lack of an aggressive state-administered racial policy.[134]

One month later, on July 14 1933, the same day Hitler outlawed the formation of political parties, the German government enacted the Law for the Prevention of Genetically Diseased Offspring. Passed in the same cabinet session that concluded the concordat with the Vatican, this law sanctioned the compulsory sterilization of persons suffering from a wide variety of supposedly hereditary illnesses, including congenital feeblemindedness, schizophrenia, manic-depressive insanity, genetic blindness or deafness, and severe physical deformities. German nurses and physicians were required to report, in exchange for a fee, all cases that fell within the purview of the law. But many German physicians needed little encouragement to comply with the law as they had been advocating sterilization for the "disabled" for years.

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[134] Ibid.

As early as 1892 the German psychiatrist August Forel had tried to justify sterilization of the insane as a national sacrifice similar to that of a soldier in the time of war. Others went further, like the Heidelberg gynecologist Edwin Kehere, who sterilized at least one of his patients to ensure that she would no longer bring "inferior" descendants into the world. In 1903 the young German psychiatrist Ernst Rudin proposed the forced sterilization of "incurable alcoholics." And in 1914 bills were introduced into German parliament to legalize voluntary sterilization. By 1930 many German medical journals were publicly calling for the forced sterilization of the "inferior" and the "unfit."[135]

But Germany was not alone in this movement. In September 1928, the Swiss canton of Waadt passed a law under which the "mentally ill" and "feebleminded" could be forcibly sterilized if public health authorities determined that such individuals were incurable and likely to produce degenerate offspring. In 1929, Denmark became the second European nation to legalize sterilization. Five years later, Norway passed its own sterilization law, followed by similar laws in Sweden, Finland, Estonia, Iceland, Cuba, Czechoslovakia, Yugoslavia, Latvia, Hungary and Turkey.[136]

It was in the United States, however, that compulsory sterilization of persons with disabilities was first put into practice. In 1907, Indiana passed the first laws allowing sterilization of the mentally ill and criminally insane. By the late 1920s twenty-eight American states had followed suit, enacting legislation that resulted in the forced sterilization of more than 15,000 individuals before 1930. By 1939 more than 30,000

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[135] Ibid.

[136] Ibid.

people in twenty-nine states had been sterilized on eugenics grounds. Nearly half of the procedures were carried out in California.[137]

After World War I, German racial hygienists, concerned that their American adversaries might surpass the fatherland in racial health, proposed strong measures to improve the quality of the German race. In 1924, Dr. Gustav Boeters, one of Germany's most prominent advocates of involuntary sterilization, defended the sterilization of "mental defectives" by appealing to nationalistic sentiments: "What we racial hygienists promote is by no means new or unheard of. In a culture nation of the first order – the United States of America – that which we strive toward was introduced and tested long ago. It is all so simple and clear." One year later Otto Reich, chairman of the Vienna Society for Racial Care, expressed his fear that Americans were becoming world leaders in racial hygiene and urged Germans to catch up. "Racial care," Reich declared, "must become the foundation of all domestic policy, and at least a part of foreign policy."[138]

German interest in sterilization grew steadily throughout the early 1930s. In the 1931 issue of his *Human Selection*, Fritz Lenz, one of Germany's leading eugenicists, cited the views of the American eugenicist, Harry Laughlin, who argued that a proper sterilization program in the United States would encompass 100,000 individuals in the first few years, rising to 400,000 sterilizations a year. Extrapolating from these figures, Laughlin concluded that with such a program the United States could sterilize about 15 million individuals of "inferior stock" within 40 years. Lenz agreed with Laughlin's assessment that forced sterilization on this scale would improve the human race, but he

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[137] Ibid.

