

# 1 Introduction: Coming to Terms with Biopolitics, Temporality and Historic Justice

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## 1.1 From Times Believed Long Overcome

In June 2020, nine citizens filed a constitutional complaint with the Federal Constitutional Court in Germany. The complaint was directed against guideline recommendations issued by the German Society of Intensive Care Physicians together with further medical societies on the question of health care rationing and treatment in situations of scarce resources due to the Covid-19 pandemic (DIVI 2020). When intensive care units face an acute shortage of resources, the societies argued, physicians must decide who should receive intensive medical treatment and who not. The guidelines suggested criteria for making these decisions and thus prioritizing some patients over others. The medical societies stated that these decisions should not be based on criteria of age, social characteristics, disability or chronic illness but only on the chances of treatment success. The claimants, however, argued that the criteria spelled out by the guidelines for establishing the chances of treatment success, like organ dysfunctionality, frailty along the Clinical Frailty Scale, neuronal diseases and ‘prognostically limited life expectancy’ effectively discriminated against many people with disabilities. “The criteria presented,” writes the disability rights organization AbilityWatch, which supports the constitutional claim,

could thus become the death sentence of a large number of disabled people. The fact that the president of DIVI publicly raises the question of ‘whether it really makes sense to intubate and ventilate in an intensive care unit people of very old age who have been unable to live on their own for a long time and who have severe chronic concomitant diseases’ awakens the worst memories

of justification patterns from times believed long overcome. (AbilityWatch 2020)<sup>1</sup>

It went without saying what times these were. In July 2020, five foundations and memorial sites commemorating the Nazi ‘euthanasia’<sup>2</sup> crimes issued a common statement to express their concern about the discussion on withholding intensive health care for people with previous illnesses or disabilities in the course of the pandemic.

The signatory memorials to commemorate the Nazi euthanasia crimes commemorate the devaluation, exclusion and murder of people under National Socialism. [...] Against this backdrop, we view with concern the discussions about intensive medical care for elderly people and people with previous illnesses or disabilities (keyword: triage) in the corona pandemic. (Gedenkstätte Hadamar 2020)

Similar discussions popped up in other countries. Many people in the United States also felt reminded of practices associated to ‘eugenics’ and ‘euthanasia’:

The debates on health care rationing unveil how our society devalues vulnerable populations. Draftguidelines from various states and health systems identified people with dementia, cancer, intellectual disabilities, and many other pre-existing conditions as those who will not benefit from treatment compared to younger, healthier, non-disabled people. [...] Eugenics isn’t a relic from World War II; it’s alive today, embedded in our culture, policies, and practices. (Wong 2020)

The Center for Public Integrity in the United States has analyzed policies and guidelines from 30 U.S. states on criteria for rationing ventilators and other resources in the case of a shortage. The Center found that all but five states had provisions in place that in effect “send people with disabilities to the back of the line for life-saving treatment” (Center for Public Integrity 2020). In Alabama, for instance, a state policy had postulated that people with “severe

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1 My translation from the German source. Unless otherwise indicated, all translations from German to English in this book are my own.

2 I will hereafter seek to avoid the euphemism euthanasia and rather speak of institutional killings, meaning the systematic killing of children with disabilities and people in psychiatric and other institutions under Nazi rule. However, since the term euthanasia is still in common use and even these memorial sites use it, it cannot always be avoided.

mental retardation [...] may be poor candidates” for treatment with ventilators if hospitals run short during the pandemic. The states of Louisiana, Pennsylvania, Texas and Utah, the Center reports, directed hospitals to take dementia into account when allocating ventilators. After a wave of complaints, the state of Alabama withdrew the policy, if only to replace it with less specific guidelines. Ensuing protests, however, from disability rights advocates as well as numerous experts and policy-makers persuaded some states to reconsider their triage policies, as the Center for Genetics and Society (2020) reports.

Aside from manifest triage policies, more indirect selection strategies, such as that of fostering so-called herd immunity, have also evoked concerns about a return of eugenics, albeit in a more indirect, economically based form. Referring to corona policies in the United Kingdom, Norway and Sweden, Vito Romer and Louis Philippe Laterza argue:

It is hard not to read eugenic implications in this kind of thinking: the ‘herd’ will survive, but for that to happen, other ‘weaker’ members of society need to be sacrificed. (Romer and Laterza 2020)

Policies that prioritize the stronger and sacrifice the weaker, they posit, stand in continuity with eugenics policies which were *not* confined to the Nazi state:

The Norwegian and Swedish states have a long history of adopting policies based on eugenics that continued well after World War II. Eugenics was deployed throughout the 20<sup>th</sup> century as a branch of scientific state management, part of a social engineering project that envisioned a society made of physically healthy and ‘socially fit’ individuals. (Romer and Laterza 2020)