[138] Proctor, pp. 74-80.

claimed that Laughlin's figures were too modest and that one might well afford to sterilize an even greater number of inferior individuals than that.[139]

Despite the German eugenicists' best efforts, proposals to allow some form of voluntary sterilization were repeatedly rejected by the legislatures of the Weimar Republic. But progress in that direction was finally made on July 2 1932, when the executive committee of the German Medical Association, along with the Prussian Health Council, met to discuss the question of "eugenics in the service of the economy." At a September meeting later that year, the Council voted to approve limited medically supervised and voluntary sterilization, designed to stop the breeding of "genetic defectives." Then, in the fall of 1932, legislation was placed before the German parliament that allowed for voluntary sterilization.[140]

It was a short step from the sterilization law the Weimar government passed in 1932 to the Nazi regime's 1933 Law for the Prevention of Offspring with Hereditary Diseases. The German legislature made it clear, however, that this law was intended to be eugenic rather than punitive. That is, persons ordered to be sterilized were not to be considered as perpetrators of a crime for which they were receiving punishment. Rather, forced sterilization was described as the sacrifice an individual makes as a result of the "personal tragedy" of having been born defective. By submitting to sterilization, such

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[139] Ibid.

[140] Ibid, p. 101.

individuals would "break their link in the chain of generation, as a sacrifice in the interest of the good of the Volk."[141]

Table 4
Sterilization Applications and Decisions in Germany, 1934-1936[142]

Year	Applications	Positive decisions	Negative Decisions
1934	84, 604	62,463	4,874
1935	88,193	71,760	8,976
1936	86,254	64,646	11,619

Table 5
Sterilization Surgeries in Germany[143]

Year	Positive Decisions	Surgeries performed
1934	62,463	32,268
1935	71,760	73,174
1936	64,646	63,547

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[141] Although the law was not intended to be punitive, many believed that the sterilization of "genetic defectives" might help eliminate crime. One prison cleric, for example, said that "when one reflects upon the fact that some proportion of the genetically ill are also morally defective and have broken the law, then one can easily understand how important sterilization may be in helping reduce criminality." Proctor, p. 102.

[142] Table contained in Friedlander.

[143] Ibid.

Table 6
Deaths Resulting from Sterilization Surgeries in Germany[144]

Year	Men Ster.	Women Ster.	Total Deaths	Death/men	Death/women
1934	16,238	16,030	102	21	81
1935	37,834	35,340	208	35	173
1936	32,887	30,624	127	14	113[145]

Pursuant to the terms of the law, German nurses, physicians and public health officials were required to register every case of genetic illness known to them. Article 9 allowed fines of up to 150 reichmarks for any doctor who failed to register such a person. Individuals with disabilities were usually first recommended for sterilization by their physicians, who would present an analysis to the local genetic health courts, the first of which convened in Berlin on March 15, 1934. Between March and December 1934, genetic health courts received 84,525 applications for sterilization. During that period the courts handed down 64,499 decisions: 56,244 in favor of sterilization and 3,692 against (4563 were either retracted or postponed.) The pace quickened between 1934 and 1939, during which period the courts decided in favor of sterilization in nearly 95 percent of the cases heard. Individuals who were ordered to be sterilized were guaranteed the right to appeal their decisions to appellate genetic courts and many did so. In 1934, nearly 4,000 persons appealed their decisions; only seventy seven were successful. The vast majority (3,559) failed in their attempts to overturn the lower courts' decisions. Throughout the

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[144] Ibid.

[145] Ibid.

entire Nazi era, fewer than three percent of appealed decisions were reversed. Those who refused to submit to sterilization were typically sent to concentration camps where they were killed.[146]

Sterilizing People with Hearing Disabilities

Among the many ailments that fell within the broad scope of the law, "feeblemindedness" was the most common ground for sterilization, followed by schizophrenia and epilepsy. People who were deaf were also primary targets for sterilization; yet, for whatever reason, their stories have rarely been discussed. Although there are no comprehensive studies that examine the application of the sterilization law to the deaf, occasional references do exist. One German historian, for example, has suggested that more than 15,000 congenitally deaf persons may have been sterilized under the law. Horst Biesold recently tried to substantiate that claim by collecting oral histories from deaf survivors of Nazi sterilization. Biesold later presented his findings in "*Crying Hands: Eugenics and Deaf People in Nazi Germany.*" [147]

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[146] The proceedings of the genetic courts were secret. Even today most of their records are protected under German laws guaranteeing that certain data will remain confidential.