One does not have to claim that we have already entered a new form of totalitarianism to realize that policies of health care rationing, whether on the hospital or state level, that refer to an individual’s capacities in terms of health, strength, or fitness are effectively establishing a system of differential value of human lives. It is the practice of calculating the value of human lives that evokes reminiscences of Nazi practices, as Lennard Davis puts it:

Social politesse, charitable involvement, religious concern all crumble in the face of the grand bargain of choosing those who appear ‘normal’—not those who are seen as weakened, abnormal, debilitated, less-than. There is a term for this demographic, and the Nazis used it with abandon: *Lives Unworthy of Living*. [...] It is easy for us to blame the Nazis for these egregious and unimaginable

inable deaths, but the current calculus about which lives are worth living provides a sobering if less overtly dramatic parallel. (Davis 2020, *emph. i.o.*)

Maybe the times believed long overcome are not so overcome after all. In any case, we can see that debates about the past are not simply about the past. They are about the present. These debates about triage, herd immunity, Nazi eugenics, Nazi 'euthanasia', eugenics in the US, or eugenics in the Scandinavian welfare states refer to the present situation. They address the scandalous treatment of people with disabilities in the past in order to scandalize the way they are treated today; they address the injustices of the past in order to counter the injustices of today. If we want to be different, these debates say, if we want to be a different kind of society than those that allowed these things to happen in the past, we have to *act* differently. It will not do to *name* selection practices differently.

In the context of these debates, but also in the wider context of the corona pandemic and governmental politics to contain it, the term 'biopolitics' crops up again and again. It emerges in relation to life-and-death decisions, allocation of health care treatment, ableism and disability rights as well as in the contexts of quarantine and mobility restrictions, surveillance mechanisms, behavioral monitoring and control, disciplinary measures, appeals to self-discipline and more.<sup>3</sup> At present, as far as I can see, references to biopolitics in relation to the corona pandemic are still rather cursory. Some refer to the work of Michel Foucault, others to Giorgio Agamben, some to both, but it is too early to expect a systematic review of which concepts of biopolitics and which aspects thereof are useful to understand the politics of the pandemic. I, too, am unable to undertake this endeavor here; rather, I indicate why I consider biopolitics in the Foucauldian sense a key concept for understanding a specific political rationality that emerged alongside modernity and is still operative today; it is not necessarily dark and destructive throughout, but it is problematic in that it implies an inherent tendency toward differential valuation of human lives.

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3 To name only a few contributions: Agamben 2020; Ahrens 2020; Davis 2020; Gerhards 2020a; Kitchen 2020; Lorenzini 2020; Sarasin 2020.

## 1.2 Coming to Terms with the Presence of the Past

The focus of this chapter is the nexus of biopolitical rationality, the temporality of increase and optimization, and what I term the ‘injuries of normality’. I will argue that modern biopolitics is characterized by the logic of increasing the human life force and that this logic implies norms and standards of differential value of human lives. Taken to the extreme, as done under Nazi rule, it involves policies of preventing, destroying and eliminating the lives of those categorized as being deficient according to its norms and standards. Not only the systematic murder of disabled new-borns and patients in psychiatric institutions, but also Nazi selective sterilization policy, the persecution of male homosexuals and persons categorized as ‘asocials’, I argue, were driven by this biopolitical rationality.<sup>4</sup> I explain my term for these types of crimes—injuries of normality—below. Although West German efforts to come to terms with the Nazi past are often lauded as a model case of historic justice, it is less well-known, particularly outside Germany, that for a long time the Federal Republic denied the status of systematic wrongdoing that requires official acknowledgement, rehabilitation and reparations to many types of crimes, including selective sterilization and the persecution of homosexuals and ‘asocials’. The victims of these injuries of normality were not entitled to reparations as victims of Nazi persecution, and it took the West German state until the 2000s to formally acknowledge that these were severe injustices committed by the state. The reason for this failure, I argue, was the unwillingness to confront the underlying biopolitical rationality that had driven these crimes in the first place. The prevailing sense among reparation policy actors was that it was—in principle—reasonable for the state to take actions against those who were mentally ill, retarded, disabled, ‘work-shy’, homosexual or otherwise found weak, abnormal or dysfunctional, because, after all, these people posed a threat to state and society. In short, rehabilitation and reparation

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4 I refer here to Miller and Rose, who define political rationality as “a kind of intellectual machinery for rendering reality thinkable in such a way that it is amenable to political deliberation” (Miller and Rose 1992, 179). Political rationalities are more than a set of governing technologies; they comprise substantial goals and principles of government, and they also have an epistemic character, defining what can be known and thus become an object of government. The concept of biopolitics covers both the dimension of political technologies and the dimension of particular goals and motives revolving around the idea of increasing the life force in the collective.

claims were refuted as long as the post-war elites shared the biopolitical motives of the perpetrators, even if they may not have accepted any means used to achieve them. By denying entitlement to rehabilitation and reparations, policy actors not only represented but performatively confirmed and re-enacted the very biopolitical rationality that had driven the crimes themselves. Conversely, the pertinent struggles for historic justice challenged the legitimacy of this rationality, and in this sense, they were, and are, as much about the present as they are about the past.

In the following pages, I unfold the nexus of biopolitics, temporality and the injuries of normality. I begin with an explication of how I read the concept of biopolitics and why it is a specifically modern phenomenon. Subsequently, I lay out the temporal logic of increase and optimization that characterizes modern biopolitics and argue that it inevitably generates systems of differential valuation and differential vulnerability. Finally, I explain the concept of injuries of normality as a specific type of historic injustice that has been largely overlooked in the field of historic and transitional justice. Moreover, I argue, injuries of normality are disregarded precisely because of their presumed 'normality'; they are taken as more or less 'normal' policies and practices and not as wrongs because and to the extent that the underlying biopolitical rationality that drives them remains unchallenged.

### 1.3 Biopolitics and the Threshold of Modernity

Biopolitics is an ambiguous and contested concept that assumes different meanings in different theoretical traditions. Oftentimes, it is used in an unspecific sense to denote any kind of relationship between 'politics' and 'life'; sometimes it refers more specifically to the policy area concerned with medicine, biotechnology and the life sciences.<sup>5</sup> These bilateral conceptions, so to speak, assume that 'life' and 'politics' are universal features of human existence that may or may not be connected to each other. Biopolitics, here, is this external connection. Michel Foucault, in contrast, has shown that the notion of 'life', the modern type of state, and the type of politics he terms biopolitics are not universals; rather, they co-emerged at the threshold of modernity in a move that "made knowledge-power an agent of transformation of human life" (Foucault 1980, 143). The era of biopolitics begins when the

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5 For a more extensive discussion, see Braun and Gerhards 2019.

human becomes the object of systematic strategies of shaping and improving. It is the historic moment when the modern state with its technologies of governing, the focus on man as a living being, and the construct of the population as an object of government co-emerge. What Foucault terms biopolitics is the connection between them.

Already before he started working on biopower and biopolitics, Foucault had shown that 'life' was not a biological fact but a relatively young category that emerged at the particular historic moment that marked the shift between the classical and the modern episteme around 1800 (Rentea 2017). Before that, 'life' did not exist, only living beings (Foucault 1994b, 127f.). Life as a category and possible subject of study emerged with modern biology and the conceptual opposition between the organic and the non-organic. The same historic moment gave birth to the secular modern state with its technologies of governing and its new area of activities called 'police' (*die Policy*) (Foucault 1994a; 2000). The modern state, Foucault argues, takes over the principle of pastoral conduct from the church, assuming responsibility for the welfare of both the individual and the collective, guiding, guarding and protecting them. However, the modern state combines pastoral conduct with new forms of knowledge and new means of enforcement. Moreover, it secularizes the purpose of conduct; the aim is no longer to save any individual soul but to preserve the general, this-worldly welfare in terms of health, longevity, wealth and prosperity. While salvation as an aim was absolute, individualistic and universal, the general welfare is relative, gradual, politically confined to a certain collectivity, and open to constant improvement. Salvation was absolute in that it was ultimately about heaven or hell, salvation or perdition; it was individualistic insofar as the goal was to save *every* human soul, no matter how weak, corrupt, or evil; and it was universal in that it was not limited to the members of a particular collective. Promoting the general welfare, by contrast, is a matter of gradual but in principle unlimited progress. And it is not a universal task; the modern state takes care of its own population within the boundaries of its own territory. It may strive to expand its territory, but it has no jurisdiction over the people living beyond it. On the contrary, improving the relative welfare and the relative strength of its own population, as compared to others, is now a way for the state to improve its own relative strength and power in a world divided into competing states (Foucault, 2000).

The modern state, in this account, performs its pastoral power through the 'police' (Foucault 2007, 312f.). Police—*die Policy*—was the Prussian prototype of what we now know as public policy. Police connects the welfare of the

individuals to that of the collective and vice versa; it seeks to improve the individuals' welfare through improving the general welfare and to improve the general welfare through guiding the individuals' behavior and way of living. Thus, the political rationality of early police, as Foucault describes it, was already a biopolitical one, targeting, shaping, managing and improving the life processes in the population as a means to strengthen the power of the state.