[147] Horst Biesold, *Crying Hands: Eugenics and Deaf People in Nazi Germany* (Washington, D.C., 1999), pp. 42-82.

Sterilizations Classified by Disease, 1934

Diagnosis	Sterilizations (%)	Men sterilized (%)	Women sterilized (%)
Feeblemindedness	17,070 (52.9%)	7,901 (48.7%)	9,169 (57.3%)
Schizophrenia	8,194 (25.4%)	4,261 (26.2%)	3,933 (24.5%)
Hereditary epilepsy	4,520 (14.0%)	2,539 (15.6%)	1,981 (12.4%)
Manic-depressive	1,017 (3.2%)	384 (2.4%)	633 (3.9%)
Alcoholism	775 (2.4%)	755 (4.6%)	20 (0.1%)
Hereditary deafness	337 (1.0%)	190 (1.2%)	147 (0.9%)
Hereditary blindness	201 (0.6%)	126 (0.8%)	75 (0.5%)
Sev. Malformations	94 (0.3%)	45 (0.3%)	49 (0.3%)
St. Vitus's Dance	60 (0.2%)	37 (0.2%)	23 (0.1%)[148]

Preliminary conversations with deaf survivors of Nazi atrocities led Biesold to conclude that gaining the confidence and collaboration of deaf persons who had been forcibly sterilized would be difficult for several reasons, including the fact that "race hygienists claims that the hereditary diseased were inferior created a self-perception of worthlessness among congenitally deaf persons." Nevertheless, Biesold sought to gain the cooperation of deaf victims of sterilization by making a public appeal in many of the leading journals and newspapers that deaf people in Europe routinely read. Biesold ultimately received 1,215 responses from deaf people who said they had sterilized by the Nazi regime. Based upon these responses, Biesold made the following findings:

1. Fifty four percent of the surviving victims of forced sterilizations were female.
2. Nearly all victims (95 percent) were born between 1901 and 1926.
3. The youngest victim was sterilized when she was 9 years old; the oldest was 50 years old.
4. The most common age was between 22-30.
5. The victims named 104 institutions for deaf students as their home school.
6. Compulsory sterilization took place throughout Germany but particularly in cities that contained schools for deaf childcare.[149]

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[148] Friedlander, p. 29.

The testimony Biesold gathered also indicates that many of the directors at German schools for the deaf actively promoted the sterilization law. Among those institutions that collaborated with the Nazi regime were the Training Institute for Teachers of the Deaf in Berlin-Neukolln, the Institute for the Deaf in Heidelberg, the Hornberg Institute, the Schleswig Institution for the Deaf, the District Instructional and Vocational Institution for Deaf Girls in Dilligen, and the Pauline Home in Winnenden.

Betrayal of the Students

The Training Institute for Teachers of the Deaf in Berlin-Neokolln

In the 1930s the Training Institute for the Deaf in Berlin was the oldest institution for deaf pupils in Prussia. Founded in 1788, it had become the premier training institute for Prussian teachers of the deaf. Gootthold Lehman served as principal of the school and director of the teacher-training program. In addition to his administrative and teaching duties, Lehman was responsible for proposing future university courses to the Prussian state ministry in science, art, and public education. During the early Nazi era, Lehmann proposed several eugenic-related topics for participants in the first-year teachers' program, among them were "The Science of Human Heredity and German Race Cultivation," the "Theory of Hereditary and Race Hygiene," and "The Collaboration of the Schools for the

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[149] Ibid.