The political rationality that emerged here targets life both at the level of the individual—health, birth, death, survival, procreation, morality and way of life—and at the level of the collective—its composition, growth, development, average health status and life span, mortality and birth rates and so forth. Note, however, that it is not confined to shaping and improving life in the biological sense. The life governed according to this biopolitical rationality was not merely the life studied by medicine or biology. It was also the life that was being led, the orderly life, the way of living, the standard of living; the life that became governed through police referred to public health and well-being, but also to trade, work, public order, and even entertainment.

In short, life is the object of the police: the indispensable, the useful, and the superfluous. That people survive, live, and even do better than just that: this is what the police has to ensure. (Foucault 1994a, 321)

Hence, Foucault does not establish an opposition of biological and social life; there is no 'life itself' underneath social and cultural life that would somehow form a more fundamental layer of human existence. Biopolitics in this sense is not the production of 'bare life', as Agamben (1998) terms it; it is not the layer of life that is laid bare after the social layer is taken off, after the social being has been stripped of its rights, social status and social relations. Unlike Agamben, Foucault does not assume a conceptual opposition between the biological and the social, between bare life or life itself and social life. There is no ahistorical, non-social, biological 'life' in Foucault. Also, in contrast to Agamben, Foucault does not conceptualize biopolitics or biopower as essentially negative forces that would operate through subtraction, taking away individuals' rights, status, social relations and ultimately lives. For Foucault, unlike Agamben, biopolitics is not quintessentially thanatopolitics. However, this does not mean that biopolitics and thanatopolitics are mutually exclusive. Rather, for Foucault, biopolitics may operate through a repertoire of political technologies ranging from more liberal to more disciplinary or even repressive or murderous ones. They may range from promoting individual self-determination via incentivizing or supporting socially desired behavior to more disciplinary



technologies, control mechanisms and negative sanctions, and ultimately the use of force and actual killing. There is no causal necessity that leads from one step to the next, from fostering life to taking life, no biopolitical determinism that starts with freedom and inevitably ends with force. Many twentieth-century states had eugenics policies in place, but not all of them killed psychiatric patients and committed genocide.

The point is, however, that strategies of managing, improving, and optimizing human life are never *only* supportive. They have a dark side as well. They inevitably involve norms and standards for measuring achievement, criteria for what qualifies as better, desirable, or improved and what does not. Thus, they constitutively imply scales of differential value of humans. The more systematic such strategies are, the more they involve measurements for determining success or failure, calculating the relation of means and ends, risks and benefits, distinguishing one from the other, stating progress or stagnation, and criteria for positioning individuals at some point on the spectrum. In this sense, biopolitics includes strategies and mechanisms for preserving and improving, but also for assessing, rating and calculating the relative health, fitness, productivity and functionality of individuals and collectivities—strategies that constantly establish, apply, confirm, refine and reinforce systems of differential valuation of humans. It strives to increase the level of health, fitness and productivity in the collective and ascribes differential value to individuals according to whether and to what extent they meet these standards. Thus, biopolitics, as Lennard Davis puts it, “is always a politics of *differential vulnerability*” (Davis 2020, *emph. i. o.*); those individuals or groups found not to meet the standards become vulnerable to the other side of biopolitics: to strategies and mechanisms of neglect and discrimination or, in the worst case, of selection and elimination.

The Nazi state took biopolitics to the extreme, pursuing the improvement of the master race through strategies of systematically eliminating those deemed to contaminate, weaken or burden it. This does not mean that biopolitics can be equated with Nazi biopolitics. Rather, we can see a continuum of biopolitical technologies ranging from promoting, supporting and improving life by means of social policy, urban planning, public health and the like to selection and ultimately elimination practices. Biopolitics is not limited to elimination, nor is there any kind of causal mechanism that necessarily leads from more benevolent forms of biopolitics to a politics of elimination. However, it does mean that the latter is always a possibility, the reason being that biopolitical rationality inevitably implies systems of differential valuation

and, accordingly, differential vulnerabilities. These systems do not necessarily refer to biological categories; in fact, it is a common misunderstanding, as the following chapters will point out, that Nazi biopolitics in general was based on biologicistic assumptions and that it was biologism that made it murderous. Nazi biopolitics, I will argue, selected along the lines of qualities the Nazis deemed useful for improving the Aryan master race, such as health, strength, fitness, productivity and performance capability<sup>6</sup>; superiority and inferiority were ascribed along these lines. Actually, the Nazis were not particularly interested in whether what they saw as inferiority was caused by social circumstances, genetic conditions, misfortune, political opposition, insubordination or a combination thereof; what mattered was whether someone conformed to their standards or not. Liberal democratic societies also allocate social positions, life chances and value along these standards; they also value health, productivity, functionality and performance even if they like to think of themselves as being the antithesis to Nazi biopolitics given that their systems of differential valuation are not based on 'biologism'. Nevertheless, they may establish and apply systems of differential valuation as well. Actually, as I will argue in Chapter 7, the mode of production still underlying liberal democratic societies today, namely capitalism, is characterized by a logic of accumulation that strongly converges with the logic of biopolitics in that both are directed at optimizing the forces of life and making them productive. Thus, following the Foucauldian line of thought, I understand biopolitics as a set of strategies and mechanisms flowing from a political rationality of optimizing the vital qualities of individuals and collectivities with a repertoire of strategies and mechanisms ranging from promoting, supporting and preserving life to devaluating and destroying it.

## 1.4 Biopolitical Temporality

Seen from this angle, biopolitics is an essentially temporalized affair. It is constituted by temporality in three regards: it is an essentially historical phenomenon, it targets temporal objects, and it is characterized by a specific future-oriented temporal logic of increasing, improving and optimizing.

First, biopolitics is a radically historical phenomenon. It is not a universal, timeless feature of human existence, but co-emerges with the modern

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6 *Leistungsfähigkeit* would be the German term; there is no direct English equivalent.

episteme, the modern state and the modern technologies of government at a specific historic moment: the threshold of modernity. Following Reinhart Koselleck (2003; 2004), we can go one step further and say that it is not even one historic moment among others but rather the moment at which eschatological time was superseded by historical time; one could say that it was the moment at which historical time entered history. Between 1600 and 1800, Koselleck shows, a new order of time arose. Time opened up into an unbounded this-worldly future, no longer delimited by the final judgement and the end of time. The new future was amenable to, but also required, forecast and planning; the modern, secular state adopted the responsibility of organizing it. The secular state replaced prophecy with rational prognosis and drew on the latter for policy making and planning, that is, for bringing about certain futures and preventing others. Together, the notion of an unbounded future and rational prognosis as a form of knowledge allowed for what Foucault terms the formation of the *Policey* and the corresponding technologies of government. Government as the conduct of conduct now meant to bring about desired futures and prevent undesired ones.

Second, biopolitics targets temporalized objects. As argued above, police and its technologies of governing were the first manifestation of biopolitics in the Foucauldian sense. Emerging at the threshold of modernity, police was a set of government strategies that was geared at shaping the future through governing the conduct of individuals, their way of living, working, behaving and procreating, as well as life processes in the population on an aggregate level. On both levels, that of the individual and that of the collective, biopolitics strives to govern temporal phenomena: behavior and processes both take place in time; they exist only insofar and for as long as they take place.<sup>7</sup> While sovereign power operates according to a territorial logic—defending the territory, expanding the territory, issuing laws for a certain territory, drawing lines between what is permitted and what is prohibited and sanctioning transgressions<sup>8</sup>—biopolitics operates according to a temporal logic, targeting the movement of bodies, the behavior of individuals, the way they lead their lives, their carrying out of work, family, and sexual life, and the life processes of the population on an aggregate level. On the aggregate level, it links past, present

7 It is a curious thing to characterize temporal phenomena as those that *take place*, but I cannot think of a better term.

8 For a more detailed outline of the various forms of power in Foucault and their respective relation to different temporal regimes, see Portschy 2020.

and future through generating statistical data in the present, constructing larger processes through ordering and articulating them, extrapolating statements from past processes into the future, informing governmental policies in the present that are geared at shaping the future. In a sense, it constitutes time by articulating past, present and future. In short, biopolitics targets temporal events and sequences and seeks to shape and direct their future course.

Third, biopolitics does so in a particularly temporalized way. Others have already pointed out that biopolitics in the Foucauldian sense is critically future-oriented and that this orientation towards ‘futurity’ defines it as a constitutively modern affair (Tellmann 2017). However, it is not simply its future-orientedness as such that characterizes modern biopolitics; rather, it is its specific mode of future-orientedness, namely the dynamic of constantly increasing, improving and optimizing the forces of human life. Modern biopolitics is distinct from earlier historic forms of ruling human behavior in that it does not only aspire to preserve, control or stabilize certain ways of life<sup>9</sup>, including their sexual, procreative and otherwise bodily aspects but strives to enable and optimize both the exploitation and the growth of the human life force. It emerges at the intersection of scientific, economic and political rationalities that are all directed at increasing the vital productivity of the human. Hence, it is not simply the fact *that* biopolitics is oriented towards the future but that it is oriented towards increasing and improving the functionality of human life that we must come to terms with (Wehling 2008, 251). In the modern era, Foucault states:

‘Deduction’ has tended to be no longer the major form of power but merely one element among others, working to incite, reinforce, control, monitor, optimize, and organize the forces under it: a power bent on generative forces, making them grow, and ordering them, rather than one dedicated to impeding them, making them submit, or destroying them. (Foucault 1980, 136)

In this sense, biopolitics is about the calculated, rational, systematic improvement of the human, driven forward by means of knowledge production as well as political technologies and various combinations thereof. It includes a type of strategies and mechanisms that are directed at managing, increasing and

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9 This is what Mika Ojakangas (2016) fails to acknowledge when he argues that biopolitics is not a specifically modern phenomenon but is already present in the writings of Plato and Aristotle.

optimizing the human life force as a means of increasing productivity and functionality in the population.