Those who managed to survive the sterilization process were burdened with feelings of irreversible violation of their physical integrity. The traumatic experience of compulsory sterilization also caused the end of many marriages. In addition, nearly one-quarter of those surveyed said their forced sterilization caused them to remain unmarried. Consequently these survivors suffered chronic "anxiety at having to grow old without the supportive love of children, and an uncertain future in isolation and loneliness." Many survivors also lived under a cloak of secrecy and a deep sense of shame and inferiority instilled in them by their Nazi tormentors.[176]

Finally, by being forcibly sterilized, people with disabilities were not only deprived of the treasured ability to have children, they also lost the chance to add loved ones to a burgeoning disability culture. For example, in the early 1930s Germany had a remarkably advanced deaf culture that flourished in deaf educational institutions, newspapers and retirement homes. By forcibly sterilizing thousands in the deaf community and by the working to death many more, the Nazis nearly destroyed the deaf community (and prevented the deaf from perpetuating a rich cultural heritage through their children). The

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know that patients with disabilities were being killed in large numbers across the country. Entire wards in hospitals were being emptied while once crowded nursing homes and asylums were suddenly shut down. Indeed, the killing program became what Himmler had described as "a secret that is no longer one."

[176] Ibid., p 149-152.

deaf community of Germany has yet to recover fully from its almost complete annihilation by the Nazi regime.

Nearly seventy years after the German government began sterilizing its first victims, eugenic and discriminatory attitudes continue to degrade and victimize people with disabilities in countries throughout the world. As Professor Jacques Voneche, a specialist in child and adolescent psychology at the University of Geneva, explains: "Obviously, these sterilizations are still being practiced today in Switzerland, but not openly." Voneche suggests that forced sterilizations are supported by parents, doctors, and leaders of various institutions. Authorities have denied these allegations, and the Swiss government has evaded responsibility by arguing that the twenty-six cantons of the Swiss federation are each responsible for making their own decisions on public health.

(Pages 114-128 omitted)

[Note: My computer is unable to align this quote when I try to change the font and double space]

Chapter Five: After The Atrocities

> *Between September 1939 and April 1945 the defendants...unlawfully, willfully, and knowingly committed crimes against humanity, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with the plans and enterprises involving the execution of the so-called "euthanasia" program of the German Reich, in the course of which the defendants herein murdered hundreds of thousands of human beings, including German civilians, as well as civilians of other nations.*
>
> -- Nuremberg Military Tribunal

Germany surrendered unconditionally to the Allied Forces on May 9, 1945. Three months later, in August 1945, Robert E. Abrams, then a junior public relations officer in the U.S. Army, was sitting in his office in Munich when a German physician approached him with a disturbing story. The physician said that when he returned to his home town of Kaufmann after serving in the war, he discovered that the psychiatrists at the local asylum were still systematically murdering their patients. Abrams went at once to investigate the situation and discovered that the story was true: three months after Germany had surrendered, the doctors in Kaufmann were still exterminating their patients. Between August 1944 and August 1945, 25 percent of the psychiatric patients at the institution had been killed by lethal injection or starvation. More than one hundred of those victims were children with disabilities. The Americans who were sent to investigate the asylum found patients who had died within the previous seventy-two hours, their naked corpses piled on the floor waiting for mass cremation.

Throughout Germany similar discoveries were being made. In September 1945 the Public Health and Security officers of the American military government investigated the hospital at Eglfing-Haar, where they found a "starvation pavilion" with 150 emaciated children strapped to their beds, twenty of whom appeared to be within hours of death. The director of Eglfing-Haar was Hermann Pfannmuller, who fled the hospital when he learned that the Americans were coming. In his hasty escape, he left many of his classified files behind, instructing his successor, Dr. Von Braunmuhl, to destroy them immediately. For whatever reason, Dr. Braunmuhl did not destroy the records. Instead, he turned them over to Major Alexander of the American military government.

According to Dr. Braunmuhl's testimony, Pfannmuller was an extremely "brutal fellow" who took great pleasure in killing his young patients whom he referred to as "chunks of meat." Von Braunmuhl told Alexander that he wanted the files to be used to prosecute Pfannmuller as a war criminal but requested that the information be used discreetly because he feared "that too much publicity focused on Eglfing-Haar would interfere with the confidence of the public in the type of treatment available at Elgfing-Haar." From the evidence contained in Pfannmuller's secret records, Alexander was able to reconstruct a detailed account of the institutional history and policies of the Nazi regime's "euthanasia" programs.[200]

Nuremberg

In 1946, the Allies – the United States, Great Britain, the Soviet Union and France – held war crimes trials at the Palace of Justice in Nuremberg. The first and most notorious trial was that of the major war criminals, including Minister of the Interior Wilhelm Frick and others. Subsequently twelve additional trials were held before the International Military

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[200] Gallagher, *By Trust Betrayed*; Robert Conot, *Justice at Nuremberg*, (New York, 1983).