The problem, for one thing, is that strategies of optimizing human life, whether through political, medical or other technologies, involve norms and standards for measuring achievement and establish what qualifies as better, desirable, or improved and what does not. Thus, such strategies constitutively imply scales of differential human value. Therefore, there is an inbuilt danger in biopolitical rationality, a dangerous tendency that may remain latent over long periods of time and be kept in check by systems of rights and a culture of solidarity but that may linger and be actuated under changing circumstances: the tendency to sacrifice less valuable lives for the life of the collective. It is rooted in the fact that individual human life is limited but the life of the collective is not. Optimizing the life force of an individual is limited by death, but optimizing the life force of the collective is not. Thus, strategies of biopolitical optimization must capitulate in the face of individual death and shift their ambitions instead to the level of the collective. When the life of the collective is reigning supreme and/or when represented as being in danger and in need of defence, sacrificing those who do not meet the standards can appear perfectly compatible with biopolitical rationality as such. This is what happened in selective sterilization policies and in Nazi 'euthanasia', and I will argue that it also what happened in Nazi persecution of homosexuals and so-called 'asocials'. It is also what happens when calculations of future healthy, fit and productive life years determine who shall live and who not. At this point, we can approach the relationships between biopolitics, temporality, historic justice and what I term injuries of normality.

## 1.5 Biopolitics, Historic Justice and Injuries of Normality

The past thirty years have seen an increased preoccupation with the legacies of past atrocities and systematic human rights violations. A fast-growing field of scholarly discourse and political activity has emerged, marked by concepts such as restitution, reparations, apology, and commemoration<sup>10</sup>. In political science, international relations, and law the concept of transitional justice (TJ)

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10 Indeed, the volume of the literature has undeniably become unmanageable. For an overview, see De Greiff 2006; Palmer, Clark, and Granville 2012. A classic for a conceptual outline is still Martha Minow's (1998) *Between Vengeance and Forgiveness*.

prevails. TJ has grown into a well-established field of inquiry and intervention since the late 1990s. Despite the consolidation of the field, transition is still a contested concept; there is no unanimous understanding of whether it should more narrowly refer to transitions from autocratic to democratic types of government or be expanded to include transitions from conflict to peace, from instability to stability, or any major changes in the form of exercising authority, which would also include changes within established democracies (Winter 2014). Furthermore, a number of efforts have been made to expand the scope of transitional justice in order to cover hitherto neglected issues such as social and economic injustices including forced evictions, the destruction of homes, or long-term social inequity (Arbour 2006; Miller 2008), sexualized violence and gender-related structural inequality (Buckley-Zistel and Stanley 2012; Hitzel-Cassagnes and Martinsen 2014), or systematic harm to indigenous people (Balint, Evans, and McMillan 2014; Corntassel and Holder 2008).

Here, I want to draw attention to a further type of historic wrong that has been largely overlooked by transitional and historic justice studies: systematic harm inflicted on people categorized as abnormal, deviant, deficient or inferior with respect to norms and standards of health, fitness, functionality, productivity and usefulness. I term such violations injuries of normality. They refer to notions of normality in a threefold sense:

First, injuries of normality emerge from biopolitical strategies of detecting, marking and selecting out the 'abnormals', the weak and the unproductive, whose lives, according to this logic, pose an impediment to the enhancement of the vital capacities of the collective, whether the latter is constructed as society, the nation, the race or another entity. Within a biopolitical rationality, the lives of those deemed abnormal, deficient or inferior pose a threat or a burden to the improvement of the collective. The logic of normality and deviance may overlap or intersect with notions of race, ethnicity, gender, religion or other markers but is also distinct from these. It targets people not primarily as members of a given social or cultural group. Members of a dominant, unmarked social group can also fall victim to injuries of normality if and when they are found to deviate from the standards of normality.

Second, this type of harm is not confined to situations of exceptional crisis or regimes of exceptional evil but also occurs in situations that generally qualify as normality. The logic of marking and selecting people categorized as disabled, deviant, dysfunctional or simply useless is not limited to situations of strife or war, nor to autocratic regimes, although these may aggravate it.

Third, the norms and standards underlying injuries of normality tend to be deeply entrenched in social, political, cultural or legal practices, institutions, discourses and thought systems, so much so that practices and policies of enforcing them are largely considered normal by contemporaries, even if they involve grave harm to those who are targeted.

In this book, I refer only to some cases of injuries of normality, namely the persecution under Nazi rule of people categorized as mentally ill, disabled, hereditarily ill, homosexual, or 'asocial'. Note that this is only a small selection of extreme cases and by no means a conclusive list of this type of historic injustice. The focus here is not so much on how and why these crimes were committed in the first place but on whether and to what extent the democratic successor state, the Federal Republic was prepared to reflect upon the wrongness of these crimes.

The Federal Republic of Germany is often referred to as a model case with regard to coming to terms with the past. Post-war (West) Germany, it is said, has confronted its Nazi past through education policies, apologies and payments of compensation in ways that could serve as a model for other countries that have committed human rights violations (Buruma 1994). German Holocaust reparations have been called "the prototype of all reparations politics" (Torpey 2006, 4). Yet the history of German *Aufarbeitung und Wiedergutmachung* is also a history of denial and disregard, most notably with respect to so-called forgotten victims. The term 'forgotten victims' is a misnomer, since some groups of Nazi victims were not forgotten at all but deliberately excluded from reparations, such as communists, deserters, homosexuals, or those who had been forcibly sterilized under the Law for the Prevention of Hereditary Diseases. The 1953 Federal Indemnification Act (*Bundesentschädigungsgesetz, BEG*) clearly and conclusively defined who was to be considered a victim of Nazi persecution, namely someone who had been persecuted for "racial, religious, or political reasons or because of the victim's world view" (BEG §1(1)). Thereby, the law sharply delineated those injuries that would be identified as Nazi injustices and qualify for reparations from those that would not.<sup>11</sup> Victims of selective sterilization, the persecution of homosexuals and of

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11 The wording goes back to the so-called Bermuda Conference formula of "racial, religious, and political refugees" framed by the U.S. and British Allies in 1943. Regula Ludi argues that the Bermuda formula drew heavily on the idea of the Minority Treaties that had been established in the interwar period to protect national, ethnic and religious minorities (Ludi 2012, 18f.). The West German post-war reparation scheme adopted the

those categorized as 'asocial' were deliberately excluded from this reparation scheme as they were not considered victims of typical Nazi persecution. The same applied to Roma and Sinti as the German Federal Court (BGH) ruled in 1956 that racial persecution under the Nazis did not begin until March 1943. Deportations and arbitrary incarceration prior to that date were considered as a means of criminal prevention, not as persecution (Feyen 2009, 330ff.). By way of this exclusion, and in many other ways as well, the stigma that had been inflicted on these groups of victims was reconfirmed and prolonged into the era of democracy. For survivors, the transition to democracy did not coincide with the end of stigmatization, exclusion and the experience of violence. In many cases, personal, institutional or legal continuities stretched into the age of the new republic: Experts called for a new sterilization law in order to protect public health; the paragraph of the Criminal Code that banned male homosexuality remained in place in its 1935 version until 1969; girls from socially deprived backgrounds were confined to institutional 'care' for reasons of their 'sexual depravity'.

My aim in this book is to shed light on this continuity by means of a threefold argument: First, Nazi selective sterilization policy, the persecution of male homosexuals, and the persecution of people categorized as 'asocial' were driven by a biopolitical rationality aimed at improving the vital qualities of the larger collective. They were firmly anchored in a biopolitical rationality that values normality, health, functionality, productivity and fitness. Second, this rationality did not dissolve in 1945. Third, the victims of selective sterilization policy, the persecution of male homosexuals, and the persecution of 'asocials' were denied entitlement to reparations and, for a long time, also an apology and acknowledgement of the injustice they suffered—because and for as long as the relevant policy actors in the post-war state and society shared this biopolitical rationality. Thus, struggles over the biopolitics of the past are simultaneously struggles over the power of biopolitical rationality in the present, and the incidents referred to at the outset of this chapter show that these struggles are not yet over.

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Bermuda formula but included persecution for political reasons. In other words, West German post-war reparations were crucially informed by the ethnic minority protection frame, and I would argue that it has remained the dominant frame in German post-war reparations to the present time.



## 1.6 Outline of the Book

The chapters in this book have been written at different points in time. They should each be comprehensible as stand-alone units. The disadvantage of this structure is, of course, that repetitions, discontinuities and even discrepancies may occur. Thoughts, concepts, foci and perspectives may have shifted over time, both in my thinking and in the literature.

This chapter was intended to introduce the three themes of this book—biopolitics, temporality and historic justice—and explain how they relate to one other. I have argued that biopolitics is a specifically modern phenomenon characterized by a future-oriented logic of optimizing the human life force on the level of the collective and that this logic implies the differential valuation of human lives which, in the extreme, can involve the elimination of those deemed less valuable.