Tribunal at Nuremberg. The first of the trials was, The United States of America vs. Karl Brandt, et al, also known as the Nuremberg Doctor's Case because twenty of the twenty-three defendants were physicians. Among the accused were Karl Brandt, Viktor Brack and Phillip Bouhler.

The indictments contained four charges. The first was that the defendants had conspired to commit war crimes and crimes against humanity. War crimes were defined by Control Council Law No. 10, as agreed to by the commanding officers of the Allied occupying armies, as "atrocities or offenses against persons or property constituting violations of the laws or customs of war." Crimes against humanity were defined more broadly as "atrocities or offenses including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or any inhumane acts committed against any civilian population or persecution on political, religious or racial grounds."

The second charge focused on the medical experiments the accused had performed on unwilling victims. This count consisted of twelve paragraphs, one of which described the killing of 112 individuals for the sole purpose of building a skeleton collection for a medical school. The third charge delineated the defendants' specific crimes against humanity:

> Between September 1939 and April 1945 the defendants...unlawfully, willfully, and knowingly committed crimes against humanity, as defined by Article II of Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with the plans and enterprises involving the execution of the so-called "euthanasia" program of the German Reich, in the course of which the defendants herein murdered hundreds of

> thousands of human beings, including German civilians, as well as civilians of other nations.[201]

Finally, the fourth charged named Karl Brandt, Viktor Brack and eight of the other defendants as members of the SS, which had been "declared to be criminal by the International Military Tribunal in Case No. 1."[202]

[PHOTO OF KARL BRANDT AT NUREMBERG – GALLAGHER MIDSECTION]

In early October 1946 the opening statement for the prosecution was made by U.S. Brigadier General, Telford Taylor, chief of counsel. Nine months later, on August 19, 1947, the tribunal handed down its judgment. Of the four defendants charged with war crimes and crimes against humanity, only one, Dr. Karl Bohme, was found not guilty. The remaining three defendants, Karl Brandt, Viktor Brack and Phillip Bouhler, were found guilty and sentenced to death by hanging. After repeated appeals and requests for clemency, Brandt, Brack and Bouhler were sent to their deaths on June 2, 1948.

Although these three men had to answer for their crimes, the overwhelming majority of the participants in the disability killing programs quietly escaped punishment.

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[201] Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946-April 1947. (Washington D.C.), Article II, section 1, paragraph (b), I:XVI. Boerst, p. 210.

[202] Ibid.

(Pages 133-144 omitted)

been a person of "goodwill" and was led by his superiors to believe that his murderous deeds were legal. Although he escaped legal punishment, the publicity surrounding his trial forced him to retire from his university position. He simply returned to his practice and continued writing. In 1963 he published a book entitled, *Borderline Situations of Life*, in which he set forth the case for euthanazing children with disabilities.

Unmarked Graves

Not only did most of the men and women involved in committing the euthanasia murders escape justice, but the atrocities committed against disabled people in Germany, Austria, Poland, the former Soviet Union and other regions during the Nazi era has gone largely unrecognized and uncompensated. Because of neglect by historians, as well as the political powerlessness and economic deprivation of people with disabilities, no memorial center or museum specifically for survivors with disabilities exists anywhere in the world today. Without memorials dedicated to people with disabilities, there are no reminders to the world of the horrors inflicted on people with disabilities during the Nazi era. Without these reminders, the specter of a recurrence of this nightmarish victimization remains.