Chapter 2 reviews a paradigmatic case of modern biopolitical logic: the politics of eugenics in the twentieth century. It shows that eugenics is best understood as a modern political project encompassing knowledge production, a broad repertoire of political mechanisms and technologies and engagement of civil society actors such as professional associations, women's organizations, charities and others. The eugenic project is a pinnacle of biopolitical rationality in that it was directed at enhancing the vital qualities of the larger collective through political technologies involving systems of differential valuation, exposure und vulnerability. The chapter refutes the common misunderstanding that eugenics was basically a project of the political Right based on biologicistic, sexist, and racist assumptions. In fact, historical research has provided ample evidence that eugenic thought and practices emerged from a broad range of political, cultural, and scientific orientations and existed in many different variants. What they have in common is not an anti-modern, 'reactionary', pseudo-scientific attitude but rather a modern biopolitical rationality.

The ensuing Chapters 3, 4 and 5 are devoted to the question how the Federal Republic of Germany has come to terms—or not—with the injuries of normality committed by the Nazi regime. Through three case studies—the policy of selective sterilization, the persecution of male homosexuals, and the persecution of 'asocials'—I reconstruct when, how, with what result and on which grounds victims' claims to reparations and rehabilitation were denied or approved. All three groups of victims belong to the wrongly named set of 'forgotten victims' who were excluded from entitlement to reparations accord-

ing to the Federal Indemnification Act. They were only granted the right to file for compensation when, in the 1980s, new hardship compensation funds were established as a second track for compensating Nazi victims. These funds, however, were designated to compensate for damages suffered due to the war or similar circumstances, not for wrongdoing on the part of the state. In addition, no official apology was issued and no official site of commemoration established until well into the twenty-first century. I trace the struggles for reparations and rehabilitation and the responses by relevant actors such as policy-makers, courts and experts as well as the rationales given for these exclusions. The focus of these chapters is on the question of what in these crimes, if anything, state actors acknowledged as wrong. It becomes clear that state actors did not grant rehabilitation and reparations because and for as long as they were unwilling to condemn the political rationality that had motivated these crimes in the past, a rationality according to which people categorized as disabled, mentally ill, mentally retarded, work-shy or weak, sick, deviant due to their homosexuality, or otherwise unproductive, useless or worthless formed a threat or burden to society that the state was obliged to fend off. In short, it was the endurance of a biopolitical rationality of enhancing the health, strength and productivity of the population through reducing the number of the allegedly unhealthy, weak and unproductive that stood in the way of historic justice. It was considered normal rather than wrong. Of the three cases presented, we can see that the denial of wrongness persisted the longest in the case of the persecution of 'asocials'; it was not until 2020 that the Bundestag officially condemned this practice. Earlier in the century, in 2004, it had officially declared that Nazi sterilization policy had been utterly wrong, although upon close inspection, one can see that the verdict of wrongness did not refer to selective sterilization policy per se but sterilization policy as a stepping stone on the way to 'euthanasia' and the Holocaust. An exceptional case of historic justice occurred in 2017, when the Bundestag repealed the criminal convictions that had been issued for male homosexuality *after* 1945 and also granted the right to reparations to those who had suffered from them. In this case, the state not only condemned the wrongdoing of its predecessor but also its own wrongs; moreover, in the same act, it formally abandoned the biopolitical construction that male homosexuality is debilitating to state and society and must thus be curbed.

Chapters 6 and 7 examine the nexus of biopolitics, temporality and the differential valuation of human life on a social-theoretical level. Chapter 6 discusses the overlaps and intersections but also the differences between Fou-

cault's analysis of biopolitics and Hannah Arendt's analysis of totalitarianism. Both Arendt and Foucault, I argue, problematize the nexus of the assimilation of politics to management and social engineering, the structure of processual time, and modern politics' and society's preoccupation with 'life'; both draw attention to the more sinister implications of this nexus. While Foucault, however, presents the more historicized analysis, Arendt offers an alternative, non-biopolitical understanding of politics, life, and time which she captures in the concept of natality. Chapter 7 explores the intersections and convergences between Foucault's conceptualization of biopolitics and Marx's analysis of capitalism concerning the relationship between power, life and time under conditions of modernity. I posit that both Marx and Foucault highlight the productive dimension of power and that life, for both, is a key resource for this historically specific type of power—in fact, it is *the* resource that can simultaneously be exploited and increased. Finally, in both Marx and Foucault, temporality is key: Capital and biopower/biopolitics share a temporal structure characterized by an ongoing, unlimited process of ever-increasing productivity. This process, they state, is directed at the future, but not at a future of fulfilment of needs. Rather, it is a permanent, unlimited process of optimizing and increasing the human forces of life, a process that cannot possibly come to a meaningful end. Again, we see that the quest for the constant improvement of human beings is accompanied by the constant construction of deficient life, life that does not meet the norms and standards of health and fitness, of functionality and productivity. Rendering this nexus amenable to critical reflection is the purpose of this book.