Moreover, while there are thousands of Holocaust museums and memorials internationally, it is exceedingly rare for any of them to give more than a passing reference to people with disabilities. Most do not even mention the horrors inflicted on men and women with disabilities during the Holocaust. In Yad Vashem in Israel, among the acres of memorials and the tens of thousands of pages of text, there is only a single brief reference to the murder of people with disabilities.

After the war, disabled victims were not recognized as persons persecuted by the Nazi regime. Survivors received no restitution for time spent in the killing hospitals nor for their forced sterilization. Although the sterilization law had been declared invalid by the Allies, the postwar German state did not recognize sterilization under the Nazi era law as racial persecution, and postwar German courts held that compulsory sterilization under the law had followed appropriate procedures. Men and women with disabilities who challenged such rulings lost their cases in court when they could not prove that the finding that had led to their sterilization had been "medically" wrong. Thus the appeal of a sterilized deaf person was denied in 1950 after two court appointed physicians certified that the original finding of congenital deafness had been accurate. In 1964 the appeal for restitution from a sterilized person, who during the Nazi period had been a student at the former Israelite Institution for the Deaf in Berlin, was denied. The postwar German court found that while the appellant as a Jew belonged to a group recognized as persecuted under the restitution law, his sterilization as a deaf person did not constitute Nazi persecution. To this day the German state has not fully recognized and compensated people with disabilities, including the deaf, for their persecution during the Nazi period.[219]

One reparations Court declared that disabled victims were "people below the level of ciphers." Another Court refused to punish those who acted in the euthanasia program because euthanasia had its supporters before the Nazi era, therefore the act was not punishable as a specifically Nazi crime. From time to time efforts were made to expand the

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[219] Friedlander, introduction.

German law so as to provide for those who were victims of the sterilization and euthanasia policies. All these efforts failed.[220]

The neglect continues today. For example, people with disabilities were designated as one of five victim groups but were ignored in the notice process of In re: Holocaust Victim Assets; Weisshaus, et al. v. Union Bank of Switzerland, et al. The notice in the Holocaust Victim Assets litigation may have been the most expensive and extensive ever given. The notice administrators anticipated spending $2.3 million on notice for Jewish organizations alone. Another $500,000 was allocated to reach Romani organizations and media. In contrast, not one dollar was allocated for organizations serving people with disabilities. In addition, no provision whatsoever was made for Braille notice, audio notice, TTY, diskette, large type for the vision disabled, or accessible computer technology for people with disabilities. The plan also provided for contact with over 6,000 Jewish organizations worldwide and perhaps as many as 500 Romani organizations. But no disability organizations were ever consulted or informed about the planned notification procedures.[221]

The Persistence of Negative Attitudes and Stereotypes

Discrimination against people with disabilities did not begin with the Holocaust. Nor did it end with the defeat of the Nazis. On the contrary, people with disabilities throughout the world continue to be the subject of many of the same myths, dehumanizing stereotypes and falsehoods that made their sterilization, exploitation, and extermination possible during the

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[220] Ibid.

[221] DRA, *Forgotten Crimes*, pp. 39-40.

Nazi Era. As Hugh Gallagher notes: "The Germans are not 'different' from Americans in any critical sense...How they treated their insane, handicapped and retarded during the Third Reich was certainly extreme behavior—tragic and appalling – but it was not inconsistent with patterns of social behavior that can be traced throughout the history of the disabled over the centuries." And, "in fact, there is no reason to believe that the attitudes of the Germans in the 1930s toward the disabled and chronically ill were different in any essential way from the prevailing attitudes elsewhere."[222] Gallagher notes that there are many different clusters of attitudes and misperceptions about the disabled, some of which follow:

Blaming the Victim

The desire to blame those who are chronically ill or disabled for their condition is, according to Gallagher, "caused by the degree of subconscious fear that the disabled arouse in the minds of most people." This theory was perhaps best expressed by the German Freudian H. Meng, who, writing in 1938, argued that the non disabled have a subconscious fear that the disabled person has perpetrated some evil act that has brought on his or her disability as punishment. In the Old Testament, for example, chronic illness and disability are directly linked to sin against God and his commandments. As Gallagher notes:

> The disabled is a sinner and, -- as spelled out in Leviticus 21:18 – he is unclean and thus may not be a priest, or even approach the altar. Twelve specific conditions are proscribed including "a blind man, or a lame, or he that hath a flat nose, or anything superfluous, or a man that is barefooted, or broken handed or crookbackt, or a

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[222] Gallagher, p. 242.

> dwarf or that hath a blemish in his eye, or be scurvy, or scabbed, or hath his bones broke."

Over the centuries, additional deformities and illnesses were added to the twelve listed in Leviticus so that the later Talmudic scholars list 142 varieties of disqualifying conditions.

The medical historian Henry Sigerist describes four different social approaches toward people with disabilities: The ancient Greeks considered disability to be a function of status and economics and people with disabilities were treated as social inferiors. Infants born with even minor disabilities in Greece or Rome, such as club foot or extra fingers, were often taken by their parents to some remote place and left there to die alone. The Christians looked upon the disabled as objects of either pity or prayer. The ancient Hebrews believed disability to be caused by sin. And the world of science views disability clinically as a symptom of disease and pathology and treats people with disabilities as patients in need of treatment and cure.[223]

Despite these varying attitudes and approaches toward disability, one thing remains constant: the tendency to blame the person for his condition. This tendency persists today.

Spread and Devaluation

In discussing attitudes toward disability, Gallagher explains two important terms: "Spread" and "devaluation." Spread describes "the phenomena which occurs when some or all attributes of a person's character are thought to be a function of his or her disability. For example: "George has cerebral palsy; his hands move in a jerky manner; therefore he must

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[223] Ibid., p. 242

be a jerky thinker, too." Or when a paraplegic happens to be a good student, this will often be explained in terms of his disability: "He is a good student because he cannot run and play like the other students. All he can do is sit and study." German physicians were engaging in spread when they assumed that because a person had some sort of disability his life was worthless and meaningless.[224]

Similarly, "devaluation" is the depreciation of a person's worth on the basis of his or her disability. Consider, for example, the Jerry Lewis telethons, which traditionally devalued the very people they tried to help. Children with muscular dystrophy were paraded before television cameras while Jerry Lewis or Ed McMahon talked about their tragic and pathetic condition. Their assumption was that the more pathetic the victim, the more money viewers would contribute to their cause. In the process the child was degraded and devalued into a victim and object. Of course the Jerry Lewis approach reflects an attitude which is both widespread in contemporary societies and has been prevalent throughout history. The "charitable model" (which combines pity for people who have disabilities with a moral imperative to "help" them) is often well-intended but necessarily degrades and ultimately dehumanizes the intended beneficiaries.[225]

The German use of such phrases as "lives unworthy of life," "useless eaters," and "human husks" to describe institutionalized patients is an extreme example of devaluation, as was the Nazi practice of referring to the people with mental and physical disabilities as *untermenschen,* subhuman.[226]

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[224] Ibid., p. 194.

[225] Ibid.

[226] Ibid.

The wrongs inflicted on people with disabilities are all the more remarkable because while they constitute a shamefully neglected minority in most countries of the world, they also form a very large group. An estimated minimum of 16 percent of any national population has one or more disabilities, and in many countries the disability rate exceeds 20 percent. People with disabilities nevertheless still face dire conditions of life, ranging from massive unemployment to near prison-like confinement. They are also often abused and neglected. Consequently, they must continue to campaign for the most basic human rights and dignities.[227]

This remains true in contemporary German society, where many people with disabilities are treated as second-class citizens and are viewed as economic burdens and inconveniences. Discriminatory attitudes have resulted in acts of targeted violence, including public taunts, insults, harassment, attacks, beatings and killings. Neo-Nazis ("skinheads") have led this abuse. Reports show that skinheads have beaten a blind man to death, severely beaten five deaf boys, thrown a wheelchair-using man down subway stairs, and shouted taunts such as "They must have forgotten you in Dachau," and "Under Hitler, you would have been gassed." The Journal of the British Council of Organizations of Disabled People reports that as many as 1,000 disabled German citizens have been physically or verbally harassed in a single year. In addition, German police do not always document hate crimes or enforce laws that ensure provision of employment for people with

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[227] Disability Rights Advocates, *Forgotten Crimes.*

disabilities. As a result of this discrimination, some people with disabilities are hesitant to leave their homes.[228]

Such harmful attitudes and treatment are not limited to Germany. Worldwide, people with disabilities continue to be marginalized and at-risk. They face formidable and multiple societal and attitudinal barriers. For example, throughout Central and Eastern Europe, where many of the Nazi atrocities occurred, mass transit is inaccessible to the mobility impaired, and para-transit or alternative transportation is almost non-existent. Accommodations are notable for their rarity to help blind or deaf men and women. Braille elevator buttons or audio crosswalk signals are installed only sporadically. In Eastern Europe, it is estimated that at least 20 percent of people who need wheelchairs do not have them. Most of those lucky enough to have wheelchairs find them costly, inadequate, inappropriate (being far too heavy, for instance) and difficult to repair.[229]

In short, the programs implemented by the Nazis to victimize and exploit people with disabilities were part of a pervasive and lasting legacy of discrimination towards people with disabilities. The rise to power in some European countries in recent years of ultra right and nationalistic parties (which tend to view anyone "different" with hostility) adds to concern for the future. The Holocaust for people with disabilities must be viewed in a larger context which links memory, present realities and future solutions.

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[228] Ibid.

[229] Ibid.

The Need to Remember

The Holocaust was an overwhelmingly evil and moral catastrophe that remains a summons to memory. The wrongs inflicted during the Holocaust were not merely physical and financial; they were an effort to erase a class of human beings. People with disabilities during the Holocaust who suffered sterilization, forever shamed, and those exterminated, forever silenced, must be recognized and remembered. The Holocaust, which is part of the shared history of people with disabilities, acts as a warning both to the disability community and to all who care about liberty, justice, and fairness. It demonstrates in the most chilling terms, the ethical, moral, and social failures that inevitably result when nations, societies, communities, and neighborhoods fail to recognize and nurture the humanity that is present in all human beings.[230]

People with disabilities hold the same desires and dreams as everyone else: they hope for a good education, a chance to work, and an opportunity to take part in the lives of their communities. They want to be, and often are, parents, artists, professionals, consumers, teachers, business people and taxpayers. The most formidable barriers they face, both physical and attitudinal, stem not from any individual disability, but from arbitrary societal constructs that must be changed to accommodate the full spectrum of human abilities. It is in society's best interests to promote the full development and participation of people with disabilities, who can contribute in every area of contemporary life. A nation who neglects or rejects such a resource does so at its peril. With estimates from the United Nations that 25 percent of all the families in the world are affected by

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[230] DRA, Forgotten Crimes.

disability, public policies which ignore or marginalize a group so large and diverse cannot be considered enlightened or sound.[231]

Finally, the suffering of the disability community must never be excluded or minimized in telling the "story" of the Holocaust. As Jewish people have long recognized, the key to "Never Again" is never forgetting. So long as history fails to recognize the persecution of people with disabilities, we cannot be assured that it will not be repeated. Indeed, it is worth remembering the words of Jean Baudrillard: "Forgetting the extermination is part of the extermination itself." Nor does it diminish the agonies of the other countless victims of the Holocaust to fully recognize the horrors committed against men, women, and children with disabilities. There is enough grief to go around.[232]

The conditions that made the Nazi regime's murderous programs possible in Germany more than a half century ago, apathy when confronted with affronts on human dignity, the presence of a charismatic leader who devalues and de-humanizes anyone different, negative attitudes and stereotypes about people with disabilities, and the manipulation of science and technology to achieve seemingly unthinkable goals, persist today in many parts of the world. We thus cannot assume that the atrocities the Nazis committed against the disability community was a unique event, never to be repeated. Our own self-interest, as well as our human obligation requires us to continue to explore and remember these events and the conditions in which they occurred.

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[231] Ibid.

[232] Ibid.